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Casting a wider net: more deals under scrutiny




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Regulatory scrutiny of mergers and acquisitions looks set to continue to intensify around the globe, with all signs pointing towards an even more complex and dynamic regulatory landscape for businesses to navigate in 2021 and beyond.

Developments taking centre stage include the continuing evolution of stated merger control reform ambitions of the Biden administration in the United States, the merger-related recommendations of the UK Digital Markets Taskforce and proposals included in the European Digital Markets Act, and the recent change of policy of the European Commission in relation to merger referrals from EU member states.

These wide-reaching reform proposals sit against the backdrop of already intensified pre- and post-close scrutiny of transactions in innovation-heavy sectors, particularly those relating to technology or life sciences. Indeed, many jurisdictions around the world are busy revamping and coordinating their existing merger review frameworks, aiming to increase the ability of competition authorities to address a perceived M&A enforcement gap. Such coordination is exemplified, for example, by initiatives such as the recent joint statement by the Australian Competition and Consumer Commission (ACCC), German Bundeskartellamt (BKa) and UK Competition and Markets Authority (CMA) on 'the need for rigorous and effective merger enforcement', as well as the multilateral working group to exchange best practices on pharmaceutical mergers encompassing, inter alia, the Federal Trade Commission (FTC), European Commission and CMA.

Further, with an ever-expanding focus on scrutinising deals involving nascent competition, and the role of data, fairness and consumer choice, competition authorities, particularly in the United States, United Kingdom, European Union and Australia, appear set to continue to push and test 'traditional' analytical frameworks on any future potential harms that may be generated by M&A activity.

This, coupled with a growing focus on data and technology security and superiority, also means that deal activity is increasingly exposed to the impact of geopolitical, public security and other political considerations, all of which are resulting in a tightening of foreign direct investment regimes (FDI) across the globe.

These key developments, which are summarised below in more detail, result in authorities casting ever wider nets over global M&A activity. As a result, and more than ever before, businesses and their advisers will need to consider the risk of regulatory scrutiny early, continuously and flexibly for global deal planning and coordination.

Global increase in merger control scrutiny

Authorities worldwide are increasingly seeking to assert jurisdiction over transactions that would not, even in recent history, have otherwise found themselves caught in complex deal review processes. This trend is set to continue and intensify in coming years, driven by concerns expressed by governments and competition authorities that existing filing thresholds and merger review frameworks may have led to undesired consolidation in certain industries.

As a result, we are seeing an uptake in initiatives to significantly overhaul existing procedural and substantive review frameworks. Proposals that have been tabled relate to reversals of the burden of proof and the introduction of working presumptions that a merger will be harmful to competition, all of which accord with a continued regulatory focus on reviewing 'killer acquisitions', including by asserting jurisdiction over a wider swathe of transactions involving smaller targets and 'nascent competitors'. While certain jurisdictions, such as Germany and Austria, have already introduced deal value-based filing thresholds, additional transactions are also being captured by the European Union's revised merger referral policy as regards the article 22 of the European Merger Control Regulation (EUMR), which is described in further detail below. Several referrals of cases to Brussels are already underway or being considered since the European Commission's recent policy change.

Against this backdrop, we are observing the tightening of merger control scrutiny in major jurisdictions globally, with a rise in active participation in merger review proceedings by complainants (including competitors, customers, suppliers and consumer interest groups) influencing deal review timelines and the substance of review processes, as well increasing judicial challenges of merger control decisions.

United States

In recent years, merger control and antitrust policy more generally have become the subject of intensive political debate in the United States. Extensive calls for reforms have been made in view of perceived inadequacy of the existing review framework to address potential anticompetitive harm in the digital era. Although it is not yet clear how material and structural any changes to existing merger control processes and review standards will ultimately be, it is clear that the Biden administration is set to leave its mark in the coming years in the merger control domain.

First, the appointees the Biden Administration has named signal an intent to pursue progressive policies and aims with respect to antitrust enforcement. Lina Khan, an outspoken critic of recent antitrust enforcement generally and of consolidation in the tech sector specifically, was nominated and subsequently confirmed to serve as the chair of the FTC. Prior to Khan's appointment as the permanent chair, Commissioner Rebecca Kelly Slaughter served as acting chair and was vocal in her concern over consolidation in specific sectors, her focus on vertical mergers and nascent competition, her desire to bring (and potentially lose) more cases, and the need for more funding at the FTC. Biden has not yet announced any nominations for permanent leadership roles at the Department of Justice (DOJ) Antitrust Division, but leadership changes at the FTC signal the permanent Assistant Attorney General is likely to also fit the progressive mould.

Second, there is bipartisan support for increased funding for both the FTC and DOJ. This funding would enable the agencies to do more: hire more attorneys and economists, investigate more transactions and bring more cases at the margins. This support is reflected in recent increases of the FTC's and DOJ's budgets. Additionally, there are calls in Congress to increase merger filing fees, which would further add to agency coffers.

Beyond the ability of the leadership at the antitrust authorities to drive enforcement policy, there are proposals to make dramatic changes to the antitrust laws themselves. This push for reform is most embodied by the Competition and Antitrust Law Enforcement Reform Act of 2021, sponsored by Senator Amy Klobuchar, though there are multiple other bills in circulation. At a high level, new proposals could introduce a change to the standard for merger review under the Clayton Act, shifting the burden of proof for certain mergers including those leading to high market shares or increased concentration levels, involving acquisitions of start-ups by firm with significant share, and acquisitions of potential or nascent competitors. These proposals, if passed, would mark a rigorous departure from existing US merger control review practices.

European Union

In tune with the global attention for 'killer acquisitions', the European Commission has announced a significant revamp in its approach towards the existing case referral system between the competition authorities from the EU member states and the European Commission. More specifically, under the case referral system laid down in article 22 EUMR, member states can request the European Commission to review a transaction that does not meet the EU notification thresholds. In the view of the European Commission, article 22 EUMR does not technically require national notification thresholds to be met for a referral to be able to occur. The new referral system constitutes a significant departure from the clear EU notification thresholds that contributed to the 'one-stop-shop' for merger control scrutiny by the European Commission.

Although the European Commission historically discouraged member states from making referrals in cases where national thresholds were not met, it is now actively seeking referrals from member states in a bid to prevent certain acquisitions of businesses that generate little or no turnover in the EU to elude merger control review. The European Commission is particularly keen to be able to assert jurisdiction over deals that may involve the acquisition of innovative players exercising 'nascent competition'. Recently published Guidance on the application of article 22 EUMR indicates that the European Commission is open to taking up reviews of such transactions, even those already closed. The European Commission will generally consider case referrals appropriate when they are submitted within six months post-closing. If the closing of the transaction was not in the public domain, this six-month period would start running from the moment when material facts about the deal have been made public in the European Union.

Whereas the Guidance stipulates that it aims to 'increase transparency, predictability and legal certainty', we expect that the new case referral mechanism would in fact lead to an increase in unpredictability and lack of legal certainty. The new referral system grants the European Commission considerable discretion in accepting jurisdiction over transactions that fall far below the EU notification thresholds based on subjective qualitative criteria that will not always be clear-cut. Limited possibilities appear available for acquiring businesses to obtain certainty whether a case may potentially be referred to Brussels. The merger of *Illumina/GRAIL* is a recent example of the European Commission's revamped approach, where it accepted a referral from the French competition authority to review the €8 billion acquisition of GRAIL by Illumina. Owing to GRAIL's limited turnover, the deal did not meet the EU notification threshold, nor any mandatory filing threshold in EU member states. Notably, legal challenges of the request for referral brought before the French and Dutch courts by Illumina were unsuccessful. The European Commission's decision to assert jurisdiction is still being challenged by Illumina before the General Court of the European Union.

Consequently, businesses will need to look beyond traditional turnover, market share or value-based thresholds and invest more time upfront for any deal in terms of analysing the competitive impact that may be alleged to result therefrom and planning a globally coordinated deal strategy capable of addressing the risks of European Commission intervention.

In parallel to the developments around article 22 EUMR, the European Commission has indicated that it plans to increase the use of simplified procedures and streamline its processes. This may free up capacity to accept case referrals and focus more on transactions which may raise substantive competition issues.

Last but not least, the proposed EU Digital Markets Act would also affect EU merger control in the future. Under the proposal, a 'gatekeeper' (ie, any provider of 'core platform services') would be obliged to notify the European Commission of any merger involving another provider of 'core platform services' or any other services in the digital sector. Like the referral system, this would apply irrespective of whether the deal meets the EU or national merger control thresholds.

United Kingdom

Following the United Kingdom's departure from the European Union, the CMA has continued not to shy away from adopting an expansive approach to asserting jurisdiction over global transactions, taking advantage of a flexible jurisdictional share of supply test and its powers to define any description of goods or services either supplied or purchased by the merging parties, even if that description has no reference to any economic market.

No doubt emboldened by the recent upholding of its jurisdiction decision by the UK Competition Appeal Tribunal in *Sabre/Farelogix* – a transaction in which, despite the target not having any direct UK customers, the CMA asserted jurisdiction on the basis of an indirect supply of airline content to one UK customer – the CMA's expansive approach to asserting jurisdiction looks set to continue.

Coupled with the threat of extensive and onerous hold-separate orders being imposed at least in the case of completed deals called in by the CMA – orders that require, among other things, the preservation of the pre-merger status of the target business – merging parties should, more than ever before, invest upfront in looking beyond the 'voluntary' label of the UK's merger control regime to assess whether their deal – whether anticipated or closed – is at risk of being called in for review by the CMA.

Looking ahead to the regulatory proposals of the UK Digital Markets Taskforce, these include the creation of a separate merger control framework for firms designated as having 'strategic market status'. For those firms, the proposals suggest that a mandatory and suspensory regime should apply to all acquisitions of 'control', including where those transactions would be subject to a lower and more cautious standard of proof. The proposals also suggest that such firms should make the CMA aware of all other acquisitions of interest in which they are involved.

Asia-Pacific

The trend of increased scrutiny of innovation-heavy transaction extends to the Asia-Pacific region. Notably, in Japan, the revision of the merger control guidelines introduced new thresholds to urge voluntary filings even if the mandatory thresholds are not met to capture a potential 'killer acquisition' in the digital sector, and also clarified the authority's appetite to scrutinise issues around big data, network effects and innovation more closely. Some aspects have already been observed in action in recent digital merger reviews. Similarly, in China, the Chinese State Administration for Market Regulation (SAMR) promulgated the Antitrust Guidelines for the Platform Economy (the Guidelines), which reiterate that SAMR is entitled to investigate transactions with anticompetitive effects that fall below the turnover thresholds, such as 'killer acquisitions'. The Guidelines draw specific attention on the role of data and algorithms in SAMR's assessment and signal that merging parties will need to consider appropriate structural remedies (eg, divestiture of databases) or behavioural remedies (eg, modifying algorithms, access to data) to secure deal approval. There have been a number of penalty decisions challenging the missed filings of digital platforms, including entirely offshore transactions, which has materially increased the risk profile of China's merger control regime. Also, following a proposal in 2018, the Korean Fair Trade Commission announced that it would introduce value-based notification thresholds, which would trigger filing obligations for acquisitions of smaller start-up companies which would not be notifiable under the turnover thresholds.

Finally, Australia applies a voluntary merger control regime that does not have thresholds but is triggered where a deal is likely to affect competition in Australia. With respect to digital markets, however, the ACCC is now actively seeking to change this existing practice. Despite the voluntary nature of the Australian regime, the ACCC has recently recommended large digital platforms to notify their deals to the ACCC in advance. The ACCC is likely to coordinate its approach with other competition authorities more frequently, of which the above-mentioned recent joint statement with the BKa and the CMA is an example, and there was indeed extensive coordination with its counterparts in Washington, Brussels and Tokyo in one of the recent cases. Australia is furthermore revising its merger control laws. These revisions may introduce a system where the merger review should expressly consider the effect of the removal of potential competitors, and the significance of the assets acquired (directly as well as part of the acquisition of a business). This could increase scrutiny over mergers and acquisitions in the digital space.

More generally, other jurisdictions that have been active in the region include Singapore, which, like Australia, has a voluntary regime but undertakes very thorough and sometimes fairly lengthy reviews; and jurisdictions with newer regimes such as Vietnam, the Philippines and Thailand. In the Philippines, the PCC has indicated that it will not hesitate to exercise its motu proprio powers to review transactions that raise competition issues but do not otherwise meet the filing thresholds. The PCC's powers are currently suspended owing to the pandemic, but post-suspension, the PCC is expected to review transactions carried out in the past year with a view to identifying deals that raised competition concerns.

Behavioural remedies

Recent years have seen an increased focus on the use of behavioural commitments as a means for remedying concerns in digital mergers. Data-related remedies, for example, may become more mainstream in future merger cases, with the spectrum of potential data-based remedies including obligations to grant access to data, commitments with respect to data use and data silos, ensuring consumer choice and consent as regards the use of certain stored data for other (unrelated) services, and the preservation of data interoperability standards.

Such remedies do not, however, provide a cast-iron guarantee for regulatory approval. In their joint statement for example, the CMA, ACCC and BKa called upon competition authorities to favour structural over behavioural remedies given the increased complexity of reviewing transactions in dynamic markets. The statement indicated that complex behavioural remedies would be unlikely to recreate the pre-merger competitive constraints in the market and, in the absence of parties offering of appropriate remedies, the CMA, ACCC and BKa have stated that they would be prepared to block a merger outright if this would be necessary to preserve effective competition.

Common ownership

An area of interest for competition authorities with a longer history, but nonetheless topical, is common ownership: more specifically, the impact of competition resulting from businesses owning (minority) shares in various competing companies. Common ownership could, according to some, underestimate the concentrated nature of markets, consequently leading to an underestimation of non-coordinated effects.

Furthermore, there is a view that common shareholders could reduce innovation and investments in research and development if a common shareholder's portfolio includes multiple competing firms in the same industry. Concerns around common ownership have recently again gained traction in the European Union during the Commission's assessments of the *Dow/DuPont* and *Bayer/Monsanto* mergers. The increase of institutional investment funds and common shareholding in the EU also led to significant research in the topic, leading to the Common Shareholding in Europe report from September 2020, commissioned by the European Commission.

It should, therefore, be anticipated by investing businesses that common ownership aspects (including non-controlling minority investments) will be part of substantive assessments during merger investigations, especially when transactions may raise concerns with respect to the reduction of innovation in the market, but also with a view to information flows resulting from representation across company governance bodies.

Proliferation of global FDI regimes

Regulatory scrutiny of global transaction processes is posing additional challenges to dealmakers, as FDI regimes are becoming ever more prevalent and are increasingly impacting deal timing and certainty in ways similar to merger control processes. This trend will not go away in the near future, as countries are facing political pressure to become increasingly more interventionist and protectionist as regards foreign investments.

Next to traditional areas of focus, such as public security and other political considerations related to telecommunications and energy networks, worldwide FDI laws are now covering data, technological security, critical technologies, healthcare and pharmaceuticals. The list of jurisdictions with FDI control regimes keeps growing and numerous jurisdictions have revised (and significantly expanded the scope of) their FDI regimes in the past 12 to 18 months.

For instance, Austria, Italy and Spain recently approved new FDI legislation during the crisis, and the UK government published draft legislation that would contain additional review mechanisms that would also apply retrospectively to any transaction that has not yet closed at the time the draft bill was announced. And, in the EU, the FDI regulation that recently entered into force sets out common principles to which the EU member states' national FDI laws must adhere, as well as an EU-wide consultation mechanism. Although this is set to contribute to more harmonisation of FDI laws in the European Union and promote the EU-wide sharing of foreign investment screening experience, we are witnessing significant discretion being available to national FDI authorities in terms of review timelines and substantive assessments, resulting in significant complexity for businesses.

While formal prohibition decisions in the European Union are so far rare, it is notable that France has recently blocked two deals involving Carrefour and military solutions company Photonis. As a result, we expect that FDI screening will continue to have a material impact on deal planning and execution on part with merger control and should be treated as such by business and their advisers. The creation and expansion of FDI regimes pending the implementation of a transaction further increases deal planning risks.

Conclusion

The developments described indicate that 2021 will be a year of evolution of the regulatory merger control landscape. At least in certain sectors, more mergers will be reviewed by more authorities and notified mergers are likely to face more intensive substantive scrutiny.

In short, competition authorities and governments are not only making sure wider nets are cast over M&A activity, but are, in parallel, also weaving nets with smaller holes. This, combined with the inevitable uncertainty that developing policies and changing regulatory regimes present, means that businesses are well advised to dedicate sufficient and early attention to merger control and other regulatory and FDI strategies when contemplating any deal. Indeed, as deals take place in an ever more complex and unpredictable regulatory context, preparing for alternative timing and execution scenarios and putting in place sufficient agility in terms of deal structuring, is more crucial than ever before.

Evaluating innovation theories of harm in merger review: economic frameworks and difficulties

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Several recent high-profile merger review cases in the life sciences space – including *Celgene/Bristol-Myers Squibb*, *Illumina/Pacific Biosciences (PacBio)* and *Roche/Spark* – have focused on innovation theories of harm, concerns that a merger may decrease the level of innovation activities by the merging parties or their competitors and harm consumer welfare. While evaluating such theories of harm is understandably of high interest, antitrust authorities should recognise that innovation is an area that does not lend itself to generalisations of a single economic theory or model. While generalising the production function for widgets as a mathematical function works well enough, innovations are not like widgets and using the same approach can lead to three fundamental problems. First, generalisations are necessarily limited by how well existing models, which fit some situations nicely, describe the broader universe of innovative activity. Second, evidence in these cases is plagued by definitional and measurement problems that are worse than usual for merger assessment since the underlying concepts to be measured or tested are not well specified. Third, remedy policies are difficult to identify for these cases without necessarily assuming some specific way in which innovation is produced. This article summarises each of these categories of challenges, discusses some approaches and considerations employed in past cases, and ultimately explains why a good model of innovation, rooted in the facts of the industry, is the best approach.

Searching for a theoretical framework

Developing a framework for analysing innovation, instead of price changes for services or manufactured goods, is challenging because economists have a relatively more limited understanding of precisely how innovations are created. Because the production of widgets usually follows a deterministic process with well-understood inputs and outputs, economists can more confidently predict the potential impact of a merger on production quantities after analysing information such as substitutability of products and cost synergies of production. This in turn allows economists to predict merger-specific price changes. On the other hand, the fact that economists cannot readily predict innovation output from innovation inputs makes an innovating firm's profit maximisation problem complex, opaque, and difficult to model. Thus, even if an antitrust authority can identify overlaps in research targets and potential synergies between R&D teams, economists can only say as a general matter that combining the teams will eliminate one incentive – rivalry – for investing in innovation. Without a general model of how combining research efforts might affect their productivity, economists cannot rule out other possibilities, including, for example, that increased productivity from the combination will dominate and that the incentive to invest in innovation will increase. Thus, it is natural that antitrust economists would search for a theoretical framework that would allow them to more confidently predict such changes for mergers of innovating firms.

Several economists – famously Arrow[1] and Schumpeter[2], among others – have attempted to model innovation and its interaction with competition; however, no consensus has been reached. Carl Shapiro's handbook chapter on the topic summarises themes common to these models in an effort to provide a unified framework for analysing whether innovation will decrease after a merger.[3] Unfortunately, this effort does not address the underlying problem – that the variety of processes by which innovations are created are not well generalised in any one or two mathematic models of production. Identifying the differences between the models we do have can create a false sense of completeness – the types of differences between these models do not capture all of the possible types of differences between innovation processes in different industries.

For example, one theme the article emphasises is appropriability – the extent to which an innovator is able to capture the social benefit of the innovation as profit. One might consider two economic models – one in which there is a race to a single, final discovery, which will be patented and perfectly protected forever, and another in which there is a series of possible discoveries, each of which enables competitors to 'leapfrog' quickly while entitling the innovator to very little protection – as bookending a spectrum on which appropriability is measured. However, even considering just this one particular type of innovation incentive – how a rival's innovation success affects the rewards of subsequent R&D – surely the collection of industries in the economy covers a much broader array of potential structures than just those lying perfectly in between these bookend models.

Unfortunately, focusing on this spectrum (or others mentioned in the chapter) in the absence of an industry-appropriate, realistic model can lead an antitrust authority – looking to economics for general principles – astray. For example, the authority might carefully measure proxies for appropriability, such as patent strength, which – in the absence of an appropriate model – will shed little light on how the particular merger at hand will change innovation outcomes. Do strong patents shape the type of R&D projects firms pursue? Does that influence how much rivalry they experience or avoid pre-merger? Is there a single race, or might one firm be racing for short-term wins while another plays an R&D long game? Consequently, economists seeking to help antitrust authorities should avoid the generalisation and instead carefully review facts to learn how innovation works in the industry in question, attempt to model that innovation, and then interpret empirical facts within that model to predict the consequences of a merger. It will be insufficient to rely on a preordained collection of parameters for which one might be able to find empirical proxies.

Evidence and measurement

Even given a well-formulated model for a particular industry under investigation, empirical analysis of a merger's effect on innovation incentives would still be complicated by measurement issues. One might imagine that almost any empirical analysis would conceptually require some quantification of the innovation produced by the merging parties and other competitors. However, such quantification runs into at least two main difficulties.

First, as already discussed, innovation is not a homogeneous phenomenon, but rather a term used to describe a wide variety of technological advances, all qualitatively different from each other.[4] It is important that the selected model be tailored to the specific type of innovation that is perceived to be at risk. For example, if there are concerns that the firms will produce fewer cost-reducing technologies, then a model focusing on cost reduction may be more appropriate. However, if there are concerns that the firms will abandon plans to develop new products, then a model focusing on product variety would be more relevant. This choice is related to evidence and measurement because it is important that any empirical tabulation of innovation inputs and outputs match those occurring within the model; not just any quantification of levels of or changes in innovation, broadly construed, will suffice. Returning to the examples above, if the model focuses on cost reductions, then empirical work should also focus on innovations that reduce costs. Similarly, if the model focuses on the development of new products, then so should empirical work. Generalised measurements would risk measuring the wrong thing entirely in specific cases.

Second, innovation affects consumer welfare much more circuitously than prices do, and an antitrust authority faces trade-offs when deciding how much to focus on welfare. Measures that most closely approximate welfare consequences, such as sales of new products and lower production costs, are also heavily influenced by factors aside from innovation, such as demand for the new product in the market or shocks to the costs of raw materials used to make the new product. Measures such as investment, expenditure, and the number of R&D employees may be easier to observe but are much more distantly related to welfare. Ultimately, the best approach will depend on the facts of each case.

These issues can be illustrated by considering a technique that past cases have used: tabulating patent citations. In their review of the *Dow/DuPont* merger, the European Commission pursued a variety of such tabulations, citing academic literature: 'One important finding of the economic literature is that citation-based indexes are informative on the technological importance of patents.'[5] While investigating patents, weighted by some measure of their importance, such as citations, may have some probative value, the technique also highlights the two issues above.

First, patents cover a variety of different types of innovation (eg, production processes and new products) which should not enter any model homogeneously.

Second, the relationship between patents and true innovation or its welfare consequences is indirect and, in some cases, non-existent. Patenting is not an inevitable manifestation of innovation but rather a strategic choice. On the one hand, patent thickets demonstrate that generating more patents is not always good or pro-competitive.[6] Bennato and others (2018) argue, 'it has long been recognised that patents are sometimes used to protect an incumbent's market power'.[7] On the other hand, certain firms choose not to patent socially valuable innovations, and instead to maintain their value as a trade secret. Even for patents that protect socially valuable innovations, they track neither the eventual output (valuable goods and services) nor the resources invested (dollars or employees) – two of the types of quantities most likely to appear in a model of innovation and rivalry.

Another empirical technique, less commonly used, is the analysis of deal value to determine whether a transaction in an innovation-related industry might be a killer acquisition. Cunningham and others (2019) define 'killer acquisitions' as acquisitions where 'incumbent firms . . . acquire innovative targets solely to discontinue the target's innovation projects and pre-empt future competition'.[8] The UK's Competition and Markets Authority used the deal-value technique in *PayPal/iZettle* and found no evidence that the transaction was a killer acquisition.[9] However, such an approach is fraught with potential shortcomings.

First, as with patents, the transaction price is strategically chosen, not a direct measure of firm value or expected innovation. Indeed, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 created transaction dollar thresholds under which companies are not required to file for a pre-merger review with US regulators,[10] and Cunningham and others (2019) found more acquisitions occur just below this threshold than would be expected and, furthermore, that these transactions were much more likely to involve a discontinuation of research projects.[11] This suggests that the transaction prices are set with policy in mind. However, concentrating too much on this relationship might also be misleading. Acquisitions – whether killers or not – would be expected to avoid valuations just above the threshold and bunch just below the threshold, to avoid the costly process of merger review. Moreover, the empirical finding of killer acquisitions with low enough values to be manipulated below the filing thresholds is inconsistent with the theory that a killer acquisition might be identified by the large value an entrant with noteworthy potential to disrupt an incumbent could demand as a payment to forego that potential.

Second, when a given target operates in multiple geographic or product markets, the transaction value will represent an aggregation across these markets. If only some of them are candidates for the killer acquisition label, it will be much harder (or impossible) for a competition authority to determine the consideration paid specifically to the target's participation in such markets and then compare that against a reasonable benchmark. Essentially, this is a particular manifestation of the problem that innovation is not a homogenous phenomenon, and an appropriate model should separate different types.

Remedies

In the event that anticompetitive harm is found to be likely, then a remedy – often a divestiture of certain assets – must be identified.[12] Identifying acceptable divestiture packages for mergers involving innovation theories of harm involves two issues specific to those mergers: whether to divest products on the market or products in the pipeline, and whether the divestiture of entire products or research pipelines is necessary to make innovation competition possible. The difficulty in finding general policy answers to these questions ultimately derives from the earlier observation that economists have yet to develop a consistently applicable model of how innovations are created. Therefore, economists face difficulty in determining which alterations to the market structure will result in more innovation (ie, which divestitures will work – and may sometimes need to choose a safer, but suboptimal, path).

The first issue mentioned above arises in mergers featuring 'product-to-pipeline' competition – that is, one of the parties has a product on the market, while the other party has a competing product in development. The US Federal Trade Commission has expressed a preference for divesting the product on the market in these cases.[13] Indeed, in the recent, high-profile *Celgene/Bristol-Myers Squibb* merger, the merged entity divested Celgene's Otezla business – the product already on the market.[14] However, in the *Amneal/Impax* merger, which involved several overlapping product markets, most divestitures were of the pipeline product; several products currently on the market were 'complicated to manufacture', and another held a monopoly position. In both cases, the Federal Trade Commission acknowledged that divesting the market product might lead to its failure, which was an unacceptable risk to consumer welfare. Therefore, they chose the safer path given case-specific facts despite their general reasons to prefer the divestiture of an established product.

'Pipeline-to-pipeline' mergers – those where the parties have products in development that would compete were they both to come to market – raise the question of the appropriate extent of the divestiture or intellectual property licensing. In some cases, again due to lack of a robust model of innovation, competition authorities worry whether divesting a particular research programme will interfere with the innovation process, or whether requiring patent licensure will be sufficient to spur innovation at competing firms. For example, with respect to the *Illumina/Pacific Biosciences* merger, the Competition and Markets Authority found patent licensure to be insufficient, acknowledging the importance of 'know-how'.[15] Similarly, with respect to the *Dow/DuPont* merger, the European Commission required divestiture of 'almost the entirety of DuPont's global R&D organisation' since doing so would 'enable . . . a buyer to sustainably replace DuPont's competitive effect in these markets and continue to innovate'.[16]

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Conclusion

Evaluating innovation theories of harm is challenging because economists lack a robust, accurate model of how innovations are created; evidence and measures used in the analyses need to be selected with care because innovations are not homogenous, and the route between innovation and consumer welfare is complex; and identifying acceptable divestiture remedies involves predicting the innovation consequences of altering the market structure, which is difficult because of the lack of a robust, accurate model. Therefore, mergers raising innovation theories of harm will likely require case-specific approaches to address these challenges.

Endnotes

1 Kenneth Arrow, 'Economic Welfare and the Allocation of Resources to Invention' in *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Universities-National Bureau Committee for Economic Research and Committee on Economic Growth of the Social Science Research Councils), 609–26.

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3 *Shapiro* (n 6).

4 For a couple of examples of ways to categorise innovation, see Rebecca M. Henderson and Kim B. Clark, 'Architectural Innovation: The Reconfiguration of Existing Product Technologies and the Failure of Established Firms', (1990) 35 *Administrative Science Quarterly* 9–30; Greg Satell, 'The 4 types of Innovation and the Problems They Solve', *Harvard Business Review* (21 June 2017).

5 European Commission, Case M. 7932 – *Dow/Dupont: Commission* Decision of 27.3.2017 [27 March 2017] paragraph 389.

6 See, for example, Stefan Wagner, 'Are "Patent Thickets" Smothering Innovation?' *Yale Insights*, interview.

7 *Bennato and others* (n 15) 6.

8 Colleen Cunningham and others, 'Killer Acquisitions' working paper [2019].

9 UK Competition & Markets Authority, 'Final Report', *Completed Acquisition by PayPal Holdings, Inc. of iZettle AB*, paragraph 11.

10 US Code, 2006 Edition, Supplement 5, Title 15 – Commerce and Trade, chapter 1 – Monopolies And Combinations in Restraint of Trade, section 18a – Premerger notification and waiting period.

11 *Cunningham and others* (n 21).

12 US Federal Trade Commission, 'Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies' accessed 29 January 2021.

13 US Federal Trade Commission, 'Analysis of Agreement Containing Consent Orders to Aid Public Comment', *In the Matter of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Impax Laboratories, Inc., and Impax Laboratories, LLC*, 4–5.

14 US Federal Trade Commission, 'Analysis of Agreement Containing Consent Orders to Aid Public Comment', *In the Matter of Bristol-Myers Squibb Company and Celgene Corporation.*

15 UK Competition & Markets Authority, 'Notice of Possible Remedies under Rule 12 of the CMA's Rules of Procedure for Merger, Market and Special Reference Groups', *Anticipated Acquisition by Illumina, Inc. of Pacific Biosciences of California, Inc.*, paragraph 28.

16 European Commission, 'Mergers: Commission Clears Merger between Dow and DuPont, Subject to Conditions', press release [27 March 2017].

Timelines

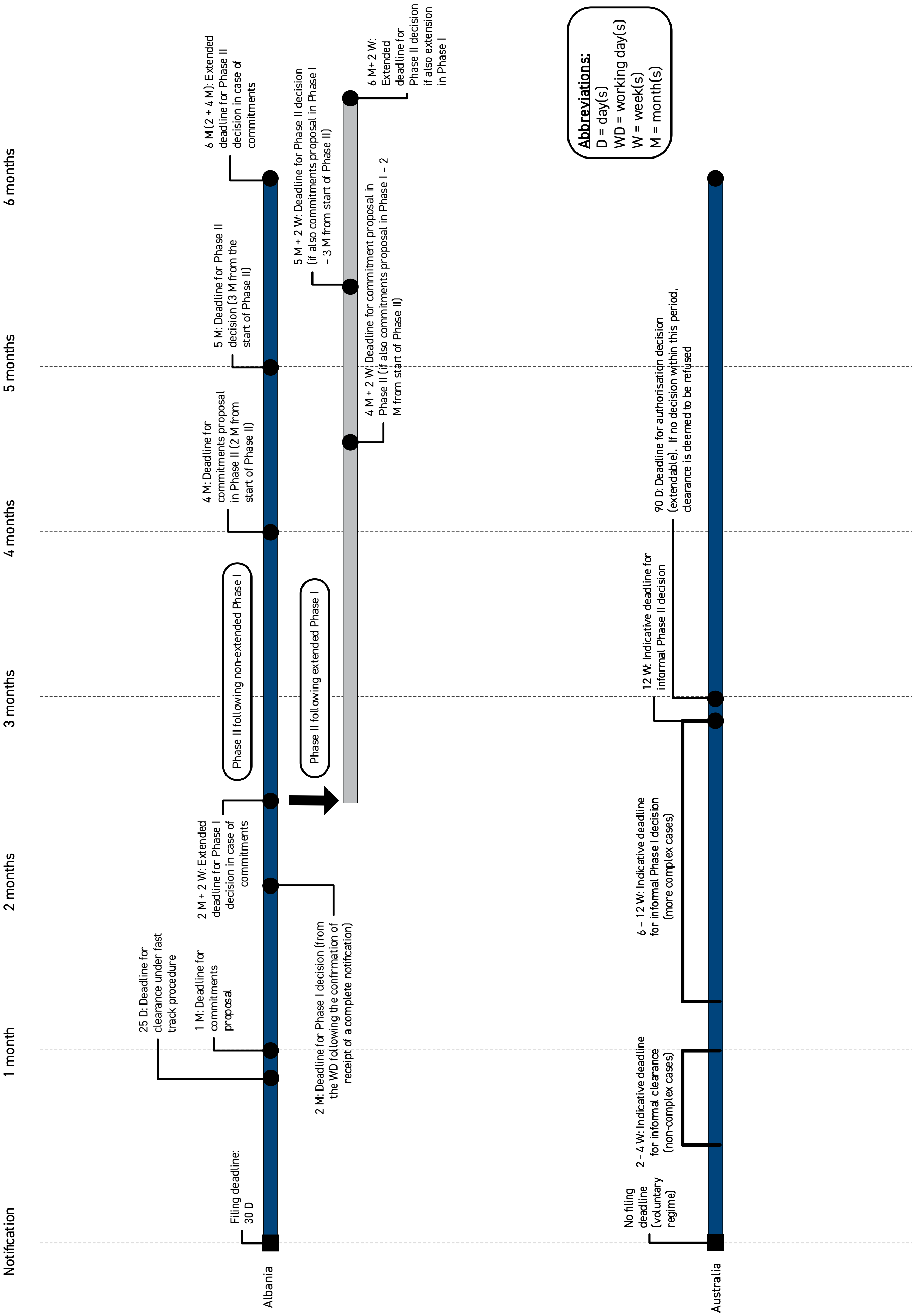
Joanna Goyder and Michael Bo Jaspers

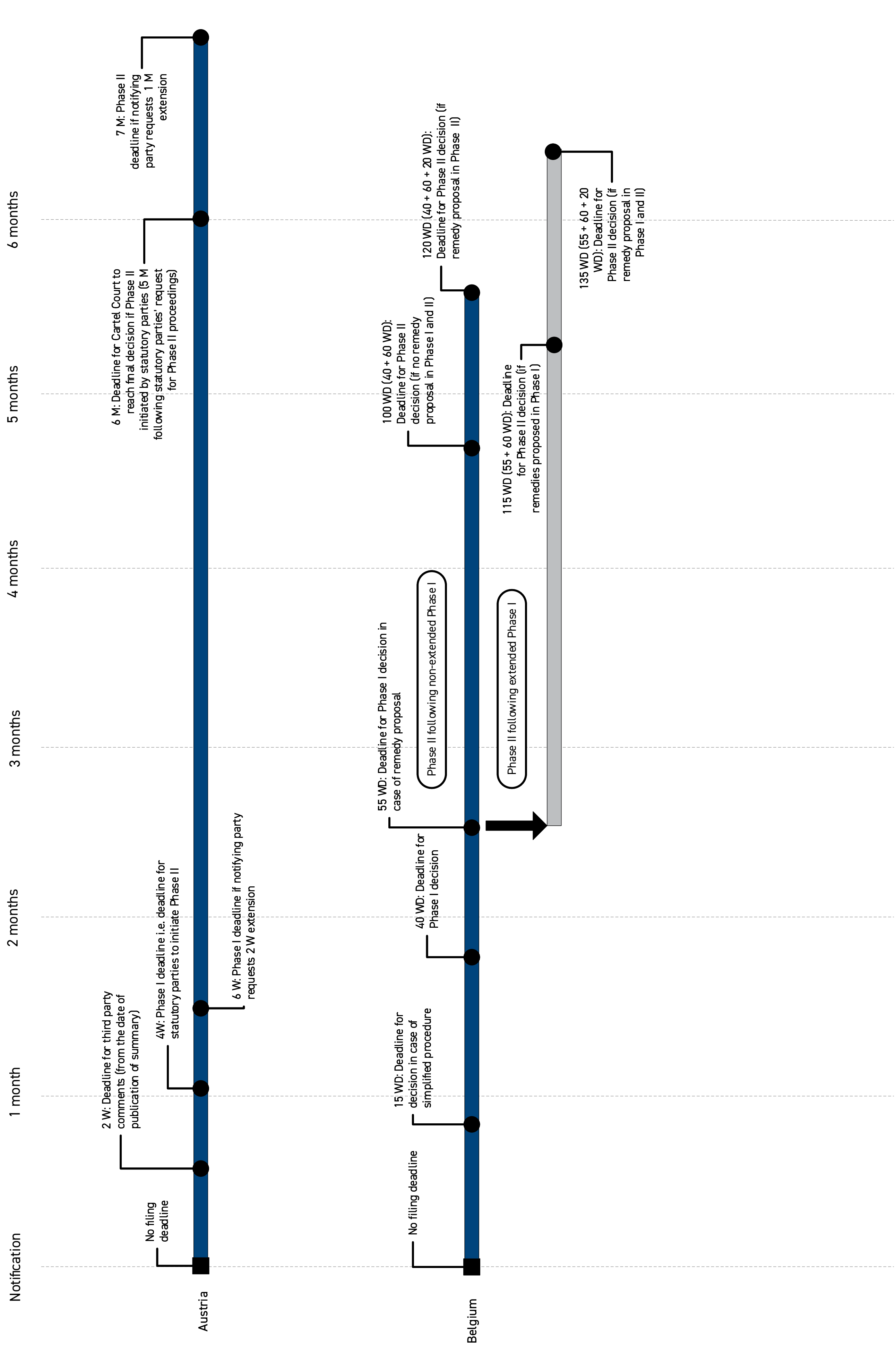
Freshfields Bruckhaus Deringer

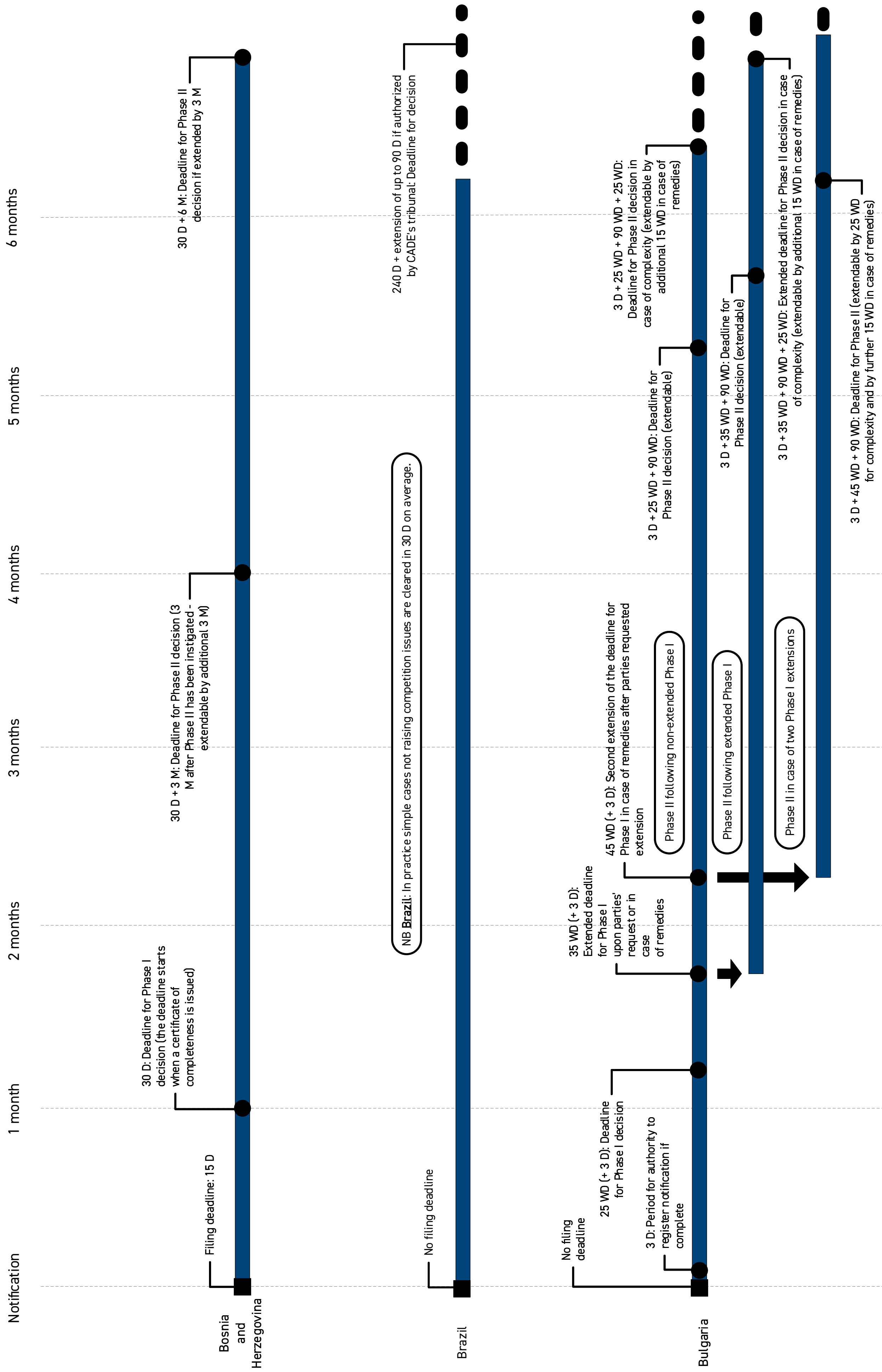
The timelines provide a high-level overview of the duration of the merger control process and the procedural steps in the 67 jurisdictions covered by this book. Given the complexity of some merger control regimes, it has not always been possible to cover all possible variations and exemptions. For more detailed information, the reader should turn to the relevant country chapters. The following aspects should be borne in mind when working with the timelines:

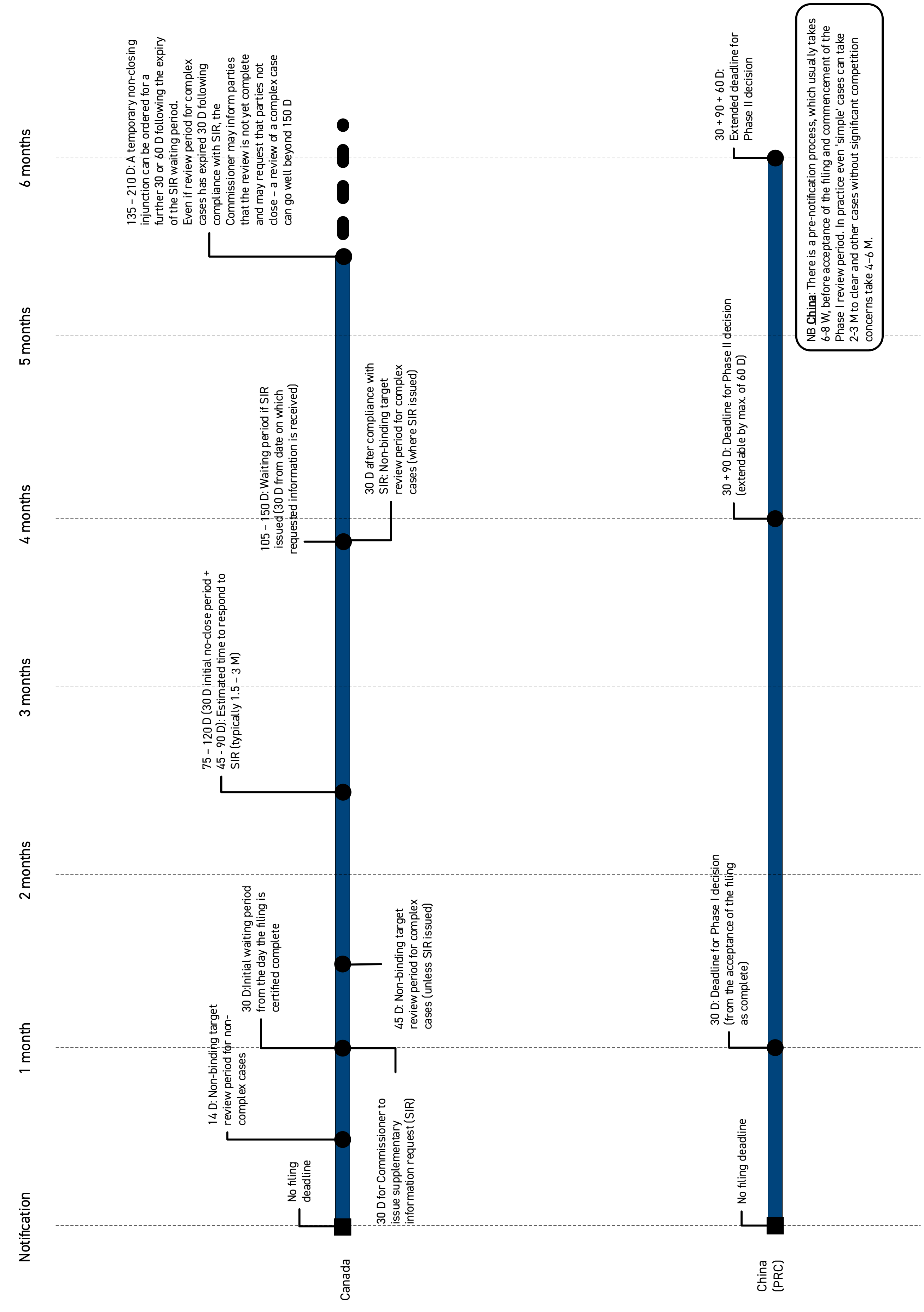
- The information regarding the filing deadline relates only to the need to file a notification within a certain period of time after a triggering event. It does not address the issue of whether the relevant jurisdiction operates a suspension obligation. Where no filing deadline exists, filing might be (and often is) required prior to implementation.
- Furthermore, the information regarding the filing deadline does not address the triggering event or events.
- Many jurisdictions operate rules pursuant to which a deadline is suspended in the event of an information request (until the information is supplied, for a fixed period or if the information is not supplied in a timely manner). Such suspensions are, as a rule, not taken into account.
- In many jurisdictions, the clock only starts after a complete filing. Rules on the scope of information to be supplied and the potential confirmation of completeness by the relevant competition authority are generally not considered.
- In some jurisdictions, deadlines are extended where the relevant periods include official holidays. In addition, deadlines are extended to the next working day where they would otherwise end on a weekend or official holiday in most jurisdictions. Such extensions of the deadlines are not taken into account.
- The timelines often use abbreviations for the relevant competition authorities. The reader can find the full names in the relevant country chapter.
- The timelines do not take into account the effect on timing of pre-merger contacts with the competition authority, which may be expected to occur in some jurisdictions.
- The timelines do not take into account ministerial authorisations after a prohibition decision, which are possible in some jurisdictions.
- Some jurisdictions have a pre-merger as well as a post-merger notification requirement. In these cases, the different deadlines are dealt with in one timeline.

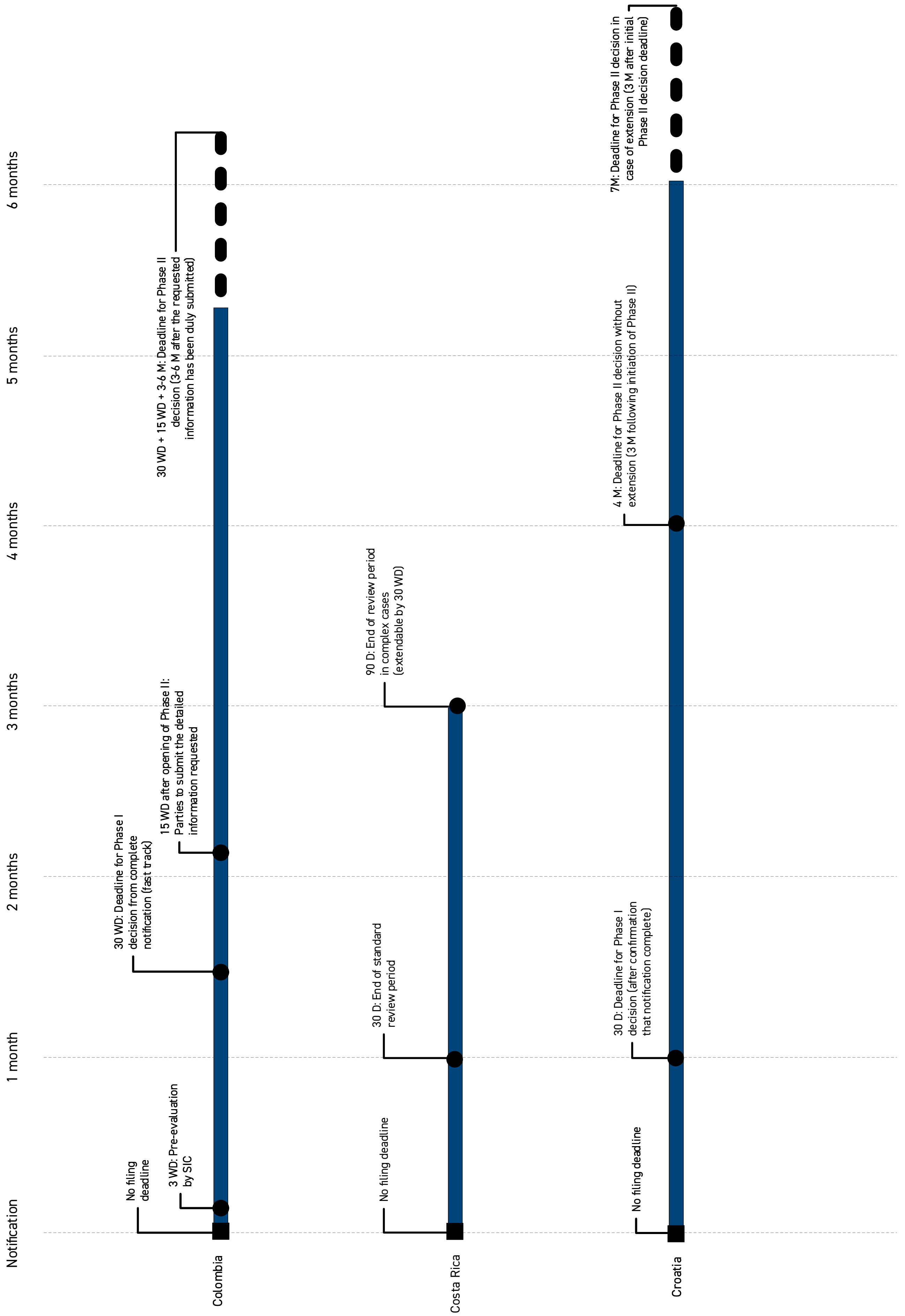
- Where relevant, additional information about, for example, proposed changes to the procedure or the status of the merger control rules are mentioned in separate boxes next to the relevant jurisdiction's timeline.
- In many jurisdictions, timelines for certain periods in 2020 and 2021 have been affected by the covid-19 pandemic. In some cases the relevant laws have been amended and in others there has been informal guidance or de facto delays. These changes have been, or are expected to be, temporary, and so are not taken into account in the timelines.

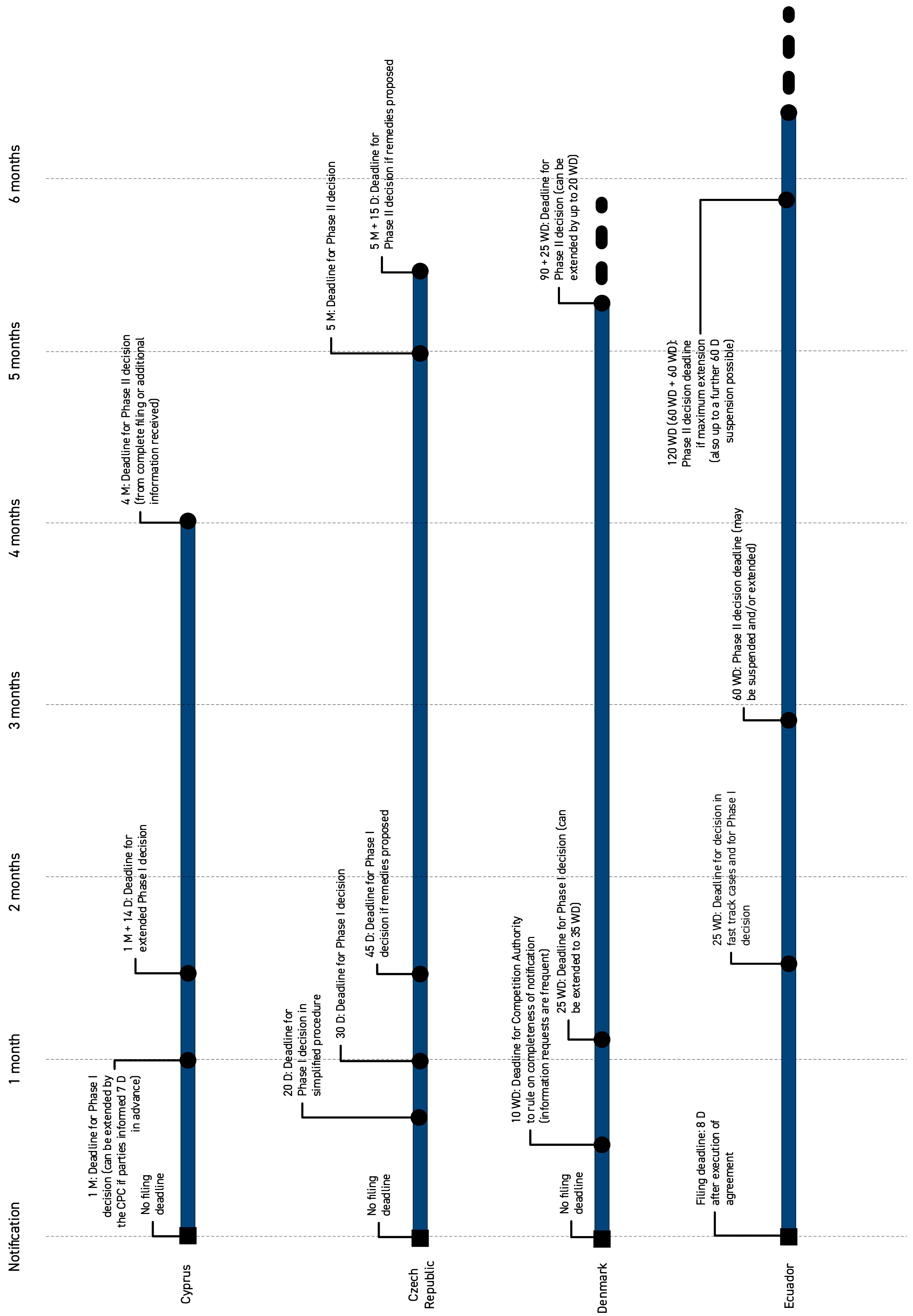

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Albania
Filing deadline: 30 D
25 D: Deadline for clearance under fast track procedure
1 M: Deadline for commitments proposal
2 M: Deadline for Phase I decision (from the WD following the confirmation of receipt of a complete notification)
2 M + 2 W: Extended deadline for Phase I decision in case of commitments
Phase II following non-extended Phase I
Phase II following extended Phase I
4 M: Deadline for commitments proposal in Phase II (2 M from start of Phase II)
5 M: Deadline for Phase II decision (3 M from the start of Phase II)
6 M (2 + 4 M): Extended deadline for Phase II decision in case of commitments
4 M + 2 W: Deadline for commitment proposal in Phase II (if also commitments proposal in Phase I – 2 M from start of Phase II)
5 M + 2 W: Deadline for Phase II decision (if also commitments proposal in Phase I – 3 M from start of Phase II)
6 M+ 2 W: Extended deadline for Phase II decision if also extension in Phase I
Abbreviations:
D = day(s)
WD = working day(s)
W = week(s)
M = month(s)
Australia
No filing deadline (voluntary regime)
2 - 4 W: Indicative deadline for informal clearance (non-complex cases)
6 – 12 W: Indicative deadline for informal Phase I decision (more complex cases)
12 W: Indicative deadline for informal Phase II decision
90 D: Deadline for authorisation decision (extendable). If no decision within this period, clearance is deemed to be refused

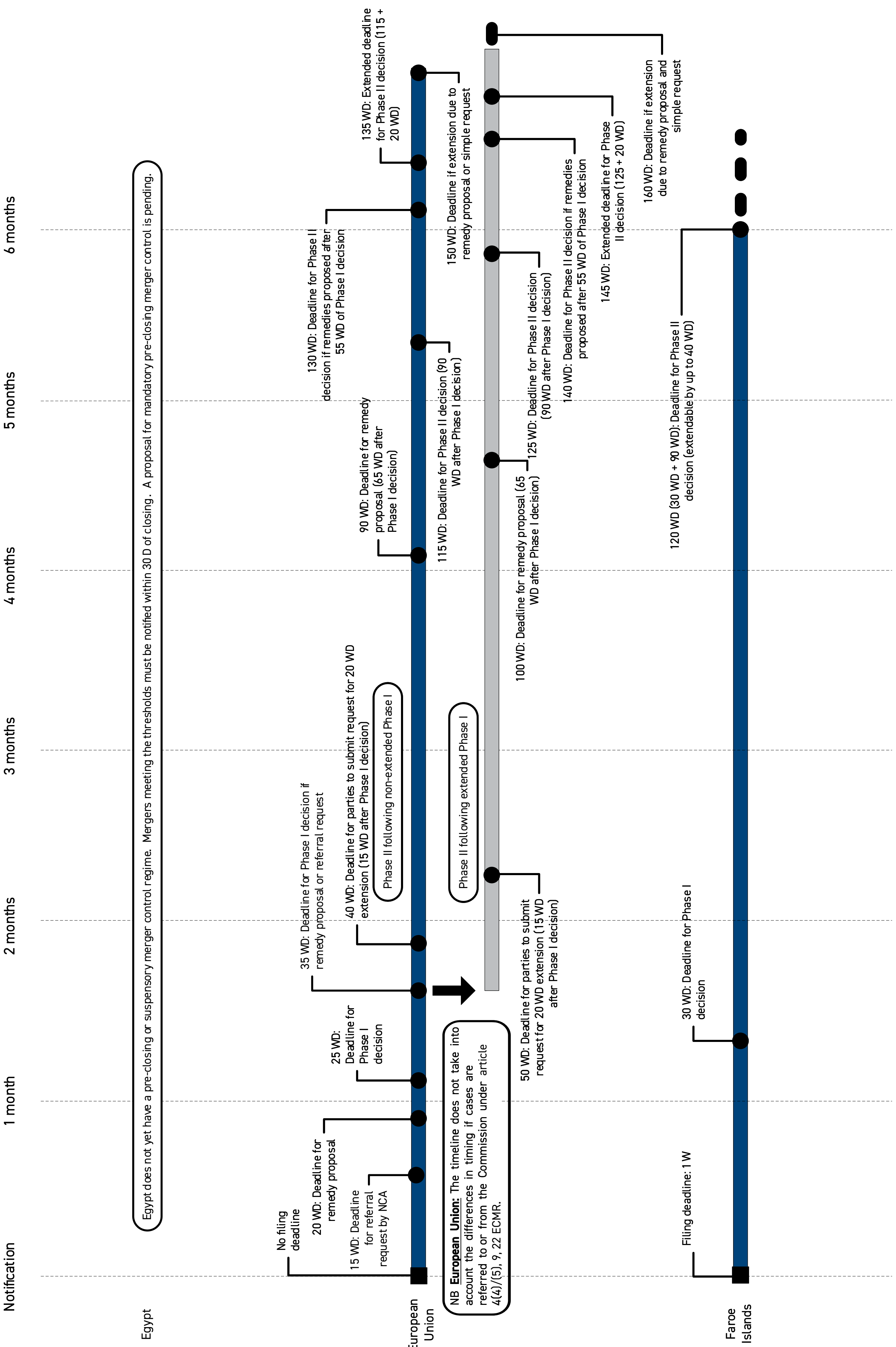

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Austria
No filing deadline
2 W: Deadline for third party comments (from the date of publication of summary)
4W: Phase I deadline i.e. deadline for statutory parties to initiate Phase II
6 W: Phase I deadline if notifying party requests 2 W extension
6 M: Deadline for Cartel Court to reach final decision if Phase II initiated by statutory parties (5 M following statutory parties' request for Phase II proceedings)
7 M: Phase II deadline if notifying party requests 1 M extension
Belgium
No filing deadline
15 WD: Deadline for decision in case of simplified procedure
40 WD: Deadline for Phase I decision
55 WD: Deadline for Phase I decision in case of remedy proposal
Phase II following non-extended Phase I
Phase II following extended Phase I
100 WD (40 + 60 WD): Deadline for Phase II decision (if no remedy proposal in Phase I and II)
120 WD (40 + 60 + 20 WD): Deadline for Phase II decision (if remedy proposal in Phase II)
115 WD (55 + 60 WD): Deadline for Phase II decision (if remedies proposed in Phase I)
135 WD (55 + 60 + 20 WD): Deadline for Phase II decision (if remedy proposal in Phase I and II)

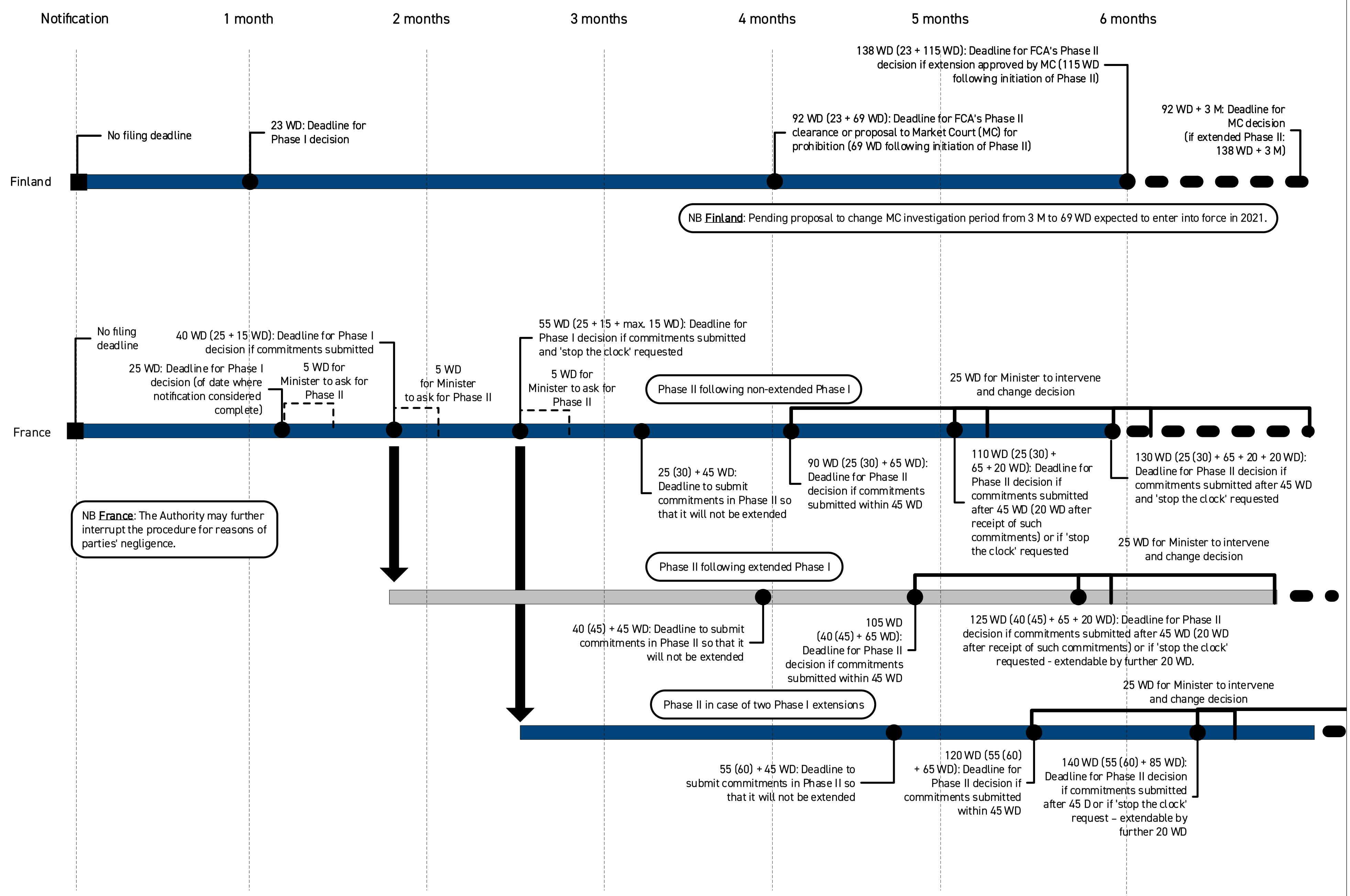

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Bosnia and Herzegovina
Filing deadline: 15 D
30 D: Deadline for Phase I decision (the deadline starts when a certificate of completeness is issued)
30 D + 3 M: Deadline for Phase II decision (3 M after Phase II has been instigated - extendable by additional 3 M)
30 D + 6 M: Deadline for Phase II decision if extended by 3 M
Brazil
No filing deadline
NB Brazil: In practice simple cases not raising competition issues are cleared in 30 D on average.
240 D + extension of up to 90 D if authorized by CADE's tribunal: Deadline for decision
Bulgaria
No filing deadline
3 D: Period for authority to register notification if complete
25 WD (+ 3 D): Deadline for Phase I decision
35 WD (+ 3 D): Extended deadline for Phase I upon parties' request or in case of remedies
45 WD (+ 3 D): Second extension of the deadline for Phase I in case of remedies after parties requested extension
Phase II following non-extended Phase I
Phase II following extended Phase I
Phase II in case of two Phase I extensions
3 D + 25 WD + 90 WD: Deadline for Phase II decision (extendable)
3 D + 25 WD + 90 WD + 25 WD: Deadline for Phase II decision in case of complexity (extendable by additional 15 WD in case of remedies)
3 D + 35 WD + 90 WD: Deadline for Phase II decision (extendable)
3 D + 35 WD + 90 WD + 25 WD: Extended deadline for Phase II decision in case of complexity (extendable by additional 15 WD in case of remedies)
3 D + 45 WD + 90 WD: Deadline for Phase II (extendable by 25 WD for complexity and by further 15 WD in case of remedies)

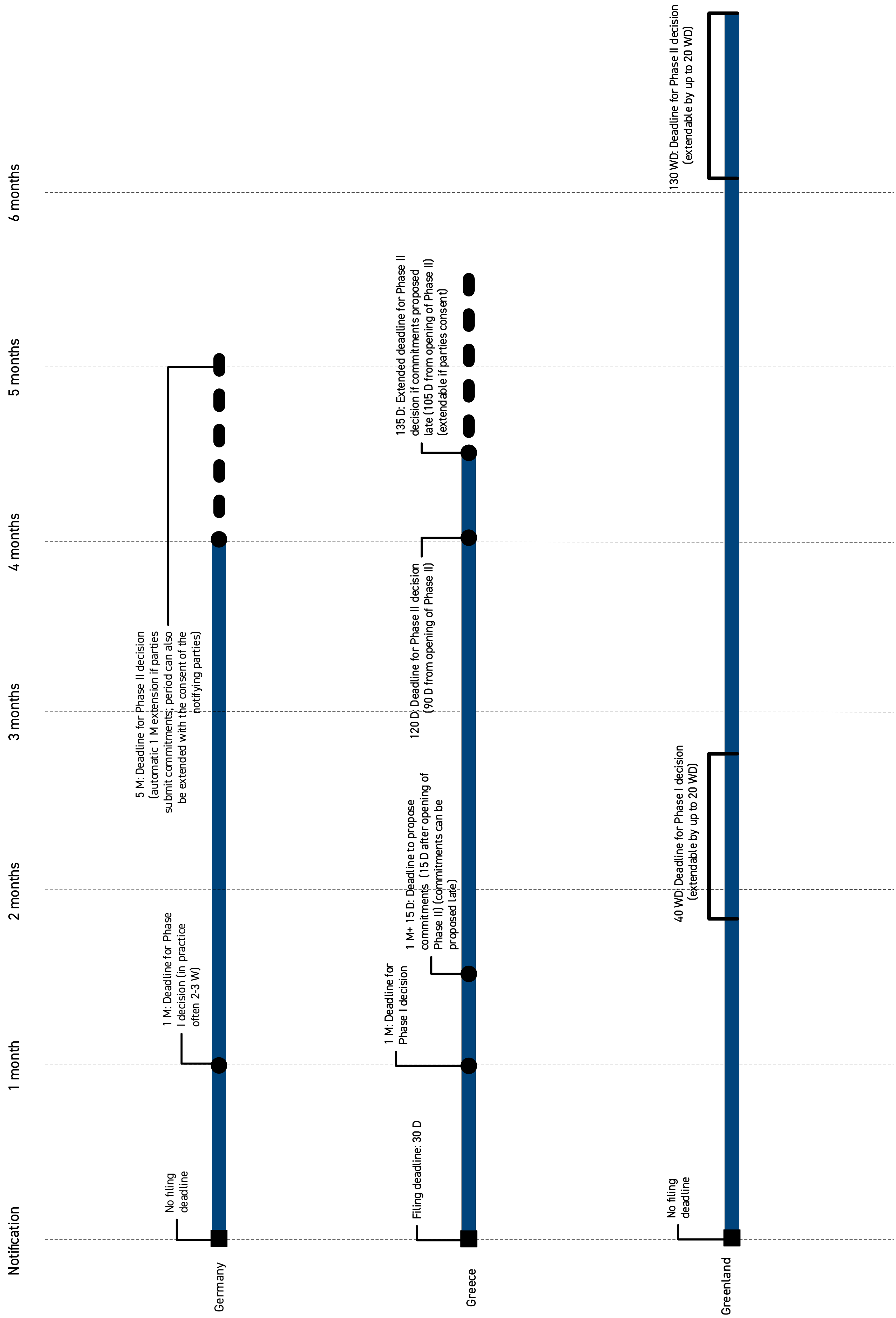

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Canada
No filing deadline
14 D: Non-binding target review period for non-complex cases
30 D: initial waiting period from the day the filing is certified complete
30 D for Commissioner to issue supplementary information request (SIR)
45 D: Non-binding target review period for complex cases (unless SIR issued)
75 – 120 D (30 D initial no-close period + 45 - 90 D): Estimated time to respond to SIR (typically 1.5 – 3 M)
105 – 150 D: Waiting period if SIR issued (30 D from date on which requested information is received)
30 D after compliance with SIR: Non-binding target review period for complex cases (where SIR issued)
135 – 210 D: A temporary non-closing injunction can be ordered for a further 30 or 60 D following the expiry of the SIR waiting period. Even if review period for complex cases has expired 30 D following compliance with SIR, the Commissioner may inform parties that the review is not yet complete and may request that parties not close – a review of a complex case can go well beyond 150 D
China (PRC)
No filing deadline
30 D: Deadline for Phase I decision (from the acceptance of the filing as complete)
30 + 90 D: Deadline for Phase II decision (extendable by max. of 60 D)
30 + 90 + 60 D: Extended deadline for Phase II decision
NB China: There is a pre-notification process, which usually takes 6-8 W, before acceptance of the filing and commencement of the Phase I review period. In practice even 'simple' cases can take 2-3 M to clear and other cases without significant competition concerns take 4–6 M.

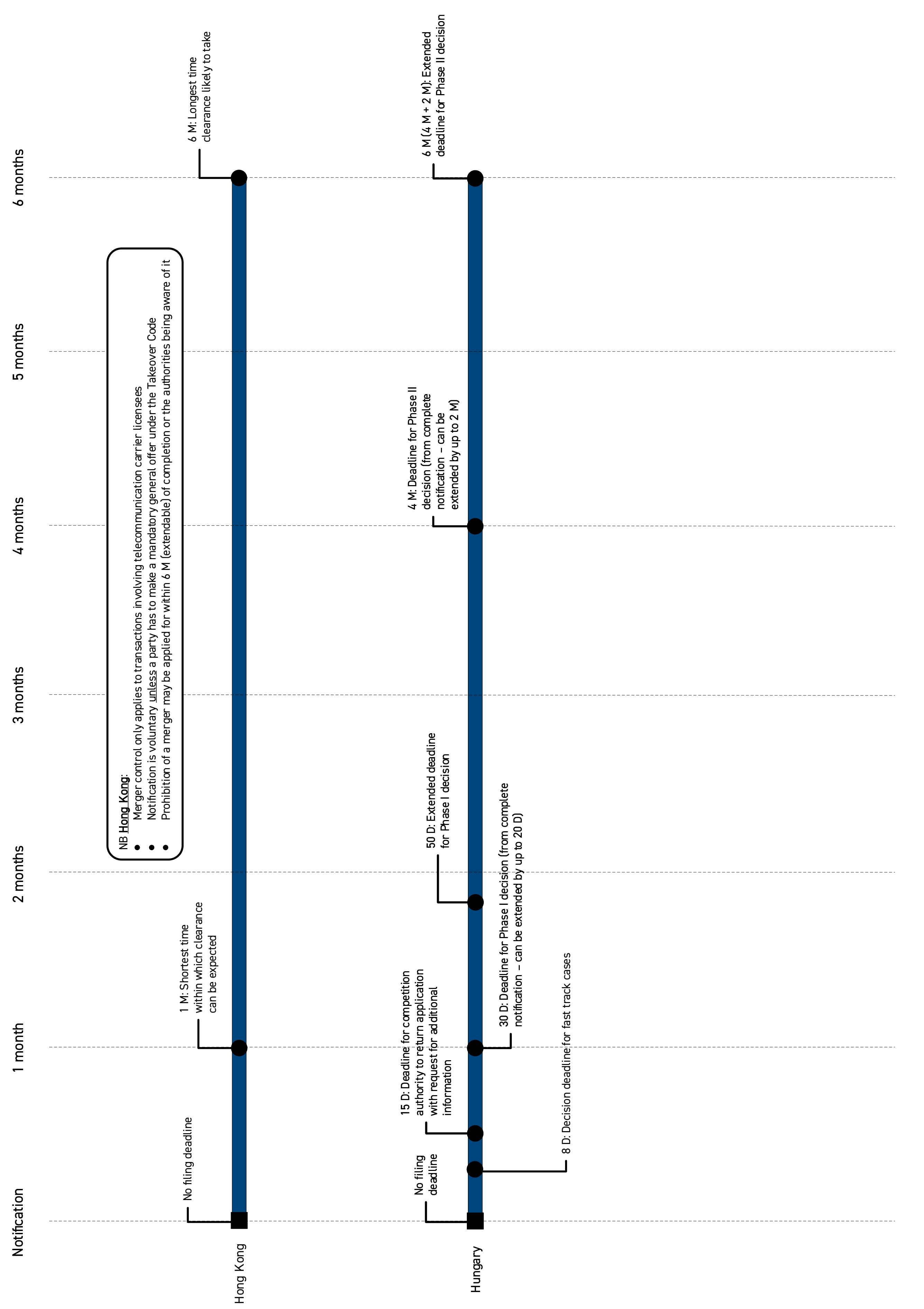

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Colombia
No filing deadline
3 WD: Pre-evaluation by SIC
30 WD: Deadline for Phase I decision from complete notification (fast track)
15 WD after opening of Phase II: Parties to submit the detailed information requested
30 WD + 15 WD + 3-6 M: Deadline for Phase II decision (3-6 M after the requested information has been duly submitted)
Costa Rica
No filing deadline
30 D: End of standard review period
90 D: End of review period in complex cases (extendable by 30 WD)
Croatia
No filing deadline
30 D: Deadline for Phase I decision (after confirmation that notification complete)
4 M: Deadline for Phase II decision without extension (3 M following initiation of Phase II)
7M: Deadline for Phase II decision in case of extension (3 M after initial Phase II decision deadline)

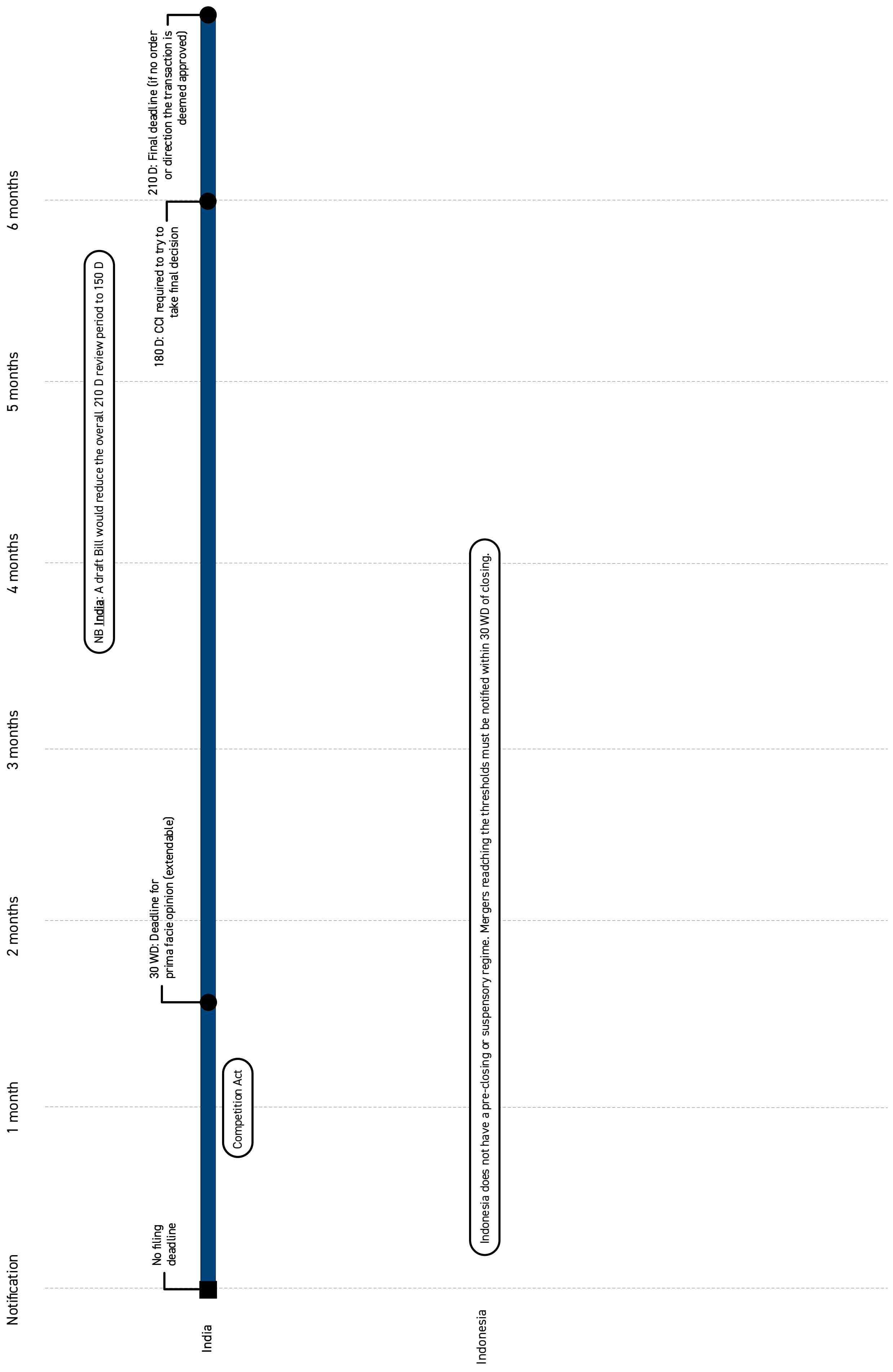

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Cyprus
No filing deadline
1 M: Deadline for Phase I decision (can be extended by the CPC if parties informed 7 D in advance)
1 M + 14 D: Deadline for extended Phase I decision
4 M: Deadline for Phase II decision (from complete filing or additional information received)
Czech Republic
No filing deadline
20 D: Deadline for Phase I decision in simplified procedure
30 D: Deadline for Phase I decision
45 D: Deadline for Phase I decision if remedies proposed
5 M: Deadline for Phase II decision
5 M + 15 D: Deadline for Phase II decision if remedies proposed
Denmark
No filing deadline
10 WD: Deadline for Competition Authority to rule on completeness of notification (information requests are frequent)
25 WD: Deadline for Phase I decision (can be extended to 35 WD)
90 + 25 WD: Deadline for Phase II decision (can be extended by up to 20 WD)
Ecuador
Filing deadline: 8 D after execution of agreement
25 WD: Deadline for decision in fast track cases and for Phase I decision
60 WD: Phase II decision deadline (may be suspended and/or extended)
120 WD (60 WD + 60 WD): Phase II decision deadline if maximum extension (also up to a further 60 D suspension possible)

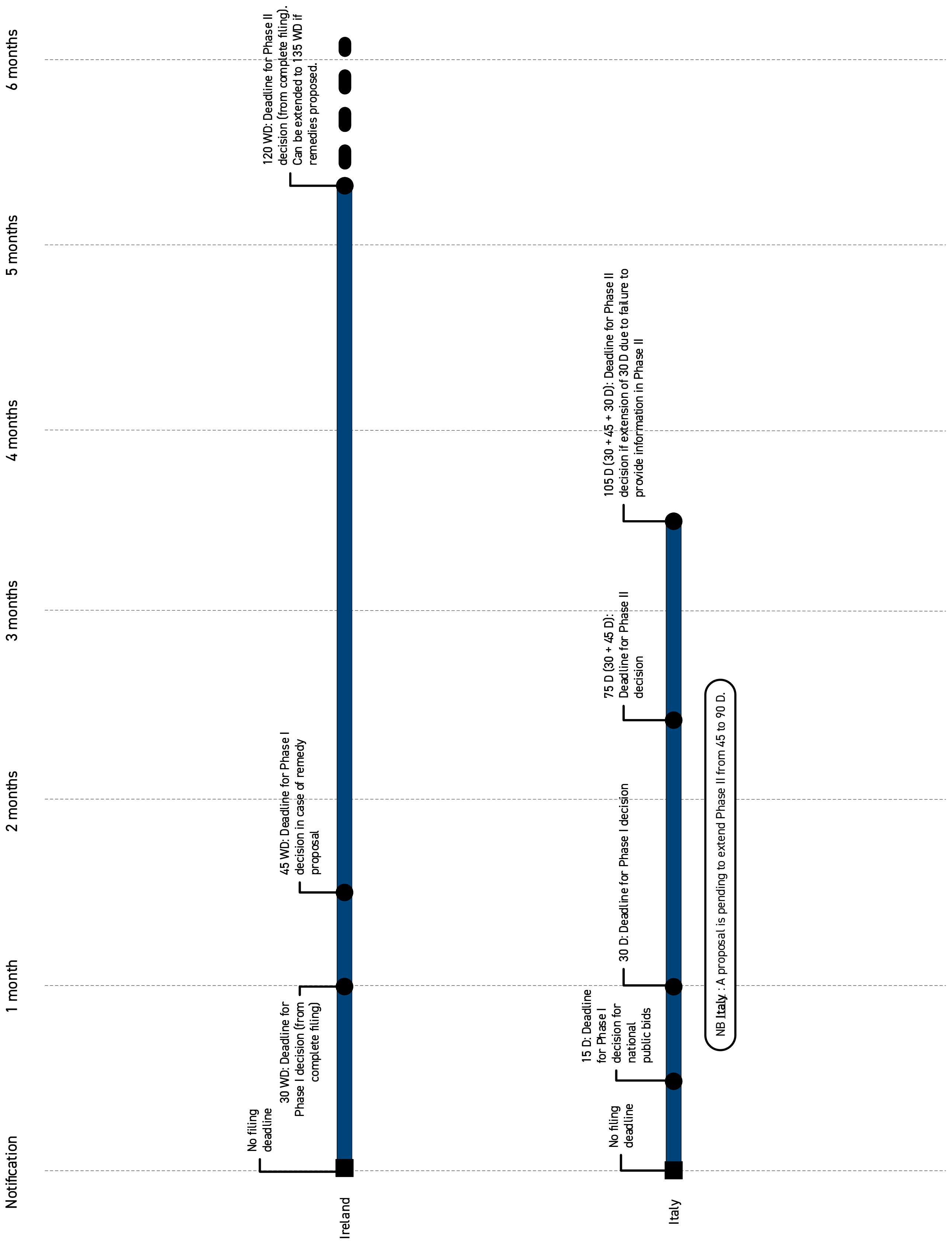

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Egypt
Egypt does not yet have a pre-closing or suspensory merger control regime. Mergers meeting the thresholds must be notified within 30 D of closing. A proposal for mandatory pre-closing merger control is pending.
European Union
No filing deadline
15 WD: Deadline for referral request by NCA
20 WD: Deadline for remedy proposal
25 WD: Deadline for Phase I decision
35 WD: Deadline for Phase I decision if remedy proposal or referral request
40 WD: Deadline for parties to submit request for 20 WD extension (15 WD after Phase I decision)
Phase II following non-extended Phase I
90 WD: Deadline for remedy proposal (65 WD after Phase I decision)
115 WD: Deadline for Phase II decision (90 WD after Phase I decision)
130 WD: Deadline for Phase II decision if remedies proposed after 55 WD of Phase I decision
135 WD: Extended deadline for Phase II decision (115 + 20 WD)
150 WD: Deadline if extension due to remedy proposal or simple request
NB European Union: The timeline does not take into account the differences in timing if cases are referred to or from the Commission under article 4(4)/(5), 9, 22 ECMR.
Phase II following extended Phase I
50 WD: Deadline for parties to submit request for 20 WD extension (15 WD after Phase I decision)
100 WD: Deadline for remedy proposal (65 WD after Phase I decision)
125 WD: Deadline for Phase II decision (90 WD after Phase I decision)
140 WD: Deadline for Phase II decision if remedies proposed after 55 WD of Phase I decision
145 WD: Extended deadline for Phase II decision (125 + 20 WD)
160 WD: Deadline if extension due to remedy proposal and simple request
Faroe Islands
Filing deadline: 1 W
30 WD: Deadline for Phase I decision
120 WD (30 WD + 90 WD): Deadline for Phase II decision (extendable by up to 40 WD)

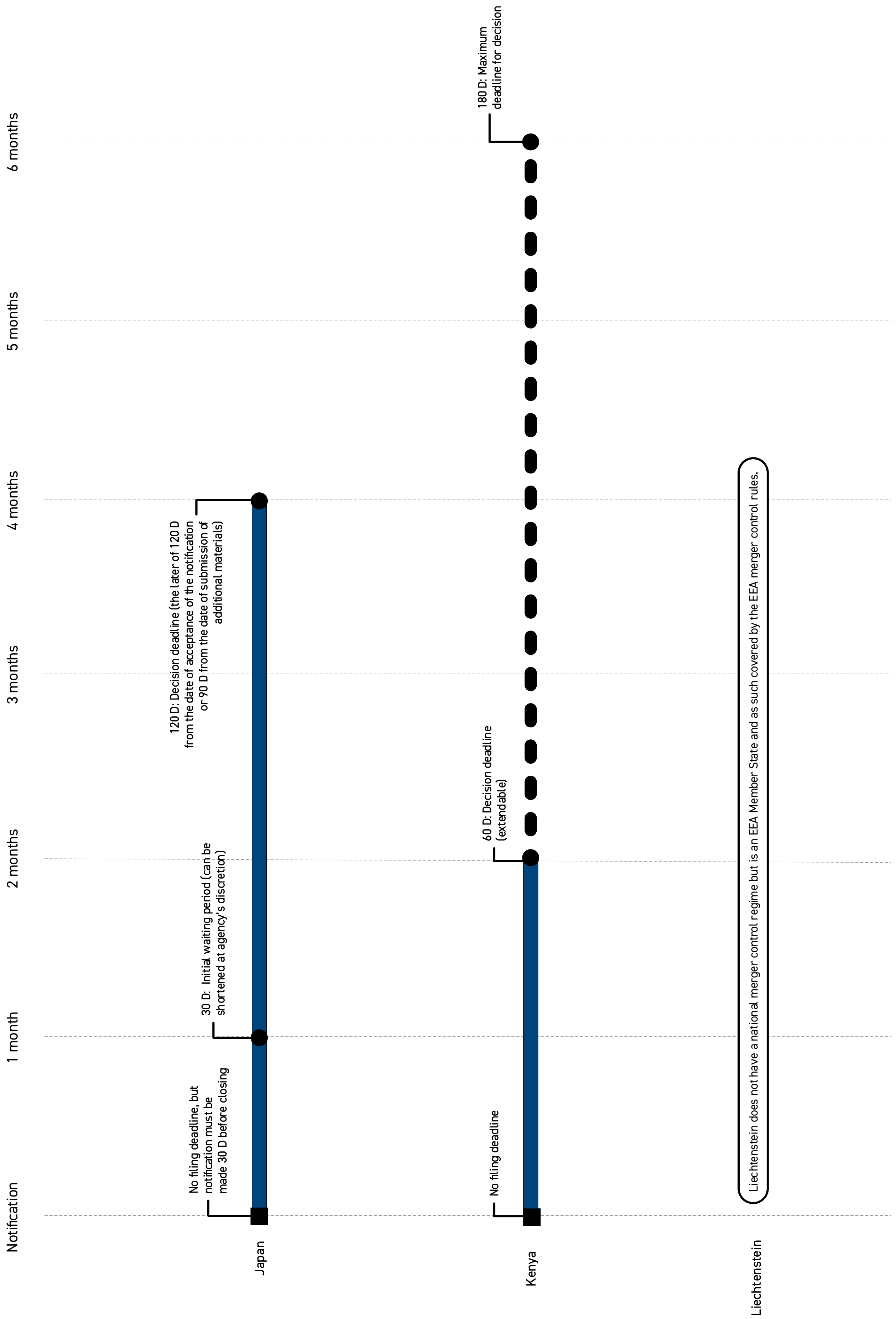

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Finland
No filing deadline
23 WD: Deadline for Phase I decision
92 WD (23 + 69 WD): Deadline for FCA's Phase II clearance or proposal to Market Court (MC) for prohibition (69 WD following initiation of Phase II)
138 WD (23 + 115 WD): Deadline for FCA's Phase II decision if extension approved by MC (115 WD following initiation of Phase II)
92 WD + 3 M: Deadline for MC decision (if extended Phase II: 138 WD + 3 M)
NB Finland: Pending proposal to change MC investigation period from 3 M to 69 WD expected to enter into force in 2021.
France
No filing deadline
25 WD: Deadline for Phase I decision (of date where notification considered complete)
5 WD for Minister to ask for Phase II
40 WD (25 + 15 WD): Deadline for Phase I decision if commitments submitted
5 WD for Minister to ask for Phase II
55 WD (25 + 15 + max. 15 WD): Deadline for Phase I decision if commitments submitted and 'stop the clock' requested
5 WD for Minister to ask for Phase II
Phase II following non-extended Phase I
25 WD for Minister to intervene and change decision
25 (30) + 45 WD: Deadline to submit commitments in Phase II so that it will not be extended
90 WD (25 (30) + 65 WD): Deadline for Phase II decision if commitments submitted within 45 WD
110 WD (25 (30) + 65 + 20 WD): Deadline for Phase II decision if commitments submitted after 45 WD (20 WD after receipt of such commitments) or if 'stop the clock' requested
130 WD (25 (30) + 65 + 20 + 20 WD): Deadline for Phase II decision if commitments submitted after 45 WD and 'stop the clock' requested
NB France: The Authority may further interrupt the procedure for reasons of parties' negligence.
Phase II following extended Phase I
25 WD for Minister to intervene and change decision
40 (45) + 45 WD: Deadline to submit commitments in Phase II so that it will not be extended
105 WD (40 (45) + 65 WD): Deadline for Phase II decision if commitments submitted within 45 WD
125 WD (40 (45) + 65 + 20 WD): Deadline for Phase II decision if commitments submitted after 45 WD (20 WD after receipt of such commitments) or if 'stop the clock' requested - extendable by further 20 WD.
Phase II in case of two Phase I extensions
25 WD for Minister to intervene and change decision
55 (60) + 45 WD: Deadline to submit commitments in Phase II so that it will not be extended
120 WD (55 (60) + 65 WD): Deadline for Phase II decision if commitments submitted within 45 WD
140 WD (55 (60) + 85 WD): Deadline for Phase II decision if commitments submitted after 45 D or if 'stop the clock' request – extendable by further 20 WD

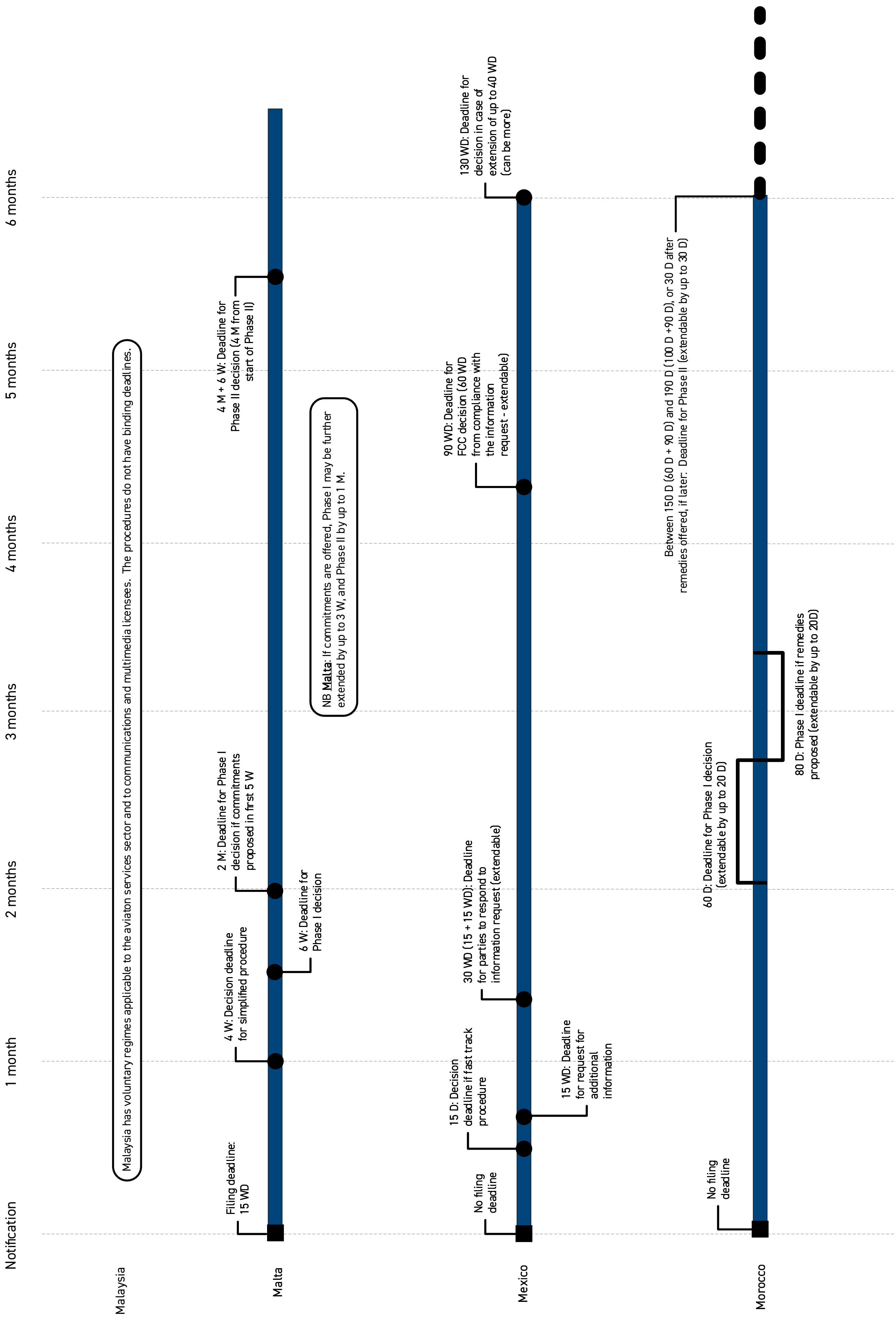

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Germany
No filing deadline
1 M: Deadline for Phase I decision (in practice often 2-3 W)
5 M: Deadline for Phase II decision (automatic 1 M extension if parties submit commitments; period can also be extended with the consent of the notifying parties)
Greece
Filing deadline: 30 D
1 M: Deadline for Phase I decision
1 M+ 15 D: Deadline to propose commitments (15 D after opening of Phase II) (commitments can be proposed late)
120 D: Deadline for Phase II decision (90 D from opening of Phase II)
135 D: Extended deadline for Phase II decision if commitments proposed late (105 D from opening of Phase II) (extendable if parties consent)
Greenland
No filing deadline
40 WD: Deadline for Phase I decision (extendable by up to 20 WD)
130 WD: Deadline for Phase II decision (extendable by up to 20 WD)

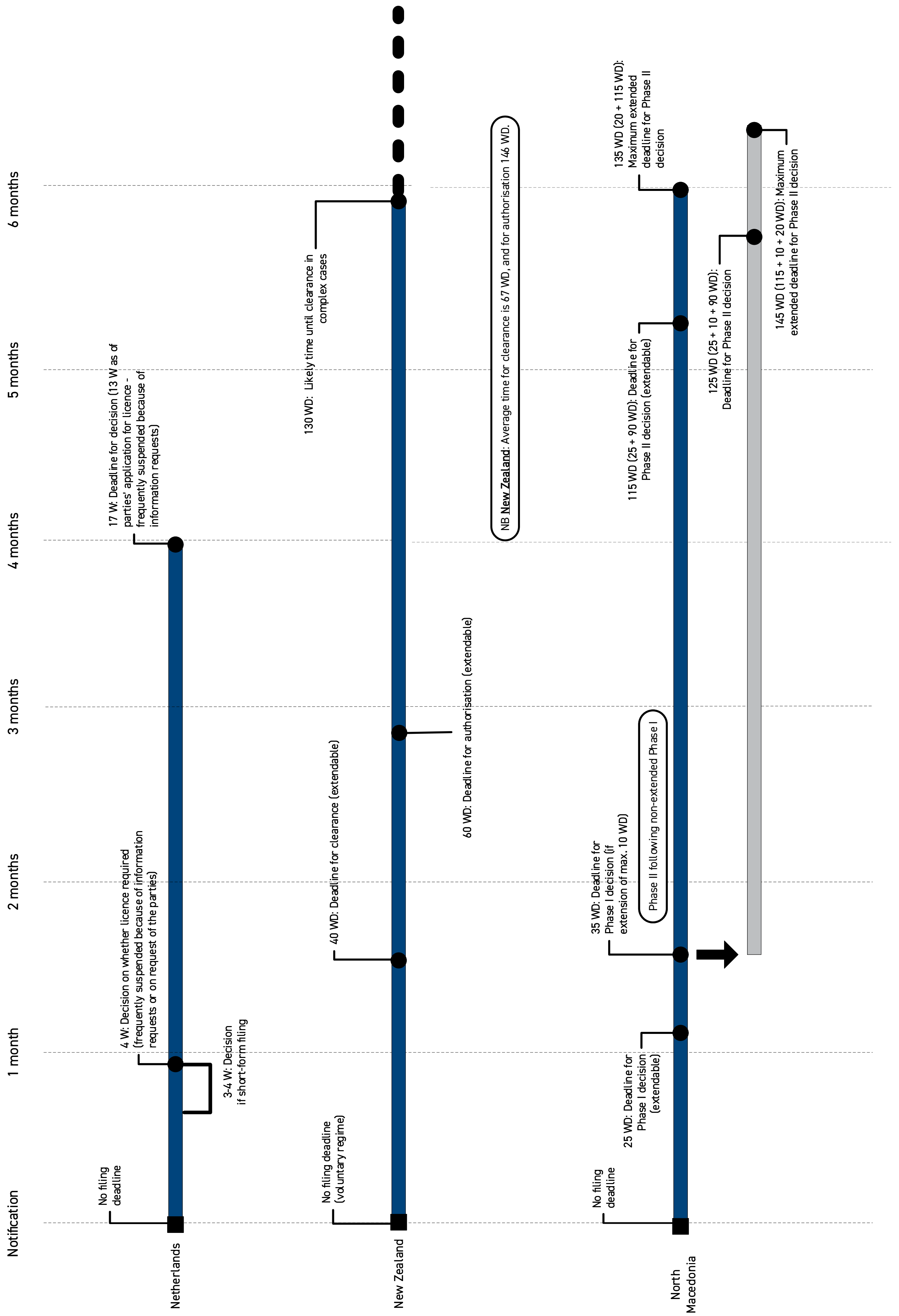

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Hong Kong
No filing deadline
1 M: Shortest time within which clearance can be expected
6 M: Longest time clearance likely to take
NB Hong Kong:
Merger control only applies to transactions involving telecommunication carrier licensees
Notification is voluntary unless a party has to make a mandatory general offer under the Takeover Code
Prohibition of a merger may be applied for within 6 M (extendable) of completion or the authorities being aware of it
Hungary
No filing deadline
8 D: Decision deadline for fast track cases
15 D: Deadline for competition authority to return application with request for additional information
30 D: Deadline for Phase I decision (from complete notification – can be extended by up to 20 D)
50 D: Extended deadline for Phase I decision
4 M: Deadline for Phase II decision (from complete notification – can be extended by up to 2 M)
6 M (4 M + 2 M): Extended deadline for Phase II decision

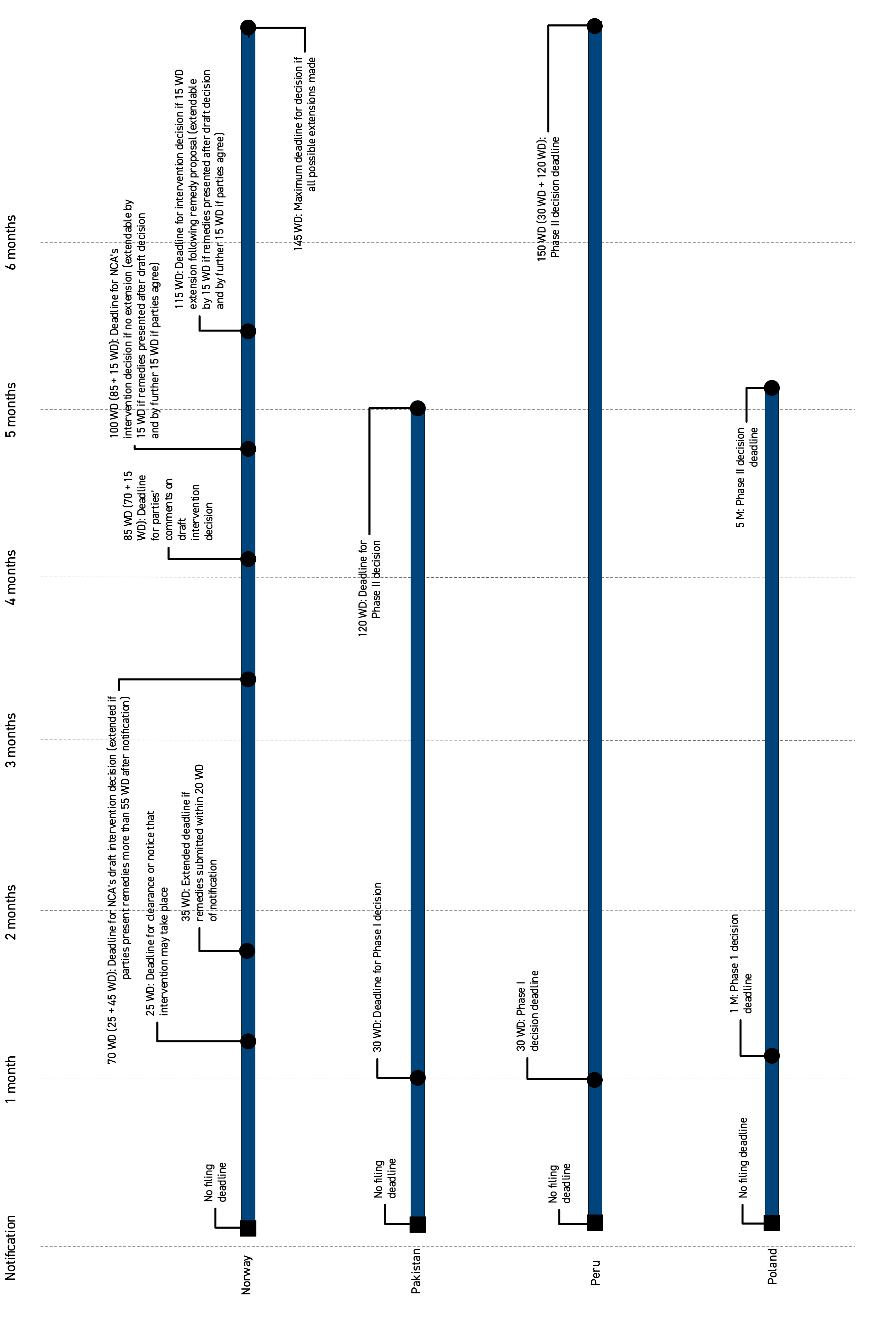

Notification
1 month
2 months
3 months
4 months
5 months
6 months
India
No filing deadline
Competition Act
30 WD: Deadline for prima facie opinion (extendable)
NB India: A draft Bill would reduce the overall 210 D review period to 150 D
180 D: CCI required to try to take final decision
210 D: Final deadline (if no order or direction the transaction is deemed approved)
Indonesia
Indonesia does not have a pre-closing or suspensory regime. Mergers readching the thresholds must be notified within 30 WD of closing.

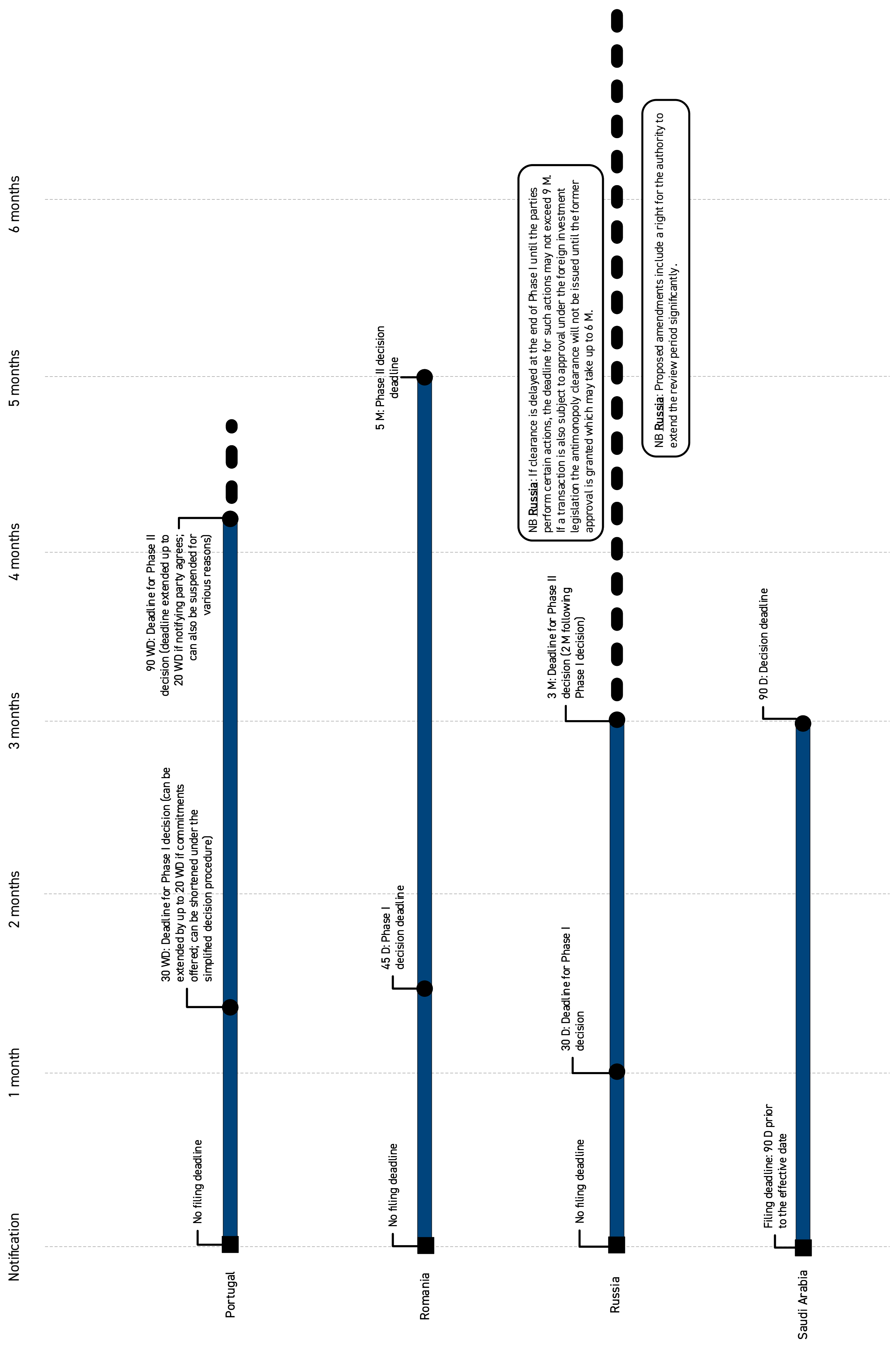

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Ireland
No filing deadline
30 WD: Deadline for Phase I decision (from complete filing)
45 WD: Deadline for Phase I decision in case of remedy proposal
120 WD: Deadline for Phase II decision (from complete filing). Can be extended to 135 WD if remedies proposed.
Italy
No filing deadline
15 D: Deadline for Phase I decision for national public bids
30 D: Deadline for Phase I decision
75 D (30 + 45 D): Deadline for Phase II decision
105 D (30 + 45 + 30 D): Deadline for Phase II decision if extension of 30 D due to failure to provide information in Phase II
NB Italy: A proposal is pending to extend Phase II from 45 to 90 D.

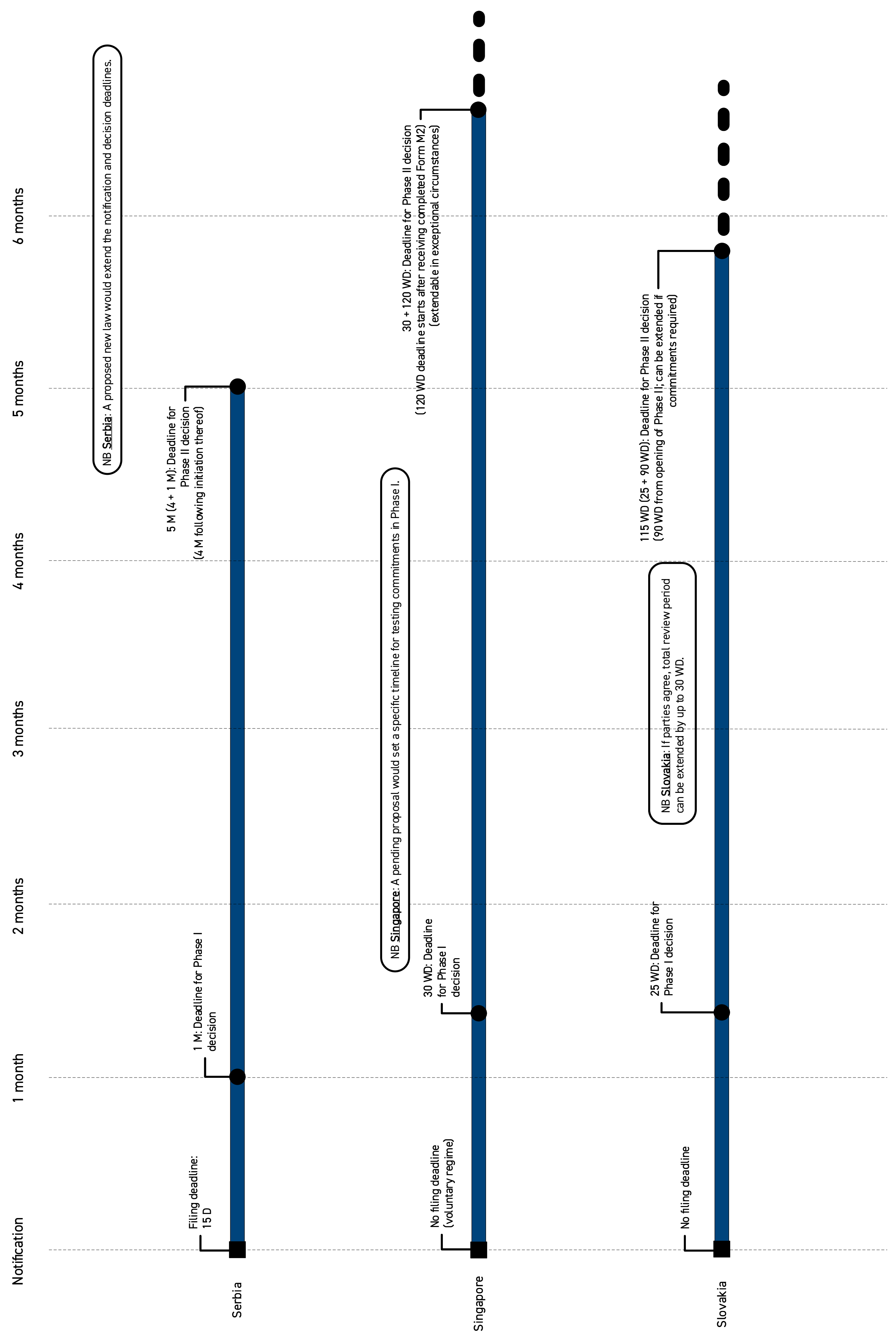

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Japan
No filing deadline, but notification must be made 30 D before closing
30 D: Initial waiting period (can be shortened at agency's discretion)
120 D: Decision deadline (the later of 120 D from the date of acceptance of the notification or 90 D from the date of submission of additional materials)
Kenya
No filing deadline
60 D: Decision deadline (extendable)
180 D: Maximum deadline for decision
Liechtenstein
Liechtenstein does not have a national merger control regime but is an EEA Member State and as such covered by the EEA merger control rules.

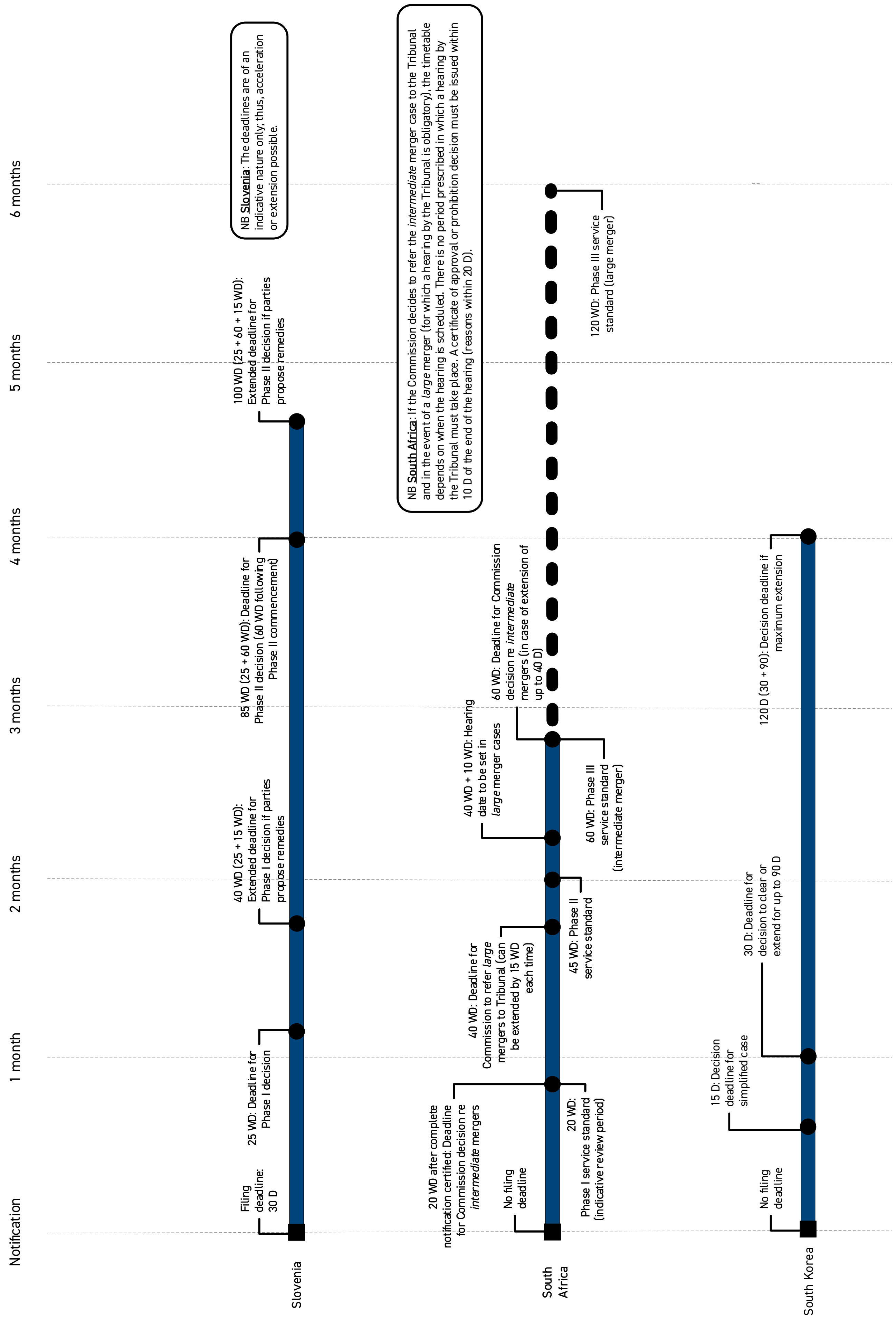

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Malaysia
Malaysia has voluntary regimes applicable to the aviaton services sector and to communications and multimedia licensees. The procedures do not have binding deadlines.
Malta
Filing deadline: 15 WD
4 W: Decision deadline for simplified procedure
6 W: Deadline for Phase I decision
2 M: Deadline for Phase I decision if commitments proposed in first 5 W
NB Malta: If commitments are offered, Phase I may be further extended by up to 3 W, and Phase II by up to 1 M.
4 M + 6 W: Deadline for Phase II decision (4 M from start of Phase II)
Mexico
No filing deadline
15 D: Decision deadline if fast track procedure
15 WD: Deadline for request for additional information
30 WD (15 + 15 WD): Deadline for parties to respond to information request (extendable)
90 WD: Deadline for FCC decision (60 WD from compliance with the information request - extendable)
130 WD: Deadline for decision in case of extension of up to 40 WD (can be more)
Morocco
No filing deadline
60 D: Deadline for Phase I decision (extendable by up to 20 D)
80 D: Phase I deadline if remedies proposed (extendable by up to 20D)
Between 150 D (60 D + 90 D) and 190 D (100 D +90 D), or 30 D after remedies offered, if later. Deadline for Phase II (extendable by up to 30 D)

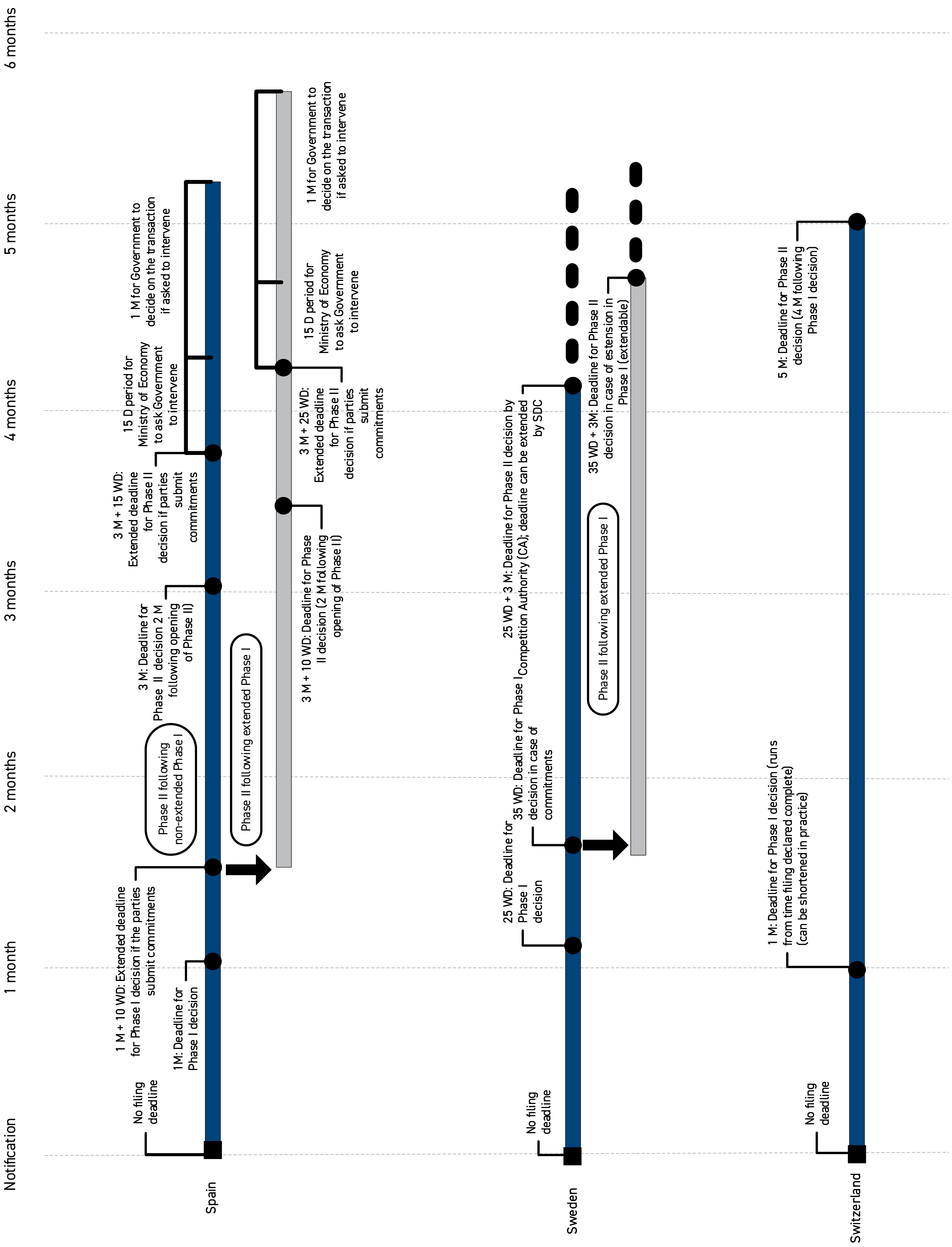

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Netherlands
No filing deadline
4 W: Decision on whether licence required (frequently suspended because of information requests or on request of the parties)
3-4 W: Decision if short-form filing
17 W: Deadline for decision (13 W as of parties' application for licence - frequently suspended because of information requests)
New Zealand
No filing deadline (voluntary regime)
40 WD: Deadline for clearance (extendable)
60 WD: Deadline for authorisation (extendable)
130 WD: Likely time until clearance in complex cases
NB New Zealand: Average time for clearance is 67 WD, and for authorisation 146 WD.
North Macedonia
No filing deadline
25 WD: Deadline for Phase I decision (extendable)
35 WD: Deadline for Phase I decision (if extension of max. 10 WD)
Phase II following non-extended Phase I
115 WD (25 + 90 WD): Deadline for Phase II decision (extendable)
135 WD (20 + 115 WD): Maximum extended deadline for Phase II decision
125 WD (25 + 10 + 90 WD): Deadline for Phase II decision
145 WD (115 + 10 + 20 WD): Maximum extended deadline for Phase II decision

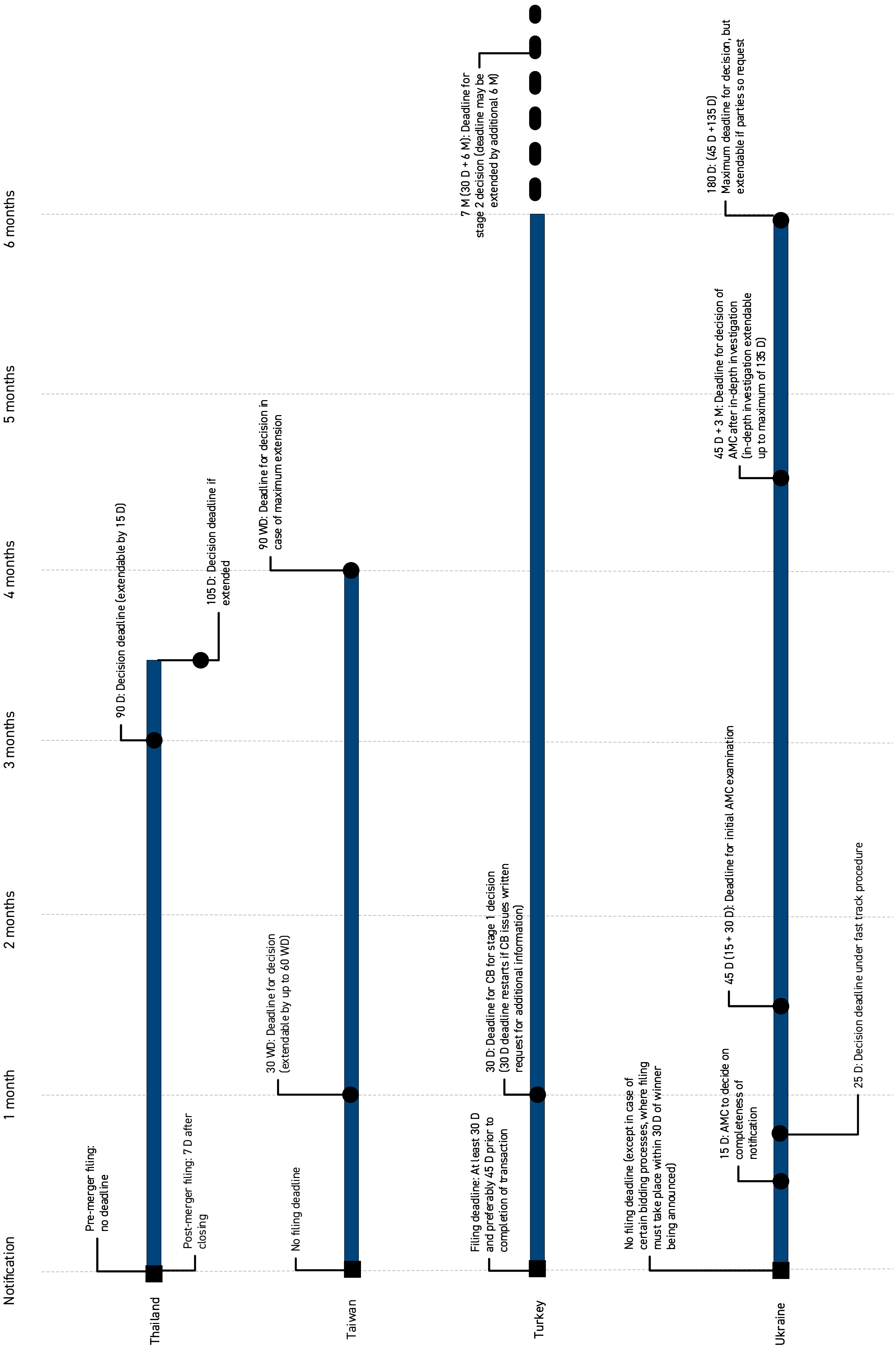

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Norway
No filing deadline
25 WD: Deadline for clearance or notice that intervention may take place
35 WD: Extended deadline if remedies submitted within 20 WD of notification
70 WD (25 + 45 WD): Deadline for NCA's draft intervention decision (extended if parties present remedies more than 55 WD after notification)
85 WD (70 + 15 WD): Deadline for parties' comments on draft intervention decision
100 WD (85 + 15 WD): Deadline for NCA's intervention decision if no extension (extendable by 15 WD if remedies presented after draft decision and by further 15 WD if parties agree)
115 WD: Deadline for intervention decision if 15 WD extension following remedy proposal (extendable by 15 WD if remedies presented after draft decision and by further 15 WD if parties agree)
145 WD: Maximum deadline for decision if all possible extensions made
Pakistan
No filing deadline
30 WD: Deadline for Phase I decision
120 WD: Deadline for Phase II decision
Peru
No filing deadline
30 WD: Phase I decision deadline
150 WD (30 WD + 120 WD): Phase II decision deadline
Poland
No filing deadline
1 M: Phase 1 decision deadline
5 M: Phase II decision deadline

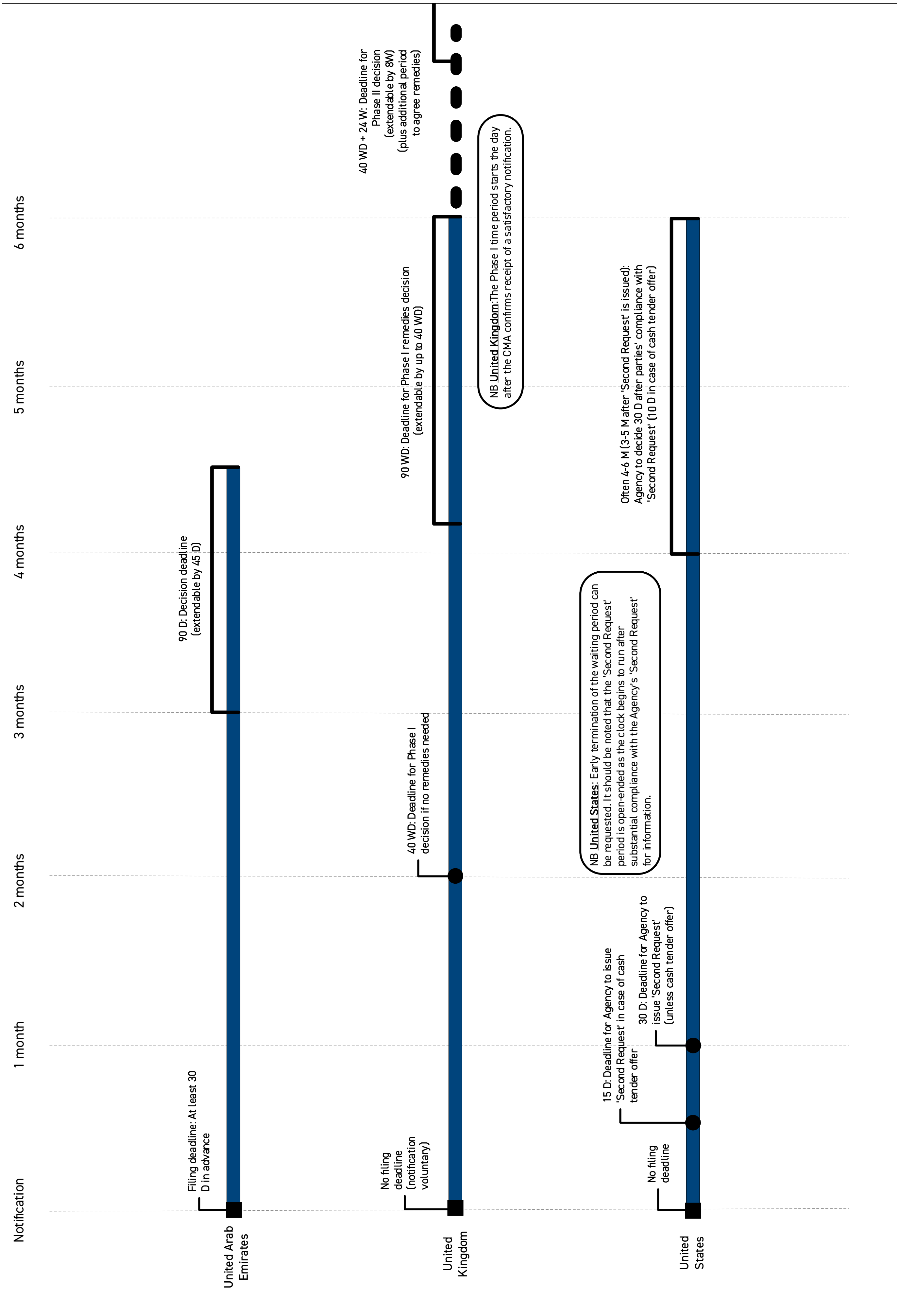

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Portugal
No filing deadline
30 WD: Deadline for Phase I decision (can be extended by up to 20 WD if commitments offered; can be shortened under the simplified decision procedure)
90 WD: Deadline for Phase II decision (deadline extended up to 20 WD if notifying party agrees; can also be suspended for various reasons)
Romania
No filing deadline
45 D: Phase I decision deadline
5 M: Phase II decision deadline
Russia
No filing deadline
30 D: Deadline for Phase I decision
3 M: Deadline for Phase II decision (2 M following Phase I decision)
NB Russia: If clearance is delayed at the end of Phase I until the parties perform certain actions, the deadline for such actions may not exceed 9 M. If a transaction is also subject to approval under the foreign investment legislation the antimonopoly clearance will not be issued until the former approval is granted which may take up to 6 M.
NB Russia: Proposed amendments include a right for the authority to extend the review period significantly.
Saudi Arabia
Filing deadline: 90 D prior to the effective date
90 D: Decision deadline

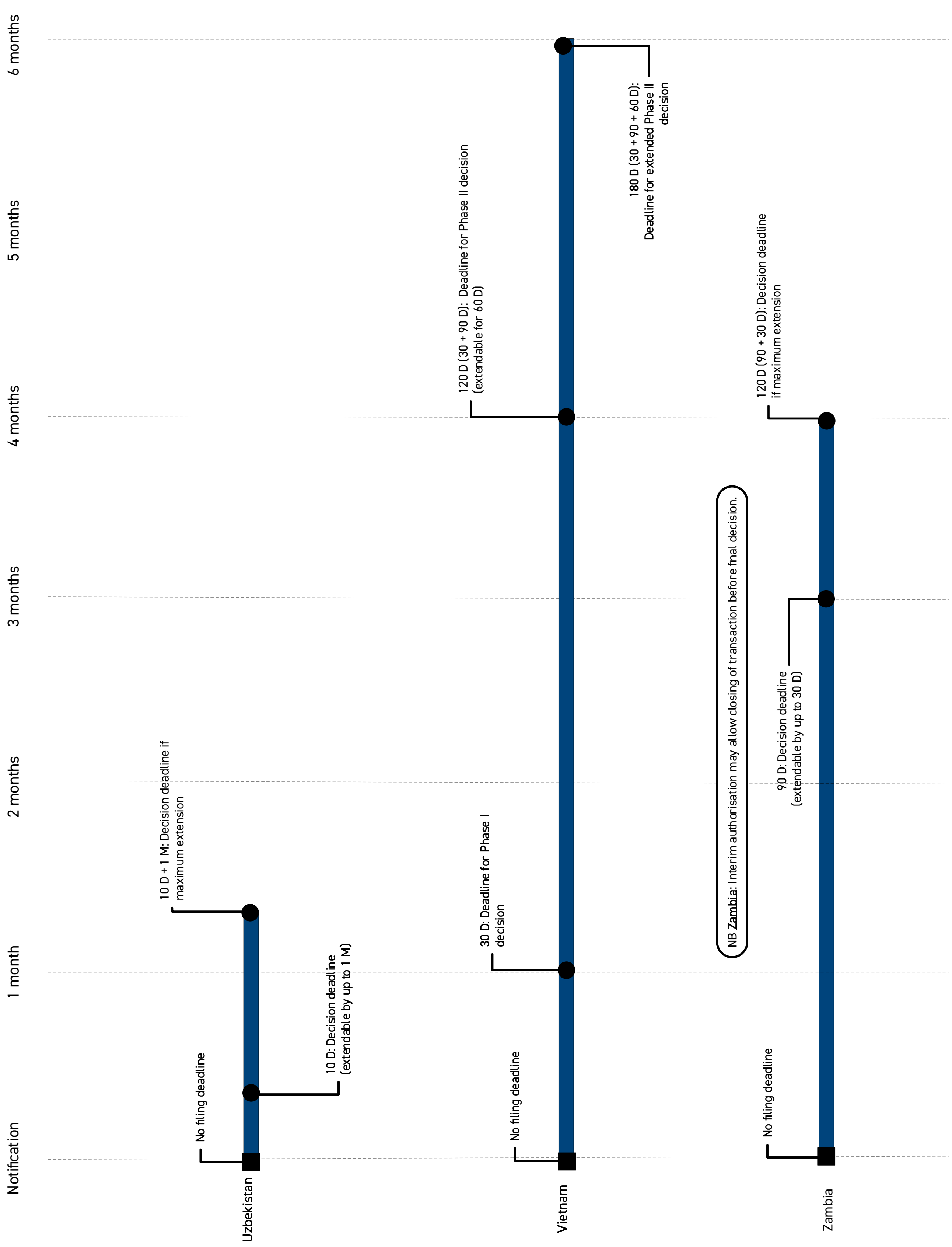

Notification
1 month
2 months
3 months
4 months
5 months
6 months
Serbia
Filing deadline: 15 D
1 M: Deadline for Phase I decision
5 M (4 + 1 M): Deadline for Phase II decision (4 M following initiation thereof)
NB Serbia: A proposed new law would extend the notification and decision deadlines.
Singapore
No filing deadline (voluntary regime)
30 WD: Deadline for Phase I decision
NB Singapore: A pending proposal would set a specific timeline for testing commitments in Phase I.
30 + 120 WD: Deadline for Phase II decision (120 WD deadline starts after receiving completed Form M2) (extendable in exceptional circumstances)
Slovakia
No filing deadline
25 WD: Deadline for Phase I decision
NB Slovakia: If parties agree, total review period can be extended by up to 30 WD.
115 WD (25 + 90 WD): Deadline for Phase II decision (90 WD from opening of Phase II; can be extended if commitments required)


Notification
1 month
2 months
3 months
4 months
5 months
6 months
Slovenia
Filing deadline: 30 D
25 WD: Deadline for Phase I decision
40 WD (25 + 15 WD): Extended deadline for Phase I decision if parties propose remedies
85 WD (25 + 60 WD): Deadline for Phase II decision (60 WD following Phase II commencement)
100 WD (25 + 60 + 15 WD): Extended deadline for Phase II decision if parties propose remedies
NB Slovenia: The deadlines are of an indicative nature only; thus, acceleration or extension possible.
South Africa
No filing deadline
20 WD after complete notification certified: Deadline for Commission decision re intermediate mergers
20 WD: Phase I service standard (indicative review period)
40 WD: Deadline for Commission to refer large mergers to Tribunal (can be extended by 15 WD each time)
45 WD: Phase II service standard
40 WD + 10 WD: Hearing date to be set in large merger cases
60 WD: Phase III service standard (intermediate merger)
60 WD: Deadline for Commission decision re intermediate mergers (in case of extension of up to 40 D)
120 WD: Phase III service standard (large merger)
NB South Africa: If the Commission decides to refer the intermediate merger case to the Tribunal and in the event of a large merger (for which a hearing by the Tribunal is obligatory), the timetable depends on when the hearing is scheduled. There is no period prescribed in which a hearing by the Tribunal must take place. A certificate of approval or prohibition decision must be issued within 10 D of the end of the hearing (reasons within 20 D).
South Korea
No filing deadline
15 D: Decision deadline for simplified case
30 D: Deadline for decision to clear or extend for up to 90 D
120 D (30 + 90): Decision deadline if maximum extension


Notification
1 month
2 months
3 months
4 months
5 months
6 months
Spain
No filing deadline
1M: Deadline for Phase I decision
1 M + 10 WD: Extended deadline for Phase I decision if the parties submit commitments
Phase II following non-extended Phase I
Phase II following extended Phase I
3 M: Deadline for Phase II decision 2 M following opening of Phase II)
3 M + 15 WD: Extended deadline for Phase II decision if parties submit commitments
15 D period for Ministry of Economy to ask Government to intervene
1 M for Government to decide on the transaction if asked to intervene
3 M + 10 WD: Deadline for Phase II decision (2 M following opening of Phase II)
3 M + 25 WD: Extended deadline for Phase II decision if parties submit commitments
15 D period for Ministry of Economy to ask Government to intervene
1 M for Government to decide on the transaction if asked to intervene
Sweden
No filing deadline
25 WD: Deadline for Phase I decision
35 WD: Deadline for Phase I decision in case of commitments
25 WD + 3 M: Deadline for Phase II decision by Competition Authority (CA); deadline can be extended by SDC
Phase II following extended Phase I
35 WD + 3M: Deadline for Phase II decision in case of extension in Phase I (extendable)
Switzerland
No filing deadline
1 M: Deadline for Phase I decision (runs from time filing declared complete) (can be shortened in practice)
5 M: Deadline for Phase II decision (4 M following Phase I decision)


Notification
1 month
2 months
3 months
4 months
5 months
6 months
Thailand
Pre-merger filing: no deadline
Post-merger filing: 7 D after closing
90 D: Decision deadline (extendable by 15 D)
105 D: Decision deadline if extended
Taiwan
No filing deadline
30 WD: Deadline for decision (extendable by up to 60 WD)
90 WD: Deadline for decision in case of maximum extension
Turkey
Filing deadline: At least 30 D and preferably 45 D prior to completion of transaction
30 D: Deadline for CB for stage 1 decision (30 D deadline restarts if CB issues written request for additional information)
7 M (30 D + 6 M): Deadline for stage 2 decision (deadline may be extended by additional 6 M)
Ukraine
No filing deadline (except in case of certain bidding processes, where filing must take place within 30 D of winner being announced)
15 D: AMC to decide on completeness of notification
25 D: Decision deadline under fast track procedure
45 D (15 + 30 D): Deadline for initial AMC examination
45 D + 3 M: Deadline for decision of AMC after in-depth investigation (in-depth investigation extendable up to maximum of 135 D)
180 D: (45 D +135 D) Maximum deadline for decision, but extendable if parties so request


Notification
1 month
2 months
3 months
4 months
5 months
6 months
United Arab Emirates
Filing deadline: At least 30 D in advance
90 D: Decision deadline (extendable by 45 D)
United Kingdom
No filing deadline (notification voluntary)
40 WD: Deadline for Phase I decision if no remedies needed
90 WD: Deadline for Phase I remedies decision (extendable by up to 40 WD)
40 WD + 24 W: Deadline for Phase II decision (extendable by 8W) (plus additional period to agree remedies)
NB United Kingdom: The Phase I time period starts the day after the CMA confirms receipt of a satisfactory notification.
United States
No filing deadline
15 D: Deadline for Agency to issue 'Second Request' in case of cash tender offer
30 D: Deadline for Agency to issue 'Second Request' (unless cash tender offer)
NB United States: Early termination of the waiting period can be requested. It should be noted that the 'Second Request' period is open-ended as the clock begins to run after substantial compliance with the Agency's 'Second Request' for information.
Often 4-6 M (3-5 M after 'Second Request' is issued): Agency to decide 30 D after parties' compliance with 'Second Request' (10 D in case of cash tender offer)


Notification
1 month
2 months
3 months
4 months
5 months
6 months
Uzbekistan
No filing deadline
10 D: Decision deadline (extendable by up to 1 M)
10 D + 1 M: Decision deadline if maximum extension
Vietnam
No filing deadline
30 D: Deadline for Phase I decision
120 D (30 + 90 D): Deadline for Phase II decision (extendable for 60 D)
180 D (30 + 90 + 60 D): Deadline for extended Phase II decision
Zambia
No filing deadline
90 D: Decision deadline (extendable by up to 30 D)
120 D (90 + 30 D): Decision deadline if maximum extension
NB Zambia: Interim authorisation may allow closing of transaction before final decision.

Acknowledgements for verifying contents

We would like to offer our thanks to the following competition enforcement agencies for their assistance in the verification of the factual information contained in the chapter relating to their jurisdiction.

Country	Agency	Contact
Australia	Australian Competition and Consumer Commission	Mark Rakers and Will Richards
Belgium	Belgian Competition Authority	Jacques Steenbergen, President
Brazil	Administrative Council for Economic Defence (CADE)	Patricia Sakowski, Deputy Superintendent
Czech Republic	Office for the Protection of Competition	Lumír Břínek, Merger Department
Greece	Hellenic Competition Commission	Panagiotis Fotis, PhD, Economist, Commissioner/Rapporteur
Greenland	Greenlandic Consumer and Competition Authority	Martin Jensen
Kenya	Competition Authority of Kenya	Raphael Mburu, Manager, Mergers and Acquisitions
Norway	Norwegian Competition Authority	Tormod S Johansen, Special Adviser
Slovakia	Antimonopoly Office of the Slovak Republic	Erika Lovásová, Director, Division of concentrations

Albania

Denis Selimi and Guenter Bauer

Wolf Theiss

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The legal basis for regulating merger control in Albania is found mainly in Law No. 9,121 on the protection of competition dated 28 July 2003 (the Competition Act), published in Official Gazette No. 71 of 2003, which aims to protect free and effective competition. The Competition Act has been amended by Law No. 10,317 dated 16 September 2010, published in Official Gazette No. 135 on 7 October 2010. The amendments became effective as of 23 October 2010.

The Competition Authority (the Authority), with the Competition Commission as its decision-making body, is principally responsible for the enforcement of the Competition Act.

Scope of legislation

2 | What kinds of mergers are caught?

Under the Competition Act, any of the following causing a lasting change of control would constitute a merger:

- the merger of two or more undertakings, or parts of undertakings, which previously were independent of each other;
- any transaction in which an individual having control over an undertaking, or one or more undertakings, acquires, directly or indirectly, a controlling interest in all or parts of one or more undertakings; or
- the establishment of a new joint company acting as an independent economic unit.

3 | What types of joint ventures are caught?

The establishment of joint ventures is caught by the Albanian merger control rules if the new joint venture company will be acting in the market on a lasting basis as an independent economic unit.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Pursuant to the Competition Act, control may be acquired by rights, contracts or other means that, either separately or in combination, on a legal or factual basis, confer the possibility of exerting decisive influence on the activities of an undertaking, in particular by means of:

- ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that allow the holder to decisively influence the composition, voting, or decision-making of the corporate governance bodies of an undertaking.

Control may also be exercised by a minority shareholder if the shareholding to be acquired confers the possibility of exercising decisive influence on an undertaking in the ways described above. However, Albanian merger control is only applicable in cases of an acquisition of joint or sole control. An acquisition of non-controlling minority participations in an undertaking and other interests less than control do not fall within the scope of Albanian merger control.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger will be subject to Albanian merger control law and has to be notified to the Authority if the undertakings concerned generated the following turnover in the business year preceding the concentration:

- combined worldwide turnover of more than 7 billion leks and domestic turnover of at least one of the undertakings concerned of at least 200 million leks; or
- combined domestic turnover of more than 400 million leks and domestic turnover of at least one of the undertakings concerned of at least 200 million leks.

The turnover to take into account is income generated by an undertaking's ordinary activities, after deduction of taxes or fees directly related to income. There are rules specific to credit or financial institutions. If an undertaking is part of a group, the group's overall external turnover needs to be taken into account.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notification of a merger to the Authority is mandatory if the turnover threshold criteria are met.

The Competition Act provides for an exception to the application of the Albanian merger control regime where financial, credit or insurance institutions acquire shares in undertakings for the purpose of resale, provided that the acquirer does not exercise the voting rights related to the acquired shares and the resale occurs within one year of the acquisition.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified and clearance by the Authority is required, even in cases where the undertakings involved in the merger are domiciled abroad, provided that the notification thresholds set out above are met.

The Competition Act expressly states that it applies to all undertakings, whether domestic or foreign, whose activities have a direct or indirect effect on the Albanian market. The Competition Act does not define the concept of effect. In practice, the Authority generally considers that a merger has an effect on the Albanian market even where the undertakings concerned do not have a direct presence in Albania (through subsidiaries or branch offices) or when the undertakings concerned are indirectly active in Albania (through imports or sales to independent local distributors) and thereby meet the turnover threshold test.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no specific rules on foreign investments.

Approval or at least a notification of acquisitions of interests above or below certain thresholds is required for the energy, banking and the insurance sectors, or with regard to public companies.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Notifiable concentrations must be notified within 30 days of the date the merger agreement, or the agreement pursuant to which a controlling interest is acquired, is entered into, or from the date of publication of the public offer to purchase or exchange shares.

If the undertakings that are required to notify the merger fail to duly file within the set deadline (late filing), the Authority may impose fines of up to 1 per cent of their annual turnover generated in the last completed business year. In the past, the Authority has imposed a fine on a foreign company for failure to file in time with respect to a merger that consisted of the acquisition of an Albanian company.

In recent cases, the Authority has accepted a (short) notification letter to meet the filing deadline, provided that a regular notification of the concentration was then submitted within a certain period of time allowed by the Authority.

10 Which parties are responsible for filing and are filing fees required?

The obligation to file the notification with the Authority rests with the merging parties and the undertaking acquiring a controlling interest in (the whole or part of) one or more other undertakings.

Upon receipt of the notification, the Authority confirms the completeness of the filing with a written certificate. If the Authority considers the notification to be incomplete, it will require the submission of any additional information that it deems necessary to review the notification within a certain period.

The Authority has issued a regulation according to which the following fees are due:

- merger filing fee: 7,500 leks or 15,000 leks, depending on whether or not the domestic turnover of the acquirer exceeds 1 billion leks;
- authorisation of a temporary implementation of a merger: 150,000 leks or 300,000 leks, depending on whether or not the domestic turnover of the acquirer exceeds 1 billion leks; and
- approval of a merger: 250,000 leks or 500,000 leks, depending on whether or not the domestic turnover of the acquirer exceeds 1 billion leks.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Mergers that meet the notification threshold criteria and thus require notification to the Authority must not be implemented prior to clearance by the Authority (suspension obligation).

The Authority assesses notified concentrations either in preliminary proceedings (Phase I) or in an in-depth investigation (Phase II).

Phase I proceedings apply to mergers that will probably not lead to a substantial lessening of competition in the relevant market or part of it. In preliminary proceedings, the Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. In June 2016, the Authority introduced fast-track proceedings for certain types of concentrations that do not raise competition concerns. These fast-track proceedings enable the Authority to clear straightforward concentrations within 25 days of the working day following the confirmation of receipt of a complete notification.

If, however, in the course of the proceedings, the Authority believes that the notified transaction raises competition law concerns, it may decide to initiate Phase II investigations, or to authorise the merger only under certain conditions. To that end, the parties may suggest (within one month of the notification) certain measures to the Authority to mitigate the possible negative effects of the merger on the market. If the parties offer commitments to the Authority, the time limit is extended by two weeks. If a decision is not issued by the Authority within two months (plus the extended term of two weeks, as the case may be), clearance is considered to be granted.

In Phase II, the Authority investigates the case and has to issue a decision within three months of the start of an in-depth investigation. The deadline can be extended by up to one month if the parties – within two months of the start of the in-depth proceeding – offer to take certain steps to mitigate the possible effects of the merger on the market.

The Authority may suspend the time frame of the proceedings if the proceedings are impeded by the undertakings concerned (in particular, if the parties do not provide the information requested by the Authority within the time limit set; the parties refuse to submit to investigations carried out by the Authority; or the parties did not inform the Authority about changes of facts contained in the merger filing).

Upon request, the Authority may also temporarily approve the merger if such request is justified as otherwise irreparable damage would be caused to the undertakings concerned or to third parties and under consideration of the overall goal of protecting competition.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Authority may impose fines on the undertakings concerned if they close the transaction before receiving clearance and for late filing, or failure to notify.

Under Albanian merger law, late filing, failure to notify, and the submission of incorrect, incomplete or misleading information to the Authority, is considered a non-serious infringement. In such cases, the Authority may impose fines up to 1 per cent of the aggregate turnover of an undertaking concerned in the previous financial year. Absent a filing, the implementation of concentrations that result in a restriction of competition in the market is considered a serious infringement and may be subject to fines of up to 10 per cent of the aggregate turnover in the previous financial year. The law does not specify any further requirement other than that the implementation of the concentration must result in a restriction of competition to qualify as a serious infringement. It remains to be seen how the Authority will interpret this requirement in practice.

In determining the amount of the fine, the Authority will take into account the financial gain resulting from the violation of the Competition Act; this amount shall be taken as the minimum amount of the fine. If a fine is imposed on a group of undertakings, the amount of the fine shall not exceed 10 per cent of the aggregate turnover generated in the market concerned by the infringement in the preceding business year.

Furthermore, the merger is deemed to be void if implemented without clearance or if conditions to which the merger authorisation is subject have not been fulfilled.

In 2009, the Authority imposed a fine of 2.6 million leks on a company that had violated the merger filing obligation. Other possible remedies, such as structural sanctions, were not imposed. In 2014, the Authority imposed a fine on a company for failure to notify amounting to 100,000 leks. That is in line with two cases in 2012 where the Authority imposed fines on two companies for failure to notify, amounting to 100,000 leks each.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are applicable also in case of foreign-to-foreign mergers. In practice, however, we are not aware of these sanctions having been applied to any such mergers to date.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Authority may authorise closing before clearance on a temporary basis. A temporary clearance may be granted if the undertakings involved in the merger would otherwise suffer an irreparable damage. The temporary clearance may, however, be issued subject to conditions that the Authority considers necessary to ensure effective competition. To our knowledge, there is no approved practice of carve-out solutions.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Law No. 10,236 on the takeover of public companies dated 18 February 2010 sets forth special merger control rules for the takeover of Albanian or foreign public companies seated (also) in Albania and that are listed at the Albanian stock exchange. As there is no operational stock exchange in Albania, the said law remains inapplicable to date.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Authority requires that the notification of a merger is prepared on the basis of a standard filing form; one can further refer to the guideline issued by the Authority for the relevant filing formalities (the Guideline). The Authority issued a new Guideline on 23 June 2008.

On the basis of the Guideline, the Authority has the discretion to require a short form or a full notification.

The notification must, inter alia, provide the following:

- information on the identity of the undertakings concerned and their authorised representatives (such as names and addresses);
- turnover of the undertakings concerned in the domestic market and worldwide;
- market shares of the undertakings concerned, including information on the methods for their calculation or estimation;
- information on the form of the concentration (merger, acquisition of control, etc);
- information on the controlling interests in the undertakings concerned; and
- information on the relevant product and geographical market and, where applicable, the market affected by the concentration.

The applicant is required to submit certain documents with the notification, such as the legal basis of the acquisition or merger; certificates of incorporation; financial statements and balance sheets for the preceding financial year; and analyses, reports, studies, statistics and further supporting materials upon which the information provided in the notification is based. The documents must be originals or copies certified by a notary. Documents that are not in English or Albanian must be translated into Albanian and certified by a notary. Notarial certifications not performed in Albania require an apostille or certification (otherwise known as 'legalisation') by the Albanian embassy in the respective country.

Furthermore, the notification must be accompanied by a certificate of payment of the merger filing fee. Following the filing, the Authority may request additional documents and information. When these requests are met, the Authority will issue a confirmation that the filing is complete and will start its review process.

Fines for supplying wrong or misleading information may amount to up to 1 per cent of the previous annual turnover of the undertaking concerned, which is responsible for the infringement.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Once an application is filed, the Authority examines the notification form and the supporting evidence.

If the Authority requires more information or additional documents, it will send a request to the notifying party detailing such requests and setting a deadline for the reply.

Once its information and documentary requests have been fulfilled, the Authority will complete its examination of the notification and will set out its findings in a report in which it makes the necessary recommendations. On the basis of the report, the decision-making body within the Authority issues its decision, thereby clearing or prohibiting the notified merger.

18 What is the statutory timetable for clearance? Can it be speeded up?

In Phase I proceedings, the Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. That period can be extended by another two weeks if the parties offer certain measures to the Authority to mitigate the possible negative effects of the merger on the market. In practice, it is our experience that the Authority strives to decide on the transaction within one month of the receipt of a complete notification.

In June 2016, the Authority introduced a fast-track merger control procedure for the following types of concentrations that usually do not give rise to competition concerns:

- two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no actual or anticipated activities in the Republic of Albania – such cases occur when:
    - turnover of the joint venture or of the activities contributed to the joint venture is less than 300 million leks in the territory of the Republic of Albania at the time of notification; and

    - the total value of assets transferred to the joint venture is less than 300 million leks in the territory of the Republic of Albania at the time of notification;
- two or more undertakings merge, or one or more undertakings acquire sole or joint control over another undertaking, provided that none of the parties to the concentration engage in business activities in the same product and geographic market, or in a product market that is an upstream or downstream market in relation to the product markets in which any other party to the concentration is engaged;
- two or more undertakings merge, or one or more acquire sole control of an enterprise or joint company, when the two following conditions are met:
    - the combined market share of all the parties to the concentration, dealing with business activities in the same product and geographical market (horizontal relationships), is less than 15 per cent; and
    - the individual or combined market share of all parties to the concentration that are engaged in business activities in a product market that is upstream or downstream from the product market in which any other party to the concentration is engaged (vertical relationships) is less than 25 per cent; or
- upon its discretion, the Authority may also decide to apply the fast-track procedure where two or more undertakings merge, or one or more undertakings take sole control or joint control of another undertaking, and when both of the following conditions are met:
    - the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 per cent; and
    - the increase (delta) of the Herfindahl-Hirschman Index resulting from the concentration is below 150.

Under the fast-track procedure, the Authority clears concentrations by way of a short-form decision within 25 days of the working day following the confirmation of receipt of a complete notification.

In in-depth proceedings (Phase II), the Authority has to issue a decision within three months of the start of such in-depth proceedings; this period can be extended by up to one month if the parties – within two months of the start of such proceeding – offer to take certain steps to mitigate the possible effects of the merger on the market.

The Competition Act provides that temporary clearance can be granted under certain circumstances.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The Competition Act provides that a merger shall be prohibited if it leads to a significant impediment to effective competition in the market or part of it, especially if this results from the creation or strengthening of a dominant market position. The potential effects of the merger are assessed on the basis of diverse information and data relating to the Albanian market, including the market shares of the undertakings concerned and of their competitors, barriers to market entry, potential competition, demand substitutability, etc.

We are not aware of any decision where the Authority has applied the 'failing firm' defence.

20 Is there a special substantive test for joint ventures?

The Competition Act does not establish a substantive test specific to joint ventures.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

In general, the Authority will assess whether a merger leads to a substantial lessening of competition in the relevant market or part of it. The Authority's assessment is based on a series of factors, including the market share of the companies participating in the merger and of their competitors; barriers to market entry; potential competition; the economic and financial power of the undertakings concerned; the economic dependency of suppliers and customers; the development of the distribution networks; economic relationships with other undertakings; demand substitutability, etc. Neither the Competition Act nor the Guideline (or other guidelines in Albania) specify theories of harm that the Authority investigates specifically (besides the substantial lessening of competition); however, in practice, the Authority's assessment often refers to precedents established by the European Commission. Therefore, it is not unlikely that the Authority would look at theories of harm such as coordinated effects, foreclosure, harm to innovation, etc.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The Competition Act does not expressly mention non-competition issues such as industrial policy or public interests as being relevant for the assessment process.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

When assessing a merger, the Authority may take into account any economic efficiencies (such as rationalisation of production, economies of scale, purchasing economies and technological progress) that may result from that merger, in particular those that bring about benefits for the consumers (which are set off against the negative effects deriving from the merger), where the same economic efficiencies cannot be achieved by less anticompetitive means, and the alleged efficiencies are measurable.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The implementation of a notifiable concentration without prior clearance from the Authority renders the transaction null and void.

Where a transaction has been implemented without the Authority's prior clearance, the Authority shall, besides the possibility of imposing fines, undertake a review of the transaction on its own initiative. The Authority may require that the undertakings concerned take the steps necessary to re-establish the situation as it existed prior to the transaction and, where relevant, may impose the separation of the merged undertakings, or the sale back of acquisitions and assets that have been transferred.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Authority may require certain remedies for clearance of the concentration, such as the divestiture of certain parts of the undertaking, the sale of shareholdings in other undertakings, the termination of contractual relations, the granting of licences, and behavioural remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Competition Act does not provide, and the Authority has not elaborated, specific rules concerning the conditions for and timing of the application of remedies. Whenever the Authority imposes conditions and remedies, these must be proportionate to the anticompetitive effects of the merger.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Authority, to our knowledge, has not yet imposed any remedies in foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In notifying a merger, the notifying undertakings are required to disclose restrictions related to the merger. The restraints directly related and necessary to the merger will be covered by the clearance of the Authority or may be subject to other conditions and remedies.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Act requires the Authority to publish the fact that it has received a notification. On that basis, third parties may submit their comments to the Authority. In general, third parties can bring facts that they consider to be an infringement of the Competition Act to the Authority's attention.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The notifying undertakings may request that the Authority treats the information provided with the notification or obtained in the course of the review process in a confidential manner. The Authority may not disclose any commercially sensitive information or business secrets.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Authority can cooperate with antitrust authorities in other jurisdictions on the basis of bilateral agreements or simply in response to their requests.

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The Authority may, however, refuse requests if the cooperation is not reciprocal or compliance with the obligation to keep commercially sensitive information or business secrets confidential would not be guaranteed.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions by the Authority may be challenged before the Tirana Court. Fines imposed by the Authority have to be challenged within 30 days.

The Authority may revoke its decision if:

- it is based on incorrect or improperly obtained data; or
- the undertakings concerned breach the obligations set forth in the authorisation of the merger.

We are not aware of any recent cases where merger control-related decisions of the Authority have been subject to judicial review by the Tirana Court.

Time frame

33 What is the usual time frame for appeal or judicial review?

The time frame for appeal or judicial review depends greatly on the complexity of the disputed matter. In practice, taking into account the usual duration of court proceedings in general, judicial review may take as long as one or two years.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Authority has in recent years shown its general willingness to impose fines on undertakings that violate the filing obligation or the prohibition to complete concentrations prior to receipt of Albanian merger clearance (for the respective fining practice in previous years). However, no fines regarding those merger filing infringements were imposed in 2020.

Beside the area of merger control, the Authority has shown specific interest and launched investigations regarding alleged infringements of competition law, in particular in regard to the following sectors or products: trading of medical protection equipment (such as face masks and antibacterial gels), liquid petroleum gas, mobile communications, banking and insurance services, crude oil, flour production, and energy. However, only one fine was imposed in 2020.

To enhance the Authority's access to information on concentrations that infringe the filing obligation, several measures have been announced in recent years, such as the conclusion of a cooperation agreement with the trade registry under which the Authority would receive more information about acquisitions or changes of control in Albanian companies. According to a statement by the Authority, this cooperation has been implemented. The Authority receives periodical updates of ownership changes on shares and verifies whether such changes qualify as a notifiable concentration.

Reform proposals

35 | Are there current proposals to change the legislation?

We are not aware of any current proposals to change the legislation.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the Authority reviewed and cleared four concentrations of which all were related to the domestic market.

Apart from these, the Authority has shown specific interest and launched investigations involving: trading of medical protection equipment (such as face masks and antibacterial gels), liquid petroleum gas, mobile communications, banking and insurance services, crude oil, flour production, taxis and energy, etc.

The impact of the coronavirus crisis is being felt in Albania. However, we are not aware that this has had any effect on the Authority's practice in merger control cases or led to any respective policy statements.

Australia

Felicity McMahon and Anita Thompson

Allens

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Competition and Consumer Act 2010 (CCA) regulates mergers affecting Australia from a competition law perspective. The CCA is a federal law aimed at restricting anticompetitive business conduct and protecting consumers. It is enforced by an independent statutory authority, the Australian Competition and Consumer Commission (ACCC).

Section 50 is the primary provision in the CCA that regulates potentially anticompetitive mergers. Only the ACCC has standing to seek a Federal Court injunction under section 50 to prevent a merger from proceeding. Other persons, including competitors, can take action against anticompetitive mergers following completion, and may seek damages, declarations or divestiture. The ACCC may also seek these remedies following an acquisition and, in addition, may seek pecuniary penalties and an order declaring the transaction void.

In relation to transactions that occur wholly outside Australia but that affect Australia, section 50A provides that the Commonwealth Treasurer, the ACCC or any other person may apply to the Australian Competition Tribunal (the Tribunal) for a declaration if the acquisition of a controlling interest in a corporation that carries on business in Australia would have the effect or likely effect of substantially lessening competition in a market in Australia, and the acquisition would not result in a public benefit that offsets the lessening of competition.

There are a number of other important laws in Australia that relate to other aspects of merger control, in particular the Foreign Acquisitions and Takeovers Act 1975 (FATA), which is administered by the Foreign Investment Review Board (FIRB). The FATA provides for mandatory notification and application for prior approval of transactions exceeding specified thresholds. The Commonwealth Treasurer has power to prohibit such transactions if they are considered contrary to the national interest. In addition, there are other industry-specific or entity-specific laws and regulations dealing with acquisitions in certain sectors, including the financial services, media, civil aviation, shipping and telecommunications industries.

Scope of legislation

2 | What kinds of mergers are caught?

Section 50 of the CCA prohibits the acquisition of shares or assets where the acquisition would have the effect or be likely to have the effect of substantially lessening competition in any market in Australia. The definition of 'market' includes a market for goods or services in Australia or in a region, territory or state of Australia. The market does not need to be 'substantial' and can include local markets. In addition, while section 50 refers to a market in Australia, the ACCC recognises the existence of markets that are global or regional in nature, and in such cases will examine the effect on competition in terms of the section of the global or regional market that exists within Australia.

There are no minimum turnover or other thresholds for sections 50 or 50A to apply, and acquisitions of any size (including of minority interests) could potentially be captured by the provisions.

3 | What types of joint ventures are caught?

Joint ventures will be regulated under the merger provisions of the CCA if they involve the acquisition of shares or assets. There are other provisions of the CCA that may also need to be considered in relation to joint ventures, including civil and criminal provisions regulating cartel conduct and a separate provision regulating anticompetitive arrangements. While there are exceptions to the cartel offences for joint ventures for the production, supply or acquisition of goods or services, strict criteria must be satisfied for these to apply.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Section 50 does not refer to 'control', but rather to the effect of an acquisition on competition. It applies to all acquisitions of shares or assets, regardless of whether they deliver 'control' of the target firm, if the acquisition leads to a substantial lessening of competition.

While the concept of 'control' is not specifically defined for merger control purposes, ACCC practice is to treat an acquisition by one company of a controlling interest in another company in the same way as an acquisition of all shares of the target company. While a majority shareholding will in many cases ensure control, the acquisition of a minority shareholding may nonetheless be found to give rise to effective control. Factors that will be taken into account by the ACCC when considering whether the acquisition of a minority shareholding is sufficient to deliver control of a company include:

- the ownership distribution of the remaining shares and securities;
- the likely exchange of competitively sensitive information;
- whether other shareholders are active or passive participants at company meetings;
- any other contracts or arrangements between the parties;
- the composition of the board of directors; and
- the company's constitution, including veto rights under majority or special majority matters.

Further, the ACCC may raise issues under section 50 even where no control is achieved, if it regards the transaction as leading to a substantial lessening of competition, for example, by reducing competitive tension between parties in the market or increasing the potential for coordinated conduct.

There is a requirement that a 'controlling interest' is obtained for the transaction to be reviewable under section 50A, which relates to acquisitions wholly outside Australia. A controlling interest will be obtained if a company becomes a subsidiary of the acquirer, or if the acquirer:

- controls the composition of the target's board of directors;
- is in a position to cast, or control the casting of, more than half of the maximum number of votes that might be cast at a general meeting of the subsidiary's shareholders; or
- holds more than half of the allotted share capital in the subsidiary.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Section 50 prohibits the following transactions if they have the effect or likely effect of substantially lessening competition in any market in Australia:

- any acquisition of shares or assets within Australia (eg, where the purchaser acquires direct ownership of shares in an Australian company or assets in Australia are acquired, regardless of the location of the purchaser); and
- any acquisition of shares or assets outside Australia if the acquirer is incorporated or carrying on business within Australia, or by Australian citizens or persons ordinarily resident within Australia.

In relation to acquisitions by foreign purchasers of shares or assets that are wholly outside Australia but that result in an indirect ownership interest being obtained in a company carrying on business in Australia, section 50A provides that the Commonwealth Treasurer, the ACCC or any other person may apply to the Tribunal for a declaration if the acquisition of a controlling interest in the Australian corporation would have the effect or likely effect of substantially lessening competition in a market in Australia, and the acquisition would not result in a public benefit that offsets the lessening of competition.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notification of mergers and acquisitions in Australia is voluntary and there is no minimum turnover or other monetary threshold for notifying mergers to the ACCC. However, the ACCC's Merger Guidelines indicate that the ACCC expects to be notified of mergers in advance where the products of the merger parties are either substitutes or complements; and the merged firm will have a post-merger market share greater than 20 per cent in the relevant market. Parties are also encouraged to notify the ACCC in situations where these thresholds are not met, but there are other reasons to consider that the transaction may raise competition issues.

If a decision to file is made, there are two available options for obtaining merger clearance:

- An informal clearance system under which parties approach the ACCC on an informal (and sometimes confidential) basis for clearance. There is no statutory basis for this clearance, and it does not prevent third parties from subsequently challenging the transaction. The process followed by the ACCC in an informal review is set out in the ACCC's Informal Merger Review Process Guidelines. It is the main method of obtaining clearance in Australia.
- A merger authorisation process that came into effect (in its current form) on 6 November 2017. The ACCC can grant merger authorisation if it is satisfied that either the proposed acquisition would be unlikely to substantially lessen competition or the likely public benefit from the proposed acquisition outweighs the likely public detriment. Where authorisation is granted and any conditions attached to the authorisation are complied with, an action cannot be brought by the ACCC or third parties on the basis that the acquisition contravenes section 50 of the CCA. The ACCC's Merger Authorisation Guidelines outline the legislative requirements and procedural steps for parties wishing to apply to the ACCC for authorisation of proposed mergers and acquisitions.

Although filing is voluntary, the ACCC will expect parties to seek clearance where a merger raises competition issues or is above the notification threshold specified by the ACCC. The ACCC also encourages parties to approach the ACCC where the ACCC has indicated to a firm or industry that notification of transactions by that firm or in that industry would be advisable. The ACCC will investigate and review all acquisitions it becomes aware of that have the potential to raise issues under section 50, regardless of whether or not clearance is sought. The ACCC will become aware of any transaction that is notified to FIRB, which can trigger an ACCC examination of the transaction if it has not previously been notified to the ACCC. FIRB will often withhold its approval until the ACCC advises FIRB that it has no objections.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers can be captured under section 50 or section 50A. Section 50 will apply to acquisitions that occur outside Australia if they involve bodies corporate incorporated in or carrying on business within Australia, or Australian citizens or persons ordinarily resident within Australia. It may be sufficient if the acquirer 'carries on a business in Australia' through a subsidiary or other representative, even though the acquirer itself has no direct operations in Australia. Section 50A will apply if a foreign-to-foreign merger results in a controlling interest being acquired in a corporation that carries on business in Australia.

In both cases, there is a local effects test, which is whether the acquisition will have the effect or likely effect of substantially lessening competition in a market in Australia. In the case of section 50A, public benefits are considered in mitigation of any anticompetitive effects.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are a number of important laws in Australia that relate to other aspects of merger control, in particular the FATA, which is administered by FIRB. The FATA provides for mandatory notification and application for prior approval of transactions exceeding specified thresholds. Significant revisions to Australia's foreign investment regime came into effect in December 2015. Other legislation imposes additional requirements and limits on certain foreign investments, including in the financial services, media, civil aviation, shipping and telecommunications industries.

The Australian government may consider both domestic and global competition issues when assessing an application for foreign investment approval.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As there is no mandatory requirement under the Competition and Consumer Act 2010 (CCA) for the parties to a proposed transaction to notify the Australian Competition and Consumer Commission (ACCC), there are no sanctions for not filing. However, if a transaction proceeds without notification and the ACCC successfully establishes that it has the likely effect of substantially lessening competition in any market then penalties and remedies for a contravention of the merger provisions will apply.

In terms of deadlines for filing, there is no deadline as filing is voluntary. However, if a decision is made to file then the timetable will depend on which of the available clearance options is chosen:

- Informal clearance: there is no set deadline for filing, however the ACCC encourages parties to approach the ACCC as early as possible when a merger is contemplated and before a merger is completed, to ensure that the ACCC has sufficient time to consider whether a review is necessary and, if so, to conduct the review. Parties will often approach the ACCC on a confidential basis prior to the public announcement of a transaction.
- Merger authorisation: there is no set deadline other than the parties must lodge a filing prior to completion of the transaction. As the parties will be required to provide an undertaking that the transaction will not complete until after the ACCC's decision, any filing should occur well in advance of completion to allow for the statutory time periods.

10 Which parties are responsible for filing and are filing fees required?

The acquirer is usually responsible for notifying a transaction to the ACCC under the informal clearance process, and is the party required to file under the merger authorisation process. There are no fees for informal clearances by the ACCC. The filing fee for a merger authorisation is currently A$25,000. Fees are generally payable in respect of filings required to be made to Foreign Investment Review Board (FIRB) under the Foreign Acquisitions and Takeovers Act 1975 (FATA).

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In relation to the informal clearance process, there is no set time frame for an ACCC decision. There are also different 'stages' of the informal clearance process which influence its duration. In general, an initial assessment of a merger will be conducted to determine whether a public review will be required. Where the ACCC is satisfied, based on that initial assessment of the information provided that there is a low risk of a merger substantially lessening competition, the ACCC may decide that it is not necessary to conduct a public review – these mergers are described as being 'pre-assessed'. Pre-assessment can be conducted for both confidential and non-confidential mergers. A significant proportion of the mergers notified to the ACCC are able to be pre-assessed expeditiously within two to four weeks. In some cases, the ACCC may conduct targeted confidential market inquiries as part of the pre-assessment process, with the consent of the applicant, which may add an additional two to four weeks. If the ACCC decides that a public review is necessary to assess a merger in the public domain, the review will typically take a further six to 12 weeks. Complex mergers that result in the publication of a statement of issues are likely to take an additional six to 12 weeks after the statement of issues is published, but this can vary depending on factors such as the responsiveness of the merger parties to information requests and whether remedies are proposed.

Seeking informal clearance does not require the transaction to be suspended prior to clearance, but in some cases where the ACCC identifies competition concerns, the ACCC will request the acquirer provide it with a written undertaking not to complete the acquisition during the informal merger review process, or alternatively to provide a minimum period of notice before completing the transaction. If an undertaking is not provided, the ACCC may seek a court injunction to stop the transaction completing until it has completed its review.

In relation to the merger authorisation process, the ACCC must reach a determination on an application for authorisation of a merger within 90 days of receiving a valid application. This period may be extended with the consent of the applicant. If no decision is made within this period, the ACCC is taken to have refused to grant the authorisation. An application for authorisation must include an undertaking that the applicant will not complete the acquisition while the application is being considered by the ACCC.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If authorisation is chosen as the method for seeking merger clearance, then it is not possible to close before clearance as this would be in violation of the undertaking given to the ACCC. A breach of the undertaking not to complete the transaction could result in a range of court orders, including an order directing the person to comply with the terms of the undertaking or any other order that the court considers appropriate.

Where informal clearance is sought from the ACCC, it is usual to wait until the ACCC has concluded its review before completing the merger. There are no sanctions for closing a transaction before informal clearance is obtained; however, the ACCC is able to seek an injunction to prevent this from occurring. Alternatively, the ACCC might let the transaction proceed and instead seek remedies including pecuniary penalties, divestiture of the shares or assets acquired, or an order that the transaction is void and that monies should be refunded to the vendor. The ACCC has rarely sought these remedies in relation to mergers. More commonly, if the ACCC is concerned that the transaction raises serious competition issues, it will seek an undertaking from the parties not to complete the transaction until completion of the ACCC's review. Often this undertaking will be provided if the transaction is one in which there are complex competition issues, given the potential for the ACCC to obtain an injunction if the undertaking is refused.

If a filing has been made to FIRB under the FATA, it is a criminal offence to close without FIRB approval. FIRB routinely seeks the ACCC's input before issuing a no objection notification.

The ACCC is also increasingly scrutinising the pre-completion integration between merger parties. In July 2018, the ACCC instituted proceedings against Cryosite Limited (Cryosite), in relation to the proposed sale of its assets to Cell Care Australia Pty Ltd (Cell Care). The ACCC alleged that Cryosite and Cell Care engaged in cartel conduct, which amounted to a form of 'gun jumping'. The ACCC considered that the parties, in the period between signing and completion, made agreements as to how to market their services and how customers would be allocated between them in the pre-completion period. The parties had not sought informal merger clearance from the ACCC. Cryosite ultimately admitted it had engaged in cartel conduct and agreed to pay a penalty of A$1.05 million in civil penalties.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As there is no mandatory requirement under the CCA for the parties to a proposed transaction to notify the ACCC, there are no sanctions for closing prior to clearance. However, if the ACCC subsequently establishes that the transaction has the effect or likely effect of substantially lessening competition in any market then the court can impose penalties and other remedies for a contravention of the merger provisions.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The ACCC strongly recommends that merger parties obtain clearance for a merger that may potentially raise competition concerns, including a foreign-to-foreign merger, prior to closing.

In exceptional circumstances, the ACCC may accept the following:

- if it is possible, a carve-out of the acquisition of shares or assets that relate to Australia out of the global transaction, so that completion in relation to the Australian aspects does not occur until after the rest of the transaction; or
- if a carve-out is not possible, provision of an undertaking to the ACCC that the Australian assets will be preserved as separate and independently viable businesses via a 'hold-separate' arrangement while the parties await informal clearance from the ACCC. If the ACCC is prepared to agree to such a remedy, it is likely to require that an ACCC-approved independent manager manage the business, the subject of the hold-separate arrangement, while it completes its merger review. This option only exists for informal clearance as authorisation cannot be granted for acquisitions that have been completed.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Chapter 6 of the Corporations Act 2001 (Cth) governs takeovers of listed Australian companies or other Australian companies with more than 50 members. The CCA does not contain any specific provisions dealing with public takeover bids. The ACCC's usual processes apply.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Under the informal clearance system, the ACCC's Informal Merger Review Process Guidelines recommend that the party lodge an initial written submission that includes:

- information about the parties to the transaction, including any relevant related bodies corporate, trading names and ownership details;
- details of the proposed transaction, including the underlying commercial rationale;
- details of the Australian business operations, interests and assets of the acquirer and target;
- where the target and acquirer supply goods or services in the same market or have a customer–supplier relationship with one another, market shares of the suppliers for each market, the extent of imports, and evidence of future new entry or expansion; and
- for mergers that the ACCC considers require public review, a list of key customer and supplier names and contact details.

The Informal Merger Review Process Guidelines and the Merger Guidelines contain an outline of the information that the ACCC may require to reach a view on how competition will be affected by the proposed transaction. The level of information required will depend on the complexity of the merger and potential competition issues raised. In an informal merger review, the parties do not need to provide a complete information package at the outset of the merger application. In simple transactions, a notification may comprise a brief courtesy letter setting out the information described above. In other transactions, a detailed submission will be required and the ACCC may request additional information throughout the review, depending on the issues raised.

Merger authorisation applications to the ACCC must be in the prescribed form approved by the ACCC (available on its website). The application must be accompanied by particulars of the proposed acquisition, the prescribed fee, an undertaking not to complete the acquisition until the ACCC has completed its review and a declaration that the application is true, correct and complete. The application should also be accompanied by a comprehensive submission, containing an analysis of any other anticompetitive effects or other detriments resulting from the acquisition and specifying any public benefits. Applications for merger authorisation that do not substantially comply with the requirements of the approved form may be invalid.

There are serious consequences for providing false or misleading information to the ACCC when applying for informal clearance or authorisation. Section 92 of the CCA prohibits a person from giving information to the ACCC in connection with an application for merger authorisation if the person knows or is reckless or otherwise negligent as to whether the information given is false or misleading. Breaches of this provision may attract pecuniary penalties. Knowingly giving the ACCC false or misleading information, or omitting any matter or thing without which the information is misleading, may also give rise to criminal penalties.

The ACCC may also revisit its informal clearance decisions if it determines that information provided to it was false or misleading. Similarly, the ACCC may take steps to revoke merger authorisation granted on the basis of false or misleading information. The ACCC may also seek orders from the Federal Court to stop the proposed acquisition from proceeding, or divesture if the acquisition has already been completed.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The steps for clearance and the phases depend on which of the two clearance options is chosen.

Where a party seeks informal clearance:

- For each merger, the ACCC will make an initial assessment based on the information available to determine whether a public review will be required. Where the ACCC is satisfied, based on the information provided and other information the ACCC has before it, that there is a low risk of a merger substantially lessening competition, the ACCC may decide that it is not necessary to conduct a public review of that merger. These mergers are described as being pre-assessed. The notifying parties will be informed that the ACCC does not intend to conduct a public review.
- For mergers that the ACCC decides require a public review, it will commence a public review of the transaction once a notified transaction is publicly announced or if details of the transaction become public prior to any announcement. The ACCC will publish the merger proposal on its website, together with an indicative timeline. During the period of initial market inquiries, the ACCC will liaise with interested third parties, and will generally provide the merger parties with written details of the relevant issues or concerns arising from the consultation. If the ACCC decides that no competition concerns have been identified at the end of its initial public review, the ACCC will notify the parties by way of a letter that it does not propose to oppose the merger. This decision will be posted on the ACCC's website.
- If the ACCC comes to a preliminary view that a proposed merger raises competition concerns that require further investigation, the ACCC will generally release a statement of issues that is published on its website, and a secondary timeline will be established. The parties will usually provide further information to address concerns raised in the statement of issues, or may in some cases

discuss potential remedies. Following consultation on a statement of issues, the ACCC will generally provide the merger parties with written details of the relevant issues or concerns arising from the consultation. Once a final decision is made, the ACCC will notify the parties of its decision in writing and post the decision on its website. A public competition assessment or media release may be issued for certain decisions.

Where a party seeks merger authorisation, it must lodge an application with the ACCC in the prescribed form approved by the ACCC. Before lodgement of the application, the ACCC encourages applicants to contact it for informal discussions and guidance. The ACCC recommends that applicants provide a draft application before the pre-lodgement meeting so that the ACCC can provide specific guidance about the issues the applicants should address in their application.

The application must be accompanied by a lodgement fee of A$25,000, an undertaking that the parties will not complete the merger before a decision is reached, a declaration that the application is true, correct and complete, and an electronic copy of any relevant information or other documents (eg, transaction documents). The ACCC will then follow the statutory timetable for clearance.

Once an application is received, the ACCC will publish it on its merger authorisation public register and conduct market inquiries. The ACCC will consult a range of parties likely to be affected by the proposed acquisition and invite interested parties to comment or lodge submissions about the proposed acquisition. The applicant will then be invited to provide a response to the issues raised in submissions lodged by interested parties. Once a final decision has been made, the ACCC will send a copy of its final determination to the applicant and place a copy on the public register.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance depends on which of the two clearance options are chosen.

Informal clearance

Where informal clearance of the merger is sought, there is no statutory timetable for clearance, and the speed of the ACCC's response will vary depending on the circumstances. An initial assessment is conducted for both public and confidential mergers, during which the ACCC decides whether the proposed transaction can be 'pre-assessed', that is, cleared without a public review. A significant proportion of the mergers notified to the ACCC are able to be pre-assessed expeditiously, often within two to four weeks. If a merger cannot be pre-assessed as a result of the initial assessment, the ACCC will advise the parties that it needs to conduct a public review and begin discussions with the parties about the process.

Phase I of a public review consists of three parts, which vary in duration:

- initial market inquiries, which take approximately two to five weeks from commencement of the public review;
- assessment of the information provided during market inquiries, which will be completed approximately two to four weeks after the close of market inquiries; and
- an announcement by the ACCC of its findings, upon completion of the assessment of information. This will take the form of a final decision (either opposing or not opposing the transaction) or a statement of issues.

Phase I of the public review will generally be completed within six to 12 weeks (excluding time periods where information is outstanding).

Publication of a statement of issues indicates the commencement of Phase II of a public review. The ACCC will issue a statement of issues where it considers that competition concerns may arise if the transaction proceeds. A statement of issues is a public document issued by the ACCC that outlines the basis upon which the ACCC has come to a preliminary view that the transaction may raise competition concerns that require further investigation. Publication of a statement of issues is likely to extend the timeline by six to 12 weeks (excluding time periods where information is outstanding), but this will vary on a case-by-case basis. This allows the ACCC to conduct additional consultation with the merger parties and other relevant parties (generally taking two to three weeks) followed by an additional period of assessment (approximately four to 10 weeks), after which it will release its final decision to oppose, not oppose, or not oppose subject to the acceptance of remedies.

While the ACCC will attempt to meet shorter deadlines, particularly where genuine commercial considerations can be demonstrated, it will not do so if this compromises its ability to make appropriate market inquiries. The ACCC publishes an indicative and non-binding timeline for each public informal clearance review at the beginning of the public review process, which outlines the dates it expects each of the above stages to be completed. The timeline may be suspended or revised if the ACCC requests additional information from the merger parties or other parties, or if remedies are proposed that require additional public consultation.

Parties are usually requested to respond to information requests within one to two weeks. The ACCC may require a period of time to properly consider the information provided, especially where it is voluminous. Where a remedy is proposed and is in suitable form, the ACCC may publicly consult on its content. The duration of public consultation depends on the complexity of the issues and the remedies proposed (eg, divestment).

Merger authorisation

In the case of applications for merger authorisation, the ACCC must make a decision in respect of an application within 90 days of the application being validly lodged (this may be extended). If the ACCC has not made a decision within 90 days (or any extended period), the application is taken to have been refused.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Under the informal review process, the substantive test that must be satisfied is that the acquisition will not result, or be likely to result, in a substantial lessening of competition in a relevant market. For merger authorisation, the Australian Competition and Consumer Commission (ACCC) must be satisfied that either the proposed acquisition will not result, or be likely to result, in a substantial lessening of competition, or that the public benefit resulting (or likely to result) from the proposed acquisition would outweigh the public detriment that would result, or be likely to result, from the proposed acquisition.

In evaluating whether a proposed acquisition is likely to have the effect of substantially lessening competition, the ACCC uses the 'with or without test' – it assesses the likely future state of competition with the merger and the likely future state of competition without the merger. In conducting this analysis, the ACCC is required to take into account various merger factors set out in section 50(3), namely:

- the actual and potential level of imports;
- barriers to entry and expansion;
- market concentration;
- countervailing power;

- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the availability or likely availability of substitutes;
- dynamic characteristics, including growth, innovation and product differentiation;
- the likelihood that the acquisition would remove a vigorous and effective competitor from the market; and
- vertical integration.

In conducting the 'with or without test', the ACCC will take into account whether one of the merger parties is likely to exit the market in the near future (ie, whether it is a 'failing firm'). Where one of the merger parties is a failing firm, the current state of competition will overstate the future state of competition without the merger. In those circumstances, it is less likely that the merger will give rise to a substantial lessening of competition. However, mere speculation that a firm may exit in the near future is insufficient. It must generally be shown that there is an imminent danger of failure and that the firm is unlikely to survive or be restructured without the merger, and the assets associated with the firm will leave the industry (eg, there is no other buyer).

For both informal merger clearance and merger authorisation, the analytical and evaluative framework the ACCC will apply when assessing whether a merger is likely to give rise to a substantial lessening of competition is set out in the ACCC's Merger Guidelines. Although the Merger Guidelines do not have legal force when determining whether a proposed transaction would breach Australian merger law under sections 50 and 50A of the Competition and Consumer Act 2010 (CCA), they formally reflect the ACCC's approach and indicate the analytical and evaluative framework the ACCC applies when reviewing the competitive effects of a transaction on a market in Australia.

A merger may also be authorised where it is likely to result in a public benefit that outweighs the public detriment that would result, or be likely to result, from the proposed acquisition. Although 'public benefit' is not defined in the CCA, the CCA does provide that the ACCC should have regard to:

- a significant increase in the real value of exports;
- import replacement; and
- all other matters relating to the international competitiveness of the Australian industry.

These factors are not exhaustive and it is common for the acquirer to suggest a range of other public benefits such as increased efficiency, industry rationalisation, employment growth and protection of the environment. The ACCC Merger Authorisation Guidelines set out the analytical and evaluative framework the ACCC will apply when assessing the public benefits of a merger.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. Joint ventures are only covered by the merger regime if they involve the acquisition of shares or assets. However, other provisions of the CCA need to be considered in relation to joint ventures, including the civil and criminal cartel offences and the provisions dealing with other anticompetitive arrangements.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The ACCC assesses prospective mergers from the viewpoint of whether or not they are likely to result in a substantial lessening of competition, and will consider the 'merger factors' listed in section 50 of the CCA as well as any other relevant factors. These merger factors provide insight as to the likely competitive pressure the merged firm will face following the merger and the possible competitive effects of the merger. The types of mergers that the ACCC will assess under sections 50 and 50A include horizontal, vertical and conglomerate mergers. The assessment of the competitive effects is based on the traditional theories of competitive harm – namely, unilateral and coordinated effects.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Where a party seeks merger authorisation, non-competition issues may be relevant, as they are taken into account when determining whether the public benefit of the merger outweighs the public detriment. They are also relevant if the merger occurs wholly outside Australia and falls for review under section 50A.

Otherwise, the ACCC will not accept arguments relating to non-competition issues when assessing whether a merger would or would be likely to result in a substantial lessening of competition.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The ACCC generally only takes into consideration merger related efficiencies where the resulting efficiencies directly affect the level of competition. The Merger Guidelines recognise that an acquisition that increases the competitiveness of the merged firm may also increase competition in the market. While the ACCC's focus in the section 50 merger analysis is the effect of the merger on competition, competitive constraints and the efficiency of markets rather than the efficiency of individual firms, it will consider how economic efficiencies may affect a firm's ability and incentives to compete in the relevant market. For example, the Merger Guidelines identify that if efficiencies are likely to result in lower (or not significantly higher) prices, increased output or higher quality goods or services, the merger may not substantially lessen competition. The ACCC generally only considers merger-related efficiencies to be relevant to the section 50 merger analysis when it involves a significant reduction in the marginal production cost of the merged firm and there is clear and compelling evidence that the resulting efficiencies directly affect the level of competition in a market and these efficiencies will not be dissipated post-merger. Economic efficiencies can be considered if the transaction is reviewable under section 50A, as part of the public benefit assessment.

Relevantly, the Merger Guidelines provide that if an acquisition is likely to result in a lessening of competition but the likely public benefit resulting from the acquisition would outweigh the public detriment, then the matter may be more appropriately dealt with by way of a merger authorisation application to the ACCC, where economic efficiencies are taken into account in the net public benefit analysis.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the Australian Competition and Consumer Commission (ACCC) considers that a transaction is likely to result in a substantial lessening of competition, the ACCC has standing to seek an injunction to prevent a merger from proceeding. The ACCC may also seek remedies following an acquisition including damages, divestiture, pecuniary penalties and also an order declaring the transaction void. The maximum pecuniary penalty is:

- for individuals, A$500,000; and
- for corporations, the greater of: A$10 million; three times the value of the benefit obtained directly or indirectly by a body corporate that is reasonably attributable to the contravening conduct; or, where the value of that benefit cannot be readily calculated, 10 per cent of the annual Australian turnover of the body corporate and its related bodies corporate.

The ACCC will normally seek these remedies against the purchaser, although technically the vendor could also be liable. The ACCC does not have the power to impose these remedies itself, and must apply to the Federal Court.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

In relation to informal clearances, the ACCC may grant clearance subject to remedies in the form of undertakings. Where the ACCC raises concerns about a transaction, the parties may modify the proposal by providing a court-enforceable undertaking, which may include divestment or behavioural undertakings. The ACCC's Merger Guidelines indicate that the ACCC has a strong preference for structural (divestment) undertakings and that behavioural undertakings will only occasionally be appropriate, as an adjunct to a structural remedy. It is rare for the ACCC to accept behavioural undertakings that apply on a permanent basis. In addition, the Merger Guidelines state that the ACCC will generally prefer divestiture to occur on or before the completion date of a merger.

In relation to merger authorisations, the ACCC may grant authorisation subject to conditions specified in the authorisation. The conditions may include a condition that a person give and comply with a section 87B undertaking. When authorisation is granted subject to conditions, the authorisation will only provide protection from the operation of section 50 of the Competition and Consumer Act 2010 (CCA) if the acquisition is completed in accordance with the authorisation, including any conditions attached to the authorisation.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Where divestment is negotiated as part of a remedy provided to the ACCC, the divestiture remedy will specify the period within which divestment must occur. The ACCC's preference is for divestments to occur on or before the completion of the acquisition. If this is not possible, the ACCC's general practice has been to require an independent administrator or manager to be appointed during a hold-separate period between completion of a merger and subsequent divestment of any business or assets required to obtain competition clearance. Although the period in which divestment must take place will depend on the circumstances, the ACCC's preference is for a divestment period of one to three months where divestment post-completion is required.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been no recent instances where the ACCC has taken action in the Federal Court in relation to a foreign-to-foreign merger. However, in the past, the ACCC has required the acquirer in foreign-to-foreign merger situations to provide a court-enforceable undertaking remedy before deciding that it would not oppose the transaction. For example, recently:

- in December 2020, the ACCC accepted an undertaking from Mylan NV (Mylan), Pfizer Inc (Pfizer) and Pfizer's subsidiary Upjohn Inc (Upjohn) in relation to the proposed acquisition by Mylan of Upjohn. The undertaking provided for the divestment of a number of brands, and approved the purchaser of the divestment;
- in November 2020, the ACCC accepted an undertaking in relation to the proposed acquisition by Elanco Animal Health Incorporated of Bayer Aktiengesellschaft's animal health business, requiring the divestment of four brands; and
- in March 2019, the ACCC accepted an undertaking from Gebr. Knauf KG (Knauf) and a number of related Australian entities in relation to Knauf's proposed acquisition of USG Corporation (USG). USG's only interest in Australia was its 50 per cent share in a joint venture with Boral International Pty Ltd and Boral Building Materials Pty Ltd. The undertaking provided that the joint venture interest would be divested to an approved purchaser.

In some instances, the ACCC has rejected undertakings offered by the merging parties, on the basis that the remedies included are insufficient to address competition concerns. In December 2020, the ACCC did not accept a long-term behavioural undertaking offered by Google that was similar to that offered to and accepted by the European Commission that sought to address competition concerns about its proposed acquisition of wearables supplier and manufacturer Fitbit. The transaction was completed on 14 January 2021 before the ACCC had finished it investigation. The ACCC has noted that the matter has become an enforcement investigation of a completed merger and no further updates will be made on the ACCC's merger public register.

The ACCC may not seek stand-alone remedies in circumstances where the remedies provided to other regulators have resolved the competition concerns in Australia.

- In March 2018, the ACCC announced that it would not oppose Bayer AG's proposed acquisition of Monsanto Corporation on the basis of global divestments. The European Commission gave conditional approval to the proposed acquisition, subject to divestiture of Bayer AG's herbicide, traits and seeds businesses, along with a number of research and development functions and projects. The ACCC previously had concerns the proposed acquisition may substantially lessen competition in the supply of weed management systems for use on canola crops and reduce competitive tension in research and development of new crop protection products. The global divestments resolved these competition concerns in Australia.
- In June 2017, the ACCC announced that it would not oppose the proposed merger of The Dow Chemical Company and EI Du Pont de Nemours and Company. The European Commission cleared the proposed merger, subject to the divesture of parts of EI Du Pont de Nemours and Company's global pesticide business and global research and development organisation. Separately, The Dow Chemical Company also agreed to divest its acid copolymers and ionomers business. In its statement of issues, the ACCC had previously expressed concerns the proposed merger may substantially lessen competition in the supply of certain insecticides, seeds and materials science products and reduce competitive tension in research and development of new crop protection products. Ultimately, the ACCC considered that these competition concerns would be addressed by the broader global divestments.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Related and ancillary arrangements or restrictions are not specifically 'approved' by the ACCC when granting informal clearance, although they may be relevant to the competition assessment that is conducted. In some cases, the ACCC may require the parties to give it court-enforceable undertakings before it will grant informal clearance of a proposed merger, and it is possible that these undertakings may include a commitment to amend, terminate or assign existing agreements. It is possible, however, to seek authorisation from the ACCC for ancillary restraints on the basis that they give rise to a public benefit. Provisions (such as non-compete arrangements) contained in a share or business sale agreements are assessable under the ordinary provisions of the CCA, but may benefit from an exemption in certain circumstances.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

For non-confidential mergers that require a public review, the Australian Competition and Consumer Commission (ACCC) will generally invite market participants to make submissions in relation to the proposed merger and, where applicable, in response to a statement of issues or proposed undertakings. These inquiries may include consultations with competitors, suppliers, customers, industry associations, government agencies and departments, overseas agencies and departments and consumer groups. Information provided to the ACCC under the informal clearance process by the parties to the transaction or third parties is usually confidential, and with limited exceptions is rarely made public. If informal clearance is granted by the ACCC and the merger proceeds, this does not prevent any person bringing an action in the Federal Court claiming damages or seeking divestiture of the shares or assets acquired, on the basis of a contravention of section 50. There have been instances of such private litigation in the past.

Where an acquirer has applied to the ACCC for authorisation of a proposed merger, the ACCC must place a copy of the application and accompanying information and documents on the ACCC website (subject to confidentiality of specific information), and invite interested persons to make a submission to the ACCC in relation to the application. If authorisation is granted by the ACCC in relation to the proposed acquisition, then an action cannot be brought by the ACCC or third parties on the basis that the acquisition contravenes section 50 of the Competition and Consumer Act 2010 (CCA), provided it was completed in the relevant time frame and in compliance with any conditions imposed. However, a third party with sufficient interest may apply to the Australian Competition Tribunal (the Tribunal) for a review of the ACCC's determination. The scope of the Tribunal's review is limited to the information before the ACCC, although it may consider new information not in existence at the time of the ACCC's determination and information sought by the Tribunal to clarify the information before the ACCC.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The informal clearance process may be undertaken by the ACCC on a confidential or non-confidential basis. An initial assessment can be conducted for both confidential and non-confidential mergers. If an acquirer seeks a confidential assessment, no market inquiries will be made and the details of the proposed merger and the ACCC's views on it will not be included in the mergers register on the ACCC website.

During the initial assessment of a matter to determine whether a public review will be required, the ACCC may seek consent of the merger parties to conduct targeted inquiries. If the ACCC decides that a public review is required, the ACCC will disclose its consideration of the public proposal, but information that is provided to the ACCC either by the parties to the transaction or by third parties on a confidential basis will not be disclosed. The ACCC actively seeks to protect the confidentiality of information provided to it on a confidential basis, so that potential acquirers as well as other interested parties feel comfortable providing commercially confidential information to the ACCC to assist in its assessment of the transaction. However, the ACCC may provide such information to other regulators, both in Australia and overseas, pursuant to section 155AAA of the CCA.

In terms of publicity, once a transaction undergoes a public review, the ACCC will list the review on its website. It may issue a general invitation for submissions from third parties, or conduct a targeted consultation process where submissions are sought directly from customers, suppliers, competitors and other potentially affected parties. If the ACCC releases a statement of issues in relation to the transaction, it will also usually issue a media release. At the conclusion of a merger subject to public review, the ACCC will routinely issue a media release, and subsequently will either post a summary of the reasons for the decision on the website or issue a public competition assessment with more detailed reasons for the ACCC's decision.

The merger authorisation process is a public process where the ACCC is required by legislation to keep a merger authorisation register and publish on the register any applications for authorisation lodged with the ACCC as well as any accompanying information or documents. Interested parties are invited to make submissions and, subject to any confidentiality claims, the register must include any document given to the ACCC in relation to an application and particulars of any oral submission made to the ACCC. The register must also include the ACCC's determination and statement of reasons. There are specific grounds on which confidential information can be excluded from the ACCC's website and the merger authorisation register. In particular, the ACCC must exclude information from the public register if it contains particulars of a secret formula or process, the cash consideration offered for the acquisition of shares or assets, or the current costs of manufacturing, producing or marketing goods or services. Any requests to have documents or submissions, or parts of them, excluded from the public register for confidentiality reasons must be made at the time of providing the document or making the submission to the ACCC.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The ACCC liaises with, and seeks assistance from, overseas regulators in relation to merger matters. This includes the New Zealand Commerce Commission, with which the ACCC has a protocol for cooperative trans-Tasman mergers review and cross-commission appointments between the ACCC and NZCC, the Department of Justice (antitrust division) and the Federal Trade Commission in the United States, the Competition Bureau in Canada, the European Commission and the Competition & Markets Authority in the United Kingdom.

In September 2020, the ACCC entered into the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC) alongside the United States' Department of Justice, the Competition Bureau in Canada, the United Kingdom's Competition & Markets Authority, and the New Zealand Commerce Commission.

The MMAC is a memorandum of understanding that aims to improve coordination and informal cooperation between the five agencies. The framework provides for the sharing of information and experience, the establishment of inter-agency working groups to consider specific issues, and includes a model agreement that agencies can use to establish formal cooperation arrangements.

Further, in April 2021, the ACCC issued a joint statement on merger control enforcement with the United Kingdom's Competition & Markets Authority and Germany's Bundeskartellamt, which emphasises 'the common understanding across competition agencies' on a number of issues relating to mergers.

Where the ACCC seeks to engage in such exchange through the sharing of confidential information and documents obtained from the merger parties, its common practice is to obtain consent for such disclosure from the parties through its standard form waiver. Exchange of information between these regulators is subject to the confidentiality restrictions under which the regulator operates. The ACCC is also actively involved in the International Competition Network through which it is able to liaise with individual competition agencies.

The ACCC is also notified by other Australian regulators of proposed mergers. For example, the Foreign Investment Review Board (FIRB) refers some mergers to the ACCC for comment on the basis that competition is a relevant factor when considering the national interest. The ACCC may use this information as a starting point for conducting its own assessment of the merger. Although there is no statutory link between FIRB and the ACCC, it is common practice for FIRB to not give foreign investment approval until the ACCC provides informal clearance or otherwise indicates that it has no objections.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

There is no statutory right under the Competition and Consumer Act 2010 (CCA) to appeal an Australian Competition and Consumer Commission (ACCC) informal clearance decision. If the ACCC indicates that it will reject an application for informal clearance and oppose the merger, the acquirer may seek a declaration in the Federal Court that the proposed acquisition does not have the effect or likely effect of substantially lessening competition. If the parties decide to proceed with the transaction, the ACCC may seek an injunction. If the ACCC rejects an application for informal merger clearance, the applicant also has the option of instead applying to the ACCC for merger authorisation. Unlike the informal clearance process, merger authorisation allows for net public benefits to be considered as part of the ACCC's assessment and also offers additional appeal rights (as set out below) if the application is rejected by the ACCC.

If the applicant (or another person with a sufficient interest in the application) is dissatisfied with a determination made by the ACCC in relation to a merger authorisation application, the applicant or other interested person may apply to the Australian Competition Tribunal (the Tribunal) for a merits review of the determination. The scope of the Tribunal's review is limited to the information before the ACCC, although it may consider new information not in existence at the time of the ACCC's determination and information sought by the Tribunal to clarify the information before the ACCC. Appeals on decisions of the Tribunal can be made to the Full Federal Court on a question of law, which is known as judicial review.

Time frame

33 | What is the usual time frame for appeal or judicial review?

In relation to informal clearances, if a declaration is sought from the Federal Court then there is no set time frame for the case to be determined. Federal Court proceedings in respect of mergers can be protracted, although the court attempts to deal with such issues expeditiously.

In relation to merger authorisations, if a determination made by the ACCC is appealed to the Tribunal for merits review, this must occur within 21 days of the ACCC's decision. The Tribunal must make a decision within 90 business days after receiving the application for review. The Tribunal may extend this period by a further 30 business days if the Tribunal considers additional information, or longer if it is necessary because of its complexity or other special circumstances.

In relation to judicial review of merger authorisation decisions by the ACCC or the Tribunal, there is no set time frame by which an appeal on a question of law would be heard by the Federal Court, although the court will attempt to deal with merger matters expeditiously.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In the financial year ending June 2021, the Australian Competition and Consumer Commission (ACCC) considered a total of 435 mergers. The majority of these mergers were pre-assessed and only 22 mergers were subject to public review by the ACCC. The majority of public review mergers were unconditionally approved, five were withdrawn and two were conditionally cleared (subject to divestment undertakings). No public reviews were opposed, and one merger (*Google/Fitbit*) completed before the public review was complete and is now the subject of an ACCC enforcement investigation.

The ACCC's current enforcement concerns and priorities are varied. However, there is a particular focus on competition and consumer issues relating to digital platforms and data (eg, the ACCC's investigations into the *Google/Fitbit* and *Facebook/Giphy* acquisitions). The ACCC is likely to continue to closely scrutinise mergers involving digital platforms and companies active in industries where data can be a competitive advantage or give rise to market power.

In their joint statement on merger control enforcement released in April 2021, the ACCC, UK Competition & Markets Authority (CMA) and Germany's Bundeskartellamt emphasised that the economic downturn caused by the covid-19 pandemic should not be used to relax standards of review or to justify anticompetitive mergers. The Joint Statement expressly states, for example, that the pandemic is not a reason to lower the standard for accepting 'failing firm' arguments. The ACCC, CMA and Bundeskartellamt also indicated their view that the decisions to clear a number of tech mergers in the early 2000s constituted 'type II errors' that the authorities were keen not to repeat. As such, the Joint Statement indicated:

- greater levels of scepticism over the public benefits and efficiencies claimed by the parties in relation to potentially anti-competitive mergers;
- the view that uncertainty about the outcome of a merger should tip consideration in favour of opposing the merger, not clearing it;
- the potential for greater reliance on the evidence of third-party complainants; and
- a strong preference for structural remedies instead of behavioural remedies.

Reform proposals

35 | Are there current proposals to change the legislation?

The ACCC has 'become increasingly concerned as to whether Australia's merger control regime remains fit for purpose': see Chair Rod Sims' comments at the Monash University National Commercial Law Seminar Series Session (3 March 2021). The ACCC has indicated that it will put forward proposals for merger reform in 2021.

The primary concerns that the ACCC has expressed to date about the existing mergers test are that:

- The inherent uncertainty in the current forward-looking test presents significant challenges for competition authorities to prevent anticompetitive mergers. Assessing the likely competitive impact of a merger involves looking at the 'counterfactual': what is likely to happen in the future without the proposed merger. This makes it challenging to prove in court on the balance of probabilities and risks overlooking the anticompetitive effects of the merger itself.
- Many of the mandatory factors to consider when assessing the likely effect of a merger (set out in section 50(3)) of the Competition and Consumer Act 2010 (CCA)) can be used to support a merger clearance. In its Digital Platforms Inquiry Final Report released in July 2019, the ACCC identified potential changes to the mandatory factors. In that report, the ACCC recommended that the factors to be taken into account under section 50(3) of the CCA in assessing the likely competitive effects of a merger should be amended to include consideration of whether an acquisition would result in the removal of nascent competition, and the amount and nature of data to which the acquirer would likely have access as a result of the acquisition.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Merger authorisation

The new merger authorisation process was tested for the first time in April 2019, when AP Eagers successfully obtained authorisation to acquire the balance of shares in Automotive Holdings Group. Since then, two more applications for merger authorisation have been filed with the Australian Competition and Consumer Commission (ACCC).

In April 2020, the ACCC authorised a merger involving Gumtree AU Pty Ltd (Gumtree)'s acquisition of Cox Australia Media Solutions Pty Ltd (Cox Media), which operates the online platforms Carsguide and Autotrader. Although the acquisition would remove one of the five major competitors in a relatively concentrated market, the ACCC found that the merged entity would continue to be constrained by other competitors. Similar to the approach in AP Eagers, as the ACCC was satisfied that there would be no substantial lessening of competition, it was not required to consider the public benefit test.

In March 2021, Industry Committee Administration Pty Ltd (ICA) applied to the ACCC to amalgamate ownership of BPAY Group Pty Ltd and BPAY Pty Ltd, eftpos Payments Australia Limited and NPP Australia Limited under a new entity by way of share acquisition. The parties' rationale for the proposed merger is that the merger will enhance efficiencies and innovation and will allow the domestic payment schemes to better compete against existing and future global payment companies. The ACCC's decision is expected by the end of July 2021.

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Merger litigation

The ACCC did not commence any new merger litigation cases in the past year. However, the case concerning the contested acquisition by Pacific National of the Acacia Ridge rail terminal owned by Aurizon was finalised in December 2020.

A central issue in this case was whether – as the ACCC alleged – the proposed acquisition would deter new entry of a rail line haul service provider by reason of Pacific National's ability to discriminate against that entrant. At first instance, the Federal Court allowed the merger, subject to an undertaking guaranteeing other operators access to the rail terminal and fair prices. The ACCC appeal of this decision was dismissed by the Full Federal Court in May 2020. Releasing Pacific National from the undertaking, the majority of the Full Court found that the prospect of new entry was only a mere possibility and speculative. In December 2020, the ACCC was denied special leave to appeal the Full Court's decision to the High Court of Australia.

Digital markets

The ACCC is becoming increasingly focused on the impact of mergers undertaken by digital platforms, particularly with respect to the control of data. The ACCC has taken a more stringent approach to mergers involving digital platforms than some other regulators. For example, on 22 December 2020, the ACCC announced it had rejected the behavioural undertaking offered by Google LLC in respect of its proposed acquisition of Fitbit, Inc. This came days after the European Commission cleared the acquisition subject to an undertaking in near identical terms. Among other things, the 10-year undertaking offered to not use any data collected through Google or Fitbit health and fitness apps in or for Google Ads. The ACCC considered that the behavioural undertaking offered did not address its concerns that the acquisition may result in Fitbit's rivals (other than Apple) being squeezed out of the 'wearables' market. Ultimately, the review was completed with no decision made because Google completed the acquisition of Fitbit on 14 January 2021. The ACCC is now considering whether to pursue enforcement action in respect of the acquisition. The ACCC has also indicated that it is investigating the *Facebook/Giphy* acquisition.

Austria

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Substantive merger control rules, including specific rules governing media mergers, are contained in Part I, Chapter 3 of the Austrian Cartel Act 2005 (ACA).

Austrian merger control rules are enforced by the Vienna Court of Appeals as Cartel Court (acting as court of first instance) and by the Austrian Supreme Court (acting as court of appeals). The Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) – together referred to as the 'statutory parties' – have the exclusive right to initiate proceedings for an in-depth review of merger cases (Phase II) before the Cartel Court, which is the sole adjudicator in competition law matters.

The FCA is an independent authority entrusted with the task of safeguarding conditions of effective competition. Merger notifications initially have to be submitted to the FCA, which, together with the FCP, decides whether a merger needs to be investigated in Phase II proceedings before the Cartel Court. The FCP is accountable to the Federal Minister of Justice and represents the public interest in competition matters.

The Competition Commission is an independent advisory body that can recommend that the FCA request a Phase II review of a merger case. Although such recommendation is not binding, the FCA has to publish a reasoned statement on its website if it does not intend to follow the recommendation.

An amendment of the ACA will likely enter into force soon. The first chamber of the Austrian parliament passed an amendment on 7 July 2021, which will now also have to be approved by the second chamber. The amendment is expected to enter into force in September at the latest, with substantial merger control changes becoming applicable from 1 January 2022.

Scope of legislation

2 | What kinds of mergers are caught?

Austrian merger control provisions apply to concentrations as defined in section 7 of the ACA. Each of the following constitutes a concentration:

- the acquisition by one undertaking of all, or a substantial part of, the assets of another undertaking, especially by merger or transformation;
- the acquisition of rights by one undertaking in the business of another undertaking by means of a management or lease agreement;
- the direct or indirect acquisition of shares in one undertaking by another undertaking if, as a result, a participation of 25 per cent or 50 per cent (in terms of capital or voting rights) is reached or exceeded (this is by far the most frequent type, also applying to most 'acquisition of control' cases);
- the establishment of interlocking directorates at the management or supervisory board level (if at least half of the management or members of the supervisory boards of two or more undertakings are identical);
- any other connection of undertakings conferring on one undertaking a direct or indirect controlling influence over another undertaking; and
- the establishment of a full-function joint venture.

Further, as the special provision on agreements between banks, particularly on mutual financial assistance in the event of a financial crisis, on common business activities or on a uniform market policy, under the Austrian Banking Act has been abandoned, such agreements now require merger clearance only if they constitute a concentration as defined above. Concentrations involving undertakings belonging to the same group as defined in the Stock Corporation Act and the Act on Limited Liability Companies are not subject to merger control.

Bank exemption

Merger control rules do not apply if a bank temporarily acquires shares in an undertaking for the purpose of reselling them, for securing its claims against the undertaking, or in the context of a restructuring process in an insolvency scenario. The shares must be sold after one year, as soon as security is no longer required or after completion of the restructuring process. The exemption also applies to the acquisition of shares by equity participation businesses, equity fund businesses and companies whose only purpose is the acquisition of shares in other enterprises and the administration and utilisation of these shares, without directly or indirectly interfering with the administration of the respective undertaking, provided that they do not exercise their voting rights to influence the competitive conduct of the undertaking (the exercise of rights to retain the value of the investment, that is, relating to the protection of the acquirer's financial interests, is permitted).

3 | What types of joint ventures are caught?

The formation of a joint venture that fulfils the functions of an independent business entity on a lasting basis also constitutes a merger. In line with the EU Merger Regulation (EUMR), 'cooperative' joint ventures are also subject to merger control. However, unlike the EUMR in its article 2(4), the ACA does not explicitly provide for the appraisal of any anticompetitive coordination that may result from the creation of a joint venture in the merger proceedings.

Leading commentators nevertheless argue that coordinative effects of a joint venture fall to be analysed under the merger control rules (and are covered by merger clearance) to the extent that they are a necessary result of the creation of the joint venture. The Austrian courts have yet to decide on this question.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The ACA does not contain a definition of the term 'control'. As mentioned above, any connection of undertakings conferring on one undertaking a direct or indirect controlling influence over another undertaking is deemed to be a merger. In practice, the notion of control is applied according to the concept of the EUMR (in particular, the European Commission's Consolidated Jurisdictional Notice). Because of the formal approach of Austrian merger control provisions, even the acquisition of a percentage of shares that does not confer control is subject to merger control: as mentioned above, an acquisition whereby a participation of 25 per cent is reached or exceeded constitutes a merger within the meaning of the ACA.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger must be notified prior to its completion if, in the last business year:

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

An amendment to the ACA has been passed by the first chamber of the Austrian parliament. This amendment foresees a change to the thresholds, namely that the combined Austrian turnover of all undertakings concerned exceeds €30 million and €1 million for at least two undertakings concerned. The exact date of the entry into force is not yet clear, but the new threshold is expected to be applicable for concentrations that will be closed from 1 January 2022.

However, a concentration where these thresholds are exceeded is exempt from the notification obligation if (1) only one undertaking concerned generated sales in excess of €5 million in Austria and (2) the other undertaking concerned generated less than €30 million worldwide turnover.

In addition, a new notification threshold based on transaction value came into force in late 2017. This means that mergers also have to be notified if:

- the combined worldwide turnover of all the undertakings concerned exceeded €300 million;
- the combined Austrian turnover of all the undertakings concerned exceeded €15 million;
- the value of consideration exceeds €200 million; and
- the target is active in Austria to a significant extent.

This new threshold is intended to catch transactions involving early stage technology targets with a high purchase price despite low turnover, but applies to all sectors. Two transactions were notified under the new threshold in 2017, 17 were notified in 2018 and 15 in 2019. In a position paper on competition law and digital challenges, the FCA stated in 2020 that most concentrations notified under the new threshold have not been those transactions that were intended to be captured (ie, concentrations in the digital markets).

In light of the practical uncertainties regarding the new threshold, in 2018 the FCA published a joint guidance paper with the German Federal Cartel Office on the transaction-value-based threshold (which was introduced in a very similar fashion in Germany). Practice so far has shown that it can be difficult to assess whether the target is 'active in Austria to a significant extent'. The guidance discusses criteria that relate to the assessment of domestic activity, local nexus of domestic activity, market relevance and significance. Domestic activity is generally not measured on the basis of domestic turnover but rather various indicators such as production facilities, branches, sales forces, research and development activities, or (regarding the digital economy) numbers of monthly active users. Furthermore, for the new threshold to be met, the activity in Austria has to be significant. Based on its guidance paper, the FCA will generally find that there is no domestic activity if the turnover of domestic target companies is below €500,000, provided that this turnover adequately reflects the market position and the competitive potential of the target company. However, not all cases in which the target has generated more than €500,000 automatically fall under the new threshold. The FCA has emphasised that this requires a case-by-case assessment, taking into account a number of factors such as local customer relationships. The FCA encourages companies and their advisers to reach out to the authorities and discuss the application of the new threshold in case of doubt. While not mandatory, pre-notification contact can be an option in this context, to clarify any queries the authorities may have in relation to notifiability of a transaction.

Even where the original thresholds (see first set of bullet points) are met, mergers are exempt from the notification obligation where the domestic turnover of only one of the undertakings concerned exceeded €5 million and where the worldwide combined turnover of the other undertakings concerned (typically the target) did not exceed €30 million (de minimis exception). It is not entirely clear whether this exemption shall also apply to the new threshold. While this has not been addressed by the available guidance paper or decision practice yet, the phrasing and the systematics of the law seem to exclude this.

The calculation of turnover is governed by section 22 of the ACA: the relevant turnover of an undertaking concerned also includes the turnover of all undertakings that are connected to it by one or more of the links that constitute a concentration within the meaning of section 7 of the ACA (in particular, by way of a shareholding of at least 25 per cent upstream or downstream). From a geographic point of view, the FCA allocates turnover in accordance with the principles applied by the EU Commission. In 2020, a gun-jumping fine was imposed in a case where the acquirer incorrectly attributed turnover to the billing address (in Germany), but not to the place of delivery (in Austria), which resulted in the acquirer wrongly concluding that the thresholds were not met.

Special rules apply to the calculation of the turnover of banks, where the sum of interest and similar revenues, proceeds from shares and participations, commission income, and income from financial transactions and other banking income has to be taken into account. With regard to insurance companies, the premium income is relevant. Specific rules apply to media mergers, where the turnover of the undertakings has to be multiplied by a factor of 200 or 20, depending on the type of activity in which the undertaking is engaged. In this context, the Cartel Court recently imposed a (comparatively low) fine for the violation of the statutory standstill obligation in a case where the turnover multiplication rules had been incorrectly applied and so no notification was made.

Mergers falling within the jurisdiction of the European Commission are not subject to Austrian merger control ('one-stop-shop' principle) unless the transaction constitutes a 'media concentration', in which case parallel notifications are required (the media merger may in such case, under Austrian merger control law, only be assessed as to whether it will impair media diversity, as permitted by article 21(4) of the EUMR).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the ACA and exceeds the notification thresholds, filing is mandatory.

However, even if the thresholds are technically exceeded, no notification is required if a merger cannot have any effects whatsoever on the Austrian market.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are subject to Austrian merger control if the turnover of the undertakings concerned exceeds the turnover thresholds and the transaction does not qualify for the de minimis exception. Notwithstanding the de minimis exception, the ACA still subjects a large number of foreign-to-foreign mergers to Austrian merger control, as it does not provide for a minimum Austrian turnover to be achieved by at least two parties.

Certain limits to the broad reach of the Austrian merger control provisions have, however, been recognised in case law. In its most recent judgment on the application of the Austrian merger control rules to such mergers, the Austrian Supreme Court held that merely indirect effects on competition on the domestic market were insufficient to trigger Austrian merger control. According to the court, a transaction is not notifiable if the foreign target company neither actually nor potentially (ie, in the foreseeable future) provides services in Austria. Three caveats are, however, in order.

First, the Supreme Court explicitly limited the scope of its decision to competitive effects emanating from the acquisition of foreign targets (without any turnover in the Austrian market); in cases involving the acquisition of domestic targets by foreign acquirers, the courts will therefore continue to take account of indirect effects (eg, an increase of the financial strength of the merged entity on the Austrian market, or the merged entity's IP rights portfolio).

Second, the target must not generate any sales in a market that also comprises Austria (eg, if the relevant market is defined as EU-wide and the target generates sales in other EU countries, the exemption does not apply).

Third, the acquisition of the target must not otherwise strengthen the acquirer's market position with regard to Austria. It can be assumed that the authority will continue to take a very wide view of the scope of Austrian merger control. Therefore, it may still be advisable to submit a merger notification even in cases where potential effects on Austrian markets are clearly limited.

Furthermore, the Cartel Court has confirmed in previous decisions that to obtain formal confirmation that a transaction is not notifiable, a precautionary notification would be required, followed by a Phase II request that the court would subsequently reject (as the FCA itself does not have the power to refuse jurisdiction).

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Following a worldwide trend towards tightened regulatory frameworks for investment control, and to implement the EU foreign investment control cooperation mechanism in the EU FDI Screening Regulation (EU Regulation 2019/452), Austria has adopted a new foreign investment control regime that significantly widens the scope of foreign investment review rules: the indirect or direct acquisition of (1) 10 per cent, 25 per cent, 50 per cent of voting rights (staggered approval model where approval is needed each time one of these thresholds is exceeded), (2) a controlling interest irrespective of specific shares of voting rights or (3) a controlling interest in substantial assets of the undertaking in an Austrian business by a non-EU/EEA/CH investor if the target is active in a sector considered sensitive from an FDI perspective, requires an authorisation from the Austrian Minister of Digital and Economic Affairs.

The sensitive sectors are split into two groups:

- The first group includes defence equipment and technologies, the operation of critical energy infrastructure, the operation of critical digital infrastructure (including 5G), water, data sovereignty systems, R&D with regard to pharmaceuticals, vaccines, medical devices and PPE. Any investment by non-EU/EEA/CH investors in these sectors exceeding 10 per cent would trigger an approval requirement;
- The second group includes critical infrastructure (energy, IT, telecommunications, etc), critical technologies (AI, robotics, semiconductors, cybersecurity etc), critical resources (food, pharmaceuticals, etc) and sensitive data. Investments by non-EU/EEA/CH investors in these sectors exceeding 25 per cent would trigger an approval requirement.

Approval needs to be obtained immediately after signing the transaction. The regulator needs to decide within a month following the deadline provided by the European cooperation mechanism (which typically ends one and a half months after submission of the application) if the application is approved, rejected or in-depth investigations would be started (the start of in depth-investigations may extend the proceedings for another two months). In its assessment, the regulator considers if an investment could pose a threat to security or public policy and includes consideration of whether the purchaser is a state-owned entity or otherwise controlled or financed by a third country, has been involved in activities that could pose a threat to security or public policy in another member state or is or has been involved in illegal or criminal activities.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no legal deadlines for prior notification of concentrations. However, as notifiable transactions must not be closed before clearance, notifications must be submitted well before the envisaged date for the closing of the transaction. It is possible to submit a filing even before the signing of the relevant agreement, provided the parties have, in principle, agreed on the structure and timing of the transaction and intend in good faith to enter into this agreement in the foreseeable future.

In complex cases (especially where the need for remedies may already be anticipated by the notifying parties) it can also be helpful for the parties to engage in pre-notification discussions with the statutory parties prior to formal filing. Likewise, in the telecoms sector it is advisable to engage in pre-notification discussions and provide the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) with regulatory data at an early stage in Phase I. In the proceeding regarding the acquisition of Tele2 Austria, a provider of fixed line telecommunications services, by Hutchison Drei Austria, one of the major Austrian mobile telecoms operators, the parties reached out to the authorities at an early stage of the transaction process, engaging in pre-notification contacts to discuss the scope of information and data required. The case has shown that clearance within the four-week Phase I window can be obtained even in complex cases if the parties actively engage with the FCA and FCP.

10 Which parties are responsible for filing and are filing fees required?

Each of the undertakings concerned is entitled to file a pre-merger notification. However, usually the acquirer files the notification. Joint notifications with the target are permissible but rare in practice. In a recent judgement, the Supreme Cartel Court explicitly held that the seller is not competent to submit a merger control filing.

In Phase I proceedings, there is a fixed filing fee of €3,500. In Phase II proceedings, the Cartel Court sets a lump-sum fee of up to €34,000. However, in the case of a (full) in-depth review of a merger in Phase II. there will usually be additional costs for the preparation of an expert's opinion, which the notifying parties will have to pay (in the past, fees ranged between €150,000 and €300,000).

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period is four weeks in Phase I and can be extended for a further two weeks upon the request of the notifying party (this can be advisable to avoid a Phase II review). The waiting period is up to six months in a Phase II review by the Cartel Court. The closing of the transaction must be suspended until clearance.

A transaction that is subject to Austrian merger control must not be implemented until:

- both statutory parties have waived their right to request a Phase II review of a merger by the Cartel Court;
- neither statutory party has requested the initiation of Phase II proceedings within the four-week period of Phase I (or six-week period in the case of an extension request); or
- if Phase II proceedings have been initiated, the issuing of a final decision of the Cartel Court whereby these proceedings are ceased, the relevant request of a statutory party is held inadmissible, or the merger is approved.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The implementation of a transaction that is subject to merger control is void if it is closed before clearance. The same applies to the underlying agreement. However, it is unclear what this means in the case of a foreign-to-foreign merger governed by foreign contract law.

In the case of an unauthorised implementation of a merger that requires pre-merger notification, the Cartel Court can, upon the request of a statutory party, impose on each party that intentionally or negligently violates the standstill obligation a fine in the amount of up to 10 per cent of the worldwide turnover achieved by that party in the last business year.

The FCA and the FCP pursue a zero tolerance policy in relation to infringements of the standstill obligation and request fines in every case. To date, the highest fine imposed by the Cartel Court for violation of the standstill obligation is €1.5 million. Fines in other cases have been significantly lower, typically ranging between €15,000 and €150,000.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, sanctions for violating the standstill obligation by early implementation of a notifiable transaction are also applied in foreign-to-foreign cases. For instance, in a case in 2020 where a German company acquired sole control over another German company, and the transaction was not notified in Austria, the FCA requested a fine and the Cartel Court issued a fine of €100,000.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In principle, any structural or behavioural undertaking is acceptable under Austrian law, including local 'hold-separate' agreements. However, given the lack of precedent decisions by the Supreme Court in this area, it is unclear which solutions would be considered sufficient by the Austrian authorities.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Public takeover bids in Austria do not receive special treatment under the merger control rules. The Takeover Act regulates Austrian public takeover bids. A takeover panel has exclusive jurisdiction over all matters coming under its scope and supervises compliance with its rules.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The merger control notification must contain precise and comprehensive information on all factual aspects that could give rise to the creation or strengthening of a dominant position, in particular:

- the corporate structure (direct and indirect shareholders and subsidiaries) of the undertakings concerned, including undertakings that are connected to them by one or more of the links that constitute a concentration within the meaning of section 7 of the ACA;
- the turnover (by volume and value) achieved by these undertakings in the last business year (to be provided separately for each relevant product or service market);
- the market shares of these undertakings in each relevant product or service market;
- information on general market conditions; and
- in the case of a media concentration, precise and comprehensive information on other factors that could impair media plurality.

In 2016, the Cartel Court fined an applicant €750,000 for providing inaccurate and misleading statements in the notification, which resulted in a wrong description of the proposed transaction (the transaction actually constituted another type of concentration). The Cartel Court also held that a very high standard of care was required when preparing merger control notifications. Recent experience suggests that a thorough analysis of the filing structure itself is advisable in cases where transactions consist of various acquisition steps (in some cases a joint filing may be required, whereas in others separate filings may be possible or required). In the absence of specific legislation, the Austrian authorities will take into account the European Commission's Jurisdictional Notice when assessing such issues.

The FCA has published a form for merger notifications on its website. The use of this form is not compulsory but is strongly recommended by the statutory parties.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Upon receipt of the notification, the FCA forwards a copy of the notification to the FCP and publishes a short summary of the notification on its website (www.bwb.gv.at). This summary contains the names of the parties, a brief description of the type of the concentration (eg, merger, creation of a joint venture) and the business sectors concerned.

Within two weeks of the date of publication, third parties whose legal or economic interests are affected by the concentration (ie, competitors and customers, in particular) may submit written comments to the FCA and the FCP. Third parties do not have procedural rights and cannot challenge a clearance decision.

In the course of their review in Phase I, the FCA and the FCP may also send requests for information to the parties, which typically have to be answered at short notice.

The Competition Commission, an independent advisory body, may recommend the FCA to request a Phase II review of the merger by the Cartel Court. Such a recommendation has to be issued within three weeks of the filing of the notification. In the event that the FCA or the FCP requests a Phase II review of the merger by the Cartel Court, the FCA will publish the request on its website.

Following the initiation of a Phase II review of the merger, the Cartel Court has five months to adopt a prohibition or clearance decision (upon request by the notifying party, the review period will be extended by one month). A decision by the Cartel Court by which a concentration is cleared subject to conditions or obligations, or both, will be published on the FCA's website once it is final and binding. Non-confidential (full text) versions of decisions of the Cartel Court are also published in an electronic database (Ediktsdatei) run by the Federal Ministry of Justice.

18 | What is the statutory timetable for clearance? Can it be speeded up?

If neither of the statutory parties requests the initiation of a Phase II review by the Cartel Court, clearance takes four weeks (or six weeks in the case of an extension request by the notifying party). The review period starts to run on the day of receipt of the notification by the FCA provided that the filing fee (€3,500) has been paid.

Early clearance is possible, if the transaction clearly does not raise competition concerns. However, this procedural option is only used rarely and the parties and their advisers should generally expect the case to take the full four-week review period. Early clearance will be granted in exceptional circumstances and requires that both the FCA and the FCP waive their right to apply for an in-depth review of the transaction to the Cartel Court. The earliest early clearance can be obtained is after the expiry of the two weeks for third-party comments (plus an additional three business days for comments to come in via mail).

Under the regime laid down by the ACA, the Cartel Court does not issue a confirmation of Phase I clearance. Instead, the statutory parties are obliged to inform the notifying party of the fact that they did not request the initiation of Phase II proceedings within the four-week (or six-week) period.

If a statutory party requests Phase II proceedings, the Cartel Court can issue a prohibition decision within five months of such request being made (if both statutory parties issue such requests, the date of the first request is decisive). After expiry of the five-month period (without a final decision) or, before that, after withdrawal of the respective requests by the statutory party (parties), the Cartel Court must close its review proceedings and the standstill obligation is lifted. The notifying party may apply for an extension of the five-month period by one month. According to the legislative materials, this period may be used, in particular, for remedy negotiations.

During Phase II proceedings before the Cartel Court, the statutory parties withdraw their requests only in exceptional cases, mainly if the parties offer commitments that are sufficient to remedy the competition concerns that had been identified and if the statutory parties do not insist on having such commitments fixed as conditions or obligations in a formal decision of the Cartel Court. Once Phase II proceedings before the Cartel Court have been initiated, such withdrawal is almost the only practical way to obtain a merger clearance before the end of the full review period.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A concentration will be cleared if it does not give rise to the creation or the strengthening of a dominant position. An undertaking will be considered to be dominant under the Austrian Cartel Act (ACA) if it faces no or only insignificant competition, or if it is in a superior market position as regards its competitors, customers or suppliers. The ACA provides for a number of rebuttable presumptions of dominance. The concept of collective dominance was formally introduced into the ACA with the 2013 amendment. In the assessment practice of the FCA, the 'significant impediment of effective competition' (SIEC) test (which has not yet been formally introduced into the ACA) has also played a role. An amendment to the ACA that was passed by the first chamber of the Austrian parliament on 7 July 2021 and is expected to enter into force by September 2021 provides for the introduction of the SIEC test alongside the existing test (strengthening or creation of a dominant position).

Single dominance will be presumed where:

- an undertaking's market share is greater than 30 per cent;
- its market share is greater than 5 per cent, and it is facing competition from no more than two other undertakings; or
- an undertaking's market share is greater than 5 per cent and it is one of the four largest undertakings on the relevant market that together hold at least 80 per cent of the relevant market.

Collective dominance will be presumed where:

- a group of three or fewer undertakings has a market share of at least 50 per cent; or
- a group of five or fewer undertakings has a share of at least two-thirds of the relevant market.

There is a reverse burden of proof where the above legal presumptions of dominance are met. In this context, the notifying party will have to prove that the transaction does not give rise to the creation or the strengthening of a dominant position. A concentration leading to the creation or the strengthening of a dominant position will be prohibited unless there is an improvement of competitive conditions that outweighs the disadvantages of market dominance, or the concentration is necessary to preserve or enhance the international competitiveness of the undertakings involved and is justified by national economic considerations.

A concentration that otherwise does not meet the requirements for clearance may be cleared by the Cartel Court subject to conditions and obligations. Media mergers are subject to a specific public interest regime (see article 21(4) of the EU Merger Regulation (EUMR)). Media mergers that meet the EUMR thresholds will be assessed by the Austrian authorities as to their effect on media plurality. The Cartel Act does not provide an exemption for failing firms; however, the Supreme Court has recognised the 'failing firm defence', which allows restructuring concentrations to be implemented even in cases where a dominant market position might be strengthened.

Overall, merger control practice in recent years has shown that the statutory parties also tend to scrutinise aspects of a case that are not directly related to the notified transaction (ie, in some cases a broader facts-based or economic approach might be applied, especially in cases with a substantive overlap in the parties' businesses). The FCA's head has also noted that macroeconomic issues such as employment protection may be considered in the context of the assessment.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The test for clearance is whether the concentration will give rise to the creation or strengthening of a dominant position. Within the scope of this test, the authorities may rely, however, on a number of theories of harm (eg, vertical foreclosure, conglomerate effects, collective dominance) to prove that a dominant position would be created or strengthened by the concentration (the FCA has also raised the issue of existing structural links enhancing coordination between the acquirer and a competitor of the target). Similar to the situation at EU level prior to the entry into force of the new EUMR, it is not entirely clear whether unilateral effects in an oligopoly situation (resulting, in particular, from the elimination of a close competitor) can be brought within the dominance test.

This notwithstanding, horizontal overlaps play by far the most important role in the competition analysis carried out by the Austrian competition authorities.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition considerations still play a considerable role in Austrian merger control. The ACA retains a provision allowing the Cartel Court to clear an anticompetitive merger on industrial policy grounds: a concentration having adverse effects on competition may be cleared if it is necessary to preserve or enhance the international competitiveness of the undertakings involved and is justified by national economic considerations.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The ACA provides that the Cartel Court shall clear a concentration giving rise to the creation or strengthening of a dominant position provided that there is an improvement of competitive conditions that outweighs the disadvantages of market dominance; or the concentration is necessary to preserve or enhance the international competitiveness of the undertakings involved and is justified by national economic considerations.

Under both elements of this provision, the Cartel Court has to take account of economic efficiencies. So far, however, economic efficiencies have not played an important role in the competition analysis carried out by the Austrian authorities. Where efficiencies are invoked in favour of a concentration, the party alleging the efficiencies bears the burden of proof. In practice, only opinions of economic experts are likely to be accepted as proof.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Cartel Court will issue a prohibition decision if it considers that a concentration would lead to the creation or strengthening of a dominant position but does not lead to an improvement of competitive conditions that could outweigh the disadvantages of market dominance, and is not necessary to preserve or enhance the international competitiveness of the undertakings involved and is not justified by national economic considerations, and that the remedies offered by the parties are not sufficient to alleviate competition concerns.

Even after clearance of a transaction the Cartel Court may, upon request of a statutory party, impose proportionate measures (post-merger measures) on the parties to alleviate competition concerns if clearance was obtained on the basis of incorrect or incomplete information, or if a party violates an obligation imposed in the clearance decision.

Upon request of a statutory party, the Cartel Court may impose fines of up to 10 per cent of the worldwide turnover achieved by a party in the last business year in cases of:

- unauthorised implementation of a merger (including violations by the parties of a prohibition decision as well as violations of conditions and obligations imposed in a clearance decision); or
- violations of a post-merger measure imposed by the Cartel Court.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

According to the Austrian Cartel Act (ACA), the parties may offer remedies (conditions or obligations, or both) even in Phase I to convince the statutory parties not to request a Phase II review of the merger by the Cartel Court. Parties may also offer remedies later to convince the statutory parties that they should withdraw such a request or to receive a formal clearance decision from the Cartel Court should the statutory parties decide not to do so. Such remedies are binding upon the parties in that the implementation of a concentration in violation of these remedies is equivalent to a violation of the standstill obligation, which is subject to fines in the amount of up to 10 per cent of the worldwide turnover achieved by the relevant party in the last business year.

There are no firm rules on the type of remedies acceptable under Austrian law, so both structural remedies (eg, divestments or IP-based remedies) and behavioural remedies are suitable. The number of concentrations cleared on the basis of remedies, including divestments, has recently shown a marked increase. However, behavioural remedies still play the primary role in practice. Also, different types of remedies may be combined to fully remove competition concerns.

Since 2014, behavioural remedies have included, inter alia, a hold-separate commitment in relation to an existing indirect minority shareholding of the acquirer group and a bundling limitation for magazine advertisements, the use of mandatory public tenders (including services below the regulatory thresholds) and limitations in relation to the annual turnover of a joint venture undertaking, non-discriminatory access to infrastructure (eg, outdoor advertising space) to competitors as well as continued operation of the acquired business, including separate market presence and a commitment not to acquire further (specified) businesses in a certain area and time period.

In 2020, two transactions were cleared subject to commitments. In both cases, a mix of behavioural remedies was agreed in Phase I. These consisted of obligations not to include exclusivity clauses in supply or distribution contracts, refraining from using volume rebates, agreeing not to prefer own distribution agents over independent distributors, keeping separate editorial teams for publishers, agreeing not to discontinue any magazines for seven years and, if a magazine is discontinued later, the publisher first has to offer it for sale.

In 2019, five transactions were cleared subject to commitments. While in four of these cases, the commitments were behavioural in nature (non-discriminatory access to services, prohibition of exclusivity arrangements with customers, safeguarding continued service and support for the target's products to Austrian customers post-transaction, non-discriminatory access to patents, etc), one case also involved structural remedies. This concerns the *REWE/Lekkerland* transaction, which was notified to the European Commission (COMP/M.9142) but partially referred to the German Federal Cartel Office and the Austrian Federal Competition Authority (FCA). The FCA opposed the acquisition of the operative business of Lekkerland in Austria and only cleared the transaction subject to REWE's commitment to carve out this business and not acquire it (or parts of it) or establish personnel links between REWE and Lekkerland Austria (in particular at management level) for a term of five years from clearance. This structural remedy was accompanied by a behavioural commitment by REWE to continue to provide services to Lekkerland Austria as previously provided by Lekkerland Group (ie, the parent) at adequate conditions.

In 2018, a case that concerned the leasing of railcars (*VTG Rail Assets/CIT Rail Holdings (Europe)*; *Nacco-Group*) was cleared subject to structural commitments, namely the divestiture of approximately 30 per cent of the Nacco business to an upfront buyer (the same conditions were also agreed on with the German Federal Cartel Office).

The FCA has repeatedly pointed out that remedies should be practicable to implement with a manageable monitoring mechanism.

Also, according to recent statements of the FCA, adequate remedy solutions will usually aim at strengthening the position of the parties' competitors in the relevant markets (eg, by granting network access). In an expert talk session hosted by the FCA, it was also pointed out that effective reporting duties play a very important role in the case of solutions based on behavioural remedies. In this context, the FCA will particularly rely on 'self-monitoring' involving competing players on the relevant markets (the FCA referred to a case where a fine of €200,000 was imposed on a party for violating its remedy obligations, which had been discovered as a result of notification by one of its competitors).

There is no formal procedure applicable to remedies offered by the parties. Such remedies will be discussed informally with the statutory parties and the Cartel Court. Remedies that are offered in Phase II before the Cartel Court will usually be subject to an evaluation by an economic expert appointed by the Cartel Court (which will also have an impact on the timing of clearance).

Decisions by the Cartel Court clearing a concentration, subject to conditions and obligations, will be published on the FCA's website once the decision is final and binding. Non-confidential (full text) versions of the Court's decisions are published in an electronic database (Ediktsdatei) run by the Federal Ministry of Justice.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The ACA does not specify which remedies are acceptable. Consequently, a broad range of remedies is possible as long as the measures sufficiently address the competition concern that has been identified by the authorities.

There is no specific time frame in which remedies may be offered and discussed. In practice, the parties may therefore approach the authorities at any time until the end of the investigation. It is advisable, however, for a party wishing to offer remedies to approach the statutory parties as soon as the nature of their competition concerns becomes clear. In several cases, parties have been able to avoid a full Cartel Court investigation by offering remedies at a relatively early stage of the proceedings (in some cases, the statutory parties were also prepared to withdraw their applications for an in-depth review on the basis of remedy offers resulting in an early termination of the ongoing Phase II proceedings).

The statutory parties have in some cases insisted on upfront buyer solutions where divestments were necessary. That is, they wanted to approve the acquirer of the assets to be divested before withdrawing their request for a Phase II review of the merger by the Cartel Court. However, in several recent cases the implementation of remedies was only required within a certain time period starting from clearance (eg, six months). In the case of a material change of circumstances after clearance of a transaction subject to conditions or obligations, or both, the parties may apply to the Cartel Court for their modification or removal.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is only very limited experience regarding remedies in foreign-to-foreign mergers. In a case involving the acquisition of parts of a Spanish bubblegum manufacturer by the world leader in chewing gum, the Austrian authorities were satisfied with a commitment by the acquirer to continue to offer the whole spectrum of bubblegum products offered by the target on the Austrian market for a period of at least two years. It cannot be excluded, however, that in cases involving foreign parties with strong market positions in Austria, the authorities would require much stricter remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The ACA does not contain any provision specifically regulating the treatment of ancillary restrictions, although their admissibility has been recognised by earlier case law. The European Commission's 2005 Notice on Restrictions Directly Related and Necessary to Concentrations may provide useful guidance on this matter.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In the course of its investigations, the Federal Competition Authority (FCA) may, on its own initiative, address information requests to competitors and customers. This has become a common approach, especially in cases involving remedies.

As regards the rights of third parties to intervene in merger proceedings, third parties whose legal or economic interests are affected by the concentration (ie, in particular, competitors and customers) may submit written comments to the FCA and the Federal Cartel Prosecutor (FCP). The deadline for the submission of written comments is two weeks after the date of publication of a short summary of the notification on the FCA's website. Such interveners, however, do not have a right to any specific treatment of their submission.

In the course of Phase II proceedings before the Cartel Court, third parties may at any time submit written comments to the court. The Austrian Cartel Act (ACA), however, explicitly provides that third-party interveners do not acquire party status in the proceedings by virtue of their submission. The Supreme Cartel Court held in early 2021 that the seller does not have party status in merger proceedings.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The FCA only publishes a short non-confidential summary of each notification on its website. If a statutory party requests the initiation of a Phase II review of the merger by the Cartel Court, the fact that such request has been made is also published on the FCA's website. In some cases, this publication consists of a single sentence, naming the statutory party having lodged the request and the date of the request. In other cases, however, the FCA has issued a press release setting out the competition problems identified in the course of its preliminary investigation.

Also, decisions by the Cartel Court clearing a concentration subject to conditions and obligations have to be published on the FCA's website. In cases involving remedies agreed between the notifying party and the FCA (so as to avoid a request for a Phase II investigation or to have such request withdrawn), the FCA also publishes the text of the commitments on its website.

The Cartel Court publishes the full text of decisions in Phase II. Decisions of the Cartel Court (including the court's reasoning) are published in the Ediktsdatei, a publicly available online collection of court decisions (however, the parties have the right to request that confidential information be redacted prior to publication, and this is done at the discretion of the court).

Business secrets are generally protected by way of a restriction on third parties access to the file. Persons who are not parties to the merger proceedings are only granted access to the file if the parties agree. Interveners in the proceedings are not considered to be parties.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

On a European level, the FCA is a member of the European Competition Network (ECN) and participates in the cooperation among ECN members. The FCA is also a member of the International Competition Network.

In its day-to-day practice, the FCA cooperates closely with the other ECN members, in particular with the German Federal Cartel Office. In particular, in cooperation with the German Federal Cartel Office, the FCA developed and published a joint guidance on the interpretation of the newly implemented transaction-value-based threshold. A final version of this guidance was published in July 2018. Therefore, where a transaction is notified not only in Austria, but also in other EU member states, the parties should ensure that the information provided to the authorities is consistent. It is, nevertheless, advisable to keep the statutory parties informed of any relevant procedural developments occurring in parallel proceedings before other competition authorities (or regulatory bodies).

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Decisions by the Cartel Court are subject to judicial review by the Supreme Court. Only the parties to the transaction and the statutory parties are entitled to appeal decisions of the Cartel Court; third parties may not appeal such decisions, irrespective of their interest in the case and of any intervention in the proceedings before the Cartel Court. The Supreme Court explicitly held in a decision in early 2021 that the seller is not entitled to appeal decisions of the Cartel Court.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Appeals may be lodged within a period of four weeks from the day on which the decision is served on the parties. The respective other party or parties to the proceedings are allowed a further four weeks to reply to the appeal. The Supreme Court must reach a decision within two months of receipt of the file, which is sent to the Supreme Court upon receipt of the reply to the appeal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, 429 transactions were notified in Austria, which is a decrease compared to previous years (495 notifications were submitted in 2019 and 481 filings in 2018). In the first quarter of 2021, 159 transactions were notified to the FCA. As in previous years, the statutory parties have been busy with merger review and significant enforcement action.

The FCA was also very active beside its case work, and published guidelines on the intra-group exemption of concentrations (following a judgment of the Supreme Court) and on distressed covid-19 related M&A (laying out its interpretation of the failing firm defence). It also published a position paper on competition in the digital space.

The guideline on the group exemption followed a much debated judgment of the Supreme Court, where a supermarket chain held a minority stake and some additional veto rights in a drug store chain (which competed with the supermarket at least in some product categories). When the supermarket chain vetoed certain investment plans, the question arose whether this could be an infringement of competition law. In line with the Supreme Court's judgment, the FCA set out the applicable principles. First, the cartel prohibition does not apply between companies that are part of the same economic entity. Second, the cartel prohibition applies between companies that do not form part of the same economic entity. Third, whether an economic entity can be assumed depends on the criteria laid down by the Court of Justice of the European Union (CJEU). Fourth, in case of joint ventures, an economic entity can only be assumed between the joint venture and one parent company (if at all). Finally, exercise of minority rights in the absence of an economic entity must be done in accordance with competition law.

In its guidelines on the failing firm defence, the FCA lays out the criteria developed by the EU Commission in its *Kali+Salz/MdK/Treuhand* decision in the context of the covid-19 crisis and also discusses granting state aid to the distressed company as an alternative to a concentration. The FCA agrees with that approach to the failing firm defence, namely that a concentration that leads to competitive concerns can still be cleared if (1) there is a failing firm, (2) there is no alternative to the concentration that would lead to less negative competitive effects and (3) the failing firm's market share would, in the absence of the concentration, fall to the acquirer anyway. The FCA adds to the EU Commission toolbox the possibility of clearing such an otherwise anticompetitive concentration on the basis of commitments.

In its position paper on competition in the digital space, the FCA touches on merger control in particular in two areas. First, it draws an interim conclusion on the transaction value-based thresholds introduced in 2017, stating that, to date, predominantly cases outside the digital economy have been notified. The FCA points out that this may be down to the fact that the traditional thresholds already catch most of these transactions, since transactions may be notifiable even in the absence of any target turnover in Austria. Second, the FCA says that in its substantive review of transactions in the digital field, the possible future adoption of the SIEC test would allow for more flexibility and advocates a respective amendment of the ACA (the draft amendment of the ACA indeed includes adoption of the SIEC test). The FCA also mentions that it lacks the necessary resources (in particular technical resources and personnel) to conduct large scale investigations that require the evaluation of big datasets, in particular in the digital field.

Reform proposals

35 | Are there current proposals to change the legislation?

In April 2021, the Ministries of Justice and Economic Affairs published a draft amendment of the ACA. The amendment was subsequently open for consultation, discussed in the first chamber of the Austrian parliament and passed by the first chamber on 7 July 2021. The approval of the second chamber of the Austrian parliament is pending at the time of writing, but changes to the amendment are not expected.

Besides the introduction of a second domestic turnover threshold of €1 million for at least two undertakings concerned, there will be changes in the substantive examination of mergers. The test is currently whether a dominant position is created or strengthened. The draft amendment would add the SIEC (significant impediment of effective competition) test but would keep the existing test. The legislative materials state that dominance would remain the main standard, but it would alternatively be possible to examine whether a transaction leads to an impediment of effective competition.

There will also be changes to the concept of a dominant position, with the introduction of specific factors to be considered in the analysis of dominance in digital markets. These include the importance of intermediary services of the allegedly dominant undertaking for the market access of other companies, access to data that is relevant for competition, and network effects. Besides this list of factors relevant to absolute dominant positions, there will be a separate section on relative market dominance, motivated by the intention to increasingly apply the concept of relative market dominance in the future, both in digital or conventional markets.

There will also be extended scope to clear an otherwise anticompetitive transaction, increasing the number of grounds for this from two to three: if it is to be expected that the concentration will also lead to improvements in the conditions of competition; if the transaction is necessary to maintain or improve the international competitiveness of the undertakings concerned; or if the concentration is necessary for the national economy. In all three cases, the expected advantages must outweigh the disadvantages of the transaction.

Further, the FCA will have to forward merger control notifications also to the Minister of Economic Affairs. This amendment is designed to ensure better coordination of merger control review with foreign investment review carried out by the Minister of Economic Affairs.

The amendment will likely enter into force by September 2021, with most changes becoming applicable on concentrations that will be notified (or closed, in the absence of a notification obligation) from 1 January 2022.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The number of transactions notified to the statutory parties in 2020 dropped to 429 (from 483 in 2019). In 2020, three transactions were cleared subject to remedies (*MedMedia/Universimed*, *Jacoby GM/Kwizda/Richter* and *Fohrenburg/Brau Union*) and three have so far been cleared subject to remedies in 2021 (*Recticel/Foam Partner*, *FUJIFILM/Hitachi*, *Post 102/D2D*), all with behavioural remedies. These remedies included obligations to continue to supply certain customers under unchanged terms for a certain time and agreeing not to use volume rebates. In the *FUJIFILM/Hitachi* case, the Federal Competition Authority (FCA) and the notifying parties agreed to remedies consisting of an extension of the remedy package agreed with the Japan Fair Trade Commission explicitly to Austria, namely continuing to supply a certain customer that is a competitor in other market areas, as well as implementing a firewall to prevent information flow from this customer relationship to the competing business areas within the notifying parties. This was one of the two cases that went to Phase II in 2020.

The other case that went to Phase II in 2020 was *Fohrenburger/Brau Union*. This concerned the production and supply of beer as well as the wholesale supply of beverages more broadly. The parties to this transaction already proposed remedies in Phase I, but these were found insufficient to eliminate the statutory parties' competition concerns in Phase I (relating, inter alia, to foreclosure regarding the wholesale market level, the entry into further gastronomy marketplaces as well as the acquirer's already strong market position). In Phase II before the Cartel Court, a remedy package was agreed. It included an acquisition ban relating to horizontal and downstream markets as well as a monitoring mechanism for the rebates applied by Brau Union to food retailers for the next three years.

In 2021, the FCA referred *Facebook/Kustomer* to the European Commission, which accepted the referral request. The case is currently pending. In 2019, the FCA joined a referral request by the German Federal Carterl Office regarding the proposed acquisition of certain rights and assets in relation to TachoSil, a surgical haemostatic product, by subsidiaries of Johnson & Johnson. These are just the most recent of a number of referral cases in recent years, such as the referral in relation to Knauf's acquisition of Armstrong World Industries' modular suspended ceilings business or the *Apple Inc/Shazam Entertainment Ltd* transaction, both of which were referred based on a request by the FCA in late 2017 and early 2018 respectively.

Also in 2020 and 2019, the FCA continued to vigorously pursue and fine violations of the stand-still obligation. To name just a few, the

FCA imposed fines against Castanea Rubra Assets GmbH (€100,000), Aktieselskabet af 5.5.2010 (€75,000) and WIG Wietersdorfer Holding GmbH (€70,000). In one case (KTM AG, Kiska GmbH), the FCA fined the parties for not having notified the acquisition of 1.1 per cent of the shares in Kiska by KTM, which pushed KTM's shareholding in the target just above the 25 per cent threshold (the fine amounted to €60,000).

Apart from that, there have been developments regarding the nature of evidence that the FCA reviews in assessing mergers. In particular, the FCA's filing form was updated in 2020, providing that internal documents have to submitted in cases with affected markets in every filing. For complex cases, it is advisable to provide economic evidence, at least in Phase II, and potentially earlier to avoid a Phase II referral. The acquisition of Tele2 Austria, a provider of fixed-line telecoms services, by Hutchison Drei Austria, one of the major Austrian mobile telecoms operators, is a prime example of good procedural cooperation with the authorities. This case has shown that a detailed economic analysis of a transaction within the four-week Phase I window is possible if the parties contact the authorities at an early stage of the transaction process, engage in pre-notification discussion of the scope of information and data required, and keep up the dialogue with the authorities throughout Phase I to swiftly provide any additional evidence required for the analysis.

The same applied for the *Comcast/Sky* case, which, because of the close cooperation regarding the authorities' media merger review, could be cleared unconditionally in Phase 1, using the two-week procedural extension tool. This matter required a solid understanding of the media market not only in Austria but more widely, combined with an ongoing dialogue with the authorities. In Phase II proceedings, the Cartel Court usually appoints an independent economic expert to review the evidence or conduct its own market investigations on which it will then report to the Cartel Court. It is also quite common that the FCA sends out questionnaires to market participants (eg, in the case *BGO Holding/hali/svoboda büromöbel*, the FCA conducted a market test with 300 customer surveys and 172 requests for information from competitors in Austria and abroad). Besides that, however, third parties still have a limited role in Austrian merger control, especially compared to the EU Merger Regulation (EUMR) process (they have no procedural rights and cannot challenge a clearance decision).

With regard to the transaction value based threshold, in June 2020, the FCA announced that it had initiated an investigation into Facebook's acquisition of Giphy, which was not notified to the FCA. Giphy is a US-based online platform that operates a library and search engine for GIFs and stickers. The FCA is investigating whether the transaction should have been notified under the transaction value based threshold, and in particular whether Giphy is active in Austria to a significant extent. The FCA is closely cooperating with the UK's CMA in this investigation. In March 2021, the FCA sent a statement of objections to Facebook.

Belgium

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is included in Book IV of the Code of Economic Law and the Royal Decree of 30 August 2013 on the notification of concentrations. On 2 May 2019, a new law was adopted that replaced Book IV of the Code of Economic Law in full, resulting in a new numbering of its articles. The decisions mentioned in this chapter shall be read as referring to the corresponding provisions of the new text.

The Belgian Competition Authority (the Authority) is responsible for the enforcement of the Competition Act. The Authority is a single and independent administrative body and is composed of a president, the Competition College (presided by the president), the Investigation and Prosecution Service (headed by the Competition Prosecutor General) and a management committee. The Investigation and Prosecution Service conducts the investigations (both in merger and conduct-related cases) and presents its cases to the Competition College, which has the decision-making power. The members of the Investigation and Prosecution Service can also issue decisions regarding simplified merger filings.

Scope of legislation

2 | What kinds of mergers are caught?

The definition of a concentration in Book IV of the Code of Economic Law is similar to that under the EU Merger Regulation (EUMR). A concentration occurs where:

- two previously independent undertakings merge;
- an undertaking or a person already controlling an undertaking acquires control over the whole or part of another undertaking; or
- two or more undertakings form a 'full-function' joint venture.

3 | What types of joint ventures are caught?

The merger control provisions of Book IV of the Code of Economic Law apply only to 'full-function' joint ventures, that is, those that perform 'on a lasting basis all the functions of an autonomous economic entity'. However, to the extent that a full-function joint venture between undertakings that remain independent could lead to coordination of the behaviour of the parent companies, such coordination will be assessed under the criteria set out in article IV.1 of the Code of Economic Law (ie, the Belgian equivalent to article 101 of the Treaty on the Functioning of the European Union (TFEU)).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Book IV of the Code of Economic Law defines 'control' fairly broadly, so that the acquisition of a minority shareholding can be caught in certain circumstances. As is the case under EU law, control means the possibility of exercising decisive influence on an undertaking, whether by contract or otherwise. For example, in cases where outright legal control is not acquired, rights attaching to use or ownership of assets, shareholders' agreements and board representation will be considered. In its *Belgacom SA/Vodafone Belgium SA/Belgacom Mobile SA* decision of 30 October 2006, the Authority confirmed that joint 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 joint venture. In its *Picanol NV/Tessenderlo Chemie NV* decision of 21 October 2013, the Authority found that Picanol NV, by purchasing 27.6 per cent of the shares in Tessenderlo Chemie NV, acquired de facto control over Tessenderlo Chemie NV because the remaining shares were dispersed among a large number of shareholders.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Concentrations must be notified if the parties have an aggregate Belgian turnover exceeding €100 million and at least two of the parties have an individual Belgian turnover of at least €40 million. Under the Code of Economic Law, for the purpose of establishing jurisdiction, Belgian turnover is the total turnover during the previous financial year attributable to the Belgian national market. The Authority seeks to align its approach regarding the geographic allocation of turnover with the practice of the European Commission. The Belgian rules for the calculation of turnover credit institutions and other financial institutions are the same as the EUMR rules (see article IV.8 of the Code of Economic Law).

The Authority confirmed in a decision on interim measures (*Alken-Maes NV/AB Inbev NV*) that it is competent to assess whether non-notifiable mergers constitute an abuse of a dominant position insofar as the potential anticompetitive effects go beyond those directly linked to the bringing about of the merger.

Book IV of the Code of Economic Law does not apply to concentrations falling under the EUMR (with exceptions, provided for in the EUMR).

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for concentrations that meet the turnover thresholds. Concentrations must be notified to the Competition Prosecutor General prior to completion of the transaction. There are no exceptions to this rule.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified in Belgium where the turnover thresholds are met, regardless of the location or nationality of the parties. Many foreign-to-foreign mergers may therefore trigger an obligation to file where the parties have sales in Belgium, even if they have no Belgian-based assets.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are special rules applicable to investment in certain sectors, including banking, insurance and media, but these generally apply irrespective of whether the investor is foreign. Also, the works council or employees' organisation of a Belgian company must be informed in advance of certain structural or other changes that will affect the company, including mergers and takeovers. In specific circumstances, consultation with the works council or union representatives concerning employment prospects and the organisation of work is mandatory.

Public undertakings and undertakings to which the public authorities have granted exclusive or specific rights are subject to the same rules as private undertakings insofar as this does not undermine their assigned role.

Since 2018, there has been a limited foreign investment control regime at Flemish level, providing for a type of 'emergency brake' procedure for strategic investments into government-owned entities. The rules allow the Flemish government to annul or declare void any foreign acquisition that would threaten the strategic interests or the independence of the Flemish Region or Flemish Community or both.

In April 2021, the federal government announced its plans to create an ad hoc investment screening commission within the Ministry of Economy. Going forwards, acquisitions of more than 25 per cent of the voting rights in companies active in critical infrastructures such as energy, transport, healthcare, communications and defence will be subject to a mandatory notification process. Further, the commission will base its assessment on national security considerations. Although the commission will have the power to prohibit acquisitions that threaten national security, the government has announced there will be a preference for mitigating any potential risks through remedies.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A concentration must be notified prior to its implementation. Draft agreements may be notified provided the parties explicitly declare that they aim to conclude a final agreement that does not differ from the draft agreement on any of the points relevant for a competition law assessment. The basic outline of the concentration, as well as related restrictions (such as a non-compete covenant) should be contained in the draft agreement. If this is not the case, or if the Competition College finds that the final agreement differs substantially from the notified draft on competition law issues, it may reject the first notification, in which case a second notification may be required, once the final agreement has been signed. This would result in delay for the review, and duplication of time, effort and costs.

Where the Competition College finds that the merging parties have failed to notify a concentration prior to its implementation, it may impose fines up to 1 per cent of the total turnover in the preceding financial year.

10 Which parties are responsible for filing and are filing fees required?

The notification must be made jointly by the parties if the merger creates a new undertaking, and by the parties or acquirers jointly in the case of acquisition of joint control. In the case of acquisition of sole control, the acquirer alone must notify.

No filing fees are required.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As is the case under the EU Merger Regulation, concentrations may not be implemented before clearance.

This suspension obligation does not prevent the implementation of a public bid or of a series of transactions in securities, provided that the concentration is notified without delay and 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, and on the basis of a derogation granted by the president.

At the request of the parties, the president can grant an exemption of the suspension obligation. This has happened a number of times in recent years.

An exemption of the suspension obligation was granted for the first time in 2008 when the Belgian state, through the Federal Participation and Investment Company, acquired a stake in Fortis and requested a derogation from the suspension obligation to implement a transaction aimed at rescuing a failing bank where further delay would have compromised the survival of the bank. In 2011, the Federal Participation and Investment Company again applied for and obtained a derogation from the suspension obligation in relation to its acquisition of Dexia Bank Belgium, after the Dexia Group got into financial difficulties.

The president, furthermore, granted exemptions to the suspension obligation in 2013, in the context of the initial public offering (IPO) of Bpost, on the basis of the urgency in light of the IPO and the fact that the transaction only required a simplified notification and did not entail any prima facie competition concerns; and, in 2015, in the context of the acquisition by Cordeel Group NV of Imtech Belgium Holding NV and Imtech België NV, based on the need to safeguard the business continuity of Imtech – a company in bankruptcy proceedings.

In 2019, the president granted an exemption to the suspension obligation in three different cases. First, in the context of the acquisition by Plukon Food Group of Pluimvee Slachterij Lammens, where a partial exemption to the suspension obligation was granted based on the necessity to take some safeguard measures in the context of Pluimvee Slachterij Lammens' bankruptcy proceedings. Second, in the context of the acquisition by Mirage Holdings of Maxi-Toys to enable an urgent capital increase, based on the need to ensure business continuity. Lastly, in the context of the acquisition of Euronics by Connect+ to avoid members of Euronics+ to leave the group, which would have impacted the value of the overall transaction.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a transaction is properly notified but implemented before clearance has been obtained (gun jumping), the Competition College may impose fines not exceeding 10 per cent of total turnover, and, in addition, periodic penalty payments not exceeding 5 per cent of the average daily turnover in the preceding financial year per day. These sanctions can be imposed even if the concentration is ultimately cleared.

In 2003, the Competition Council (now the Competition College) imposed a €1 million fine for breach of the suspension obligation under the Competition Act of 1991, but this decision was overturned by the Brussels Court of Appeal. In 2015, the Belgian Competition Authority (the Authority) imposed a symbolic fine of €5,000 on Cordeel Group NV for closing its acquisition of Imtech Belgium Holding NV and Imtech België NV before obtaining merger clearance.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for gun jumping equally apply in the case of a foreign-to-foreign transaction.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign-to-foreign mergers cannot be closed outside Belgium without breaching the suspension obligation, unless the president grants a derogation.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No, except that in this case the duty to notify rests with the bidder only and the suspension obligation is somewhat different.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

A considerable amount of detailed information (comparable to the information that is required for an EU Form CO filing) must be provided, including information concerning the parties, the relevant market or markets, details of the transaction and the personal and financial links of the parties with other companies. The information must be provided in accordance with Form CONC C/C. Derogations as to the amount of information to be provided may be obtained, although these are not binding on the Competition College. The form must be completed in a Belgian official language (French or Dutch), depending on where the parties have their principal seat of business. Where the merger agreement is signed between non-Belgian entities, the parties are free to choose the language of the filing (in practice, French or Dutch). Supporting documents must be submitted in their original language. Where this is not a Belgian official language or English, a translation in the language of the proceedings may be requested. Notifying parties should indicate in their notification which information constitutes business secrets for such information to be treated as strictly confidential.

Certain mergers that are unproblematic from a competition law perspective can be notified under the simplified procedure. Under this procedure, the information provision burden is slightly reduced, although significant amounts of information must still be provided.

Notifying parties may be fined for providing incorrect or incomplete information. The Authority has in the past fined notifying parties for the provision of incomplete information. For example, in 2012, the Authority fined Belgacom €75,000 for providing incomplete information in response to a request for information in the framework of its acquisition of Wireless Technologies BVBA. In 2015, it imposed a €50,000 fine on Sanoma for obstructing the review of the acquisition by De Persgroep Publishing NV of magazines Humo NV, Story, Teve-blad and Vitaya by failing to provide certain information in response to a request.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

A distinction can be made between simplified and non-simplified cases. Simplified cases are reviewed and cleared on an expedited timetable. Non-simplified cases can be dealt with in first phase or, if they raise serious doubts, may go into an in-depth second phase investigation. In January 2020, complementary rules concerning the simplified merger procedure entered into force that widened the scope of application of the simplified procedure.

For both simplified and non-simplified cases, notifying parties are required to engage in pre-notification discussions with the Authority, on the basis of a draft notification. Upon notification, the Competition Prosecutor General starts the investigation and appoints one of the prosecutors who will be in charge of coordinating the investigation. The prosecutor appointed by the Prosecutor General can request additional information from the parties, both during the pre-notification discussions and after formal notification. The prosecutors usually conduct their investigation by consulting online databases and contacting suppliers, customers and competitors.

In non-simplified cases, the prosecutor is required to submit a draft decision to the president, with copy to the notifying party or parties who have the right to respond in writing. Depending on the complexity of the transaction, if the prosecutor considers that the transaction is likely to lead to a significant impediment to effective competition, it will communicate its objections to the parties at least five working days before the submission of the draft decision to the president. The parties can submit commitments during this period and the prosecutor will consider the commitments in the draft decision. Under the normal procedure, a formal hearing before the Competition College is held, at least 10 working days after the prosecutor submits the draft decision.

18 What is the statutory timetable for clearance? Can it be speeded up?

Where the conditions for the simplified procedure are met and the concentration does not raise any competition concerns, a member of the Investigation and Prosecution Service will confirm this in a written decision to the notifying parties within 15 working days. This decision has the legal value of a Competition College clearance decision. In 2020, all but one of the simplified decisions were issued before the end of the statutory 15 working day review period.

In non-simplified cases, the Competition College must take a decision no later than 40 working days after notification (first-phase decision), failing which the transaction is deemed to be cleared. The Competition College may decide to initiate second-phase proceedings if the concentration raises serious doubts as to its effect on competition. A further 60 working days' investigation is then carried out, at the end of which the Competition College must reach its final decision (second-phase decision). There is no possibility of speeding up this process, but the time limits may be prolonged at the request of the parties. If the parties offer commitments, the first phase will be increased by 15 working days and the second phase by 20 working days. The law of 2 May 2019 that modified Book IV of the Code of Economic Law left the time periods unchanged. However, the prosecutor now has an extended deadline to submit its comments to the Competition College when the parties offer remedies. The new rules also introduced the possibility for the prosecutor to stop the clock at all stages of the proceedings.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test in Belgian merger control is aligned with the EU Merger Regulation as it provides that concentrations that do not 'significantly impede effective competition' in the Belgian market or in a substantial part of it must be cleared, while concentrations that would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, must be blocked (the SIEC test).

In its assessment, the Competition College must take into account factors such as the effectiveness of actual or potential competition (whether at a national or international level) as well as barriers to entry, the bargaining power of customers and suppliers, the maturity of the market, the economic and technical level of the market and alternative sources of supply.

The Competition College must clear concentrations where the parties' share on the relevant market in Belgium does not exceed 25 per cent.

20 | Is there a special substantive test for joint ventures?

Book IV of the Code of Economic Law does not provide for a special substantive test for the joint ventures it governs (ie, full-function joint ventures). However, to the extent that full-function joint ventures between undertakings that remain independent could lead to coordination of the behaviour of the parent companies, such coordination will be assessed under the criteria set out in article IV.1 of the Code of Economic Law, which is the Belgian equivalent to article 101 TFEU.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Under the SIEC test, the Belgian Competition Authority (the Authority) can examine the various types of harm that result from a merger (single dominance, unilateral effects, coordinated effects, conglomerate effects and vertical foreclosure). To date, its focus has been mainly on single dominance based primarily on a market share analysis. However, the Authority increasingly takes an economic approach based on the effects of the merger on competition, looking beyond market shares. For example, it recognises that market shares do not correctly reflect the dynamic process of bidding markets and heterogeneous, two-sided markets and that the actual effect of the merger on the competitive dynamics should be examined.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Authority assesses concentrations purely based on competition criteria. These competition criteria may be interpreted broadly. For example, in the past the Authority considered the plurality of the media as a factor in its assessment of mergers in the media sector. The powers of the Council of Ministers to clear a transaction blocked by the Competition Council on the basis of 'general interest' considerations have been abolished as of 2013.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

In its assessment, the Competition College must take into account factors such as the effectiveness of actual or potential competition (whether at a national or international level) as well as barriers to entry, the bargaining power of customers and suppliers, the maturity of the market, the economic and technical level of the market and alternative sources of supply.

The Competition College must clear concentrations where the parties' share on the relevant market in Belgium does not exceed 25 per cent.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition College may clear a transaction subject to conditions, as explained below. If the notifying party fails to provide an acceptable remedy to address the Belgian Competition Authority (the Authority)'s competition concerns, the Authority may prohibit the transaction.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The Competition College may make a clearance decision subject to structural or behavioural conditions, such as divestiture of assets or an undertaking not to open new outlets in Belgium for a given period of time. The parties can address competition concerns by modifying the terms of the transaction, including by giving divestment undertakings, in the course of both first-phase and second-phase proceedings.

The Authority has recently approved several concentrations subject to structural remedies. In 2018, the Authority approved the acquisition by Volvo Group Belgium NV of authorised retailer Kant NV subject to the closure of one of Volvo's points of sale and the authorisation of another retailer. In 2017, the Authority conditionally approved the acquisition by McKesson of Belmedis et al, subject to the divestment of one of their depots in the Ghent area. In 2016, the Authority made the merger between supermarket chains Delhaize NV and Koninklijke Ahold NV conditional upon the divestment of up to 23 stores and cleared the acquisition of Utopolis NV by Kinepolis NV subject to the divestment of two out of the four Utopolis cinemas.

In multiple cases, the Authority has proven to be receptive to behavioural commitments rather than relying solely on structural remedies to address concerns. In 2020, the Authority conditionally approved the acquisition by the Delorge Group of Coox, two car dealership groups for Audi, Seat, Skoda and Volkswagen commercial vehicles. The parties agreed that Delorge would maintain the status quo for a number of competitive parameters (eg, opening hours and holidays) and that it would treat Coox dealerships in the same way as Delorge dealerships with respect to replacement cars and the introduction of new technologies. Further, in *IPM/EDA-LAH*, the Authority took the Phase 0 or informal behavioural commitments offered by IPM into account in its assessment of the proposed acquisition by IPM of the press activities of Editions de l'Avenir (EDA) and l'Avenir Hebdo (LAH). The notifying party had informed the Investigation and Prosecution Service (IPS) two weeks before the IPS submitted its reasoned proposal to the College that it had decided it would maintain the newspaper *L'Avenir* as a separate title for a period of at least five years with its own editorial staff and a number of specific services, thereby pre-emptively addressing any potential competition concerns the Authority may have had. In 2019, the Authority approved the acquisition of sole control over media group, De Vijver Media, by telecommunications provider Telenet, who would be fully vertically integrated post-transaction, subject to a set of behavioural commitments aimed at guaranteeing access to its television channels to competing distribution platforms on the one hand, and access to both its distribution and advanced advertising platforms and its user data to competing broadcasters on the other hand. In 2017, the Authority approved the acquisition by telecommunications provider Telenet of cable operator Coditel subject to Telenet granting a third party (Orange) access to the Coditel network based on defined technical terms and price-setting mechanism, and not to offer any new quad-play services in the Coditel area during a certain period. In 2016, the Authority made the acquisition of AMP and LS Distribution Benelux by postal incumbent Bpost, active in press and small parcel distribution, press subscription management services and operation of retail press outlets, subject to behavioural remedies aimed at preserving competition between different distribution systems and guaranteeing the equal treatment and non-discrimination of all the points of sale. In 2015, the Authority conditionally approved the acquisition by media company De Persgroep Publishing NV of several Belgian magazines (Humo, Teve-blad, Story and Vitaya). De Persgroep Publishing NV, inter alia, committed to maintaining Humo, Story and Teve-blad on the market for a period of three years to safeguard the plurality of media.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In the first-phase investigation, the notifying parties have five working days from the day they are informed of the prosecutor's objections (which needs to occur at the latest on working day 20) to formally offer remedies. In the second phase, they have 20 working days from the opening of the second phase investigation to do so. The notifying parties also have the possibility to anticipate any competition concerns by offering Phase 0 or informal commitments prior to the IPS submitting its reasoned proposal to the Competition College *(IPM/EDA-LAH)*.

In recent cases, the remedies documents attached to the Authority's conditional clearance decisions have taken a similar form as the model text of commitments under the EU Merger Regulation (EUMR), including a detailed description of the conditions and obligations attached to the clearance, the assets to be divested (in the case of a divestiture remedy), reporting obligations to the Authority, the conditions that need to be met by the purchaser of the remedy assets, etc. It is now standard practice to include the possibility for the notifying parties to request a waiver or modification of (part of) the commitments.

In 2018, the Authority lifted one of the conditions (the mandatory notification to the Authority of any organic growth) imposed on leading movie theatre company Kinepolis in 1997 when the authority conditionally approved the merger of cinema groups Bert and Claeys, resulting in the creation of Kinepolis. In late 2018, the Market Court annulled that decision on procedural grounds. The Authority subsequently adopted a new decision in 2019, lifting the same condition subject to some limitations. However, in October 2019, the Market Court again annulled the Authority's decision and completely lifted the commitment regarding organic growth. It further referred the case back to the Authority to determine an appropriate transition period for the termination of that condition. In February 2020, the Authority determined a period of 18 months, ending on 11 August 2021 would be an appropriate, effective and proportionate transitional period, after which Kinepolis will be free to grow organically without any prior authorisation of the Authority.

In 2015, the incumbent telecom operator Proximus (formerly Belgacom) requested the Authority to lift the commitments imposed in 2011 in the context of its acquisition of Wireless Technologies BVBA and its subsidiary The Phone House (TPH), a retailer of telecom equipment and services. To alleviate the transaction's anticompetitive effects created through vertical overlaps between the parties' activities, Belgacom had offered to divest 25 to 35 TPH shops, transform two of its Belgacom Centres into TPH shops, and safeguard the multi-operator model of TPH shops for at least five years (including the adoption of a Chinese wall policy). The commitments contained a review clause that was triggered if the sales of competitors' products constituted less than 30 per cent of the TPH's total turnover. The Authority granted Proximus' request to lift the commitments, as it concluded that the importance of TPH shops as distribution channels for Proximus' competitors had decreased considerably since 2011, which made customer foreclosure by Proximus very unlikely. The Authority's approval was conditional upon Proximus adopting a lenient approach in terminating the existing agency agreements; communicating transparently to customers when a certain shop had been transformed from the multi-operator to the exclusive model; and the adoption of a Chinese wall policy to protect any sensitive information available to TPH shops.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Competition College has not imposed any remedies in a foreign-to-foreign merger case.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Even though the Competition Act does not provide any explicit reference to ancillary restrictions, its approach should be the same as under the EUMR. Therefore, competition restrictions (such as non-compete clauses) agreed in connection with a concentration will be covered by the clearance decision provided they are directly related and necessary to the implementation of the concentration. However, they are not expressly covered in the decision, so the risk of incorrectly categorising them as ancillary lies with the parties. Where they are not covered by the decision, they remain subject to the usual competition rules on restrictive agreements. The Authority confirmed this approach in its 2017 decision approving the acquisition by Brussels Airlines of Thomas Cook. Following the merger approval, the Authority opened an investigation regarding potentially anticompetitive practices resulting from certain clauses included in the commercial service agreement concluded between Brussels Airlines and Thomas Cook Belgium, of which the Authority became aware when it examined the acquisition. On 1 July 2020, the Authority found that the relevant clauses gave rise to an infringement by object and by effect. However, it decided not to impose a fine given that the problematic clauses were never implemented and that the agreement had been terminated following the bankruptcy of Thomas Cook Belgium.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Any individual or legal entity showing 'sufficient interest' can intervene during the investigation. The Competition Act allows the Belgian Competition Authority (the Authority) to consult any person it deems appropriate for the purpose of its investigation, and contacts with third parties, including competitors and customers, are routinely made. It has become standard practice in cases that give rise to competition concerns for the Authority to hear interested third parties (see most recently *Delorge/Coox*, *AVS Group GmbH/De Fero*, *Conway/Alvadis*, *Telenet/De Vijver Media*, *Ineos Oxide/RWE Generation Belgium*). Recently, the Authority has been using online investigation tools to collect feedback from customers and competitors (eg, in *Volvo Belgium/Kant Group*). Finally, the Supreme Court, when deciding on a reference for preliminary ruling in 2008, confirmed that interested third parties can be authorised by the Competition Council (and, by analogy, now by the Competition College) to inspect and make copies of certain non-confidential documents in the investigation file, provided that these documents are strictly necessary to enable the interested third parties to effectively intervene and raise any competition concerns. The Competition College has since granted interested third parties access to non-confidential extracts from the draft decision.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Extracts of notifications (including the names of the parties) and decisions of the Competition College are published in the Official Gazette and on the website of the Authority.

Members of the Investigation and Prosecution Service and the Competition College may not use or divulge documents or information supplied in the notification for purposes other than those of the investigation. However, members of the Authority are freed from this duty of confidentiality when they give testimony in court. Responsibility for clearly identifying and marking confidential information as such lies with the party seeking protection.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Authority is a member of the European Competition Network, the European Competition Authorities Network and the International Competition Network.

The Competition Act allows the president, the Competition Prosecutor General and the members of the personnel of the Authority to exchange confidential information with the European Commission and the competition authorities of the other member states and use in evidence information received from them.

The president represents Belgium in European and international competition organisations and participates in meetings of European and international institutions.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

All decisions taken by the Competition College in the field of merger control, including decisions of the members of the Investigation and Prosecution Service under the simplified procedure, can be appealed to the Market Court, a specialised chamber of the Brussels Court of Appeal. Interested third parties can appeal decisions if they previously requested to intervene during the proceedings before the Competition College leading to these decisions.

The Competition Act provides that the Market Court does not have full jurisdiction when reviewing merger decisions and can only annul or uphold the decisions. On 11 February 2021, a new bill entered into force clarifying that a request to lift or amend the conditions attached to a merger clearance decision of the Belgian Competition Authority (the Authority) is also subject to this exception to the principle of full jurisdiction of the Market Court. This means that the Market Court is only allowed to determine whether the Authority's decision to uphold, amend or lift conditions should be annulled or upheld. If an annulment takes place, the Market Court has to refer the case back to the Authority.

A judgment by the Market Court can itself be reviewed on points of law and procedure only by the Supreme Court. The president represents the Competition Authority in appeal procedures before the Market Court and the Supreme Court.

Decisions of the prosecutors on the confidentiality of submitted information can be appealed to the president within three working days of notification of the decision.

Time frame

33 What is the usual time frame for appeal or judicial review?

Final decisions of the Competition College in the field of merger control may be appealed to the Market Court within 30 days of notification of the decision to the parties. Third parties who intervened in the merger proceedings may also appeal the decision within 30 days of notification of the decision.

In general, the Market Court processes appeals brought against decisions of the Authority in merger control cases quickly (one year or even less).

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

There is no specific severity or leniency in the Competition College's enforcement policy as regards foreign-to-foreign mergers.

Mergers and acquisitions in the energy, telecommunications and financial sectors may attract particular attention from the Belgian Competition Authority (the Authority).

Reform proposals

35 Are there current proposals to change the legislation?

On 3 June 2019 a new law entered into force amending Book IV of the Code of Economic Law. The new rules streamlined merger control and other proceedings before the Authority. While the duration of the simplified Phase I and Phase II review periods remained unchanged, the prosecutors leading a merger control investigation were granted more leeway to stop the clock at all stages of proceedings (including during a simplified procedure), as opposed to only in Phase I as was the case previously. The prosecutor also has five more working days (10 instead of five) to pass its recommendations to the Competition College if the notifying parties submit a remedy proposal.

On 20 January 2020, complementary rules concerning the simplified merger procedure entered into force. These stipulate that the Authority can now additionally apply the simplified procedure in the following cases:

1. in mergers with horizontal overlaps where the combined market share of the merging parties is less than 50 per cent and:
   - the increase in the Herfindahl-Hirschman Index resulting from the transaction remains below 150; or
   - the increase in market share remains below 2 per cent; and

2 in mergers where the Authority, taking into account all relevant circumstances, considers that there is no doubt on the admissibility of the concentration and that the concentration does not raise competition concerns given that:
- the merging parties are active on the same product and geographical market and their combined market shares would be higher than 25 per cent but lower than 40 per cent; or
- one or several of the parties involved in a vertical merger has a market share over 25 per cent but below 40 per cent either upstream or downstream.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the Belgian Competition Authority (the Authority) adopted 30 decisions, compared to 28 decisions in 2019. All but one notified concentrations were cleared, with the vast majority of the clearance decisions (25) being adopted after a simplified review procedure. The *Dossche/Ceres* concentration was withdrawn after the Authority opened an in-depth investigation in January 2020. Two concentrations were reviewed by the Authority after a referral by the European Commission based on Article 4(4) EUMR: *Kuwait Petroleum/Uhoda* and *Corendon Holding/Sunscreen Bidco*.

In 2020, the Authority imposed remedies in one case, *Delorge/Coox*. It also reviewed for a second time the commitments it had imposed on Kinepolis in 1997 when it conditionally cleared the merger of the Bert and Claeys groups into the Kinepolis cinema groups. The Authority further accepted informal Phase 0 commitments in *IPM/EDA-LAH* resulting in an unconditional Phase I clearance of the transaction.

Delorge/Coox

On 20 November 2020, the Authority – following an in-depth investigation opened in June 2020 – conditionally cleared the proposed acquisition by the Delorge Group of Coox, two authorised car dealers of Audi, Skoda and Volkswagen cars and light commercial vehicles in the Limburg province. During its Phase II investigation, the Authority organised, for the first time, a data room procedure to enable the notifying party's economic advisers to assess the switching analysis conducted by the Authority. The Authority raised concerns as to the impact of the concentration on a number of quality parameters on which the parties competed. To alleviate the Authority's concerns, Delorge committed to a set of behavioural remedies, including to:
- maintain the status quo with respect to a number of competitive parameters such as opening hours and holiday closures for a period of at least three years;
- grant the same pro rata number of replacement cars to the Coox garages as the number of replacement cars made available to the Delorge garages for a period of at least three years; and
- introduce a new technology in the Coox garages from which the Delorge garages already benefit within a period of three years.

Kinepolis

On 11 February 2020, the Authority decided that, as of 12 August 2021, following an 18-month transitional period, Kinepolis will be free to grow organically and operate new cinemas without any prior authorisation from the Authority. This decision follows the annulment by the Market Court of an earlier decision taken in March 2019 to subject the partial lifting of Kinepolis' obligation to request prior authorisation for organic growth to certain conditions in relation to the size (no authorisation required if a new cinema has a maximum of seven theatres and a maximum of 1,125 seats) and the location (10km radius around existing Kinepolis cinema complex) of any new cinema complex. before that, the Market Court had already annulled a 2018 decision taken by the Authority to partially lift commitments entered into by Kinepolis in the context of the merger of the Bert and Claeys groups in 1997.

IPM/EDA-LAH

On 22 December 2020, the Authority unconditionally cleared the proposed acquisition by media group IPM of the press activities of Editions de l'Avenir (EDA) and of l'Avenir Hebdo (LAH), together l'Avenir Group. The acquisition concerned the daily newspaper *L'Avenir*, the weekly *Le Journal des Enfants* and the weekly magazines *Moustique* and *Télé Pocket* and would result in a duopoly on the market for newspapers in French-speaking Belgium between IPM and Rossel. In its analysis of unilateral effects, the Authority took into account that the parties had offered informal or Phase 0 commitments. Indeed, two weeks before the Investigation and Prosecution Service submitted its reasoned proposal to the College, the notifying party decided it would maintain the newspaper *L'Avenir* as a separate title for a period of at least five years with its own editorial staff and a number of specific services.

In the first five months of 2021, the Authority has already cleared seven concentrations, all but one under the simplified procedure. The *Cordes & Graefe/FACQ* case was reviewed and cleared by the Authority after a partial referral by the European commission on the basis of article 4(4) EUMR. On 31 May 2021, the Authority cleared the proposed acquisition of Mobile Vikings by Proximus unconditionally after a Phase I investigation.

Bosnia and Herzegovina

Naida Čustović

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In Bosnia and Herzegovina, merger control, as well as other aspects of competition law, is substantially governed by the Competition Act of Bosnia and Herzegovina (the Act). The Act became effective as of 27 July 2005. It was enacted at the state level and applies throughout the entire territory of Bosnia and Herzegovina, that is, in both entities (the Federation of Bosnia and Herzegovina and the Republic of Srpska) and in the Brčko District. The Act was amended twice so far, in 2007 and 2009.

In addition to the Act, numerous regulations were adopted by the Bosnia and Herzegovina Competition Council (the Council), the authority responsible for enforcement of the Act and for monitoring competition in the market. These regulations set out the procedural framework and define the standards for application of the Act. The most relevant regulations for merger control are the Regulation on the Notification of Concentrations and the Criteria for the Assessment of Concentrations, and the Regulation on the Definition of Relevant Markets.

The competition legislation of Bosnia and Herzegovina is generally in line with the rules and principles of the EU competition law regime. Moreover, in practice, the Council often uses the EU competition law standards as a guide to deciding the cases brought before it.

The Council is an independent authority established by the Act. It has exclusive competence to decide on the existence of activities prohibited by competition law in the market of Bosnia and Herzegovina. The Council has six members. Three members are appointed by the Council of Ministers of Bosnia and Herzegovina, with one representative from each of the constituent nations. Two members are appointed by the government of the Federation of Bosnia and Herzegovina, and one member is appointed by the government of the Republic of Srpska. The mandate of all members of the Council lasts for six years with an option to be extended for an additional six years. A new president of the Council is appointed every year. The Council submits its annual reports to the Council of Ministers of Bosnia and Herzegovina.

More information about the Council and its activities can be found at www.bihkonk.gov.ba.

Scope of legislation

2 | What kinds of mergers are caught?

The Act defines a concentration as:

- a merger by absorption or a merger by the formation of a new entity;
- the acquisition of control or a controlling interest by one or more undertakings over another undertaking or a part thereof, or a group of undertakings or a part thereof through the acquisition of a majority shareholding, or the acquisition of a majority of voting rights, or in any other way under the company laws of Bosnia and Herzegovina; or
- the creation of a full-function joint venture.

Intra-group acquisitions and restructurings are not caught by the merger control rules.

3 | What types of joint ventures are caught?

Joint ventures performing on a lasting basis all the functions of an autonomous economic entity (full-function joint ventures) are caught by the Act.

Joint ventures that aim to coordinate the market behaviour of two or more undertakings, whereby each of them maintains its legal and economic autonomy, are not subject to the merger control regime, but may be covered by the provisions on restrictive agreements.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act provides a rather general and broad definition of 'control' without specifying any details that may lead to the existence of control within the meaning of the Act.

Following the wording of the Act, 'control' exists when one or more undertakings jointly have a dominant influence over another undertaking or group of undertakings, based on the law, an agreement or any other means, and considering all legal circumstances and facts. 'Control' is deemed to exist when one or more undertakings jointly:

- have a majority shareholding in an undertaking;
- have a majority of the voting rights; or
- have the right to appoint more than half of the management board members, the supervisory board members, or the appropriate body that manages or controls operations, or otherwise has the right to manage the operations of the undertaking.

Given this broad definition of 'control', the acquisition of a minority interest that enables the holder to exercise a dominant influence over an undertaking or group of undertakings is subject to the merger control regime.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

According to the Act, the Council has to be notified of an intended concentration if, in the preceding business year:

1. the combined worldwide turnover of the undertakings concerned exceeds 100 million Bosnia and Herzegovina convertible marks; and

2 (a) the individual turnover of each of at least two undertakings concerned in Bosnia and Herzegovina amounts to at least 8 million Bosnia and Herzegovina convertible marks; or (b) the undertakings concerned together have a market share of more than 40 per cent on the relevant market in Bosnia and Herzegovina (according to the interpretation applied by the Council, this threshold can be met by one undertaking alone).

The Regulation on the Notification of Concentrations and the Criteria for the Assessment of Concentrations (Regulation) adopted by the Council, effective as of 5 May 2010, stipulates that if the undertakings concerned have registered corporate seats in Bosnia and Herzegovina, the concentration shall be notified to the Council if the local threshold (2)(a) or (b) is satisfied, regardless of whether the worldwide threshold (1) is also met. The Council intended to clarify the wording of the Act with this provision. However, its interpretation has led to confusion. In particular, it was unclear whether the Council is at all competent to interpret the Act in such way in a legally binding manner and whether this provision may also have an impact on foreign-to-foreign mergers. Therefore, we filed a request for clarification to the Council. In its rather broad reply, the Council stated that if some of the undertakings concerned have their registered corporate seat outside Bosnia and Herzegovina or some undertakings concerned have their registered corporate seat abroad, but have subsidiaries in Bosnia and Herzegovina, both the local threshold (2)(a) or (b) and the worldwide threshold (1) have to be met to trigger a filing obligation. Therefore, one may conclude that the 'clarification' provided by the Council in the Regulation (ie, notification required if only the local threshold (2)(a) or (b) is satisfied) applies only to cases where all undertakings concerned are purely domestic undertakings (ie, undertakings that have local shareholders and are not subsidiaries of foreign legal entities).

The aggregate turnover of the undertakings concerned is to be calculated on a worldwide consolidated basis. Turnover generated by sales between the undertakings concerned is not taken into account.

In the case of an acquisition of one or more parts of an undertaking or of a group of undertakings, irrespective of whether such parts constitute independent legal entities, only the turnover pertaining to the parts subject to the concentration is taken into account. Should there be more than one concentration of the undertakings concerned within a two-year period, they will be considered as one single transaction and it shall be deemed that the transaction occurred on the date of the occurrence of the last transaction.

If the undertaking concerned is a bank or financial institution, the turnover shall consist of the following: income from interest and similar income sources; income from securities; commissions; net profit from financial operations; and other operating income.

For insurance and reinsurance companies, the turnover shall consist of gross premiums, which include all received and expected premiums, as well as reinsurance premiums, but after the deduction of taxes and fees charged by reference to the amounts of the individual premiums or the aggregate amount of premiums.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

As a general rule, the Council shall be notified of all concentrations that exceed the thresholds set forth in the Act.

An exemption from the filing obligation exists in cases in which banks, financial institutions or insurance companies acquire shares in the ordinary course of business with the intention of reselling them within the following 12 months, provided that in the meantime the shares are not used to influence the market behaviour of the undertaking concerned. Furthermore, the acquisition of control by a bankruptcy administrator or liquidation administrator in the course of bankruptcy or liquidation proceedings does not require that the Council be notified.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign concentrations are covered by the Act if the turnover thresholds are exceeded.

We are not aware of any cases or discussions in which the Council would have indicated that an effects-based exemption from the filing obligation (where the turnover thresholds were met) would be accepted. To date, the Council appeared to be unwilling to consider arguments in that respect.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special rules related to foreign investments, special sectors or other relevant approvals in the competition law of Bosnia and Herzegovina. However, in certain business sectors, such as banking, telecommunications, energy and pharmaceuticals, additional regulatory provisions exist that need to be observed. For example, certain changes in the shareholding structure of a telecommunication provider require a notification to or approval by the competent telecommunications agency. This notification or approval from the telecommunications agency is required in addition to the merger approval by the competition authority, if any.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

According to the Competition Act of Bosnia and Herzegovina (the Act), the Bosnia and Herzegovina Competition Council (the Council) has to be notified of an intended concentration within 15 days of the signing of the respective agreement, the announcement of a public offer of shares, or an acquisition of control, whichever (of the three) occurs first. However, the undertakings concerned have the option to notify the concentration already once they can demonstrate their intention to undertake the concentration based on, for example, the conclusion of an agreement in principle, a memorandum of understanding, a letter of intent signed by all parties to the concentration or a public announcement of the intention to submit a purchase offer.

Failure to notify the Council of the concentration within due time may result in a fine of up to 1 per cent of the total turnover of the undertakings concerned, realised in the business year preceding the concentration. In addition, a fine of between 5,000 and 15,000 Bosnia and Herzegovina convertible marks may be imposed on the responsible persons within the undertakings concerned. Such fines may be imposed regardless of whether the concentration was implemented or not at the moment when the Council learned of the concentration. Therefore, fines for a failure to notify the Council of a concentration in due time may be substantial (depending on the undertaking's turnover). In this respect, the Council imposed fines for late filling in several cases (2013) ranging between 19,000 and 310,000 Bosnia and Herzegovina convertible marks. The Council may also impose fines for the implementation of a concentration prior to or without clearance.

10 Which parties are responsible for filing and are filing fees required?

Responsibility for notifying the Council of the acquisition of a majority shareholding or a majority of voting rights or other controlling interests rests with the acquirer. In the case of an acquisition of control based on a public offering of shares, the offeror has the filing responsibility. In the case of joint ventures and in all other cases, the responsibility to notify the Council of the transaction lies with all undertakings concerned.

An initial filing fee of 2,000 Bosnia and Herzegovina convertible marks is payable prior to the submission of the notification, and proof of payment must be submitted to the Council with the notification. In addition, a fee of 5,000 Bosnia and Herzegovina convertible marks is payable after the Council issues a Phase I clearance decision without performing an in-depth investigation. A fee of 0.03 per cent of the total annual turnover of each of at least two undertakings concerned, generated through the sale of goods or services in the market of Bosnia and Herzegovina (up to 50,000 Bosnia and Herzegovina convertible marks) is payable if the Council adopts its decision after an in-depth (Phase II) investigation. If the Council dismisses the notification because of the requirements for filing not being met, a fee of 1,000 Bosnia and Herzegovina convertible marks is payable. In practice, the Council will not issue its decision unless the fees are paid.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Act provides that the intended concentration must not be implemented until the Council passes a decision authorising the transaction or until the waiting period expires (suspension obligation).

Following the submission of the notification, the authority first assesses the completeness of the filing. The law does not provide a specific time frame for this stage. In practice, it is thus recommended to be in contact with the authority during this stage to ensure that this period is short. Once the filing is accepted as complete, the Council issues a certificate of completeness. If the Council, upon review of the submitted notification, takes the view that the notified concentration does not raise any competition law concerns in Bosnia and Herzegovina, a clearance decision for the concentration is issued within 30 days of the date of issuance of the certificate. If the Council does not take any decision within such 30-day period, the concentration shall be deemed to be approved.

If the Council takes the view that the intended concentration is likely to have a negative effect on competition in the market, it can initiate an in-depth (Phase II) investigation. Such investigation may take up to three months, meaning that the Competition Council is obligated to issue a final decision within three months of the day of adoption of a decision on initiation of proceedings.

An extension of an additional three months is possible if the intended concentration involves a sensitive business sector and in cases in which it is necessary to carry out additional analysis defining the state of facts or an examination of evidence. If the Council initiates a Phase II investigation but fails to issue a decision within the abovementioned deadline, the concentration shall be deemed to be approved.

The suspension obligation does not prevent the implementation of a takeover bid of which the competent authority has been notified in accordance with the respective public takeover bids regulations as provided in article 18, paragraph 10 of the Act.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing a concentration without obtaining prior clearance by the Council may result in a fine of up to 10 per cent of the parties' total turnover in the year preceding the closing of the concentration. Individuals responsible within the undertakings may in that case be subject to fines ranging from 15,000 to 50,000 Bosnia and Herzegovina convertible marks. These fines were introduced with the amendments to the Act adopted in October 2009. Previously, there were no sanctions prescribed by the law in the event that the parties implemented the transaction before obtaining clearance, although the suspension obligation did exist.

The statute of limitations for infringing the suspension obligation is five years from the date of the infringement (ie, the day of closing the transaction without clearance).

In addition, if the Council was not notified of a concentration and it later finds that such concentration had negative effects on competition in the market of Bosnia and Herzegovina, the Council may order that the acquired shares and assets be sold. The Council may also restrict the voting rights of the acquiring undertaking or order the cessation of the joint venture or any other form of acquired control that the Council believes restricts competition in the market of Bosnia and Herzegovina.

In March 2010, for the first time after the 2009 amendments to the Act, the Council imposed a fine on an undertaking for closing the concentration before obtaining prior clearance from the Council. The fine amounted to 200,000 Bosnia and Herzegovina convertible marks and was imposed on a local company engaged in the trade of petroleum and petroleum products for failure to notify the Council of the acquisition of 10 petrol stations from another local company, as well as for closing the concentration before obtaining prior clearance from the Council. For procedural reasons, this fine was reimposed by the Council in 2011. Apart from that, the Council imposed in three more cases fines for failure to notify a concentration and breach of the suspension obligation in 2011, although at lower amounts (40,000, 50,000 and 70,000 Bosnia and Herzegovina convertible marks). In 2012, the Council did not impose any sanctions for closing before clearance. In 2013, in one case, a fine of 656,667 Bosnia and Herzegovina convertible marks was imposed on the undertakings concerned for late filing and closing before clearance. In this case, however, the decision of the Council was challenged by one of the undertakings concerned and, consequently, the fine was substantially lowered. In 2014, the Council imposed in one case a fine of 26,500 Bosnia and Herzegovina convertible marks for failure to notify the concentration and closing before clearance.

In 2015, 2017, 2018 and 2019, the Council did not impose any sanctions for closing before clearance or for failure to notify a concentration, while in 2016 fines were imposed in two cases for failure to notify the concentrations and for implementation of the concentrations without decision of the Council. In one case, two undertakings with fines of 30,000 and 7,500 Bosnia and Herzegovina convertible marks, respectively, for failure to notify the concentration, and with fines of 60,000 and 15,000 Bosnia and Herzegovina convertible marks, respectively, for implementation of the concentration without decision of the Council. In the second case, a fine in an amount of 10,000 Bosnia and Herzegovina convertible marks was imposed to the undertaking concerned for a failure to notify the concentration within the statutory deadline. In 2020, the Council imposed fines in two instances: in the first case, four undertakings have been fined for the implementation of the concentration without decision of the Council in the payment platforms and other electronic services market in Bosnia and Herzegovina (however, the amounts of the fines are not publicly available); and in the second case, one undertaking was fined in an amount of 20,000 Bosnia and Herzegovina convertible marks for a failure to notify the concentration within the statutory deadline in the bus transportation of passengers services market in Bosnia and Herzegovina.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable in cases involving foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign-to-foreign mergers are assessed in the same way as local concentrations. The Act and the applicable regulations do not provide for hold-separate (carve-out) solutions. Although discussed in practice, such solutions have not yet been tested with the authorities in Bosnia and Herzegovina.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The suspension obligation does not prevent the implementation of a takeover bid of which the competent authority has been notified in accordance with the respective public takeover bid regulations as provided in article 18, paragraph 10 of the Act.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The information and documentation required for the notification of an intended concentration is set out in the Regulation on the Notification of Concentrations and the Criteria for the Assessment of Concentrations. The following information, inter alia, is to be provided to the Council when filing a notification:

- names, seats and business activities of the undertakings concerned;
- names and contact details of persons authorised to represent the undertakings concerned before the Council;
- description of the intended concentration;
- legal basis of the concentration;
- information regarding the financial status and total turnover of the undertakings concerned (on both a worldwide and national level) for the business year preceding the concentration;
- information about the relevant market and the market shares of the undertakings concerned;
- list of the main competitors and estimates of their market shares;
- information on the ownership structure of the undertakings concerned;
- information about related parties;
- description of distribution and retail networks used by the undertakings concerned;
- description of planned research projects and investments regarding the undertakings concerned; and
- reasons for the intended concentration and detailed description of the expected benefits for customers.

Documents that have to be enclosed in a notification are, inter alia:

- excerpts from the commercial registry or other equivalent documents showing the relevant details regarding the undertakings concerned;
- powers of attorney for the persons authorised to represent the undertakings concerned before the Council;
- an original or a certified copy of the legal basis of the intended concentration;
- financial statements of the undertakings concerned for the business year preceding the concentration; and
- organisational charts of the undertakings concerned.

The Council may request additional information and documentation that it deems necessary or useful when considering a concentration. If the notifying party cannot submit certain information or a requested document despite all reasonable efforts, it may provide the Council with the brief reasonable explanation as to why that information or a particular document is not available.

The notification and all enclosures thereto have to be provided in one of the official languages of Bosnia and Herzegovina. Furthermore, all documents submitted to the Council have to be in the form of an original or a certified copy and apostilled (depending on the jurisdiction of origin of a particular document).

Provision of incorrect or incomplete information to the Council or refusal of a party to comply with an information request may result in a fine of up to 1 per cent of the total turnover of the undertakings concerned, realised in the business year preceding the concentration. In addition, a fine of between 5,000 and 15,000 Bosnia and Herzegovina convertible marks may be imposed on the responsible persons within the undertakings concerned.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The Act provides that the intended concentration must not be implemented until the Council passes a decision authorising the transaction or until the waiting period expires (suspension obligation).

Following the submission of the notification, the authority first assesses the completeness of the filing. The law does not provide a specific time frame for this stage. In practice, it is thus recommended to be in contact with the authority during this stage to ensure that this period is short. Once the filing is accepted as complete, the Council issues a certificate of completeness. If the Council, upon review of the submitted notification, takes the view that the notified concentration does not raise any competition law concerns in Bosnia and Herzegovina, a clearance decision for the concentration is issued within 30 days of the date of issuance of the certificate. If the Council does not take any decision within such 30-day period, the concentration shall be deemed to be approved.

If the Council takes the view that the intended concentration is likely to have a negative effect on competition in the market, it can initiate an in-depth (Phase II) investigation. Such investigation may take up to three months, meaning that the Competition Council is obligated to issue a final decision within three months of the day of adoption of a decision on initiation of proceedings.

An extension of an additional three months is possible if the intended concentration involves a sensitive business sector and in cases in which it is necessary to carry out additional analysis defining the state of facts or an examination of evidence. If the Council initiates a Phase II investigation but fails to issue a decision within the above-mentioned deadline, the concentration shall be deemed to be approved.

The suspension obligation does not prevent the implementation of a takeover bid of which the competent authority has been notified in accordance with the respective public takeover bids regulations as provided in article 18, paragraph 10 of the Act.

18 What is the statutory timetable for clearance? Can it be speeded up?

Once the Council issues a certificate of completeness, it has to decide within 30 days whether the proposed concentration raises competition law concerns in Bosnia and Herzegovina. If the Council believes that the proposed concentration will not have any negative effect on competition, it will issue a (Phase I) clearance decision. If the Council does not issue a decision within the 30-day period, the concentration shall be deemed to be approved.

If the Council takes the view that the intended concentration could have a negative effect on competition, it may initiate a Phase II investigation. A Phase II investigation may take up to three months, meaning that the Competition Council is obligated to issue a final decision within three months following the date on which the resolution authorising the institution to conduct Phase II proceedings is adopted. The Phase II investigation may be extended for an additional three months if the intended concentration involves a sensitive business sector and in cases in which it is necessary to carry out additional analysis defining the state of facts and examination of evidence. If the Council initiates a Phase II investigation but does not issue a decision within the defined deadline, the concentration shall be deemed to be approved.

In practice, after submission of the filing, it usually takes a rather long time until the Council considers the filing complete and issues the certificate of completeness. Therefore, the start of the review period is usually delayed. Against that background and according to our experience, it takes about three to five months from initial submission of the filing until clearance in cases in which the Council does not initiate a Phase II investigation. If a Phase II investigation is launched, the overall proceedings until clearance may take up to eight months (and even longer).

The law does not provide for a formal way of speeding up the procedure.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The Bosnia and Herzegovina Competition Council (the Council) will assess the effects that the intended concentration is likely to have (ie, whether the intended concentration results in the creation or strengthening of a dominant position of one or more undertakings that may restrict competition in the market).

The Competition Act of Bosnia and Herzegovina (the Act) provides the following general criteria for assessment as to whether the concentration prevents, restricts or distorts the competition:

- the structure of the relevant market;
- concentration effects to other actual and potential competitors;
- the market position of the undertakings concerned and their market shares, economic and financial power and strength;
- economic, legal and other entry obstacles to the market;
- supply and demand trends for the relevant goods or services;
- technical and economic developments trends; and
- consumers' interests.

Despite the difference in the wording of article 2, paragraph 2 of Regulation (EC) No. 139/2004, the criteria applied by the Council in making its assessment are usually similar to those applied by the European Commission.

20 Is there a special substantive test for joint ventures?

No. The same substantive test is applied to joint ventures.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The Council investigates whether the intended concentration leads to the creation or strengthening of single or collective market dominance and will typically also look into vertical foreclosure aspects, while other criteria are typically of a lesser concern.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Non-competition issues are generally not supposed to be relevant in the review process.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Council takes economic efficiencies into consideration to the extent that it can be established by the parties that such economic efficiencies benefit customers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Bosnia and Herzegovina Competition Council (the Council) may, in addition to monetary penalties, order the parties to sell the acquired shares or restrict the voting rights of the undertakings concerned, or order the cessation of the joint venture or any other form of acquired control that restricts competition in the market.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Act of Bosnia and Herzegovina (the Act) does recognise structural or behavioural remedies as a way to remedy competition concerns.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Act does not regulate the basic conditions and timing issues applicable to a divestment or other remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, the Council has not required any remedies to be offered.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The competition law of Bosnia and Herzegovina does not regulate that aspect. Also, the Council has not yet developed a practice in this respect. However, as the Council often refers to the European Commission's practice for guidance, it is not unlikely that the principles with regard to ancillary restraints adopted by the European Commission would be taken into account by the Council when dealing with such matters.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Bosnia and Herzegovina Competition Council (the Council) is competent to gather information ex officio and require from the parties, as well as from third parties, additional information and documentation that the Council considers necessary or useful for an assessment of the concentration. Moreover, third parties that have a legal or economic interest in the concentration (eg, competitors) are invited to submit their observations and concerns regarding the intended concentration. This invitation is published on the Council's website and in daily newspapers.

Access to the Council's file is only granted to the parties to the proceedings. The Competition Act of Bosnia and Herzegovina is not clear as to whether and under what circumstances third parties can be admitted as parties to merger control proceedings. According to the general administrative rules of Bosnia and Herzegovina, a party can, inter alia, be a person that has a right to be such party to protect its legal interests. In general, only undertakings concerned are admitted and regarded as parties in the proceedings before the Council.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Final decisions of the Council are published in the Official Gazettes (state, entity and Brčko District level) and on the Council's website.

Also, the Council publishes information regarding submitted notifications (ie, general information such as the names of the parties, the form of concentration and the business sector in which the concentration is taking place) with an invitation to all interested parties to submit their comments on its website and in daily newspapers.

All other communication between the Council and parties in the course of the concentration assessment procedure is not publicly available. All information that is deemed to contain business secrets is to be kept confidential by the Council. Such information is not disclosed and is removed from any decision published by the Council.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

As of 2005, the Council is a member of the International Competition Network, which enables cooperation with other antitrust authorities from countries that are members of the network. Also, the Council actively promotes cooperation with antitrust authorities from the region. To this end, the Council has concluded memorandums of understanding with the Croatian Agency for the Protection of Competition, the Serbian Commission for the Protection of Competition, as well as with the competition authorities of Turkey, Bulgaria and Macedonia. In the following period, cooperation is expected to be established with the competition authorities in Montenegro, Slovenia, Estonia and Austria.

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JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The Bosnia and Herzegovina Competition Council's decision can be challenged in an administrative court procedure before the Court of Bosnia and Herzegovina. The claim must be brought within 30 days after publication of the decision.

Time frame

33 What is the usual time frame for appeal or judicial review?

Administrative court proceedings before the Court of Bosnia and Herzegovina usually last up to one year, but can take longer depending on the complexity of the case.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the draft activities report of the Bosnia and Herzegovina Competition Council (the Council) published on its website, in 2019, the Council received 21 cases relating to merger control and nine final decisions in total were adopted by the end of 2019 (four concentrations were approved, four cases were dismissed because the notified behaviours were deemed not to qualify as notifiable concentrations under the relevant regulations and, in one case, the concentration was conditionally approved).

Reform proposals

35 Are there current proposals to change the legislation?

There have been no amendments to the Competition Act of Bosnia and Herzegovina or pertaining by-laws.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

According to the activities report of the Bosnia and Herzegovina Competition Council (the Council) published on its website, in 2020, the Council received 17 cases relating to merger control, out of which, in 2020, four concentrations were approved in Phase I, six cases were dismissed because they were deemed not to qualify as notifiable concentrations under the relevant regulations and two concentrations are deemed to be approved owing to the Council's failure to decide upon the notification within the statutory deadline. The remaining cases have been transferred to 2021.

The concentrations that have been approved in 2020 are: an acquisition of the sole control of ASA FINANCE d.d. Sarajevo over Central Osiguranje d.d. Sarajevo, in the market of non-life insurance in Bosnia and Herzegovina; an acquisition of the sole control of Prointer ITSS d.o.o. Banja Luka over Kaldera company d.o.o. Laktaši in the market of the production of devices for distribution and control of electricity in Bosnia and Herzegovina; an establishment of a joint venture by BH Telecom d.d., Raiffeisen Bank d.d. Bosna i Hercegovina, Comtrade d.o.o. and QSS d.o.o. in the market of the provision of services of implementation of an IT platform for payment services and other technological solutions in Bosnia and Herzegovina; and an acquisition of the sole control of Sejari d.o.o. Sarajevo over Centrotrans-Eurolines d.d. Sarajevo in the market of services of bus transportation of passengers in Bosnia and Herzegovina. In all proceedings, the Council mostly relied upon the market data submitted by the notifying parties in their merger notifications.

Brazil

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The main legislation is Law No. 12,529 of 2011 and a series of resolutions issued by the Administrative Council for Economic Defence (CADE), the antitrust agency. In terms of merger control, the main resolutions are as follows:

- CADE's Internal Rules of Proceeding (Resolution No. 1 of 2012, as amended by Resolution No. 22 of 2019);
- Resolution No. 2 of 2012, as amended, provides for the definition of 'group of companies', the cases eligible for the fast-track proceeding, required information under both the fast-track and ordinary proceedings, and stake acquisition rules;
- Resolution No. 12 of 2015 establishes the rules for consultation on CADE's position on the application of merger control rules in specific cases;
- Resolution No. 16 of 2016 establishes the 30-day deadline for fast-track merger reviews;
- Resolution No. 17 of 2016 establishes the criteria for filing of associative (collaborative) agreements; and
- Resolution No. 24 of 2019 establishes the procedures for gun-jumping investigations and the report of transactions that do not meet the threshold for mandatory reporting.

CADE includes three distinct bodies: an Administrative Tribunal, the General Superintendence in charge of merger analysis and antitrust investigations, and a Department of Economic Studies. With respect to merger review enforcement, the General Superintendence is responsible for reviewing and clearing transactions that do no raise antitrust concerns, and challenging cases before the Tribunal, while CADE's Tribunal is responsible for deciding on the cases challenged by the General Superintendence, by the Tribunal or by interested third parties and regulatory agencies.

In terms of latest developments, CADE has issued a series of Guidelines establishing directives on issues related to competition policy or institutional procedures and to provide explanations of the existing legislation, in terms of merger control, including the Guidelines on Gun Jumping and the Guidelines on the Assessment of Horizontal Mergers. In July 2017, CADE published an Internal Manual for the Analysis of Ordinary Merger Cases, describing the best practices for the review of such cases by CADE's officials based on the experience of the agency since the entry into force of the Law No. 12,529 of 2011, including pre-filing, granting of waivers and infraction notices in the course of the proceeding. In October 2018, CADE issued the Guidelines on Remedies, which gather the best practices and procedures adopted by CADE in the design, implementation and monitoring of remedies established by the agency. In April 2019, CADE issued the Guidelines for the Submission of Information to the Department of Economic Studies, aiming at improving, standardising and expediting the economic analysis of the cases. Finally, in July 2019, CADE issued the Resolution No. 24/2019 that replaces Resolution No. 13/2015 and establishes procedural aspects for gun-jumping investigations and the report of transactions that do not meet the threshold for mandatory reporting.

Scope of legislation

2 | What kinds of mergers are caught?

Mergers, equity and assets acquisitions, joint ventures, consortia, associations and any foreign-to-foreign transactions are caught, provided they produce effects in Brazil and meet the double turnover jurisdictional threshold.

Effects, for the purposes of Brazilian merger notification, are defined very broadly to include deals in which the target company (including joint ventures) has either assets or legal entities in Brazil or revenues originating in Brazil, even if through exports only and regardless of their amounts. There is no precise definition by CADE as to what level of sales in Brazil the business involved in the transaction could establish sufficient nexus or effects to trigger CADE's jurisdiction – generally, even minimal sales or revenues can require a notification if the other thresholds are met.

Associative or collaborative agreements between competitors must be filed with CADE if the following criteria are met:

- the parties or groups meet the double Brazilian turnover criterion; and
- the agreement is for a period of at least two years and its object is the creation of a 'joint enterprise' to develop a certain economic activity, provided that:
    - it establishes the sharing of risk and results between the parties regarding the object of the agreement; and
    - the parties or groups are competitors in the relevant market that is the object of the agreement.

Agreements between vertically related parties are not subject to notification as 'associative or collaborative agreements' since 2016, when Resolution No. 17/2016 came into force.

3 | What types of joint ventures are caught?

All types of joint ventures are subject to merger review in Brazil provided they produce effects in Brazil and meet the double turnover jurisdictional threshold. The only exception envisaged in the Brazilian Competition Law concerns joint ventures, consortia, or associative or collaborative agreements for the specific purpose of participating in public bids.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Brazilian competition legislation does not provide a firm definition of 'control'. CADE states broadly that control involves the ability to interfere in the activities of a company or undertaking. It can either be due to the possession of a majority of the equity interest or when a minority shareholder has control powers as a result of contractual arrangements, for example. The control can be sole or shared.

Control can also be external when exercised by a party that does not actually hold a shareholding interest in another party, but it has the ability to direct the development of a business, such as in the franchiser–franchisee relationships (Merger Review No. 08700.000395/2019-83 – *Sonic*/*Chilli Beans*/*GIF IV*).

The acquisition of minority and other interests is also caught by merger control rules under certain circumstances described in Resolution No. 2/2012, article 10:

- when said acquisition results in acquisition of control, sole or joint;
- provided that the activities of the purchaser group and the target do not overlap or are vertically related:
  - when it grants to the purchaser direct or indirect participation of 20 per cent or higher in the target; or
  - acquisition made by the holder of 20 per cent or more of the social capital or voting capital, provided that the acquired participation, direct or indirectly, of at least one individual seller, represents 20 per cent or more of the social or voting capital; or
- provided that the activities of the purchaser group and the target overlap or are vertically related:
  - when it grants to the purchaser direct or indirect participation of 5 per cent or higher in the target; or
  - when the purchaser already had 5 per cent of participation in the social or voting capital of the target and the last acquisition, individually or added to others, results in an increase of participation of 5 per cent or more in the social or voting capital.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Law No. 12,529 of 2011 introduced a double turnover system. The legal thresholds for mandatory notification are turnover or volume of sales in Brazil in the year preceding the transaction, by one of the parties equal to or greater than 750 million reais, and by another party equal to or greater than 75 million reais. These values were established in Interministerial Ordinance No. 994/2012 MJ/M. Parties are considered as the consolidated economic groups to which they belong.

For the purposes of calculation of the turnover, CADE considers as part of the same economic group the companies that are subject to a common control and companies in which any of the companies under common control has, directly or indirectly, at least 20 per cent of the voting or share capital.

Companies that are ultimately state-owned are considered part of separate or autonomous economic groups, meaning that other state-held interests are not considered part of the economic group, provided there is no coordination with these other companies. This also means that transactions between two separate state-owned companies are subject to normal merger control regulations as if they were fully independent.

For investment funds, the following will be considered as part of the same economic group: the quota holders with more than 50 per cent participation in the fund directly involved in the transaction, and the companies of its economic group; and the companies in which the fund directly involved in the transaction has more than 20 per cent of the voting or share capital.

CADE has the prerogative of requiring the submission of any transaction within a period of one year as of its closing date, even if it does not satisfy the notification thresholds mentioned herein.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory whenever the transaction can produce any effects in Brazil and meets the double Brazilian turnover jurisdictional threshold. The only exception contained in the Brazilian Competition Law concerns joint ventures, consortia or associative or collaborative agreements with the specific purpose of participating in public bids and the agreements derived from these public bids. Resolution No. 2/2012 of 2012, as amended, provides for other exceptions in the case of an equity acquisition. CADE can request the filing of transactions that do not fulfil the jurisdictional thresholds up to one year after the closing.

Lastly, the mandatory notification of associative or collaborative agreements must fulfil the requirements established in Resolution No. 17/2016.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes, foreign-to-foreign mergers must be notified whenever they produce or can potentially produce effects in Brazil and the double Brazilian turnover jurisdictional threshold is met. Effects, for the purposes of Brazilian merger notification regime, are defined very broadly to include the presence of assets or legal entities in Brazil or revenues originating in Brazil related to the business involved in the transaction, even if through exports only. There is no 'minimum or sufficient effects' test in place, and even minimal sales or revenues generated in Brazil can trigger a notification. This situation has been assessed on a few occasions throughout CADE's decisional practice.

On certain occasions, CADE has decided that it has jurisdiction over foreign-to-foreign or international transactions where a worldwide relevant market definition is possible and the economic groups are active in the directly affected or related markets in Brazil. CADE also has, on other occasions, decided not to assess foreign-to-foreign transactions when effects in Brazil are sufficiently demonstrated to not be concrete or plausible. An assessment of potential effects of the envisaged transaction in the Brazilian territory is recommended whenever the parties reach turnover thresholds.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There is no specific legislation for merger control involving foreign investment in Brazil. Merger review provisions apply similarly across the board.

Law No. 12,529 of 2011 applies to all economic sectors, which means that no special clearance should be fulfilled by sector regulators or agencies, except for the banking sector. In February 2018, CADE and the Central Bank entered into a memorandum of understanding regarding each agency's jurisdiction in merger control cases involving the banking sector, ending a long dispute over their jurisdiction for such cases. Mergers in the banking sector now must be submitted to both agencies. However, in the extreme case of transactions that may pose 'high and imminent' risks to the stability of the Brazilian financial system – at the Central Bank's discretion – may be unilaterally approved by the Central

Bank, and CADE will have to approve the deal without restrictions as well, based on the aspects of a prudential nature applied by the Central Bank.

Other regulated sectors may require not only the standard merger review clearance by CADE, but also special clearance by their respective sector regulators or agencies. Depending on the nature of the transaction, this may be the case, for example, for the telecommunications industry, insurance, oil and gas, electricity, aviation, health insurance, securities and hydro transportation.

CADE has cooperation agreements in place with several other government agencies – including most regulatory agencies and other bodies, such as the Internal Revenue Service – and will regularly interact with them in more complex cases for further information on the markets and these agencies' views on the transaction. This has been the case, for instance, in the recent reviews of *AT&T/Time Warner* (Merger Review No. 08700.001390/2017-14), *Disney/Fox* (Merger Review No. 08700.0044944/2018-53) and *Banco Itaú/XP Investimentos* (Merger Review No. 08700.004852/2018-28).

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no deadline for filing in Brazil, but transactions of mandatory notification cannot be closed or implemented before clearance. Any failure to notify or gun jumping is subject to penalties that can include rendering the deal null and void. In addition, the Administrative Council for Economic Defence (CADE) may impose penalties ranging from 60,000 to 60 million reais, require the parties to file the transaction for merger control review, and launch an administrative proceeding to investigate whether the parties could have engaged in anticompetitive practices. In international transactions, carveout agreements (to hold Brazil-related assets separate and consummate the transaction elsewhere) are not acceptable under CADE's current case law.

Notification should be submitted to CADE preferably after the execution of a formal binding document between the parties and, obviously, before the consummation of any act associated with the transaction. Also, it should be submitted, whenever possible, jointly by the parties participating in the transaction.

Regarding gun jumping, article 147, second paragraph, of CADE's Internal Rules states that the parties involved in transactions being reviewed by the agency should keep their facilities and all competitive conditions unaltered until CADE's final decision approving the transaction. In the meantime, any transfer of shares or influence of the parties in each other's business is prohibited, as well as the exchange of competitively sensitive information outside of what is strictly necessary for the agreement between the parties to be arranged.

CADE has been increasingly strict in enforcing its gun-jumping regulations and has been employing all tools at its disposal to enforce its pre-merger control regime. For instance, CADE negotiated a fine of 30 million reais in Merger Review No. 08700.009018/2015-86 (*Cisco/Technicolor*) after the parties recognised that they closed the transaction during CADE's analysis and made a carveout of the Brazilian portion of the target. In Merger Review No. 08700.002655/2016-11 (*Blue Cycle/Shimano Inc*), CADE imposed a fine of 1.5 million reais and determined the nullity of the distribution agreement between Blue Cycle and Shimano – this was the first time that the nullity sanction was imposed. In 2017, in the Merger Review No. 08700.007553/2016-83 (*Mataboi Alimentos/JBJ Agropecuária*), after negotiating a pecuniary fine of 664,983.32 reais, CADE blocked a transaction that had already been implemented, based on its effects, and determined that the transaction be undone entirely. Most recently, CADE negotiated a record fine of 57 million reais in the Merger Review No. 08700.001908/2019-73 (*IBM/Red Hat*), when the parties implemented the estimated 132 billion reais transaction worldwide while CADE's review was still ongoing.

Per CADE's decisional practice, in international transactions, carveouts or hold-separate mechanisms for Brazilian assets or businesses (while the transaction is implemented elsewhere) can be seen as a circumvention of the pre-merger control regime and do not exempt gun-jumping violations in Brazil.

Pecuniary sanctions can be collected from any of the parties of the transaction, whichever is easier for CADE. Failure to pay the fine will lead CADE to start proceedings for collection in a federal court.

On 20 May 2015, CADE published gun-jumping guidelines. These guidelines bring examples of the kinds of conduct that may be interpreted by CADE as gun jumping and also suggest measures to mitigate the risk of gun jumping, such as the creation of an antitrust protocol and the creation of clean teams.

Efforts are still undergoing to improve CADE's gun-jumping detection efforts. Internal agency guidelines were issued in 2018 to streamline the assessment of third-party gun-jumping complaints. In July 2019, CADE's Tribunal approved Resolution No. 24/2019 that replaces Resolution No. 13/2015 and establishes procedural aspects for gun-jumping investigations and the report of transactions that do not meet the threshold for mandatory reporting. It also sets forth the criteria for the calculation of gun-jumping fines, which includes the time elapsed since consummation of the transaction and transaction value and other aggravating factors (eg, timing, severity of conduct and intent).

10 Which parties are responsible for filing and are filing fees required?

The law makes no distinction between different parties to a deal, so that all parties (including the seller) are responsible for filing (one filing per deal only), and any party can be punished for non-compliance. The flat filing fee is 85,000 reais. The payment receipt of CADE's fee must be submitted along with the filing form on the filing date.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Under article 88 of Law No. 12,529 of 2011, merger control cases must be reviewed within 240 days. This deadline can be extended by 60 days, at the request of the parties, and no more than 90 days, based on a reasonable decision of CADE's Administrative Tribunal. As per CADE's Resolution No. 16/2016, the General Superintendence's decision on fast-track cases should be issued within 30 days of filing or amendment. In 2020, the authority actually cleared simpler transactions incapable of raising competition issues in an average period of 17.5 days (plus 15 waiting days after the decision is published by the General Superintendence of CADE in the Official Gazette, during which the clearance can be challenged at CADE, in both fast-track and non-fast-track cases). For ordinary cases, parties should also take into account the pre-notification procedure (ie, time necessary for submitting drafts of the filing form with CADE before it green-lights the filing). The time frame for ordinary cases may substantially vary depending on the complexity of the case, yet the 2020 average review period was 104.1 days. Transactions can neither be closed nor implemented before clearance by CADE.

Transactions carried out in the over-the-counter or in the stock exchange markets do not require CADE's prior clearance to be implemented. However, political rights related to the acquired shares shall not be exercised by the buyer before CADE's approval.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The gun-jumping penalties are:

- to make the deal null and void;
- the payment of a penalty ranging from 60,000 to 60 million reais; and
- the launching of an administrative proceeding if the deal is considered harmful to competition.

There have been several cases in which CADE imposed pecuniary gun-jumping penalties on the parties, and a couple of cases in which CADE made the deal null and void.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There are no examples of sanctions applied in cases involving closing before clearance in pure foreign-to-foreign mergers under the new Brazilian Competition Law.

Nevertheless, CADE has stated in its decision-making practice, first in the *Cisco/Technicolor* case (Merger Review No. 08700.009018/2015-86) and most recently in *IBM/Red Hat* (Merger Review No. 08700.003660/2019-85), both international transactions, that carveouts or hold-separate mechanisms for Brazilian assets or businesses (while the transaction is implemented elsewhere) can be seen as a circumvention of the pre-merger control regime and do not exempt gun-jumping violations in Brazil (implying that there will be no distinction for the application of the gun-jumping sanctions on foreign-to-foreign mergers).

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

CADE may, upon request of the parties, agree to authorise them to partially implement the transaction so that some measures can be undertaken by the parties before final clearance is issued. This involves uncertain negotiations with the authorities and remains an exceptional measure.

CADE's Internal Rules provide that an injunction and preliminary authorisation may be exceptionally granted when there is no danger of irreparable damage to the competitive conditions of the market, the measures for which authorisation is sought are fully reversible, and there are imminent substantial and irreversible financial losses to the acquired company.

According to Law No. 12,529 of 2011 and CADE's Internal Rules, upon request, CADE may authorise parties to close a notified transaction before clearance if there would be no irreparable harm to competition, the measures for which the authorisation was requested are fully reversible and the target company would face serious financial losses if it could not proceed more quickly. For the first time since the enactment of Law No. 12,529 of 2011, in December 2017, CADE's Tribunal granted an injunction and preliminary authorisation for the anticipated closing of Merger Review No. 08700.007756/2017-51, involving Excelente BV and Rio de Janeiro Airports. In this exceptional case, the General Superintendence already had unconditionally approved the deal, but the parties would have to wait the statutory 15 days (after the publication of the approval decision in the Official Gazette), during which the clearance could be challenged by CADE's Tribunal. This was a national case related to a public agreement and with a certain background of public and political interest (which is the due activity of the international airport of Rio de Janeiro). According to CADE, should the transaction not be closed immediately, one of the parties would not receive the necessary capitalisation and payments, which could interrupt the activities of Rio de Janeiro's international airport.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The main difference on the merger control rules applicable to public takeover bids is that CADE does not demand their clearance before the offer is consummated. However, CADE still prohibits that any voting rights be exercised by the new owner before clearance.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filing requires the preparation of a notification form (either a simple form for transactions that are eligible for the fast-track proceeding, or a complete form for ordinary transactions). Both forms require corporate information on the parties and the economic groups to which they belong, and on the transaction itself. In contrast to some other jurisdictions, Brazil requires the parties to present a relevant market definition up front. Estimates of market shares for the parties and their main competitors, clients and suppliers are also required, as well as some elaboration on barriers to entry and other market conditions. The information is requested in a substantially more detailed way in the complete filing form, which usually demands a considerable time for the parties to prepare.

The main documents that the parties must present accompanied by the filing form, to the extent that they are available, are:

- a copy of the final version of the contractual instrument concerning the transaction, listing the respective exhibits relevant to the antitrust review;
- copies of non-compete and shareholders agreements, if any;
- a list containing all other documents that have been prepared in connection with the transaction; and
- the latest annual report or audited financial statements of the parties directly involved in the transaction, and of their respective economic groups.

Other documents are specifically required for non-summary cases, to the extent that they are available, such as copies of reviews, reports, studies, inquiries, presentations and other similar documents prepared with the purpose of evaluating or analysing the proposed transaction, and market studies, researches, reports, forecasts and any other document, either prepared by third parties or not, which are relative to the affected market dynamics.

The payment receipt of CADE's fee must be submitted along with the filing form on the filing date. CADE's filing fee is the same and applied for both fast-track and ordinary proceedings.

There are legal sanctions on supplying wrong or missing (labelled 'false or misleading') information in merger reviews to CADE. Based on article 43 of Law No. 12,529 of 2011, as a general rule, false or misleading information, documents or statements provided by any agent to CADE shall be punishable by a pecuniary fine that may vary from 5,000 to 5 million reais. Moreover, if CADE delivers its clearance decision based on false or misleading information, according to article 91 of Law No. 12,529 of 2011, the applicable fine shall vary from 60,000 to 6 million reais without prejudice to the revision of CADE's previous decision and the adoption of other applicable measures.

CADE is becoming especially sensitive as regards the submission of information that is central to the antitrust assessment and has sanctioned parties on a few occasions for supplying misleading or incomplete information.

In 2016, in Merger Review No. 08700.010688/2013-83 (JBS/Rodopa), CADE closed a deal with complex remedies and later learned that the parties had withheld the information that environmental licences did not allow production levels agreed in the remedies to take effect. CADE fined the parties 3.5 million reais and stated it would not declare the transaction null and void solely because of the delicate financial situation of the target. Still in 2016, in Merger Review No. 08700.002084/2016-14 (*Marcopolo/San Marino*), CADE fined the parties 250,000 reais for misidentifying a company that pertained to the parties' economic group as a competitor. In 2020, in Merger Review No. 08700.002566/2019-17 (*Ultra Som/Hapvida/GSFRP*), CADE imposed a fine of 2 million reais on the parties for presenting conflicting market share information at different stages of the merger review proceeding. Most recently, in 2021, in Merger Review No. 08700.003258/2020-34 (*Delta/Latam*) CADE decided to reopen a previous merger proceeding filed by the same notifying parties to investigate the accuracy of potentially conflicting information.

Providing accurate information to CADE should be a priority even during pre-notification contacts, since the same regulations also apply. The inaccurate information presented in *Marcopolo/San Marino* was part of pre-notification contacts.

CADE often contacts third parties during market investigations in merger reviews (especially in those not eligible for the fast-track proceeding). Not responding to CADE's requests for information is an administrative violation and can subject offenders to fines between 5,000 and 100,000 reais for each day past the original response deadline.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The review starts at CADE's General Superintendence, which oversees the merger investigation. Within the General Superintendence, all cases are first analysed by a specific unit (Triage Unit) in charge of a preliminary analysis to distinguish fast-track from non-fast-track or complex mergers. The latter ones are sent to one of CADE's specialised units (according to the market area involved) for further analysis. The final decision on either path comes from the General Superintendent, who can approve the merger outright as it normally does for fast-track proceeding cases or ordinary cases that are not considered harmful to competition. If the General Superintendence believes the merger cannot be cleared or needs remedies, it challenges the merger to the Tribunal. Therefore, complex cases will certainly take longer and are usually analysed by CADE's Administrative Tribunal. If the merger review is to be analysed by the Administrative Tribunal, a commissioner will be assigned to the case by draw. The commissioner will prepare a report and the decision vote, which is then submitted to the full commission during a public session. The final decision at the tribunal is taken by a majority vote.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Simple transactions incapable of causing any anticompetitive impact may be subject to a fast-track proceeding. This fast-track treatment is granted at the authority's discretion whenever the transaction involves a horizontal overlap inferior to 20 per cent; whenever the transaction involves a vertical relationship in which none of the parties has more than 30 per cent in any of the vertically related markets; or if the transaction concerns the creation of classic or cooperative joint ventures; or if it is the entry of a new player; or finally if the horizontal concentration is below 50 per cent and does not surpass a variation of 200 points in the Herfindahl-Hirschman Index. As per CADE's Resolution No. 16/2016, the General Superintendence's decision on fast-track cases should be issued within 30 days of filing or amendment. In addition, these cases are likely to be reviewed in an average period of 15 days (plus 15 waiting days after the publication of the approval of the General Superintendence of CADE in which the clearance can be challenged at CADE's Tribunal). Ordinary cases will take longer, up to the 330-day legal limit (yet the average review period is 104.1 days). With regard to cases where remedies have to be negotiated, our experience shows they take an average time of approximately 180 days, especially because usually the commitments do not provide a clear-cut solution, and also because they heavily rely on the timing of the proposal, in addition to the complexity of the transaction, and eventually CADE's need for market tests related to the proposed remedies.

Besides trying to provide the relevant information as completely and clearly as possible and arranging pre-notification meetings with the authorities to try to anticipate discussions with the case handlers, there is not much the parties can do to speed up clearance.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Brazilian Competition Law contains both a dominant position test and a lessening or restriction of competition test. Although not much elaboration has been done regarding either one, in practice most decisions tend (usually implicitly) to focus more on the dominant position test, meaning that a deal will normally be cleared if not deemed to create or strengthen a dominant position, even without a deeper analysis of the possible lessening of competition effects.

In July 2016, the Administrative Council for Economic Defence (CADE) published the Guideline for the Analysis of Horizontal Concentration Merger Reviews, setting forth the main arguments that would be taken into consideration for the analysis of merger reviews with horizontal concentration. There are no published guidelines on vertical mergers yet, although CADE may borrow from the experience of international guidelines and agencies when deemed adequate.

CADE's recent case law and the Guidelines on the Assessment of Horizontal Mergers show a special concern with the loss of a firm through a transaction that may facilitate coordination among the remaining firms in the industry, leading to reduced output, increased prices or diminished innovation. Further, the authority recognises the principle that a reduction in the number of firms in a market increases the potential for coordinated conduct, including both overt and tacit collusion.

20 | Is there a special substantive test for joint ventures?

No, it is the same test applicable to mergers, with the already mentioned exemption of joint ventures aiming at taking part in public bids, which are not subject to merger review by CADE.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In accordance with the Brazilian Competition Law, the authority will investigate transactions that lead either to market dominance or to a lessening of competition. For these purposes, the authority will analyse both unilateral effects and coordinated effects, though the former are much more frequently used in practice. Vertical issues are equally important in the review and several remedies have already been imposed based on foreclosure or essential facility-like theories, and CADE may even seek structural remedies in vertical cases. One recent feature in the review, especially for full-form cases, is that the Brazilian authority tends to pay attention to conglomerate effects of the transaction. More recently, CADE has been reviewing cases involving non-traditional theories of harm, including the vertical use of data, for example, in Merger Review No. 08700.000059/2021-55 (*Magalu/Hub Prepaid*).

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Traditionally, non-competition issues such as industrial policy or public interest are not factored into the review process by the competition authorities. Other government bodies cannot intervene in merger control analysis but merely participate on whatever grounds they deem appropriate. In February 2018, CADE and the Central Bank entered into an agreement regarding each agency's jurisdiction in merger control cases involving the banking sector, ending a long dispute over their jurisdiction for such cases. Mergers in the banking sector must now be submitted to both agencies, but transactions in which delay in closing may pose 'high and imminent' risks to the stability of the Brazilian financial system – at the Central Bank's discretion – may be unilaterally approved by the Central Bank and CADE will have to approve the deal without restrictions as well, based on the aspects of a prudential nature applied by the Central Bank.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The economic efficiency defence is expressly accepted by the Brazilian Competition Law within certain conditions, which include evidence that the gains will also benefit consumers. Although they are regularly analysed and taken into account in substantially complex transactions, it is fairly uncommon for CADE to authorise a deal based on efficiencies alone. In the authority's opinion, efficiencies presented by the parties in merger transactions are rarely accepted because they are normally unproven, not related to the transaction or insufficient to justify the approval, or there is no evidence that they will be passed on to the consumers.

CADE has been adopting high standards of proof in the analysis of efficiency claims and, as a rule, efficiencies normally are not decisive for the clearance of a given transaction, especially if it involves significant concentration in the markets involved. Even so, there are some cases in which the efficiency claims were accepted by CADE and therefore played a more relevant role to approve a transaction without restrictions, such as:

- Merger Review No. 08700.009559/2015-12 (*TNT/Fedex*), after the appeal opposed by a third party, CADE's Tribunal maintained the unconditional clearance decision posed by the General Superintendence and, among other arguments, understood that there were duly quantified efficiencies that demonstrated that the net effect of the transaction is at least non-negative;
- Merger Review No. 08700.003252/2016-81 (*Casino/Dia*), efficiency claims of countervailing power;
- Merger Review No. 08700.012062/2015-73 (*Universal Studios/Sony Pictures*), efficiency claims of costs reduction owing to the sharing of the distribution agreement; and
- Merger Review No. 08700.010033/2015-77 (*TIM/Vivo/Claro/Oi*), efficiency claims of costs reduction owing to the sharing of infrastructure.

Moreover, CADE tends to assess efficiencies only at the latest stage of the merger review (ie, after being unable to ascertain that the exercise of market power is unlikely through the traditional analyses of merger control, especially in vertical mergers), as an opportunity to the parties to demonstrate that the effects of the transaction are non-negative. However, efficiencies can be presented from the beginning of the merger review. This careful assessment of the efficiencies was reinforced in merger review No. 08700.004446/2017-84 (*Essilor/Luxottica*), in which CADE clarified that its assessment of efficiencies would take place only if it could not discard the possibility of exercising market power in earlier steps of the merger review, following third-party complaints that efficiencies were unproven. If it is the case, CADE will likely decide for additional investigation that gives the parties the opportunity to present efficiencies in complex deals, and these may be used as a base to negotiate remedies further.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Administrative Council for Economic Defence (CADE) has very broad enforcement powers, with the law expressly allowing it to take whatever measures are deemed necessary to remedy damages caused by a transaction, including up to dissolution or break-up of a company. As an administrative authority, CADE can request judicial backing to forcibly carry out decisions such as the collection of fines or the performance of a specific obligation. Since the pre-merger control regime in Brazil entered into force by means of Law No. 12,529/2011 in 2012, CADE has reported to have increased the use of remedies in complex deals or transactions reviewed under a non-fast-track proceeding. Since the enactment of Law No. 12,529/2011 in 2012, remedies have been rather negotiated between CADE and the parties, and unilateral imposition of restrictions by CADE on the deals are rare.

In addition, CADE has the power to require, within one year of the date of consummation, the submission of any merger to analysis, even when the specific merger is not included under the thresholds provided by Law No. 12,529/2011.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. CADE has a tradition of attempting, whenever possible, to remedy specific competition problems rather than blocking a whole deal. Divestment and behavioural commitments have been adopted, tailored to the characteristics of the markets affected, targeting, for instance, brands, production facilities and distribution networks. If, in the post-merger notification regime, such undertakings were mostly unilaterally imposed by CADE, in the pre-merger notification regime it is expected that discussing and negotiating the commitments with CADE will be routine for more complex cases and within the new (and shorter) time frames envisaged in the Brazilian Competition Law. Although, in theory, CADE tends to favour structural remedies owing to its liquidity (as indicated in 2018 CADE's Remedies Guidelines), the practice shows that, in particular since 2016, most of the remedies negotiated by CADE have been behavioural ones – although remedy discussions always occur on a case-by-case basis. Such behavioural remedies may include objective pricing criteria, transparent commercial policies, as well as prohibitions to impose exclusivity, discriminatory conditions, tying and bundling strategies.

A noteworthy highlight of CADE's recent decision-making practice was the 2020 reassessment of *Disney/Fox* (Merger Review No. 08700.004494/2018-53). CADE had originally approved the deal in February 2019 subject to the sale of Fox's Fox Sports pay-TV channels, as part of a divestment package that was also adopted in other jurisdictions. However, the assets failed to attract viable buyers in Brazil. In May 2020, CADE reviewed its decision and approved the deal subject to new behavioural conditions. However, CADE noted that this was only possible because the parties clearly demonstrated that they had undertaken all efforts to comply with the initial conditions. Previously, CADE had ordered a deal to be undone (*JBS*/*Rodopa* – Merger Review No. 08700.010866/2013-83), when divestments failed to attract bidders and the parties offered no other conditions that could remedy anticompetitive concerns.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The remedies have to be specific; they should address the competition problems raised by the deal, and they have to be adequate to the market. CADE is usually concerned with the effects of the remedies on consumers rather than on competitors – although remedy discussions always occur on a case-by-case basis. Timing will depend on the specific remedy being adopted by the authorities; however, offering remedies earlier on in the process in complex cases may increase the chances of successfully negotiating remedies with CADE. Based on article 165 of CADE's Internal Rules, CADE may receive proposals of remedies from the parties from the filing up to 30 days after the challenge by the General Superintendence to CADE's Tribunal.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There has never been a foreign-to-foreign case involving foreign companies without any assets in Brazil (parties exclusively active in Brazil through export sales) in which remedies were required by the authorities. Foreign-to-foreign mergers involving assets in Brazil have been subject to the same remedies mentioned above.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Clearance decisions routinely include non-compete provisions. In 2009, CADE released two internal rulings (Súmulas 4 and 5) based on its case law and consolidating the understanding about such ancillary agreements. In Súmula 4, CADE consolidated the understanding that it will accept non-compete agreements in joint ventures, provided that they have a close relationship with their corporate purposes and their relevant markets. In Súmula 5, CADE consolidated its prevailing understanding that a reasonable period for such non-compete agreements is five years as of the acquisition of the company or business, provided that it is related only to the affected business sold. CADE has frequently ordered the parties, even in foreign-to-foreign mergers, to change the original agreement if a non-compete clause provides for a longer period or comprises a broader market or territory. Ancillary exclusivity agreements can also be covered by the decision, and CADE has in the past ordered the elimination of exclusivity clauses it did not deem reasonably justified.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Clients, suppliers and competitors are often involved in non-fast track cases, voluntarily or upon a calling by the authorities. Third parties can present submissions, request meetings with officials or even challenge the clearance made by the General Superintendence. Often, the authorities also bring clients and competitors into the process by sending them official requests for opinions and additional information. Their input is traditionally taken into consideration by the authorities. Third parties that act in bad faith may receive penalties that vary from 5,000 to 5 million reais.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The process is given full publicity. After notification, CADE publishes in the Official Gazette a summary of the notification, including the names of the parties and inviting comments from anyone. The parties and third parties can require confidential treatment of certain information, but the remaining files are public and can be accessed at CADE's website. If relevant business information such as business secrets is requested during the review, the parties may request restricted access to that information or confidential treatment. The decision is also published in the Official Gazette and, for the merger reviews that reach CADE's Administrative Tribunal, the decision will be taken in an open public session, which is streamed in real time through CADE's website.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

CADE has cooperation agreements or memoranda of understanding with several jurisdictions, including Canada, Chile, Costa Rica, the European Union, Italy, Mercosur countries (Argentina and Paraguay), BRICS countries (China, Russia and South Africa), Portugal, the United States, Peru, Colombia, Japan and South Korea. CADE has also signed similar agreements with the Inter-American Development Bank and the World Bank Group. Contacts and discussion between Brazilian authorities and those of other jurisdictions are steadily increasing, especially with respect to the investigation of international cartels, and stimulated by repeated contacts in international organisations such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network.

The new framework also incentivises greater interaction and coordination between CADE and international antitrust authorities during ordinary merger reviews, including the coordination of remedies. At the same time, such interaction and experience has substantially improved the design and implementation of remedies by CADE in comparison to past precedents. In 2019, the OECD accepted Brazil's application for membership as associate member of the entity's Competition Committee.

CADE can, in international cases, cooperate with antitrust authorities in other jurisdictions and may share information with them if the parties grant a waiver. In 2020, for instance, CADE cooperated with the agencies in the European Union, in *Danfoss*/*Eaton* (Merger Review No. 08700.003307/2020-39); with Russia, in *DSM*/*Erber* (Merger Review No. 08700.003260/2020-11), in *Alstom*/*Bombardier* (Merger Review No. 08700.002824/2020-91), and in *IFF*/*DuPont* (Merger Review No. 08700.002599/2020-92); with Chile, in *Delta*/*LATAM* (Merger Review No. 08700.003258/2020-34), and in *Fiat*/*Peugeot* (Merger Review No. 08700.002193/2020-18); with Ecuador, in *Sinch*/*Movile* (Merger Review No. 08700.002761/2020-72); with the United Kingdom, in *Sinch*/*SAP* (Merger Review No. 08700.002878/2020-56); with South Africa, in *IFF*/*DuPont* (Merger Review No. 08700.002599/2020-92); and with Canada, in *ChemChina*/*Sinochem* (Merger Review No. 08700.001760/2020-19).

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Administrative appeals against the Administrative Council for Economic Defence (CADE)'s decisions are submitted to the same panel of commissioners, as it is a one-tier agency within the Brazilian public administration. This means that decisions are rarely changed in the administrative sphere, unless there is evidence of a new fact or document that could result in a more favourable decision. However, the parties always have the right to go to court to challenge a CADE decision. The Brazilian Constitution provides for the judicial review of administrative acts. If the capacity of the courts to go over procedural aspects is unlimited, the extent to which they can review the merits of CADE decisions remains unclear and will only be decided by the judiciary itself as more appeals reach the higher courts in the next few years.

Time frame

33 | What is the usual time frame for appeal or judicial review?

As judicial review in Brazil begins with a court of first instance and may ascend on successive appeals up to the Supreme Court, a final judicial decision on an administrative act may take several years. However, an injunction suspending the effects of CADE's decision may be obtained in a few weeks. This will tend to be the crucial judicial battle, in that if the appealing parties do not get an injunction suspending a CADE order immediately, they will have to comply with it first and then wait for years until a final judicial decision is issued. The number of court challenges to CADE decisions on merger cases is still quite small, but at least in some high-profile cases, parties were able to secure an injunction suspending a divestment order until the end of the judicial review.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Enforcement of the notification rules was quite rigorous under the former law, and led to a large number of penalties imposed for non-compliance including foreign-to-foreign mergers. Unfiled deals, which were subsequently discovered, were almost always fined. The Administrative Council for Economic Defence (CADE) has already imposed several penalties for gun-jumping events. Moreover, CADE has been imposing several remedies (be it structural or behavioural) in several transactions that are considered harmful to competition.

In the merger control area, apart from the already published gun-jumping guidelines, CADE published a Guideline for the Analysis of Horizontal Concentration Merger Reviews, setting forth the main arguments that are taken into consideration for the analysis of merger reviews with horizontal concentration.

In October 2018, CADE issued the Guidelines on Remedies, which gather the best practices and procedures adopted by CADE in the design, implementation and monitoring of remedies established by the agency. In April 2019, CADE issued the Guidelines for the submission of standardised information, as requested by the agency, to the Department of Economic Studies, to improve and expedite the analysis of the cases.

Reform proposals

35 | Are there current proposals to change the legislation?

No.

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UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Administrative Council for Economic Defence (CADE) focused on maintaining its merger review activities early in the covid-19 pandemic, and its review efforts and timing did not significantly change in relation to previous years. Interaction with parties and judgment sessions are currently conducted remotely.

Merger control activity in Brazil remained strong throughout the past year, and CADE reviewed a record 471 cases in 2020 (a record since 2015), with high-profile cases including *Boeing/Embraer* (Merger Review No 08700.003896/2019-11), *Fiat/Peugeot* (Merger Review No. 08700.002193/2020-18) and *Buscopan/Hypera* (Merger Review No. 08700.003353/2020-91)). No cases were blocked by CADE in 2020.

In the previous year, there was an uptick in the review of cases by CADE's Tribunal that had been previously approved by the General Superintendence, which was in previous years a proceeding used sparingly. In two of these cases, one of the commissioners suggested to further review the clearance of transactions involving *Fiat/Peugeot* (Merger Review No. 08700.002193/2020-18) and *FIP Profit/Kepler* (Merger Review No. 08700.000180/2020-04), although most of the commissioners understood that no further review was necessary. In two other cases, most of the commissioners agreed that further review was necessary in the clearance of transactions involving *Bunge/Imcopa* (Merger Review No. 08700.002605/2020-10) and *Bunge/Seara* (Merger Review No. 08700.001134/2020-14), so CADE's Tribunal reassessed the merits of these cases. In all occasions, CADE's Tribunal confirmed the previous opinions rendered by the General Superintendence, which had unconditionally cleared the transactions.

During the covid-19 crisis, CADE released multiple statements reinforcing the agency's commitment to continue its activities, while adapting to the health restrictions in place. Most of the agency's staff continued to work remotely, which has made video and audio conferences a routine.

In July 2020, CADE issued a 'Temporary Informative Note on Cooperation Between Undertakings to Cope with the COVID-19 Crisis' to provide some guidance to the market on how to avoid antitrust issues whenever such cooperation was necessary. Nevertheless, save for one public case in May 2020 – *Movimento Nós* (Proceeding No. 08700.002395/2020-51) – CADE did not review further cooperation agreements that were aimed at fighting the effects of the covid-19 crisis. Cases involving distressed companies (what was an expectation early in the pandemic and could have led to the review of failing firm theories) also failed to materialise.

Nevertheless, as the pandemic progressed, CADE's merger review activities proceeded almost as normally, and CADE was able to quickly adapt to remote work, which continues.

Bulgaria

Peter Petrov

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The principal piece of legislation regulating merger control in Bulgaria is the Protection of Competition Act (PCA). The Bulgarian national competition authority, the Commission on Protection of Competition (the Commission), has been entrusted with enforcing merger control rules under national law. It has issued a standard notification form (updated as of 10 June 2021 by a Decision No. 603, dated 10 June 2021), and guidance on its completion, which are available on the Commission's website.

Scope of legislation

2 What kinds of mergers are caught?

The PCA defines a merger (concentration) among undertakings as a lasting change of control, which results from the legal merger or amalgamation of two or more previously independent undertakings, or the case where one or more persons, already controlling at least one undertaking, acquire control, directly or indirectly, in respect of other undertakings or parts of them, by way of acquisition of shares or property, by contract or by any other means.

Changes of control on a temporary basis are generally not caught by local merger control. Examples of situations where control is acquired on a temporary basis include the acquisition by an intermediate buyer in preparation for the transfer of the business to a final controlling shareholder during a short period of time, as well as situations such as a short-term lease of a business. Conditional transactions (such as those related to put and call options) are also generally not considered to occasion concentrations upon their entry, but rather upon the fulfilment of the relevant conditions.

While a concentration can arise both where control of an entire undertaking is being transferred and where control is transferred in respect of only part of that undertaking, transactions where control is transferred in respect of certain assets, solely for the purpose of a particular service being provided back to the transferor or its group by an outside supplier (outsourcing), are generally not considered to result in a concentration, unless the transferred part of the business will have access to the market outside the outsourcing relationship.

Changes between sole and joint control and vice versa, as well as changes in the jointly controlling parents, are usually considered to represent a concentration. The conversion between positive and negative sole control is normally not considered to constitute a merger for the purposes of merger control.

Acquisitions of control by individuals or entities, which do not themselves constitute an undertaking and do not control previously one or more undertakings, have also been considered not to represent a concentration. However, the Commission has used a very broad interpretation in respect of the concept of undertaking in this context.

Similarly to other jurisdictions, transactions where credit and other financial institutions or insurance undertakings, which deal in securities on own account or on account of others, hold temporarily securities of an undertaking for the purpose of resale, are not considered to represent a concentration, provided they do not exercise the voting rights attached to these securities for the purpose of influencing the competitive conduct of the undertaking, or exercise such voting rights only to the extent necessary to prepare the transfer of the securities that should be fulfilled within one year of their acquisition.

The acquisition of control by a person entrusted with functions in the context of liquidation or insolvency of the undertaking is also not considered a concentration for the purposes of Bulgarian merger control. The acquisition by financial holding companies of control, where such control is exercised solely to maintain the value of the investment, but not to determine the competitive behaviour of the undertakings in which the holding participates, either directly or indirectly, is also not caught by local merger control rules.

Finally, intra-group reorganisations, where ultimately control remains the same, are also not considered to represent a concentration.

3 What types of joint ventures are caught?

The creation of a joint venture performing on a lasting basis all the functions of an economically autonomous entity is considered a concentration. As above, short-term alliances (eg, consortia established solely for the purpose of bidding for and performing a particular public contract) generally do not constitute a concentration. However, the continuation of their activity on a lasting basis upon change of the original intent may be caught by merger control rules.

The acquisition of joint control of a pre-existing undertaking can also trigger the application of these rules.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The PCA defines control as the acquisition of rights, the entry into agreements or other means that as a matter of law or fact, together or individually, would allow the exercise of decisive influence on an undertaking by acquiring ownership or use of all or part of its assets or acquiring rights, including on the basis of an agreement, which afford the ability to exercise decisive influence on the composition, voting or decisions of the bodies of the undertaking.

Acquisitions of minority shareholdings do not trigger Bulgarian merger control rules, unless they result in the acquisition of control within the sense explained above.

In this context, the Commission has taken into account the ability of a minority shareholding to exercise de facto control, considering factors such as the fact that the remaining shareholdings are widely dispersed, and therefore a sufficiently large minority interest is capable of achieving a decision-making majority in the bodies of the undertaking, in particular considering the history of majorities in such bodies. A minority shareholding can also afford negative sole control where a single shareholder alone is capable of blocking strategic decisions, despite the fact that neither it, nor any other shareholder is capable of adopting them by itself, and provided joint control is not present otherwise.

Joint control results from the ability of several independent parents, jointly to exercise decisive influence on the undertaking, as a result of factors such as their agreement to vote together on particular strategic issues, or their ability to adopt or veto strategic decisions, considering the applicable majorities, the existing shareholdings and other arrangements.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A transaction that represents a concentration would need to be notified to and cleared by the Commission, where the jurisdictional threshold detailed below is met, provided, however, such concentration is not subject to notification and clearance by the European Commission under the EU Merger Regulation. The threshold is as follows:

- the combined aggregate annual turnover of all the undertakings participating in the concentration in the territory of Bulgaria during the preceding financial year exceeding 25 million levs; and
- either the aggregate annual turnover of each of at least two of the participating undertakings in the concentration in the territory of Bulgaria during the preceding financial year exceeding 3 million levs; or
- the aggregate annual turnover in the territory of Bulgaria during the preceding financial year of the undertakings, subject to acquisition, exceeding 3 million levs.

As a consequence of the second alternative component in the jurisdictional threshold (turnover of the target), situations may arise where the threshold is passed and the notification obligation is triggered, by reason of the target's turnover alone, even though the acquirer may have had no or very little turnover in Bulgaria during the preceding financial year.

Transactions that are below the thresholds cannot be investigated on their merits under Bulgarian merger control. The parties are, however, free, if in doubt, to notify such transactions on a voluntary basis. In such cases the Commission, without reviewing the case on the merits, has to issue a decision that the transaction does not fall within the scope of the prior notification obligation.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Where the local notification thresholds are exceeded, the filing is mandatory, unless the transaction also triggers the thresholds for notification to and clearance by the European Commission under the EU Merger Regulation, in which case the European Commission would have jurisdiction. Nevertheless, where the European Commission, despite having jurisdiction, has referred the case to the Bulgarian competition authority under the conditions laid down in the EU Merger Regulation, the Commission would have jurisdiction to review the case, provided the Bulgarian notification threshold (see above) has been exceeded.

No exceptions to the mandatory filing obligation are currently available.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers have to be notified where the thresholds for notification are met. In this respect, there is no distinction between foreign-to-foreign and purely local mergers. The fact that the Bulgarian jurisdictional thresholds are met has been considered sufficient by the Commission to assert jurisdiction irrespective of any local effects or nexus considerations. Such considerations, the Commission has held, are relevant to the assessment of the concentration as part of the merger control proceedings, but not to the obligation to notify.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are generally no rules specific to foreign investments (ie, general prudential supervision of shareholding rules as regards certain regulated entities apply equally to local and foreign investors). Exceptions to this are certain restrictions on foreign investments in the real estate sector and investments and activities by offshore companies and their affiliates. However, these do not factor in the Bulgarian merger control process.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific filing deadline; however, given that notification and clearance should precede the acquisition of control and should be submitted prior to undertaking of factual and legal actions to implement the transaction, the parties would be well advised to submit their filing sufficient time in advance to allow the decision of the Commission on Protection of Competition (the Commission) to be issued in time.

As there is no filing deadline, there are no sanctions related to late filing. As regards closing the transaction without having submitted a notification or prior to clearance, see below.

10 Which parties are responsible for filing and are filing fees required?

The persons acquiring control (directly or indirectly) are the parties responsible for filing. These, depending on the circumstances of the case, may be the direct parties to the transactions, their parents or the specific entities established to take control or otherwise participate in the concentration.

In the case of a legal merger, the merging parties would be under an obligation to file.

A filing fee of 2,000 levs applies. In addition, a clearance fee of 0.1 per cent of the combined aggregate Bulgarian turnover of the participating undertakings for the latest preceding financial year would apply where a clearance decision is issued. This fee is capped at 60,000 levs.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Where notification is mandatory, implementation of the transaction must be suspended prior to clearance. The suspension does not apply in the case of a tender offer or a series of transactions in securities admitted to trade in regulated markets of financial instruments, by which control is acquired from different sellers, provided the Commission is notified without delay, and also provided the acquirer does not exercise the rights attached to the securities, except to the extent necessary to protect the value of the investment made.

After submission of the notification, the Commission has five working days to review the filing as to whether it is complete. If the Commission considers the filing complete, the chairperson will initiate proceedings. If the filing is incomplete, the Commission will inform the parties and initiate proceedings only after the deficiencies in the information or documents have been rectified.

As of the day following the day of initiation of proceedings, the Commission, in an accelerated (Phase I) proceedings, has to review the notification within a period of 25 working days. The review period is instructive and its expiry without a decision does not lead to a presumptive clearance. Requests for additional information during the proceedings stop the clock, and the review timeline is correspondingly extended.

The Phase I review period can be extended by up to 10 working days at the parties' request, to allow them to prepare proposals for changes to the concentration. If proposals for changes to the concentration are submitted, the review period is automatically extended by a further 10 working days to allow the Commission to review and analyse the proposed proposals for changes to the concentration.

Where, during the Phase I proceedings, the Commission has come to the conclusion that the concentration raises serious doubts that as a result of its implementation, effective competition in the relevant market will be significantly impeded, in particular as a result of the creation or strengthening of dominant position, it may initiate an in-depth (Phase II) investigation into the case.

The Phase II investigation must be completed within 90 business days of the publication in the Commission's online electronic register of the decision to open the Phase II investigation. In complex cases, this period can be extended by up to an additional 25 working days. In case of a remedies offer, the timeline for review is automatically extended by 15 working days. The review periods in Phase II are also instructive and no implied clearance is available should they not be met.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing or integrating the activities of the merging businesses in violation of the suspension obligation or without having submitted a notification and obtained clearance where this is mandatory can result in the imposition of sanctions in an amount of up to 10 per cent of the infringing parties' annual turnover.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions are applied in such cases.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Commission has not objected to carveout closing, where the transaction may be implemented in other jurisdictions, but is not implemented in Bulgaria pending clearance from the Commission. The way in which this is achieved would depend in each particular case, considering the parties' activities in Bulgaria, but in general would involve the undertaking of legal obligations that the concentration will not be accomplished as regards Bulgaria until the Commission has issued its decision.

The Commission does not have the authority to waive the standstill obligation neither of its own initiative, nor at the request of the parties.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

In the case of public takeover bids in respect of publicly listed companies whose shares are traded in regulated markets of financial instruments, the suspension obligation does not apply, subject to notification without delay and provided the acquirer of control does not exercise the voting rights attached to the securities, except where necessary to protect the value of the investment. In this context, notification without delay would normally mean that the notification should be submitted as soon as possible and in any case before the actual acquisition of control has taken place.

Planned concentrations should normally be notified after the publication of the bid, but may occasionally be notified before that, if the parties can demonstrate a good faith intention to make such a bid. It must be underlined, however, that no exception to the notice publication requirement has been provided for such cases.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification must contain information on the undertakings concerned, as well as their groups, the nature of the concentration as well as the mechanism and time frame in which control will be acquired, the economic rationale of the transaction, description of the relevant markets in which the parties operate, including their market shares, annual turnovers, their main competitors, suppliers and customers, as well as the parties' view as to why the transaction will not lead to the significant impediment to effective competition in particular as a result of the creation or strengthening of a dominant position in any relevant market. Usually, documents evidencing the corporate existence of the parties are attached to the notification, the transaction documents giving rise to the change of control on a lasting basis, the annual reports of the undertakings concerned, a power of attorney, organisational charts of the parties' groups, a draft public notice on the transaction and various other documents that reflect the parties' positions in the relevant markets before the concentration.

A significantly higher level of details is required in respect of 'significantly affected' markets; which arise if there is: a horizontal overlap leading to a combined market share of 15 per cent or more; or a vertical overlap or conglomerate effects raising individual or combined share of 25 per cent or more in any affected product markets. Less detailed information is required for markets that are not considered 'significantly affected'.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

After submission of the filing, the Commission's administration will review the notification and attachments and where they are complete, the chairperson of the Commission will initiate proceedings on the case (a case number is assigned).

Once proceedings are initiated, a brief notice concerning the case is published on the website of the Commission (draft of which is provided by the parties to the merger control proceedings).

During the proceedings, the Commission often sends questionnaires to the parties and to their major competitors, suppliers and customers, who in addition to providing information, are invited to express their views concerning the merger.

At this stage or with the notification, the parties can offer remedies to address specific competition concerns that arise out of the transaction.

After the Phase I review, the Commission will issue a decision by which it:

1. declares that the transaction does not constitute a concentration or does not fall within the scope of the mandatory notification obligation;
2. clears the transaction unconditionally;
3. clears the transaction subject to conditions and obligations; or
4. initiates in-depth (Phase II) proceedings on the case.

The decision under (4) above cannot be appealed. The decision at the end of Phase I is issued without a hearing of the parties. Access to the file can be provided only after the Phase I decision is issued.

The actions following the initiation of Phase II investigation follow a similar pattern to those under a Phase I proceeding. Interested third parties can submit observations within 30 days of publication of the decision opening the Phase II investigation on the Commission's website.

At the end of the review, the Commission will either issue an unconditional clearance, or adopt a statement of objections, addressed to the notifying party or parties.

The parties will have 14 days or more to respond to the statement of objections and access the file. After they submit their response, they also have the right to be heard in an open sitting of the authority, which can take place no sooner than two weeks after the expiry of the deadline for the submission of the response.

At the end of the Phase II investigation, the Commission will issue a decision by which it:

- approves the transaction unconditionally;
- approves the transaction subject to conditions and obligations; or
- prohibits the transaction.

Where the transaction is approved subject to conditions and obligations, the Commission may appoint a monitoring trustee to oversee their implementation.

18 | What is the statutory timetable for clearance? Can it be speeded up?

In practice, most mergers are reviewed within the 25-working-day review period prescribed by the law for a Phase I (accelerated) proceeding. The Commission rarely shortens its review below this period and also rarely extends it beyond it by any significant amount of time. However, it takes additional time, after the adoption of the Commission's decision, for the parties to be notified.

In almost all cases the Commission makes use of its ability to request additional information during the preliminary review process (after submission of notification), which extends the period for initiation of the case itself and the deadlines for the decision, respectively.

In Phase II proceedings, in most cases the Commission has issued its decision sooner than the expiry of the 90 working days period prescribed by the Protection of Competition Act.

The review periods vary depending on the nature and complexity of the case. In principle, the Commission follows the statutory periods for examination and its internal guidelines within the assessment of the specific transaction.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A transaction will be cleared where it does not lead to significant impediment to effective competition, in particular as a result of the creation or strengthening of a single or collective dominant position.

The Commission on Protection of Competition (the Commission) may clear a concentration that may impede effective competition, including may lead to the creation or strengthening of dominance, where it aims to modernise the relevant economic activity, improvement of the structures of the market, better meeting interests of consumers and overall the positive effects would outweigh any negative effects on competition in the relevant markets.

Following the conversion to the 'significant impediment to effective competition' (SIEC) test in February 2021, the primary focus of the Commission's analysis would have to be the loss of competition that is expected to result from the transaction and to what extent it can affect the proper functioning of the competitive process in the relevant markets. The Protection of Competition Act has added a specific list of factors that the Commission may take into account in its assessment. These include market structure, economic and financial strength of the undertakings concerned, buyer power, available alternative sources of supply and demand, technical and economic progress providing benefits to consumers, trends in supply and demand, consumer interests, barriers to market entry and any other relevant circumstances. Although some of these additional factors appear to imply assessment criteria external to a strictly competitive analysis, they must be read in conjunction with the merger test itself.

20 | Is there a special substantive test for joint ventures?

No, the SIEC test applies also to joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Previously the Commission's analysis was essentially focused on dominance, and by extension any horizontal or vertical non-coordinated effects that will arise as a result of the transaction, to the extent that these are a direct result of the creation or strengthening of a dominant position. Conglomerate issues and coordinated effects have rarely, if at all, featured in the reasoning of the Commission's decisions.

Following the introduction of the new SIEC test, dominance should remain the primary focus of the Commission's analysis. This is the primary theory of harm under the SIEC test as well. However, the new test should allow intervention in the rare cases where effective competition is significantly impeded, even where dominance is not created or strengthened. It is yet to be seen how the Commission will interpret the test, and to what extent it will have appetite for intervention in borderline cases. In each case, merger control enforcement under the new substantive test should remain subordinated to competition considerations, rather than external factors. These should remain the subject of any investment screening regime, that may be introduced in the future, within the framework of the EU's foreign direct investment screening Regulation 2019/452.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues would not normally be considered in the Commission's analysis as regards mergers, except where such noncompetition issues constitute positive effects of the transaction, which have to be considered in the balance with any factors impeding competition as a result of the transaction.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are considered to only a limited extent. Normally the analysis is focused on the possible harm to competition as a result of the transaction and ways to address this. Only once they have been addressed or mitigated to a significant extent can any efficiencies come into play to finalise the Commission's overall assessment. Where serious competition issues arise, efficiencies alone have never been sufficient to tip the balance between prohibiting and clearing the transaction.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission on Protection of Competition (the Commission) has the power to prohibit a concentration. It also has the power to clear the transaction subject to conditions and obligations. The conditions and obligations should correspond to the proposals for changes to the concentration offered by the parties. However, the Commission can offer guidance to the parties in this respect, by pointing out the issues they need to address in their remedies offer.

Where a notifiable concentration was completed in contravention of a prohibition decision or without clearance, where it finds that the transaction should have been prohibited or cleared subject to conditions and obligations, in addition to imposing any sanctions, the Commission can impose any measures it deems necessary to restore effective competition in the relevant markets, including separation of capital, shares or assets, and termination of joint control.

The Commission may withdraw its clearance decision where it is based on incomplete, incorrect, untrue or misleading information, or where the parties have failed to comply with the conditions and obligations attached to the clearance decision aimed at preserving effective competition and limiting its negative impact on the market concerned. The decision of the Commission may also be revoked by the court.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The parties are free to offer any remedies, behavioural or structural, that they consider capable of addressing any competition issues that may arise as a result of the merger.

In general, the preference so far in the Commission's case law has been towards behavioural remedies.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The parties can offer remedies at any time during the proceedings before the Commission, including with the notification itself. Guidance on the preparation and submission of such an offer is expected to be provided in rules for imposing measures to safeguard competition in case of concentrations between undertakings, which are to be adopted considering the implications from the introduction of the new SIEC (significant impediment of effective competition) test.

Where accepted, the remedies become binding on the notifying party as conditions and obligations attached to the clearance decision. The obligations usually have a specific deadline by which they need to be fulfilled, but there are also cases where open-ended obligations have been adopted.

The Commission has the power to control the fulfilment of the conditions and obligations, with a corresponding obligation of the parties to inform the Commission about the performance of its decision. It may appoint a monitoring trustee to help with supervision of the remedies imposed. Where the parties have failed to comply, the Commission may impose sanctions upon them and in addition may reopen the case and withdraw the clearance decision.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Commission has adopted remedies as conditions and obligations attached to its clearance decision on several occasions in foreign-to-foreign mergers. In some cases, these have been remedies offered on a global basis across a number of jurisdictions, which were then also transposed in the Bulgarian merger control proceedings, and in others these have been remedies specific to Bulgaria.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Commission generally follows closely the European Commission's practice as regards ancillary restraints. On a number of occasions, the Commission has held that such restrictions should be considered cleared with the decision clearing the concentration, provided they are deemed directly related and necessary to the implementation of the concentration. Where the Commission is seized with the matter of such ancillary agreements, it would normally discuss them in the reasoning of its decision.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Main customers and main competitors are routinely involved in the review process by being invited to provide their position on the transaction, along with any specific information and documents the case handlers deem necessary, where the transaction gives rise to significantly affected markets (see above).

Unless they are constituted as parties or interested third parties in the proceedings, they would not normally have access to the file.

However, where they have a legal interest, they can appeal the Commission on Protection of Competition (the Commission)'s final decision in the framework of judicial review.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Shortly following the opening of the proceedings on the case, a brief notice of the notified transaction is published on the Commission's website. This notice is drafted by the parties and attached to the notification, but may be amended by the Commission before it is published. Therefore, the parties must expect that the transaction will become public shortly after they have submitted the merger notification to the Commission.

Documents containing commercial and other secrets must be accordingly noted (by placing a stamp or written note that the document is confidential on each page) at the time of their submission to the authority. At that time or shortly thereafter, the parties must also provide a non-confidential version of the confidential documents, along with a list of all confidential and non-confidential documents and reasoning for the requests for confidentiality. The confidential document is then excluded from the access to the file and its content will not be replicated in the public version of the Commission's decision.

The Commission may, on a request of a party or of its own initiative, waive the confidentiality of particular information or documents, where it considers they are not confidential, or where this is necessary to prove an infringement or for effective exercise of the rights of defence of the parties. The party (including a non-participating third party) whose information is disclosed has the right to appeal against the disclosure in the framework of judicial review.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Bulgarian competition authority is a member of the European Competition Network – the information sharing network of all competition authorities in the European Union. In this network it actively cooperates with other authorities, particularly in the case of multijurisdictional merger filings. Cooperation may be limited to exchanging information, or may extend to sharing views on the scope of relevant markets, the effect that the particular concentration may have upon them and how any competition issues may be remedied. A waiver of confidentiality is often requested from the notifying party for the purposes of such information exchange within the European Competition Network.

The Commission has also entered into bilateral memorandums on cooperation with competition authorities of Azerbaijan, Albania, Bosnia and Herzegovina, Croatia, Cyprus, Kosovo, Moldova, Macedonia, Montenegro, Russia, Serbia, Turkey, Ukraine and others.

In addition, the Commission actively participates in cooperation on competition issues within the International Competition Network, the Organisation for Economic Co-operation and Development, the competition forum of UNCTAD, and certain other international initiatives.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

All decisions of the Commission on Protection of Competition (the Commission) ending the proceedings (with the exception of a decision opening a Phase II investigation) are subject to judicial review. The parties to the proceedings, as well as all interested third parties, can bring an appeal against the decision in the framework of judicial review.

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Time frame

33 What is the usual time frame for appeal or judicial review?

The deadline for submitting an appeal is 14 days, which for the parties to the proceedings starts as of the moment they are notified of the decision, and for third parties, from the moment the decision is published on the website of the Commission.

The judicial review process can go through two instances – a first instance consisting of review by one judge at the Administrative Court of Sofia District, and a cassation instance, consisting of review by a panel of three judges at the Supreme Administrative Court. While the review periods vary depending on the complexity of the case and the workload of the court at the relevant time, normally the proceedings on the case should be complete within a period of one to two years.

An appeal does not suspend the effect of a clearance decision, in respect of which immediate execution derives from the law or the Commission's ruling, unless the court explicitly orders the suspension of its implementation.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Commission on Protection of Competition (the Commission) routinely reviews and decides on foreign-to-foreign, foreign-to-local and local-to-local mergers, without distinction. It also imposes sanctions for failing to notify a merger, where notification was necessary, including in the cases of foreign-to-foreign mergers.

The Commission's focus has been on strengthening the pre-notification process. Recently, it adopted special guidelines on pre-notification contacts.

Another notable recent development has been the imposition of fines for failure to supply complete and non-misleading information during merger review process. This development follows similar cases at the EU level.

Reform proposals

35 | Are there current proposals to change the legislation?

The Commission recently published draft guidelines on merger remedies for public consultation. These guidelines are yet to be adopted, and follow the recent reform of the substantive merger test.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The change of the merger test has been the most fundamental reform of Bulgarian merger control of the last few years. The Commission on Protection of Competition has recently been moving towards a mature and economics-based approach to merger control, where clearly non-problematic mergers are allocated less enforcement resources, while potentially problematic cases are reviewed in much greater detail. This, while short of introducing distinct simplified and full merger procedures, has brought Bulgarian merger control closer in line with the process at the EU level.

Canada

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In Canada, the federal Competition Act (the Act) establishes jurisdiction for the review of mergers affecting markets in Canada. The Act is enforced by the Commissioner of Competition (the Commissioner), who is appointed by the Federal Cabinet, typically for a five-year renewable term. The Commissioner is supported by the Competition Bureau (the Bureau), an independent law enforcement agency within the federal Department of Innovation, Science and Economic Development. The Commissioner and, by extension, the Bureau have broad powers to investigate, evaluate and, where appropriate, challenge mergers. Should the parties to a merger not be prepared to cure competitive concerns identified by the Bureau, the Commissioner can apply to the Competition Tribunal (the Tribunal) for a remedial order.

The Tribunal, created by the Competition Tribunal Act (the Tribunal Act), is a specialised adjudicative body composed of judicial members and business and economic experts. The Tribunal is the forum of first instance for any merger challenged by the Commissioner. While the Tribunal Act requires that the Tribunal conduct its hearings 'as informally and expeditiously as the circumstances and considerations of fairness permit', the Tribunal operates with many of the procedures of an ordinary court. Proceedings take a number of months – often up to a year or even more – to complete.

The Investment Canada Act applies whenever a non-Canadian, directly or indirectly, establishes or acquires control of a Canadian business, regardless of whether it was previously owned by Canadians or other non-Canadians. A non-Canadian acquirer must either file an application for review or a post-closing notification of the investment (depending on the size of transaction) unless a specific exemption applies.

Scope of legislation

2 | What kinds of mergers are caught?

All mergers that have a sufficient Canadian nexus (ie, a real and substantial connection to Canada), regardless of size, are subject to the substantive jurisdiction of the Act, and therefore to potential investigation and evaluation by the Commissioner and possible referral to the Tribunal. The definition of 'merger' is broad and includes the acquisition of control or a significant interest in the business of another person. However, the Act's pre-merger notification regime is of more limited scope. Part IX of the Act creates five broad categories of transactions that are subject to pre-merger notification if they meet certain party and transaction size thresholds. These are: asset acquisitions; share acquisitions; acquisitions of an interest in an unincorporated combination; amalgamations; and the formation of unincorporated combinations.

3 | What types of joint ventures are caught?

Generally, joint ventures with a sufficient Canadian nexus are caught by the Act's broad definition of 'merger' and are subject to the Act's substantive jurisdiction. Depending on how it is structured, a joint venture could be caught under the mandatory pre-merger notification regime as an unincorporated combination (usually a partnership), a share or asset acquisition, or a corporate amalgamation. However, there are exemptions for joint ventures that meet certain conditions. There are also provisions in the Act addressing competitor agreements, even if they do not constitute 'mergers', which may apply to joint ventures.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act contains a bright-line definition of 'control': the holding or acquisition of more than 50 per cent of the voting securities of the corporation or, in the case of a partnership, sole proprietorship, trust or other unincorporated entity, the holding or acquisition of an interest in the non-incorporated entity that entitles the holder or acquirer to more than 50 per cent of the profits of the entity or of its assets on dissolution. However, the Act's pre-merger notification regime does not require that control be acquired to trigger a filing obligation. The acquisition of 'any of the assets in Canada of an operating business' (other than in the ordinary course) or of shares yielding cumulative ownership of more than 20 per cent of the voting shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the voting shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) is sufficient to trigger a notification obligation (provided that the other criteria are met). There are similar thresholds for acquisitions of interests in combinations.

Additionally, minority interests less than outright control may be caught by the substantive (as opposed to notification) provisions of the Act, because the Act defines a merger to include any transaction by which a party acquires a 'significant interest' in the business of another person. A 'significant interest' is not defined by the Act. However, the Commissioner's Merger Enforcement Guidelines (MEGs) contemplate that the acquisition of a 'significant interest' could occur at as low as a 10 per cent ownership interest – or in some cases without an equity interest if contractual or other circumstances allow material influence to be exercised over the economic behaviour of another person (including decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights). The MEGs note that, among other factors, board composition, voting and veto rights, the terms of any shareholder or voting agreements and put, call or other liquidity rights are relevant to determining if there has been or will be an acquisition of a 'significant interest'.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Act's substantive jurisdiction extends to all mergers that have a real and substantial Canadian nexus, regardless of size. However, the Act's pre-merger notification requirements are triggered by bright-line thresholds designed to give certainty to merging parties regarding filing obligations. The transaction must involve an 'operating business' in Canada (in the sense that employees regularly report for work within Canada in relation to the business) as opposed to merely a passive investment. But, in the Commissioner's view, such employees may be those of an agent or contractor. The obligation to notify is also contingent upon satisfaction of both a party-size threshold and a transaction or acquiree-size threshold.

Party-size threshold

The parties to the transaction, together with their worldwide 'affiliates' (defined generally as those entities in a relationship of control to one another or under common control), collectively have assets (book value) in Canada or gross revenues from sales in, from or into Canada (that is, domestic sales plus exports and imports) in excess of C$400 million in the most recently completed fiscal year. For share acquisitions, the acquiring corporation and the acquired corporation (rather than the vendors of the shares) are deemed to be the parties to the transaction. In the case of the acquisition of an interest in a combination, the parties are the person or persons who propose to acquire the interest and the combination whose interest is to be acquired. A vendor that owns more than 50 per cent of the shares in a corporation, or the interests in a combination, to be acquired would be included in the party-size threshold calculation as an affiliate of the entity being acquired.

Transaction-size threshold

The transaction-size threshold (sometimes referred to as the acquiree-size threshold) is based on the book value of assets in Canada of the entity that is the subject (target) of the transaction or that are themselves the subject of the transaction, or the gross revenues generated from those assets (domestic plus export sales). For 2021, the threshold (for assets or revenues) is C$93 million. The threshold is subject to an annual adjustment based on changes in GDP, which is typically announced and goes into effect in late January or early February of each year.

If the underlying party-size and transaction-size thresholds are met, the acquisition of more than 20 per cent of the voting shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the voting shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will trigger a notification obligation. Similarly, a proposed acquisition of an interest in a combination of two or more persons to carry on business other than through a corporation (eg, a partnership) is also notifiable if the party-size and acquiree-size thresholds are met and if it will result in the acquiring party and its affiliates being entitled to more than 35 per cent (or more than 50 per cent if the entitlement was already 35 per cent) of the profits of the combination or of its assets on dissolution. Similar, but more complex, thresholds apply to amalgamations.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification is mandatory for transactions that exceed the party-size and transaction-size thresholds. A narrow exemption exists for asset securitisations meeting certain criteria. There are also other exceptions of limited scope (such as transactions involving affiliated entities).

Parties occasionally notify voluntarily (eg, by applying for an advance ruling certificate (ARC)), where a transaction falls below the notification thresholds, if there is significant concern about the competitive impact of a transaction. Doing so allows the parties to seek confirmation from the Commissioner as to whether he or she will challenge the merger.

If a non-notifiable merger comes to the Bureau's attention from other sources (eg, marketplace complaints or the Bureau's Merger Intelligence and Notification Unit), a notification is not required but the Bureau may request or compel production of relevant information to carry out an assessment under the substantive merger provisions of the Act. The Bureau has recently increased its focus on gathering intelligence to identify and review below-threshold potentially anticompetitive transactions, with at least four below-threshold transactions reviewed in depth since June 2019, including one that resulted in a divestiture. Transactions may be challenged by the Bureau for up to one year after closing.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Canada asserts an 'effects' test for jurisdiction. Thus, mergers may be subject to substantive review under the Act even though they occur outside Canada, if competitive effects from the transaction will be experienced within Canada. The competitive effects of primary interest are the impacts on customers located in Canada. Such effects could arise in relation to current or future sales into Canada when one or both merging parties are located outside Canada.

Foreign-to-foreign transactions are subject to pre-merger notification if the financial thresholds for notification are exceeded and the target has an operating business in Canada. (The asset value branches of the thresholds focus only on assets in Canada. However, the revenue branches of the thresholds include exports in addition to domestic sales, and in the case of the party-size threshold imports as well.) For example, the acquisition of more than 20 per cent of the shares of a foreign public corporation that has a subsidiary that carries on an operating business in Canada would trigger a notification obligation if the subsidiary's assets or revenues exceed the acquiree-size threshold and the parties and their affiliates collectively have assets or revenues exceeding the party-size test.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Investment Canada Act applies whenever a non-Canadian directly or indirectly acquires control of a Canadian business, regardless of whether it was owned before the acquisition by Canadians or by non-Canadians. If the transaction exceeds certain size threshold (see discussion below) it will require advance approval; if it is below that threshold the purchaser must file a notification of the investment, unless in either case a specific exemption applies. The Investment Canada Act's provisions with respect to national security also apply to transactions both above and below the thresholds, and also to acquisitions of interests less than controlling interests.

There are a number of financial thresholds that determine whether a transaction is subject to review and approval, or merely requires notification (notification can be given either before or after closing). The applicable financial threshold turns on, among other things, whether the acquirer is a state-owned enterprise (SOE), or whether the target is currently owned or to be acquired by an investor from a World Trade Organization (WTO) country, or a country with which Canada has entered into a trade agreement (Trade Agreement Investor). A Trade Agreement Investor is an entity controlled by citizens of states that are party to the Comprehensive Economic and Trade Agreement between Canada and the European Union, an entity controlled by citizens of states that are party to (and have ratified) the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, an entity controlled by citizens of states that are party to the Agreement between the United States of America, the United Mexican States and Canada (USMCA), as well as citizens of Chile, Colombia, Honduras, Panama, Peru, South Korea and the United Kingdom). There is a separate applicable (lower) threshold applicable to firms controlled by citizens of WTO members. 'WTO investors' are entities controlled by citizens of member states of the World Trade Organization. There are also alternate thresholds that apply if the investor is a state-owned enterprise (SOE). There are also separate and very low thresholds which apply where the Canadian business being acquired engages in cultural activities (such as those involving books, magazines, film, television, audio or video recordings, or radio or television broadcasting).

The threshold test changed, for non-SOE WTO investors, from an asset value test to an enterprise value test in 2015. As of February 2021, if the Canadian business is being acquired directly, by or from a WTO investor and is not engaged in cultural activities, an investment is reviewable only if the Canadian operating business being acquired has an enterprise value of C$1.043 billion. Also, as of February 2021, if the Canadian business is being acquired directly by or from a Trade Agreement Investor and is not engaged in cultural activities, the investment is reviewable only if the Canadian operating business being acquired has an enterprise value of C$1.565 billion. Both the WTO investors threshold and the Trade Agreement Investors threshold typically undergo annual adjustments each January or February, based on changes to GDP.

Where the investment involves the acquisition of publicly traded shares, enterprise value is calculated as the sum of the market capitalisation of the target and its liabilities minus its cash and cash equivalents. Where the investment involves the acquisition of privately held shares, enterprise value is calculated as the sum of the acquisition value and the target's liabilities (based on its most recent quarterly financial statements) minus its cash and cash equivalents (based on its most recent quarterly financial statements). Where the investment involves the acquisition of assets, enterprise value is calculated as the sum of the acquisition value and assumed liabilities minus cash and cash equivalents.

Where an SOE WTO investor is involved, and if the Canadian business is being acquired directly and is not engaged in cultural activities, an investment will be reviewable only if the Canadian operating business being acquired has assets with a book value in excess of C$415 million. This threshold also typically undergoes an annual adjustment each January or February.

If the acquisition by or from a WTO investor is indirect (ie, the acquisition of shares of a foreign corporation that controls a Canadian business) and does not involve a cultural business, the transaction is not reviewable, regardless of size.

Where the Canadian business engages in any of the activities of a cultural business, or if both the investor and the vendor are not WTO investors, the applicable thresholds for direct and indirect investments are assets with a book value in Canada of C$5 million or C$50 million, respectively.

If the transaction is subject to review, an application for review is made to the Investment Review Division of the federal Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage, where the merger involves any cultural businesses). There is an initial review period of 45 calendar days, which may be extended by 30 calendar days at the discretion of the agency, and further upon consent of the investor.

On an application for review, the substantive test applied is whether the proposed transaction is likely to be of net benefit to Canada. Any economic impact on Canada may be considered, including employment, investment, productivity, R&D, exports, Canadian management participation in the business and other factors. If the acquirer is an SOE, the review will also examine whether it is likely to operate the acquired Canadian business in an ordinary commercial manner. The Investment Canada Act approval is parallel to but separate from Competition Act reviews (in cases subject to a Competition Act review). In addition, the Bureau provides input into the Investment Canada Act review process with respect to a transaction's effects on competition, in addition to completing its own review. Very few transactions are rejected under the Investment Canada Act net benefit to Canada test, but it is typical for investors to provide undertakings to the government to confirm that the net benefit test will be fulfilled.

An acquisition of control of a Canadian business by a non-Canadian that falls below the thresholds for review under the Investment Canada Act does not require an application for review. However, even where the transaction falls below the thresholds, it must still be notified by way of a filing with the Investment Review Division of the Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage for cultural cases). Notifications may be submitted by the acquirer any time before or up to 30 days after consummation of the transaction. If the transaction is in the cultural sector, a review may then be ordered (regardless of the asset value) by the Federal Cabinet within 21 days of receipt of the notification.

The Investment Canada Act also establishes a national security review regime, under which transactions can be reviewed regardless of the size of the business or transaction, the nationality of the acquirer (except Canadians), whether the transaction involves an acquisition of control or of a minority interest, and whether or not the transaction has closed. In December 2016, the Canadian Government published its Guidelines on the National Security Review of Investments (the National Security Guidelines), which were subsequently revised in March 2021. The National Security Guidelines set out the types of investments that may trigger national security reviews. Factors that the government considers in determining whether to review an investment for national security reasons include:

1. the potential for injury to Canada's defence capabilities;
2. the potential for transfer of sensitive technology or know-how outside Canada. Sensitive technologies can include (but are not necessarily limited to):
    1. advanced materials and manufacturing;
    2. advanced ocean technologies;
    3. advanced sensing and surveillance;
    4. advanced weapons;
    5. aerospace;
    6. artificial intelligence;
    7. biotechnology;
    8. energy generation, storage and transmission;
    9. medical technology;
    10. neurotechnology and human-machine integration;
    11. next generation computing and digital infrastructure;
    12. position, navigation and timing;
    13. quantum science;
    14. robotics and autonomous systems; and
    15. space technology;
3. the Canadian business's involvement in research respecting, manufacturing or selling goods or technology that may be needed for Canada's national defence;

4 the potential impact of the investment on the supply of critical goods and services to Canadians;
5 the potential impact of the investment on critical minerals and critical supply chains (comprising minerals that are essential for renewable energy and clean technology applications, including batteries, permanent magnets, solar panels and wind turbines, and minerals used for advanced manufacturing supply chains, including defence and security technologies, consumer electronics, agriculture, medical applications and critical infrastructure);
6 the potential impact of the investment on Canada's critical infrastructure, which includes energy and utilities, finance, food, transportation, government, information and communication technology, health, water, safety and manufacturing;
7 the potential to enable foreign surveillance or espionage;
8 the potential for the investment to hinder current or future intelligence or law enforcement operations;
9 the potential for injury to Canada's international interests;
10 the potential of the investment to involve or facilitate organised crime; and
11 the potential for the investment to enable access to sensitive personal data that could be leveraged to harm Canada's national security through its exploitation. Sensitive personal data includes:
    1 personally identifiable health or genetic data;
    2 biometric data;
    3 financial data;
    4 communications data;
    5 geolocation data; or
    6 personal data concerning government officials, including members of the military or intelligence community.

Further, the National Security Guidelines emphasised that all investments by SOEs and by investors subject to the influence of SOEs, will be subject to enhanced scrutiny related to potential national security concerns.

In addition to issuing the revised National Security Guidelines, in April 2020, the government provided a covid-19 policy statement noting that the Investment Canada Act's national security provisions would be used to carefully review any foreign direct investments in Canadian businesses related to public health and involved in the supply of critical goods or services to Canadians or to the government. As well, the policy statement highlighted that 'sudden declines in valuations [of Canadian businesses] could lead to opportunistic investment behaviour', and that, until the economy recovers from covid-19, the government would engage in enhanced scrutiny of foreign investments in Canadian businesses 'to protect national security and to ensure the integrity of all investments into Canada'. Based on these statements, it appeared possible that the government of Canada might use the Investment Canada Act's national security provisions to take action against certain types of investments by non-Canadians in respect of Canadian businesses that are at depressed valuations due to the economic impact of covid-19. However, we have not seen any evidence to date that national security reviews have been initiated to address this type of concern and in most if not all industries market value rebounded quickly from immediate post covid-19 pandemic declaration lows.

There have been a few recent cases involving national security reviews under the Investment Canada Act that have become public. A number of transactions have been rejected or have been abandoned based on concerns about the investor in question acquiring telecommunications assets that were regarded as critical infrastructure. There has also been a 'proximity' case in which the establishment of a new Canadian business was required to find a new location that was not nearby a facility of the Canadian Space Agency. One transaction has been blocked because the geo-mapping assets in issue were sensitive on a national security basis. In addition, a Chinese firm was ordered to divest a recently acquired interest in a Canadian fibre components and modules company, but this decision was challenged and on a re-review the government cleared the transaction. In early 2018, the proposed takeover of a Canadian construction services firm by a Chinese state-owned enterprise was blocked. While the precise reasons for this decision were not made public, the Canadian firm's work with nuclear power facilities, telecommunications infrastructure, and military housing and training facilities may have raised concerns related to critical infrastructure. In late 2020 a Chinese acquisition of a Canadian mining company with a mine site on the North-West Passage was prohibited.

In addition to the general reviews under the Competition Act and, if applicable, the Investment Canada Act, there are sector-specific ownership limits and review regimes in areas such as financial services, transportation, broadcasting and telecommunications.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Competition Act (the Act) does not set out deadlines for filing. The timing for submission of a notification is a decision of the parties. However, a transaction that is notifiable may not be consummated until the applicable statutory waiting period has expired.

Failure to comply with the pre-merger notification requirements in the Act constitutes a criminal offence with possible fines of up to C$50,000 as well as the possibility of civil penalties of up to C$10,000 per day. The Competition Bureau (the Bureau) monitors financial press accounts of transactions and may also be made aware of transactions through competitor, customer or supplier complaints. Although, to date, there have been no convictions or penalties imposed for failure to notify (other than agreements to implement compliance programmes), this provision of the Act may be enforced vigorously unless the failure to notify was inadvertent, in which case a decision not to prosecute or other resolution might be negotiable with the Commissioner of Competition (the Commissioner) and the Director of Public Prosecutions.

10 Which parties are responsible for filing and are filing fees required?

Generally, both parties to the transaction have the obligation to file. For share acquisitions and acquisitions of an interest in a combination, the Act deems the target entity, not the vendor, to be a party to the transactions. In hostile or unsolicited takeover bids, the bidder makes an initial filing (which commences the waiting period) and the Commissioner then requisitions the counterpart filing from the target (which must be filed within 10 days).

On 1 April 2021, the filing fee for a notification was lowered to C$74,905.57. This fee amount will be in effect until April 2022, when it once again will be subject to an adjustment for inflation. The same filing fee applies to a voluntary notification by way of an application for an advance ruling certificate. The filing fee is often paid by the acquirer, but this is a matter of negotiation between the parties. Where filings have been submitted by both parties, the Bureau considers both notifying parties to be jointly and severally liable for the filing fee. If only a request for an advance ruling certificate is submitted for a proposed transaction, the requesting party is solely responsible for the fee.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is a 30-day no-close waiting period from the day the filing is certified complete (usually the same day as the filing by the last of the parties occurs). In hostile or unsolicited takeover bids, the 30-day no-close waiting period begins on the date that bidder's filing is certified as complete.

The Commissioner may, within the initial 30-day waiting period, issue a supplementary information request (SIR) (similar to a US 'second request') requiring the parties to submit additional information that the Commissioner believes to be relevant to his or her assessment of the proposed transaction. If the Commissioner issues a SIR, a second no-close waiting period is established, which expires 30 days after the day that the required information has been received by the Commissioner and certified complete by the parties (except in the context of hostile or unsolicited takeover bids, where the second no-close waiting period commences once the Commissioner receives the certified complete SIR response from the bidder). While the issuance of a SIR is a formal process established by the Act, requests by the Commissioner during the initial waiting period for the voluntary disclosure of additional information are common and do not affect the statutory waiting period.

Consummation of the transaction is not permitted during the waiting periods. The Act provides for early termination of either waiting period by the Commissioner. This can be expected to occur if the review has been completed but not when the review is ongoing.

If the parties proceed by way of an application for an advance ruling certificate instead of filings, there is not a fixed timeline. The no-close period effectively runs until the Commissioner has either issued such a certificate or provided a 'no action' letter confirming the Commissioner's lack of intention, at that time, to make an application under section 92 of the Act in respect of the proposed transaction together with a waiver of the filing requirements.

In complex cases, reviews may extend beyond the statutory waiting periods. In such cases, the Commissioner sometimes simply requests that the parties refrain from closing their transaction until the review is complete, or seeks undertakings from the parties that they will not close the transaction without providing the Commissioner with an agreed amount of advance notice. There is no obligation to accommodate such a request, but merging parties often do so, typically in an effort to ensure that the Commissioner remains focused on assessing the evidence related to the transaction, rather than preparing for litigation or seeking an injunction. Formal timing agreements between the parties and the Bureau may also be used to confirm that a transaction will not be closed for a period of time after the expiry of the statutory waiting period. In particular, if the parties plan to raise an efficiencies defence, the Commissioner has provided recent guidance indicating an expectation that the parties and the Bureau will enter into a model timing agreement to allow the Bureau sufficient time to evaluate the parties' claimed efficiencies.

The Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

If the Commissioner decides to challenge a transaction, another provision of the Act allows the Commissioner to seek an interlocutory injunction to prevent the transaction from closing in whole or in part, pending the resolution of the Commissioner's challenge on the merits. To obtain an interlocutory injunction, the Commissioner must prove that there will be 'irreparable harm' if the injunction is refused and that the 'balance of convenience' favours delaying the closing of the transaction. The 2016 *Parkland* case clarified that 'irreparable harm' includes harm to consumers and harm to the broader economy resulting from the transaction, where such harms cannot be undone by an order of the Competition Tribunal (the Tribunal) under the merger provisions of the Act. The Commissioner must provide 'sufficiently clear and non-speculative' evidence of market definition and concentration and likely harm to competition to meet this test.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing prior to expiry of the applicable waiting period is a criminal offence that can be subject to a fine of C$50,000 and also a civil penalty of up to C$10,000 for each day of non-compliance. While there have been no reported cases of prosecutions, and while some leniency has been shown in cases of inadvertence, the Commissioner is likely to enforce this provision vigorously if it appears that the non-compliance was intentional.

There is also the possibility that coordination undertaken prior to closing that amounts to 'gun jumping' could be subject to a prosecution for conspiracy or bid rigging (given that the parties would not (yet) benefit from the affiliates exception from these criminal offences).

Even if the waiting period has expired, closing before the Commissioner has completed reviewing the matter carries the risk that the Commissioner will challenge the merger, post closing, if he or she concludes that the merger is likely to lessen or prevent competition substantially. He or she may seek a divestiture or dissolution order up to one year after the date of closing.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

To be subject to the Canadian notification provisions, and therefore subject to a no-close period in Canada, there must be a local nexus, including an 'operating business' in Canada. While foreign to foreign transactions with no on the ground Canadian nexus may be subject to substantive review if there are expected to be substantive effects in Canada, likely by way of diminished import competition to Canada, if there is no operating business in Canada the transaction is not subject to notification and consequently not subject to a suspension period.

Subject to crafting a local hold-separate resolution (which is extremely rare), if the transaction is notifiable in Canada, the penalties for early closing outlined above would apply to foreign-to-foreign transactions.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The parties may proceed with closing if the no-close waiting periods have expired but the review process is ongoing, and the Commissioner has not obtained an injunction or entered into a timing agreement with the parties.

The Commissioner will focus primarily on Canadian issues in all cases. In a foreign-to-foreign merger, the Bureau (and the Tribunal) will typically be receptive to local divestiture or possibly behavioural remedies as long as they are sufficient to address the domestic anticompetitive effects. Local hold-separate arrangements pending resolution of a Bureau review or Tribunal proceeding have occasionally been employed in the past. However, the Bureau's Remedies Bulletin indicates that the circumstances in which the Bureau will consider agreeing to the use of such hold-separate agreements are narrow.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

Rules exist to ensure that targets of hostile or unsolicited takeover bids supply their initial notification in a timely manner. In such a case, the 30 day no-close waiting period commences upon the submission of the acquirer's filing, even if the target has not yet submitted its information.

For hostile or unsolicited takeover bids that result in SIRs being issued by the Commissioner, the second 30 day no-close waiting period commences upon the Commissioner's receipt of a certified response to the SIR from the acquirer.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The information required for a pre-merger notification filing is set out in the Act and in regulations promulgated pursuant to the Act. The main requirements of the pre-merger notification filing are:

- an overview of the transaction structure;
- an executed copy of the legal documents to be used to implement the proposed transaction (or the latest draft thereof, if not yet finalised);
- a description of the business objectives of the transaction;
- a list of the foreign antitrust authorities that have been notified of the proposed transaction;
- a summary description of the principal businesses carried on by each party (on an affiliate-by-affiliate basis) and of the principal categories of products (or services) supplied by such businesses in their various markets, including contact information for the top 20 customers and suppliers for each such product category;
- basic financial information for each party;
- business, product, customer, supplier, financial and geographic scope of sales information of each of the party's principal businesses;
- all studies, surveys, analyses and reports prepared or received by an officer or director for the purpose of evaluating or analysing the proposed transaction that contain market-related or competition-related information (similar to the '4(c)' documents under the US Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the HSR Act)); and
- similar information related to each affiliate of the notifying party with significant Canadian assets or sales.

If the Bureau concludes during the initial 30-day review period that a more detailed review is warranted, it may issue a SIR requiring the production of additional documents and data. The Bureau's (non-binding) guidelines related to the merger review process state that, in all but exceptional cases, the Bureau will limit the number of custodians to be searched in preparing a response to a SIR to a maximum of 30 individuals. The default search period for hard copy and electronic records in the possession, custody or control of a party will generally be the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years. The Bureau will also generally limit the relevant time period for data requests to the year-to-date period immediately preceding the date of issuance of the SIR and the previous three full calendar years. Where parties operate on a North American basis, and where the transaction does not raise Canada-specific concerns, the Bureau may, in appropriate cases, work with the parties to try to limit the list of custodians (to the extent possible) to a list of custodians that the US authorities have agreed to in connection with a second request under the HSR Act.

An officer or other person who has been duly authorised by the board of directors of the notifying party is required to certify on oath or solemn affirmation that, to the best of that person's knowledge and belief, all information provided in the pre-merger notification filing and in a response to a SIR (if applicable) is correct and complete in all material respects. Knowingly providing incorrect information could result in criminal prosecution for perjury in connection with swearing a false certificate.

The Act also contains an obstruction offence that applies where any person impedes or prevents or attempts to impede or prevent any inquiry or examination under the Act. Knowingly withholding or providing misleading information could be seen as impeding or attempting to impede an examination by the Commissioner.

There has also been one reported case where the Bureau advised merging parties (identities not disclosed) that it would rescind the previously issued clearance because the information received in connection with the merger notification was materially misleading.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

After notifications have been filed, the Bureau will typically have follow-up questions as it conducts its investigation. In transactions that give rise to a prima facie overlap or where it is not clear to the Bureau whether there is overlap based on information provided by the merging parties, Bureau staff will usually contact customers set out in the parties' filings (as well as other market participants) to solicit information from them regarding the proposed transaction. In addition, the Bureau may request that the parties to the merger provide additional information, documents or data such as estimates of market shares.

If the Commissioner plans to issue a SIR, the scope of this request will be discussed with the merging parties very shortly before the expiry of the initial 30-day waiting period and these discussions may continue after the request is issued. The SIR will typically involve compulsory production of large volumes of documents and data. Subpoenas may also be issued to third parties to produce relevant documents or data. The provision of compulsory testimony through depositions before a hearing officer is possible but rarely used in practice.

Most complex mergers will involve face-to-face meetings with Bureau staff and federal Department of Justice lawyers. Regardless of complexity, regular communication between the Bureau staff and the parties' counsel is the norm.

18 | What is the statutory timetable for clearance? Can it be speeded up?

There is a 30-day no-close statutory waiting period from the day the filing is certified complete.

The Commissioner may, within the initial 30-day waiting period, issue a SIR requiring the parties to submit additional information that is relevant to the Commissioner's assessment of the proposed transaction. If the Commissioner issues a SIR, a second no-close statutory waiting period continues until 30 days after the day that the required information has been received by the Commissioner and certified complete by each of the parties.

In most straightforward cases, the Commissioner's review is concluded in less than two weeks. However, in more complex cases, the Bureau's review process may be substantially longer.

Although it is non-binding, the Bureau's Fee and Service Standards Handbook sets out the following 'service-standard' periods to which the Bureau will attempt to adhere in its review process:

- 14 days for non-complex mergers;
- 45 days for complex mergers, except where a SIR is issued; and

- 30 days after compliance with a SIR, for complex mergers where a SIR is issued (this last service-standard period is coextensive with the statutory no-close waiting period following compliance with a SIR).

The Bureau informs notifying parties of the commencement of its service standards within five business days of receiving sufficient information to assign a complexity rating, as outlined in its Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters. However, service standards are intended to be maximums and the Bureau may (and often does, in non-complex cases) complete cases in less than the full service-standard period.

It is possible to speed up the timetable for clearance if the Bureau's substantive inquiries can be satisfied before the statutory waiting or the 'service-standard' periods (or both) expire. The Commissioner can terminate the waiting periods early – within the initial 30-day period or within the no-close period following the issuance of a SIR – if he or she is satisfied that there is not a competitive concern. Parties and their counsel will usually provide additional information as requested by the Bureau on a voluntary basis and often submit detailed 'competitive impact' analyses to the Bureau to expedite completion of the review process.

If the parties proceed by way of an application for an advance ruling certificate, the no-close period effectively runs until the Commissioner has either issued such a certificate or provided a 'no action' letter confirming the Commissioner's lack of intention, at that time, to make an application under section 92 of the Act in respect of the proposed transaction together with a waiver of the filing requirements.

In cases in which a formal filing has been made and the 30-day period has expired but the Commissioner needs more time for his or her review, the Commissioner sometimes simply requests that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate that request, but merging parties often do so. However, there have been a number of recent cases where merging parties have chosen to close their transactions once the waiting periods have expired but prior to the Bureau finishing its review. This includes the *Parrish & Heimbecker/Louis Dreyfus* grain elevator sale that closed in December 2019 and that the Commissioner has challenged before the Competition Tribunal (case ongoing at the time of this writing); the *Thoma Bravo/Aucerna* deal that closed in May 2019 and that the Commissioner subsequently challenged, ultimately resulting in a divestiture pursuant to a consent agreement; the *Tervita/Newalta* deal that closed in July 2018 with the Commissioner opting to let the one-year deadline to challenge the transaction expire; and the *Pembina/Veresen* deal that closed in October 2017 with the Commissioner's decision not to challenge the transaction not being made until September 2018.

Formal timing agreements between the parties and the Bureau may also be used to confirm that a transaction will not be closed for a period of time after the expiry of the statutory waiting period, or for a period of time after the parties give the Commissioner notice of their intention to close. In particular, if the parties plan to raise an efficiencies defence, the Commissioner has provided recent guidance indicating an expectation that the parties and the Bureau will enter into a model timing agreement to allow the Bureau sufficient time to evaluate the parties' claimed efficiencies. Alternatively, the Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

Given the foregoing, for simple transactions the review period is typically about two weeks. However, for the most complex transactions, the review period can extend to 150 days, or even longer.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for the Commissioner of Competition (the Commissioner) to challenge and the Competition Tribunal (the Tribunal) to issue a remedial order is whether the merger or proposed merger is 'likely to prevent or lessen competition substantially' in any relevant market. The Competition Act (the Act) sets out a number of evaluative factors that the Tribunal (and, by implication, the Commissioner during his or her investigation) is to consider in applying this substantive test:

- the availability of acceptable substitute products;
- the effectiveness of remaining competition;
- foreign competition;
- whether the merger will remove a vigorous competitor from the market;
- whether the target entity has failed or is about to fail;
- barriers to entry;
- the nature and extent of change and innovation in the market; and
- any other relevant factors (which will often include the possible existence of countervailing buyer power).

The Act also requires that the Tribunal not make a determination on the basis of market shares or concentration ratios alone.

The Act provides an explicit statutory efficiencies defence that allows an otherwise anticompetitive merger to be 'saved' if there are offsetting efficiencies. A 2015 decision of the Supreme Court of Canada indicated that quantitative efficiencies and quantitative anticompetitive effects will typically be balanced against one another, after which non-quantitative evidence will also be considered.

The Commissioner's Merger Enforcement Guidelines (MEGs) elaborate on the Competition Bureau (the Bureau) views respecting each of the evaluative factors set out in the Act. They also establish 'safe harbours' within which the Commissioner generally will not challenge a merger with respect to 'unilateral effects' and 'coordinated effects' theories of competitive harm. In respect of unilateral effects, the Commissioner generally will not challenge a merger if the combined post-merger market share of the merged entity is less than 35 per cent. For coordinated effects theories of harm, the Commissioner generally will not challenge a merger where the post-merger four-firm concentration ratio (combined market shares of the largest four firms) is below 65 per cent or the merged entity's market share would be less than 10 per cent. Transactions that involve higher market shares or industry concentration are not automatically challenged, but will generally receive careful scrutiny.

The fact of a 'failing firm' technically is not a defence to merger challenge. Rather, if the business, or part of the business, of a party to the merger or proposed merger has failed or is likely to fail' is a factor to be considered by the Tribunal in determining whether a merger is likely to give rise to a substantial prevention or lessening of competition. The MEGs elaborate that, if 'imminent failure' of a firm is probable and that, in the absence of the merger, the assets of the failing firm would be likely to exit the relevant market, then the loss of the actual or future competitive influence of the failing firm will not be attributed to the merger in the Bureau's review. In addition, the Bureau will want to be satisfied that there are no competitively preferable alternatives to the proposed transaction such as a competitively preferable purchaser, retrenchment by or even liquidation of the failing firm. In April 2020, the Bureau released a position statement describing its approach to failing firm arguments after its review and decision not to challenge the *American Iron & Metal Company/Total Metal Recovery* transaction. It confirmed and elaborated on the approach in the MEGs that financial documents and related information will be examined in detail to determine whether the firm is failing and that no competitively preferable alternatives exist. The position statement also detailed the types of information that the Bureau typically gathers from customers, competitors and other interested parties to perform this analysis.

In the Bureau's most recent Annual Plan, released in April 2021, the Bureau emphasised that it would use all of its tools to review mergers, which includes applying 'evidentiary rigor in assessing failing firm claims in the context of merger reviews'.

20 | Is there a special substantive test for joint ventures?

Joint ventures often fall within the definition of mergers and in such situations are subject to the same substantive test. However, the Act specifically exempts from merger review certain unincorporated 'combinations' in connection with one-off projects or programmes, including research and development projects, provided a number of specified criteria are met. These relate to control of the joint venture parties, the business rationale for the formation of the joint venture, the scope and duration of the joint venture's activities, and the extent of the adverse effect of the joint venture on competition. Part IX of the Act contains an imperfectly analogous notification exemption for 'combinations': if they are formed with a restricted range of activities, there is an agreement in writing or intended to be put in writing imposing an obligation to contribute assets to the combination and governing a continuing relationship between the parties, there is no change in control of a party and there are provisions for orderly termination of the combination.

In March 2010, two new provisions of the Act came into force dealing with agreements between competitors. Such agreements may be subject either to criminal prosecution under the conspiracy offence or to challenge as a reviewable practice by way of an application to the Tribunal for a prohibition order. The substantive framework for the competitor agreements reviewable practice is almost identical to the merger provisions. Once the Bureau has decided which track to pursue (merger, civil agreement among competitors or criminal conspiracy), there are double jeopardy protections that preclude it from using the other tracks.

The Bureau has indicated in its Competitor Collaboration Guidelines that the conspiracy offence will be restricted to 'naked restraints' (cartel-like conduct) and that those bona fide joint ventures that do not constitute mergers will normally be reviewed under the competitor agreements' reviewable practice provision.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In general, the Bureau will consider whether a proposed horizontal transaction (ie, a merger involving current or potential competitors) is likely to lead to a substantial lessening or prevention of competition on either a unilateral effects basis or a coordinated effects basis. Under the unilateral theory of harm, the Bureau will consider whether the merged entity will likely be able to raise prices profitably (or lessen competition in other, non-price dimensions) as a result of the merger without relying on an accommodating response from its competitors. Under the coordinated theory of harm the Bureau considers whether the proposed merger is likely to reduce the level of competition in a market by, for example, removing a particularly aggressive competitor, or enabling the merged entity to coordinate its behaviour with that of its competitors, so that higher post-merger prices are profitable and sustainable because other competitors in the market have accommodating responses.

Vertical mergers may raise concerns when they increase barriers to entry, raise rivals' costs or facilitate coordinated behaviour.

Mergers may also give rise to concerns about the prevention (as opposed to lessening) of competition in a market when, in the absence of the proposed merger, one of the merging parties is likely to have entered the market de novo and eroded the existing market power of the other party.

In addition to price, the Bureau may also assess the effects of a merger on other dimensions of competition, including quality, product choice, service, innovation and advertising.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The MEGs, Tribunal jurisprudence and media statements by senior Bureau staff indicate that merger review is informed by the Act's purpose clause, including its concern with ensuring that 'small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy'. Broader issues, such as employment, head office functions, national champion concerns or other industrial policy considerations have not historically been relevant to the Commissioner's review. These factors can be relevant to an assessment under the Investment Canada Act.

Bureau reviews of proposed mergers in the federal financial services and transportation sectors on competition grounds may operate in parallel with ministerial approval processes that are based on broader public interest considerations. In both systems, the Commissioner's views on the competitive ramifications of proposed mergers inform but would not bind the relevant minister in making a decision on public interest grounds. Thus, the Act specifically provides that the Tribunal shall not make an order in respect of a merger involving financial institutions or transportation undertakings in respect of which the Federal Minister of Finance or Minister of Transport, as the case may be, has certified to the Commissioner that the merger would be in the public interest.

In February 2019, the Commissioner provided a report to the Minister of Transport regarding a proposed merger of the two main airlines operating in northern Canada, Canadian North and First Air. The Bureau's report concluded that the proposed merger would give rise to significant competition concerns. However, in June 2019, the government of Canada approved this merger following a public interest assessment led by the Minister of Transport, notwithstanding the Commissioner's competition concerns.

Similarly, in March 2020, the Commissioner provided a report to the Minister of Transport regarding the proposed acquisition by Air Canada of Transat AT, concluding that this proposed acquisition would likely result in a substantial lessening or prevention of competition in the sale of air travel or vacation packages to Canadians. Specifically, the Commissioner indicated that the merger would substantially lessen competition on 83 routes originating in Canada with destinations in Europe, Mexico, Central America, the Caribbean, Florida and South America. However, in February 2021, the government of Canada approved this merger subject to a number of terms and conditions. Notwithstanding the receipt of approval in Canada, Air Canada ultimately decided to abandon the deal in April 2021 in response to the European Commission signalling to the parties that it would not approve the transaction.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Act provides an efficiencies defence that allows an otherwise anti-competitive merger to be 'saved' by efficiencies that are likely to be greater than and offset any prevention or lessening of competition. The scope of the efficiencies defence was examined in the *Superior Propane* and the *CCS/Tervita* cases. *Superior Propane* was the first litigated case in which a party succeeded in having an otherwise anticompetitive merger saved by efficiencies. A key issue in that case was whether a 'total surplus' or a 'consumer welfare' standard should be used to evaluate the trade-off between efficiencies and anticompetitive effects. The Tribunal adopted the 'total surplus' standard, but the Federal Court of Appeal rejected this approach and remanded the case back to the Tribunal for reconsideration of the proper standard to apply. At the rehearing, the Tribunal again rejected the consumer welfare standard but adopted a 'balancing weights' approach, which gives some consideration to the redistributive effects of a merger (eg, negative impacts on low-income consumers) in addition to the overall magnitude of efficiency gains. This decision was upheld by the Federal Court of Appeal.

In *CCS/Tervita*, the Supreme Court of Canada overturned decisions of the Tribunal and Federal Court of Appeal and accepted the parties' efficiencies defence. While the majority decision of the Supreme Court recognised that the transaction's cognisable efficiencies were minimal, the Commissioner had not met the required burden to quantify the quantifiable anticompetitive effects of the merger. As a result, the transaction's minimal efficiencies were sufficient to outweigh the uncalculated anticompetitive effects, which were given a weight of zero. In the same decision, the Court noted that there were economic arguments in favour of the total surplus approach to the efficiencies defence, but specified that the Tribunal has the flexibility to make the ultimate choice of methodology. Qualitative anticompetitive effects and qualitative efficiencies generated by a merger will only be considered and weighed against each other in the analysis in respect of effects and efficiencies that cannot be quantified. As a result, the Bureau now seeks to determine whether the parties plan to raise an efficiencies defence early in the review process. Supplementary information requests typically have efficiency-related questions that parties must address if they intend to make an efficiency claim. The Bureau may require production of considerable data so that it can properly quantify the transaction's anticompetitive effects and efficiencies.

In May 2020, the Bureau published a model timing agreement for merger reviews involving efficiencies claims. The timing agreement establishes stages, including when certain data and information are to be supplied to the Bureau how and when the Bureau will respond to the efficiencies arguments raised by the merging parties. The first transaction to use the (then draft) model timing agreement was the *Canadian National Railway Company (CN)/H&R Transport Limited* transaction in 2019.

In *CN/H&R*, the Bureau concluded that the acquisition by CN of H&R would likely result in a substantial lessening of competition in eight local markets, but the Bureau determined that the efficiency gains would be greater than the likely anticompetitive effects and therefore did not challenge the transaction. This is the latest in a series of cases where efficiency claims have 'saved' an otherwise anticompetitive transaction, not through litigation but during the Bureau's review. In the 2017 *Superior Plus/Canwest Propane* transaction, the Bureau concluded that while the merger would give rise to a substantial lessening of competition in 10 local markets, it would not seek to require divestitures in these markets because the efficiency gains resulting from the transaction were likely to outweigh the anticompetitive effects in these local markets significantly. Divestitures were required in 12 other local markets where efficiency gains were not seen to outweigh the anticompetitive effects. The Bureau also concluded that the efficiencies defence was applicable in its 2016 review of Superior Plus's proposed acquisition of Canexus, although this deal was abandoned because of a challenge by the Federal Trade Commission in the United States. In addition, in the 2017 *First Air/Calm Air* merger, the Bureau noted that its financial expert found that the merger's efficiencies gains were likely to outweigh its anticompetitive effects significantly, leading to the Bureau's conclusion that it did not have a sufficient basis to challenge the merger. The Bureau's review of *Chemtrade/Canexus* in 2017 was also approved on the basis that the efficiencies that would likely be lost from blocking the merger or imposing remedies would significantly outweigh the likely anticompetitive effects of the merger.

In March 2018, the Bureau published for public comment a draft of a new guide for assessing efficiencies in merger reviews. The final version of the guide had not been published at the time of writing, and the draft guide has been removed from the Bureau's website. However, in May 2019, the then recently appointed Commissioner gave a speech in which he noted that he is highly unlikely to exercise his enforcement discretion to decline to challenge a potentially anticompetitive merger without 'reliable, credible and probative evidence that supports and validates the efficiencies defence being advanced'. The Commissioner indicated that the Bureau will expect to receive detailed evidence supporting the efficiencies claimed, to have the opportunity to test the evidence underlying the efficiency claims and to be provided with adequate time, pursuant to timing agreements, to meaningfully assess the efficiencies. The model timing agreement provides detail on the type of information that the Bureau expects to receive from merging parties to substantiate efficiency claims.

In early 2021, the Standing Committee on Industry, Science and Technology has been studying Canada's competitiveness, which has included considering possible amendments to the Competition Act. One possible amendment being discussed and debated is the possible elimination of the efficiencies defence.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Tribunal (the Tribunal) on application by the Commissioner of Competition (the Commissioner) may order the parties to a proposed merger to refrain from implementing their merger or doing anything the prohibition of which the Tribunal determines is necessary to ensure the merger (or a part of it) does not prevent or lessen competition substantially. If a merger has already been completed, the Tribunal may order the dissolution of the merger or the divestiture of assets or shares. In addition, with the consent of the Commissioner and the merging parties, the Tribunal may order any other action to be taken to remedy the anticompetitive effects of a proposed or completed merger.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Divestitures are the primary remedy used in merger cases. In the *CCS/Tervita* case, the Competition Bureau (the Bureau) sought dissolution as the preferred remedy, but the Tribunal concluded that a divestiture order would be appropriate. While it is possible (and frequently of interest to merging parties) to resolve issues through the use of behavioural remedies such as firewalls or agreements to supply, these tend to be viewed by the Bureau as less desirable than structural remedies such as divestiture and are more often seen in vertical rather than horizontal cases. Parties should expect that, in most cases, the Commissioner will seek to have any negotiated remedies recorded in a consent agreement that is filed with the Tribunal, whereupon it has the force of a Tribunal order.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Any divestiture or other remedy ordered by the Tribunal must restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. The Tribunal has broad jurisdiction to attach detailed terms and conditions to divestiture orders, including deadlines for completion and provisions appointing and empowering trustees to effect divestitures if the merging parties fail to do so in a timely manner. The Bureau also has broad discretion to negotiate the terms of divestiture or dissolution orders or behavioural remedies to be embodied in a consent agreement.

The Bureau's 2006 Remedies Bulletin indicates that it prefers 'fix-it-first' remedies whereby an approved up-front buyer is identified and, ideally, consummates its acquisition of the standalone business to be divested at the same time as the merger parties consummate their own transaction. When it is not possible to fix it first – which, in practice, is frequently – the Bureau will normally require that divestures be effected by the merging parties within three to six months. If they fail to do so, a trustee will be appointed to complete the sale in a similar time frame without any guaranteed minimum price to the seller.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign mergers with competitive effects within Canada are subject to the federal Competition Act, including its remedial provisions. Consequently, divestitures of Canadian assets have been required in many foreign-to-foreign mergers. In many of those cases there were remedies in foreign jurisdictions as well. In some cases, the Bureau may rely on remedies required by foreign competition authorities and not take separate remedial steps in Canada if the foreign remedies are sufficient to address anticompetitive concerns in Canada. Examples include *United Technologies/Raytheon*, *Harris Corporation/L3 Technologies*, *United Technologies/Rockwell Collins*, *BASF/Ciba*, *Dow/Rohm & Haas*, *GE/Instrumentarium*, *Procter & Gamble/Gillette*, *UTC/Goodrich*, *Thomson/Reuters* and *Novartis/GSK*, where the remedies required by the United States or European authorities were seen as sufficient to address Canadian concerns.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Bureau will consider ancillary restrictions as part of its consideration of the transaction as a whole. Thus, the Bureau's clearance of a transaction will normally also cover any ancillary restrictions that are known at the time of the review.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Bureau (the Bureau) routinely contacts customers, and often also suppliers and competitors, for factual information and their views about a merger. However, the Competition Act (the Act) authorises the Commissioner of Competition (the Commissioner) alone to bring an application to the Competition Tribunal (the Tribunal). Consequently, a complainant has no direct ability to challenge a merger.

The Bureau is attentive to complaints from all types of private parties. The Act also provides that any six residents of Canada can compel the Commissioner to conduct an inquiry into a merger (or other matters under the Act), but the Commissioner remains the sole 'gatekeeper' who can commence a merger challenge before the Tribunal.

The Competition Tribunal Rules provide that, if the Commissioner brings an application to the Tribunal, any party affected by the merger may seek leave to intervene. Thus, complainants may obtain a formal voice in the proceedings at that stage.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

All documents (including pre-merger notifications) and information provided to the Bureau are to be treated confidentially. However, the Act permits the Commissioner to share information and documents received with a Canadian law enforcement agency (which would be rare in merger cases). In addition, the Commissioner may disclose information for the purposes of the administration or enforcement of the Act. This may occur in the Bureau's contacts with customers, suppliers and competitors, although such interviews are conducted in a manner that attempts to minimise disclosure of any confidential information to the extent possible.

The Commissioner's interpretation of the confidentiality safeguards in the Act is articulated in the Bureau's 2013 Information Bulletin on the Communication of Confidential Information Under the Competition Act. The Bureau takes the position that it has the power to share confidential information with foreign antitrust agencies without receiving a waiver from the parties providing the information, pursuant to the 'administration and enforcement' exemption. This interpretation is perceived by some as controversial and has not been tested before the courts.

The Bureau does not publicly announce the receipt of filings or commencement of investigations in the merger context. Once a merger review has been completed, the Bureau publishes the names of merger parties, the industry in which they operate and the outcome of the Bureau's review in a monthly online registry. The Bureau also publishes press releases or position statements regarding decisions in high-profile cases.

If the merger proceeds to a hearing before the Tribunal, it may be necessary, for the purposes of administration and enforcement of the Act, for otherwise confidential information to be disclosed. While the Bureau's position that it had a 'public interest privilege' over all documents collected from third parties as a class as part of a Bureau investigation or inquiry was rejected by the Federal Court of Appeal in the *Vancouver Airport Authority* case, such a privilege may still be claimed for certain materials on a document-by-document basis. Competitively sensitive information of third parties can be protected in Tribunal proceedings through the use of confidentiality orders.

Where a challenge occurs or a remedy is embodied in a consent agreement, most of the relevant materials will be filed on the public record at the Tribunal. However, commercial or competitively sensitive material may be filed on a confidential basis if a protective order is obtained.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Bureau routinely cooperates with other antitrust authorities on mergers that have multi-jurisdictional aspects. Specific antitrust cooperation instruments (cooperation agreements or memoranda of understanding) exist between Canada and three jurisdictions that give rise to a significant number of cross-border reviews: the United

States, the European Union and the United Kingdom, as well as between Canada and each of Australia, Brazil, Chile, China, Colombia, Hong Kong, India, Japan, Mexico, New Zealand, Peru, Singapore, South Korea and Taiwan. In addition, in September 2020, the Bureau announced that it had signed a new multilateral competition enforcement framework with Australia, New Zealand, the United Kingdom and the United States.

Separately, in March 2021, the Bureau announced that it has joined its counterparts in the United States, the United Kingdom and the European Union to launch an international working group to develop an updated approach to analyse the effects of pharmaceutical mergers. This working group was initiated by the United States' Federal Trade Commission.

Unlike many of its sister agencies, the Bureau asserts that it does not require a waiver to share confidential information with foreign agencies, as long as such sharing of information is likely to result in assistance to the Bureau in its review of a transaction. However, it frequently requests that merging parties grant confidentiality waivers to foreign agencies to enable them to engage in two-way communications with Bureau staff.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Although the Competition Bureau/Commissioner investigates and determines whether to challenge a merger, the challenge is heard, and the decision is made by, the independent Competition Tribunal.

The Competition Tribunal Act provides for an appeal from a decision of the Competition Tribunal (the Tribunal) on questions of law and of mixed fact and law to the Federal Court of Appeal as of right, and on questions of fact alone by leave of the court. An appeal from a decision of the Federal Court of Appeal is only available if leave is obtained from the Supreme Court of Canada. In its decision in *CCS/Tervita*, the Supreme Court of Canada held that Tribunal decisions on questions of law are to be reviewed on a standard of correctness and questions of fact and mixed law and fact are to be reviewed on the basis of reasonableness.

Although it is theoretically possible to obtain judicial review of the Commissioner of Competition's decisions or actions, in practice, he or she is accorded a very high amount of deference because the Commissioner's activities are investigative rather than adjudicative.

Time frame

33 | What is the usual time frame for appeal or judicial review?

A decision of the Tribunal is appealable to the Federal Court of Appeal, but factual findings may only be appealed with leave of the court. The typical time period for such an appeal would be six to 12 months.

An appeal from the Federal Court of Appeal to the Supreme Court of Canada is only available with leave from the Supreme Court, which is granted only infrequently. In the *CCS/Tervita* case, which is the most recent merger case reviewed by the Supreme Court, almost two years elapsed from the date of the Federal Court of Appeal decision until the Supreme Court of Canada released its decision (five months for leave to be granted, eight months for the case to be heard, and 10 months under reserve).

Enforcement decisions by the Commissioner (eg, a decision not to challenge a merger) are theoretically subject to judicial review by the Federal Court. However, such decisions are granted very substantial deference, so it is rare for complainants or other parties to bring an application for judicial review of such a decision. The time frame for such a proceeding would likely be similar to appeals of Tribunal decisions.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Merging parties (both domestic and foreign) will typically work with the Commissioner of Competition (the Commissioner) to address any concerns he or she might have with their transaction, rather than face a lengthy and uncertain process of defending their merger through litigation before the Competition Tribunal (the Tribunal). As a result, the Commissioner has litigated very few contested proceedings before the Tribunal. Amongst those cases litigated the Commissioner obtained mixed results in the *Southam* newspaper case. However, the Commissioner failed to obtain a remedy in the *CCS/Tervita*, *Hillsdown* and *Superior Propane* cases. The Commissioner was also unsuccessful in attempting to obtain a temporary injunction against the *Labatt/Lakeport* merger and subsequently decided not to challenge this merger. More recently, the Commissioner obtained a partial injunction, and ultimately a consent resolution, in the *Parkland* case. In some cases, the Commissioner has obtained remedies in merger cases on consent following the start of litigation. For example, in August 2019, the Commissioner succeeded in obtaining a divestiture on consent in *Thoma Bravo/Aucerna* following the Commissioner filing an application to the Tribunal challenging the transaction. The Commissioner's December 2019 challenge to the *Parrish & Heimbecker/Louis Dreyfus* grain elevator transaction remains ongoing as of the time of writing.

In the vast majority of cases in which the Commissioner has had concerns, the Competition Bureau (the Bureau) has been successful in negotiating consent divestitures or behavioural remedies. This has occurred in numerous foreign-to-foreign mergers, including *WESCO/Anixter*, *Elanco/Bayer Animal Health*, *Evonik/PeroxyChem*, *Linde/Praxair*, *BASF/Bayer*, *Bayer/Monsanto*, *Abbott/St Jude*, *Abbott/Alere*, *DuPont/Dow*, *Valspar/Sherwin-Williams*, *Teva/Allergan*, *Iron Mountain/Recall*, *Medtronic/Covidien*, *Novartis/Alcon*, *The Coca-Cola Company/Coca-Cola Enterprises*, *Teva/Ratiopharm* and *Live Nation/Ticketmaster*. Transactions have also occasionally been abandoned in the face of opposition by the Commissioner (eg, Bell's proposed reacquisition of 50 per cent interests in two television channels from Corus in 2018, and the *LP/Ainsworth* and *Bragg/Kincardine* mergers in 2014).

The current merger review process was adopted in March 2009. From March 2009 to September 2020, supplementary information requests (SIRs) were issued in connection with approximately 126 transactions. In recent years, SIRs have been issued in approximately 5 to 6 per cent of all transactions. This trend increased in the statistics for the Bureau's half-year ended 30 September 2020, in which SIRs were issued in approximately 11 per cent of cases. Responding to these requests requires a significant investment of time and resources (similar to, although usually not as extensive as, the US 'second request' process). The time frame for the completion of the Bureau's review of a transaction subject to a SIR has ranged from three months to seven-and-a-half months.

The substantive merger enforcement framework is set out in the 2011 Merger Enforcement Guidelines. The Bureau remains focused primarily on horizontal cases that could substantially lessen or prevent competition through unilateral or coordinated effects.

Reform proposals

35 | Are there current proposals to change the legislation?

On 1 May 2018, technical changes were implemented to the Competition Act's provisions to expand the definitions related to affiliated entities. The earlier version of the Act did not fully capture affiliates held through trusts and partnerships.

In February 2021, Canada's House of Commons Standing Committee on Industry, Science and Technology passed a resolution that called for the Committee to conduct a study on 'competitiveness in Canada', which would include considering potential reforms to the Competition Act. That process is just commencing, but the Committee held four meetings on the subject of 'Competitiveness in Canada' in April 2021. Ideas advanced for amendments related to mergers have included eliminating or amending the efficiencies defence; introducing a more streamlined process for reviewing non-complex mergers; and granting the Commissioner the ability to review transactions more than one year after closing.

It remains to be seen what, if any, amendments to the Competition Act will actually result from this process.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

As part of the Competition Bureau (the Bureau)'s response to covid-19, the Bureau has noted that it has become increasingly difficult to make market contacts in a timely manner, which might lead to merger reviews taking longer than the Bureau's service standards. The Bureau, therefore, recommends that merging parties with complex matters notify the Bureau as early as possible to provide the Bureau with sufficient time to conduct its review. More generally, the Bureau has indicated that it will be prioritising 'urgent marketplace issues that require immediate action to protect Canadians'. The Bureau has also stopped providing hard copy letters and is now providing all letters electronically, which include letters indicating merger clearance.

During the pandemic and economic recovery period, we expect that there may be significantly more transactions involving failing firms and restructurings that will give rise to reliance on the efficiencies defence.

In April 2021, the government of Canada's proposed budget included a significant increase in the Bureau's budget (by approximately 50 per cent). If this increase in funds is approved, we expect that the Bureau may become more active and take on more cases.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Chinese Antimonopoly Law (AML) (which entered into force on 1 August 2008) contains a chapter entitled 'Concentrations of Undertakings'. This chapter deals with the merger control regime in China. The AML is supplemented by implementing regulations, including the Rules on Notification Thresholds for Concentrations of Undertakings published by the State Council (the Notification Thresholds Rules), adopted in 2008 and amended in 2018; and the Guidelines on the Definition of the Relevant Market published by the Antimonopoly Commission of the State Council (which is generally responsible for coordinating and guiding antitrust policy within China).

The Antimonopoly Bureau (AMB) under the State Administration for Market Regulation (SAMR) is now responsible for the enforcement of merger control in China. The AMB was established in March 2018 as a result of the merger of the Antimonopoly Bureau of the Ministry of Commerce (MOFCOM), which was formerly responsible for the enforcement of the merger control rules under the AML, and the two other former competition authorities in China, the Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (NDRC) and the Antimonopoly and Anti-unfair Competition Bureau of the State Administration for Industry and Commerce (SAIC).

In addition to the AML, several implementing rules, regulations and measures have been adopted, including, among others:

- Interim Provisions on Assessment of the Effects of Concentrations on Competition (2011), which provide the factors to be considered when assessing the effects of a transaction, including market shares, the degree of control of a relevant market, concentration levels, impact on market entry and technological progress, impact on consumers and other relevant undertakings, and impact on national economic development;
- Interim Provisions on Standards for Simple Cases (2014), which provide criteria for defining 'simple cases', namely, transactions that do not give rise to significant competition concerns and therefore merit streamlined review by SAMR;
- Guidelines on the Notification of Simple Cases (adopted in 2014 and amended in 2018), which provide procedural guidance on the notification of simple cases but do not set any deadlines for the authority to complete its review in these cases. That said, in practice, SAMR seeks to complete its review of 'simple cases' in Phase I;
- Guidance for Notification of Concentrations of Undertakings (adopted in 2014 and amended in 2018, the Notification Guidance), which specifies the factors to consider when determining whether there is an acquisition of control and provides procedures for pre-notification consultation meetings with SAMR;
- Guidance on the Notification Name of Concentrations of Undertakings (adopted in 2014 and amended in 2018), which provides rules on how to name a transaction for notification purposes; and
- Interim Provisions on Review of Concentrations of Undertakings (2020), which are a welcome consolidation of various rules and regulations related to key areas of China's merger control regime including, among others, notification thresholds, filing procedure, review procedure, assessment of the competitive effects of a transaction, remedies and investigations into failure to file. In addition, it is worth noting that these new Interim Provisions empower SAMR to delegate its merger review function to its provincial branches. This is expected to ease SAMR's resource constraints as it faces an ever-growing caseload.

Scope of legislation

2 | What kinds of mergers are caught?

Mergers and acquisitions that are characterised as a 'concentration of undertakings' are caught by the AML and require notification to SAMR if they meet the relevant turnover thresholds.

A concentration of undertakings is defined in the AML as:

- a merger of undertakings;
- an undertaking acquiring control over one or more undertakings by acquiring shares or assets; or
- an undertaking acquiring control or being able to exercise decisive influence over one or more undertakings by contract or any other means.

3 | What types of joint ventures are caught?

The AML is silent on whether joint ventures are subject to notification. However, this issue was clarified in the Notification Guidance. This provides that a newly established joint venture (ie, a greenfield joint venture) constitutes a concentration of undertakings if at least two undertakings jointly control the joint venture. If, however, only one undertaking solely controls a joint venture and other shareholders have no control, then that joint venture does not constitute a concentration of undertakings. The Notification Form also provides that both greenfield joint ventures and joint ventures formed by way of acquisition or change of control are reportable transactions and that the 'undertakings concerned' in joint venture transactions will vary depending on the nature and type of the transaction structure. MOFCOM/SAMR have imposed remedies in several cases involving the establishment of a joint venture, such as *Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho* (2014) and *Zhejiang Garden/DSM* (2019). Several companies have also been fined for failure to file reportable joint ventures.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The AML does not provide a definition of 'control'.

However, the Notification Guidance explains that control in the context of China merger control includes both sole control and joint control and that control or decisive influence is determined by reference to legal and factual circumstances. Factors that are taken into consideration include the corporate governance procedures of the undertakings concerned as reflected in transaction documents and articles of association (eg, the voting mechanism at the general meeting of shareholders, the board of directors or other supervisory board, the appointment and removal of senior management), the objective and the future plan of the transaction, the shareholding structure of the undertakings concerned before and after the transaction (eg, if an acquisition of control cannot be determined on the basis of concentration agreements and articles of association, but factors such as the shareholding being dispersed give an undertaking de facto control, such a transaction also constitutes an acquisition of control), the relationship between the shareholders and directors of other undertakings; whether there exist significant commercial relationships, cooperation agreements, etc, between the undertakings concerned. Accordingly, the issue of whether a transaction leads to an acquisition of control or decisive influence must be determined on a case-by-case basis.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

For any merger or acquisition of control that is considered a 'concentration of undertakings', a pre-merger notification must be filed with SAMR if the relevant parties' turnover exceeds any of the following thresholds, as set out in the Notification Thresholds Rules and the Notification Guidance:

- the total worldwide turnover of all undertakings concerned in the transaction in the previous financial year exceeded 10 billion yuan and the PRC turnover of each of at least two undertakings concerned in the transaction in the previous financial year exceeded 400 million yuan; or
- the combined PRC turnover of all undertakings concerned in the transaction in the previous financial year exceeded 2 billion yuan and the PRC turnover of each of at least two of the undertakings concerned to the transaction in the previous financial year exceeded 400 million yuan.

In cases where a concentration does not meet the notification thresholds, the undertakings concerned may nevertheless notify the transaction voluntarily to SAMR. Parties may choose to file on a voluntary basis in circumstances where the transaction may give rise to competition concerns.

Further, SAMR has the discretion under the Notification Thresholds Rules to review non-reportable transactions that are not voluntarily notified by the parties, if SAMR considers that the transaction is likely to result in the 'elimination or restriction of competition'. Such a discretionary review may, for example, be initiated in the event of complaints from third parties including customers, suppliers or competitors.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for any 'concentration of undertakings' that meets any of the notification triggers specified in the Notification Thresholds Rules.

The AML provides for an exemption from pre-merger filing for intragroup transactions in specific circumstances, namely where:

- among all undertakings involved in the concentration, one undertaking possesses 50 per cent or more of the voting shares or assets of every other undertaking; or
- one undertaking not involved in the concentration possesses 50 per cent or more of the voting shares or assets of every undertaking involved in the concentration.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes. Foreign-to-foreign mergers must be notified if the turnover thresholds are met. The Notification Thresholds Rules require two parties to generate turnover in China (albeit low amounts). Otherwise, there is no additional 'effects test'. However, under the Interim Provisions on Standards for Simple Cases, certain foreign-to-foreign transactions may qualify as 'simple cases' on the basis that the transaction does not give rise to significant competition concerns. Transactions that qualify for simple treatment are subject to less burdensome information requirements under the Guidelines on the Notification of Simple Cases and a streamlined review process.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes. All foreign investment in China must be filed with or approved by MOFCOM or one of its local branches. Foreign investment is regulated under the Foreign Investment Law (effective from 1 January 2020), the Implementing Regulations of the Foreign Investment Law (effective from 1 January 2020), the Catalogue of Sectors Where Foreign Investment is Encouraged (Encouraged Sector Catalogue) (2020) and the Negative List (amended in 2020). Certain sectors are closed to foreign investment or subject to foreign ownership restrictions, while foreign investment is encouraged in other sectors through preferential policies. Foreign investment falls under four categories in China: encouraged, permitted, restricted and prohibited. The first category is provided in the Encouraged Sector Catalogue and the last two categories are prescribed in the Negative List. The 2020 Encouraged Sector Catalogue contains 480 nationwide sectors and 755 regional sectors, representing an increase over the encouraged sectors in the former 2019 Encouraged Sector Catalogue. The 2020 Negative List has reduced the number of restricted and prohibited sectors from 40 to 33 compared to the 2019 version, including sectors such as financial services, manufacturing, agriculture and infrastructure. This highlights an increasing trend towards fewer restrictions on inbound investment. While foreign investment in restricted sectors must be approved by MOFCOM or its local branches, only a procedural filing is required for foreign investment in sectors outside the Negative List.

Another relevant approval regime is the national security review regime, which took effect in March 2011. This regime applies to (1) an investment made by a foreign investor in China's military or military-related industries, or an investment in a Chinese domestic business located near military or military-related facilities; or (2) a foreign investor's acquisition of control over a Chinese domestic business active in critical agriculture, critical energy and resources, critical equipment manufacturing, critical infrastructure, critical transportation services, critical cultural products and services, critical IT-related or Internet products and services, critical financial services, key technologies and other critical sectors.

A set of implementing rules, published by MOFCOM in August 2011, include an 'anti-circumvention' clause, prohibiting foreign investors from circumventing national security review by relying on mechanisms such as trusts, multilevel reinvestments, leasing and loan arrangements, contractual control structures or offshore transactions. This makes clear that the national security review is concerned with the substance and actual effect of a transaction rather than its form.

According to the Measures on Security Review of Foreign Investment (effective from 18 January 2021), a reportable foreign investment is notifiable to a working mechanism office (the Office) led by NDRC and MOFCOM. Institutionally, the Office sits under NDRC.

A national security review is conducted in three phases:

- a preliminary review phase, which lasts up to 15 working days, during which the Office determines whether a foreign investment triggers a national security review;
- a general review phase, which lasts up to 30 working days; and
- a special review phase, which lasts up to 60 working days, and will be initiated if a foreign investment has or may have an impact on national security, and can be extended in special scenarios.

Notably, during its review, the Office can stop the clock while awaiting a notifying party's response to information requests.

If the Office determines that a transaction gives rise to national security concerns, parties may be required to abandon or (in cases where completion has already occurred) unwind the transaction, or to put in place remedial measures to address the concern.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Chinese Antimonopoly Law (AML) does not provide any deadlines for filing, but it provides that notifiable transactions cannot be closed without being notified to and cleared by the authority.

Undertakings that fail to notify a qualifying transaction to the State Administration for Market Regulation (SAMR) may be subject to various penalties. SAMR has the power to order the undertakings to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and adopt other necessary measures to restore the pre-merger market situation. SAMR may also impose a fine of a maximum of 500,000 yuan. The more serious implication for most businesses is the adverse impact on relations with SAMR, potentially on a long-term basis.

Both the Ministry of Commerce (MOFCOM) and SAMR's published decisions for failure to file to date involve not only domestic transactions and Sino-foreign transactions, but also foreign-to-foreign transactions.

In 2014, MOFCOM adopted its first public failure to notify decision. It imposed a fine of 300,000 yuan on Tsinghua Unigroup for failure to notify its acquisition of RDA Microelectronics (both are Chinese companies). Fines were imposed notwithstanding the fact that MOFCOM found that the transaction had no adverse impact on competition in China, making it clear that 'lack of impact' on competition is not a basis for not filing in China if the transaction constitutes a concentration of undertakings and the turnover thresholds are met.

In 2017, MOFCOM adopted its first penalty decision involving a foreign-to-foreign transaction for failure to notify. Canon was fined 300,000 yuan for failure to file its acquisition of Toshiba Medical. The case involved a multistep transaction. There have been several cases involving foreign-to-foreign transactions since then. For example, in 2017, MOFCOM announced a fine of 150,000 yuan on OCI Corporation for failure to file its acquisition of Tokuyama Malaysia; and in 2018, SAMR fined Paper Excellence BV, a company registered in the Netherlands, for failure to file its acquisition of Eldorado Brasil Celulose SA, a Brazilian company.

In 2019, SAMR adopted its first penalty decision involving a transaction that closed prior to clearance. As a result, the party with a duty to file, New Hope Investment, was fined 400,000 yuan for implementing the transaction before SAMR approved it.

SAMR has stepped up enforcement against failure to notify reportable transactions since November 2020, especially against companies active in the internet sector. In December 2020, SAMR fined three companies 500,000 yuan respectively for failing to notify reportable transactions involving variable interest entities (VIE). This was the first time that SAMR had taken action against VIE-related transactions. The decisions also marked the first time that SAMR imposed the current maximum fine under the AML. The Antitrust Guidelines for the Platform Economy (the Platform Guidelines), which were subsequently adopted in February 2021, have reinforced SAMR's position on VIE-linked transactions, so transactions with VIE-related structures should similarly be notified if the turnover thresholds are met.

As of April 2021, MOFCOM and SAMR had together published 86 decisions for failure to notify. In the first four months of 2021, SAMR published 24 failure to notify decisions, most of which concern the internet sector. This is a record high compared to the same period in past years. In addition to the focus on VIE-related transactions, the recent cases also reveal that minority stake acquisitions and some offshore joint ventures are subject to closer scrutiny. For example, Shanghai Hantao Information Consultation Co, Ltd was fined 500,000 yuan for failure to notify its acquisition of a 6.67 per cent stake in a target company. In relation to offshore joint ventures, since June 2020, SAMR has investigated the establishment of two offshore joint ventures. One transaction concerned a joint venture between Taiwan Cement and OYAK, a Turkish cement company, set up in the Netherlands with no apparent nexus to China. The other involved a joint venture between Didi and Softbank in Japan active in the car-hailing business in Japan. These enforcement activities highlight the authority's strict stance on failure to notify reportable transactions.

In some cases, the merging parties voluntarily submitted a notification after completing their underlying transactions, and actively cooperated during the investigation with the authority. However, the merging parties were still fined despite these mitigating factors.

10 Which parties are responsible for filing and are filing fees required?

According to the Notification Form and the Notification Guidance, the notification of a concentration effected by way of a merger is made by all undertakings concerned in the merger. For a concentration effected by other means, the notification is made by the undertaking that will acquire control or will exercise decisive influence, with the assistance of other undertakings to the concentration. Undertakings involved in the concentration that serve merely as an acquisition or investment vehicle are not considered as an appropriate notifying party. The Notification Guidance further provides that if two or more of the undertakings have the obligation to notify, the undertakings may jointly notify or appoint one of the undertakings to make the notification. Where parties agree that one of them should notify the transaction on behalf of all of them, the others are not exempt from their obligation to notify. Other undertakings participating in the transaction may submit a notification where the parties obliged to file the notification fail to do so.

It is not unusual in practice for the target to be involved as a joint filing party. At present, there are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

SAMR has a statutory review period of 180 calendar days.

The initial review period is 30 days (Phase I), commencing from acceptance of the filing as complete. In practice, the period between notification and acceptance of the case is unpredictable. The pre-acceptance period normally takes up to six to eight weeks or longer depending on, among other things, the complexity of the transaction, the completeness of the notification, supplemental questions raised by SAMR and the merging parties' response to those questions. The pre-acceptance period can be shorter (approximately up to four weeks) if the transaction is a simple case. The authority has intensified its pre-acceptance review for data completeness in recent years, which may potentially impact the duration of the pre-acceptance period for both standard and simple cases.

At the end of the initial Phase I review period, SAMR must either issue a written decision to clear the transaction or issue a written notice of 'further review'. If the notifying party does not receive any written notice of further review at the end of the review period, the transaction is deemed to have been cleared and the parties are free to implement the concentration. If the notifying party receives a further review notice, which, unlike in the European Union for example, does not necessarily indicate that SAMR has concerns about the concentration, the review period can be extended for another 90 days (Phase II), commencing from the date of the decision for 'further review' of the transaction. In certain circumstances, the 90-day Phase II review period may be extended by another 60 days.

However, some conditional clearance decisions show that in practice the total review period can take longer than the maximum statutory review period of 180 days. This is the case, for example, where the authority is running out of the time to complete its review owing to complex remedy negotiations. In such a case, the notifying party may need to agree to withdraw and refile the notification, which restarts a further 180-day review period. Recent examples of cases where the parties have withdrawn their notification and re-filed include *Cisco/Acacia* (2021), *Nvidia/Mellanox* (2020), *Danaher/GE BioPharma* (2020), *Novelis/Aleris* (2019), *Zhejiang Garden/DSM* (2019), *II-VI/Finisar* (2019), *Cargotec/TTS* (2019) and *KLA-Tencor/Orbotech* (2019).

There is no provision under the AML or its implementing rules for expedited review. However, transactions that qualify as simple cases under the Guidelines on the Notification of Simple Cases benefit from a quicker review. The simple case procedure is proving effective so far in shortening the review period. In 2020, simple cases accounted for approximately 80 per cent of the authority's caseload, and nearly all of them were cleared within Phase I.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The completion of a reportable concentration prior to clearance can lead to sanctions. SAMR has the power to order the undertakings to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and adopt other necessary measures to restore the pre-merger market situation. SAMR may also impose a fine of a maximum of 500,000 yuan. The more serious implication for most businesses is the adverse impact on relations with SAMR, potentially on a long-term basis.

Fines to date have usually been imposed for failure to file, not closing before clearance, and published penalty decisions to date involve domestic transactions, Sino-foreign transactions and foreign-to-foreign transactions. In 2019, SAMR imposed fines for the first time for closing before clearance. It fined New Hope Investment 400,000 yuan for implementing its transaction prior to SAMR approval.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes. Sanctions also apply in cases involving closing before clearance in foreign-to-foreign mergers. However, SAMR has yet to adopt a penalty decision involving closing before clearance of a notified foreign-to-foreign merger.

Fines to date have been imposed for failure to file, rather than closing before clearance. In 2017, MOFCOM published the first penalty decision involving a foreign-to-foreign transaction for failure to file (ie, Canon's acquisition of Toshiba Medical). Shortly after that, it fined OCI Corporation 150,000 yuan for failure to file its acquisition of Tokuyama Malaysia in 2017; and in 2018, SAMR fined Paper Excellence BV, a company registered in the Netherlands, for failure to file its acquisition of Eldorado Brasil Celulose SA, a Brazilian company. More recently, in June 2020, SAMR fined Taiwan Cement and OYAK, a Turkish cement company, for failure to notify the establishment of an offshore joint venture. In March 2021, SAMR fined Didi and Softbank for failure to file the establishment of their joint venture in Japan.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is little track record to date on this question and there is no formal 'hold-separate' or 'carveout' arrangement that might be acceptable to remedy local issues in a foreign-to-foreign merger.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No. Although there is no official position on this, in practice, the review process can be expedited when a transaction is subject to public takeover bid rules.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Under the AML and the merger control implementing rules, the notification materials to be submitted include the following:

- a notification form, containing the names of the parties, registered business addresses, scope of business, the identity certificates or registration certificates of the notifying parties, as well as the date on which the concentration will take place – in the case of offshore notifying parties, certificates notarised and authenticated by the relevant local authorities must be submitted;
- explanation of the transaction's impact on competition in the relevant market;
- the transaction agreement and other relevant documents;
- the financial and accounting reports for the previous accounting year of the participating undertakings, audited by public accountants; and
- other documents and materials as may be required by the authority.

The Notification Form requires a significant amount of information and documents to be provided such as details of the parties' Chinese activities and foreign entities active in the relevant sectors, details of the joint venture (if applicable), general information on other undertakings involved in the transaction (eg, the seller), internal documents and materials prepared by third parties in relation to the transaction, and detailed information about customers and suppliers. This may result in more time and resources being required to prepare a filing. While some of the information required is optional, SAMR may ask for explanations if the optional information is not provided.

As mentioned above, 'simple cases' are subject to less burdensome information requirements. According to the Guidelines on Notification of Simple Cases, SAMR will not review a notification as a simple case on its own initiative. Notifying parties that would like their transaction to be treated as a simple case must submit an application to SAMR using a 'simple case notification form'. Some of the information and documents required to be submitted in the standard notification form are not required in the simple case notification form. This, to some extent, eases the administrative burden for notifying parties. Information and documents that do not need to be provided in a simple case notification form include:

- information on the parties' affiliates if not active in the business relevant to the notified transaction;
- the business licences and certificates of approval of the parties' affiliates within China;
- the demand and supply structure of the relevant market and information on the parties' major suppliers and customers;
- information on market entry;
- information on horizontal or vertical cooperation agreements; and
- potential efficiencies of the transaction.

However, a simple case notification still requires substantial corporate and competition-related information; in particular, market definition analyses and a full set of data including total market sizes and the market shares of the parties and their major competitors. In addition, a 'public notice form' must be submitted alongside the simple case notification form. The notice identifies the notifying parties and includes a summary of their activities, the transaction and the reasons for notifying the transaction as a simple case (with reference to one or more of the criteria for qualifying as a simple case). After the transaction is accepted by SAMR as a simple case, SAMR will publish the public notice form on its website for a period of 10 days for public comments.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The AML contemplates a two-phase review process. The Interim Provisions on Review of Concentrations of Undertakings provide guidance on the procedures to follow when the authority conducts its review. They also recognise a notifying party's right to be heard and to make known its views on concerns raised by the authority.

Prior to a formal notification of a concentration, a notifying party may consult SAMR on matters related to the notification. The application for pre-notification consultation is made in writing. This is not a mandatory procedure. In complex cases, for example, where the notifying parties are uncertain as to whether a transaction is reportable, or the precise scope of the relevant markets involved is difficult to delineate, it may be helpful to consult SAMR prior to filing. This may facilitate preparation of the filing and streamline the review process. The decision to consult SAMR is made on a case-by-case basis.

18 | What is the statutory timetable for clearance? Can it be speeded up?

In practice, a large majority of reviews (including 'no-issue' cases) extend well beyond the initial 30-day Phase I review period – unless the transaction is a simple case. For a case without significant competition concerns and that does not qualify for simple treatment, the usual time taken from notification to clearance is approximately four to six months depending on the facts of the case. It is commonly understood that the delay is largely caused by a combination of factors such as capacity constraints at SAMR, the complexity of the cases and the broad scope of involvement of other government agencies and third parties that the authority consults during its review process.

Although the Guidelines on Notification of Simple Cases do not provide any formal guidance regarding the timetable for review of simple cases, this is proving effective in shortening the review period. The usual time taken from notification to clearance is approximately two to three months and the vast majority of simple cases are cleared within Phase I. Some cases are cleared shortly after the start of Phase II if SAMR is unable to complete its review within Phase I. SAMR does not usually conduct extensive consultation with stakeholders, such as other government agencies for simple cases as it does for standard cases. This is one of the key factors that facilitate the shortened review.

Administrative time limits have been set for case teams to request information and for notifying parties to respond to information requests. This serves to streamline and speed up the review process.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Under the Chinese Antimonopoly Law (AML), a concentration must be prohibited if it has or is likely to have 'the effect of eliminating or restricting competition', unless the parties can show that the concentration may generate efficiencies and that its positive effects on competition significantly outweigh its negative effects on competition, or that the concentration is in the public interest.

The AML provides that the following factors shall be taken into consideration in reviewing a concentration:

- the market shares of the participating undertakings in the relevant market and their ability to control the relevant market;
- the degree of concentration in the relevant market;
- the effect of the proposed concentration on market access and technological development;
- the effect of the proposed concentration on consumers and other relevant undertakings;
- the effect of the proposed concentration on the development of the national economy; and
- other factors that affect market competition considered relevant by the authority.

Industrial policy and other non-competition factors also play a prominent role, and can often cause delays in the review process.

20 | Is there a special substantive test for joint ventures?

Joint ventures are not subject to any special standard of review distinct from other types of transactions. However, unlike in the European Union, both full-function and non-full function joint ventures require notification.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Under the AML, a concentration may be challenged on the ground that it has or is likely to have 'the effect of eliminating or restricting competition'. The State Administration for Market Regulation (SAMR) is familiar with concepts such as unilateral and coordinated effects. Recent conditional clearance decisions showing the application of these concepts include *Cargotec/TTS* (2019), *II-VI/Finisar* (2019), *Zhejiang Garden/DSM* (2019), *Novelis/Aleris* (2019) and *Danaher/GE BioPharma* (2020). *KLA Tencor/Orbotech* (2019), *Zhejiang Garden/DSM* (2019), *ZF/WABCO* (2020) and *Cisco/Acacia* (2021) are recent cases in which the authority analysed foreclosure effects resulting from vertical integration. There is a renewed and growing interest in leveraging and tying or bundling effects, as evidenced most recently by the conditional clearance decisions in *KLA Tencor/Orbotech* (2019), *Infineon/Cypress* (2020) and *Nvidia/Mellanox* (2020). In *Brocade/Broadcom* (2017) and *Nvidia/Mellanox* (2020), the authority also raised concerns over the potential misuse of third-party competitors' confidential information and the risk of undermining interoperability of complementary products in the relevant markets.

In *Google/Motorola Mobility* (2012), *Microsoft/Nokia* (2014) and *Nokia/Alcatel Lucent* (2015), MOFCOM dealt with the complex question of the licensing of standard essential patents in the IT sector.

In 2014, MOFCOM published a decision to block the proposed Maersk/MSC/CMA CGM P3 Network shipping alliance (the P3 Prohibition). This was the second prohibition decision in the history of merger review in China and the first time MOFCOM prohibited a global foreign-to-foreign transaction. The decision analyses the alliance as an integration of the three major container liner shipping companies' businesses (as opposed to a typical loose alliance in the shipping industry). MOFCOM analysed the horizontal overlaps between the parties on particular trades and relied on the resulting post-transaction high market shares and market concentration levels as primary grounds to oppose the transaction. In *Maersk Line/Hamburg Süd* (2017), MOFCOM considered the potential anticompetitive effects of vessel-sharing agreements to which the merging parties are members.

In *Dow Chemical/DuPont* (2017), *Becton Dickinson/CR Bard* (2017), *Bayer/Monsanto* (2018), *UTC/Rockwell Collins* (2018) and *Danaher/GE BioPharma* (2020), the authority examined, among other things, the transaction's potential adverse impact on innovation.

In addition, the authority will investigate factors that may affect the development of the national economy, as well as the public interest.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Non-competition issues are relevant to both domestic consolidations, where industrial policy factors may be supportive, and to inbound investment, where industrial policy factors may create additional challenges in securing merger clearance.

The AML provides that 'undertakings may implement a concentration through fair competition and voluntary coalition in accordance with law to expand their business scale and increase their market competitiveness'. That provision is understood to reflect the state's policy of encouraging consolidation and concentrations between Chinese domestic companies and supporting successful domestic companies to compete with foreign multinational companies. In addition, SAMR may decide not to prohibit a concentration that creates serious competition issues where there is proof that the concentration is in the public interest. The AML also provides that the state must protect the legitimate operation of industries that are vital to the national economy and national security where mainly state-owned enterprises are active. Relevant guidance also provides that specific explanations should be given in the notification if the concentration is related to national security, industrial policy, state-owned assets, etc. National security review is also potentially applicable under the national security review regime.

Investments by foreign companies in China and foreign-to-foreign transactions may also be reviewed in light of industrial policy considerations where it is considered that broader interests in China may be adversely affected by the concentration. Examples might include the acquisition of well-known Chinese brands or R&D facilities located in China. This can create delays in the process and, at worst, can derail the transaction.

As evidenced by two notable conditional clearances (*Glencore/Xstrata* and *Marubeni/Gavilon*) in 2013, global transactions involving commodities that are strategically important to China will be subject to close scrutiny during the transaction's review. In both cases, although the parties did not enjoy a significant combined market share, each transaction was subject to a long review process and remedies. This is possibly owing to sensitivity regarding transactions involving strategically important industrial and agricultural raw materials, the import of which China relies on heavily. In both decisions, MOFCOM referred to China's dependence on the import of the relevant products. Although MOFCOM did not explicitly present China's reliance on imports as a concern, its decisions are nonetheless indicative that transactions involving supply of strategically important products may be subject to stricter scrutiny.

In addition, non-competition issues can become a complicating factor in high-profile, transformational deals in sensitive or strategic sectors deemed important to China's economy. In July 2018, Qualcomm aborted its US$44 billion acquisition of NXP Semiconductors after failing to secure Chinese merger control approval before the long-stop date. There has been widespread speculation that the *Qualcomm/NXP* deal was impacted by the Sino–US trade dispute. During the Sino–US trade dispute in 2018 and 2019, some other high-profile US deals experienced delays in obtaining merger control approval in China.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The AML allows SAMR to clear a concentration that gives rise to competition concerns if there is proof that the concentration may generate efficiencies and that its positive effects on competition significantly outweigh its negative effects on competition. In practice, notifying parties must provide relevant information and evidence on the possible efficiencies that may arise from the concentration, including how the efficiencies are to be achieved, the time required, quantification, the level of the resulting benefit to consumers and whether such efficiencies can be achieved without the concentration. The 2011 Interim Provisions for the Assessment of the Effect of Concentrations of Undertakings on Competition also make reference to the possibility of transactions giving rise to economic efficiency through economies of scale, economies of scope and reduced production costs, without specifying to what degree such considerations are relevant in assessing transactions. Economic efficiencies have not been discussed in any detail in remedy decisions to date.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Under the Chinese Antimonopoly Law (AML), a concentration cannot be implemented until clearance has been obtained from the State Administration for Market Regulation (SAMR). SAMR can block a concentration or impose remedies as a condition for clearing the concentration. As of April 2021, two transactions have been prohibited and remedies have been imposed in 49 cases.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. SAMR may clear a concentration subject to remedies. According to the Interim Provisions on Review of Concentrations of Undertakings, the authority may impose divestiture remedies, behavioural remedies (eg, security of supply-type remedies, access to essential facilities such as networks or platforms, licensing key technologies and terminating exclusive agreements) or a combination of both. There are many examples of both types of remedies in China's decisional practice.

The Ministry of Commerce (MOFCOM) and SAMR have imposed a range of behavioural remedies, including security of supply remedies, remedies preventing bundling or tying or imposing unreasonable transaction conditions, remedies that impose restrictions on future acquisitions, access remedies and remedies that seek to address unique or sector-specific concerns. In *Uralkali/Silvinit* (2011), for example, MOFCOM imposed behavioural remedies that aimed to maintain the status quo for the sale of the parties' products in China, including requirements as to volume, quality, product type and contract negotiation practices. Similarly, in *ZF/WABCO* (2020), SAMR required the parties to continue supplying the relevant product in China based on terms and conditions that were not inferior to the status quo and on a fair, reasonable and non-discriminatory (FRAND) basis. In *Agrium/Potash Corporation* (2017) and *HP/Samsung* (2017), in addition to remedies related to the terms and conditions of supply of certain overlap products, MOFCOM also required the merging parties to commit not to acquire a competing business for a prescribed number of years. Another notable case is *Google/Motorola Mobility* (2012). MOFCOM imposed behavioural remedies to ensure, in particular, that Google would continue to offer its 'Android' platform on a free and open-source basis, and that it would continue to comply with the fair, reasonable and non-discriminatory licensing terms in connection with Motorola Mobility's significant portfolio of standard essential patents in the telecommunications sector. In *Microsoft/Nokia* (2014) and *Nokia/Alcatel Lucent* (2015), MOFCOM also imposed behavioural remedies to address the licensing of standard essential patents. In *Maersk Line/Hamburg Süd* (2017), MOFCOM imposed a set of behavioural remedies requiring the merging parties to withdraw from two vessel-sharing agreements on trades between the Far East and South America and not to enter into any vessel-sharing agreement with major competitors on these trades for five years, and ordered Maersk Line to reduce and maintain its reefer capacity shares below a certain level for three years post-closing. In *Essilor/Luxottica* (2018), *KLA Tencor/Orbotech* (2019), *Infineon/Cypress* (2020), *Nvidia/Mellanox* (2020) and *Cisco/Acacia* (2021), behavioural remedies were imposed, including requiring the merging parties not to engage in bundling or tying nor impose unreasonable terms and requiring the merging parties to continue to supply Chinese customers on FRAND terms. In *Brocade/Broadcom* (2017) and *Nvidia/Mellanox* (2020), the merging parties also committed to take measures to protect confidential information of third parties and to maintain the interoperability level of relevant products.

In terms of divestment remedies, SAMR may require merging parties to commit to divest a business, assets or minority interests within a specified time frame post-closing. In recent cases, buyer upfront divestiture remedies have been imposed (eg, *NXP/Freescale* (2015) in the semiconductor sector and *Dow Chemical/DuPont* (2017) in the agrichemical sector) as well as 'fix-it-first' divestiture remedies (eg, *ABI/SABMiller* (2016) in the brewery sector, the first such case, and *Abbott/St Jude Medical* (2016) in the medical devices sector).

Often a combination of behavioural and divestment remedies is imposed. In *Glencore/Xstrata* (2013), for example, MOFCOM imposed both divestiture remedies and behavioural remedies (ie, commitment to supply the Chinese market). This approach has been adopted in a number of recent remedy cases (eg, *Dow Chemical/DuPont* (2017), *UTC/Rockwell Collins* (2018), *Linde/Praxair* (2018), *Bayer/Monsanto* (2018), *Novelis/Aleris* (2019) and *Danaher/GE Biopharma* (2020)).

The authority has also imposed 'hold-separate' remedies in the past, although there is no mention of hold-separate remedies in the 2014 Interim Remedy Provisions among the examples of the types of remedies that can be imposed. Hold-separate remedies are potentially far-reaching in that they oblige merging parties to operate separately and independently after closing (eg, with respect to management, sales, products and R&D) and prevent full integration until and unless the remedy is lifted. Hold-separate remedies can remain in force for a relatively long period of time and the remedies will be lifted automatically or upon application. For example, in *Seagate/Samsung* (2011), which concerned the global hard disk drive (HDD) market, MOFCOM required complex hold-separate remedies, which essentially required Seagate to hold the Samsung HDD business separate from its own HDD business for a period of at least a year from the decision. The hold-separate remedies were lifted in 2015 upon application, approximately four years after they were imposed.

Shortly after the *Seagate/Samsung* decision, MOFCOM imposed extensive hold-separate remedies in *Western Digital Corporation/HGST* (2012), which prohibited Western Digital Corporation from combining its operations with HGST's HDD business for a period of at least two years from the decision. The hold-separate remedies were eventually partially lifted in 2015 upon application; the remaining elements of the hold-separate remedies expired in 2017 automatically.

Similarly, in *Marubeni/Gavilon* (2013), *MediaTek/MStar* (2013), *Advanced Semiconductor Engineering/Siliconware Precision Industries* (2017), *Cargotec/TTS* (2019) and *II-VI/Finisar* (2019), the authority imposed hold-separate remedies. In *Cargotec/TTS* (2019) and *II-VI/Finisar* (2019), SAMR required the parties to make specific measures to ensure independence and competition, including setting up firewalls, formulating firewall-related internal guidance and providing competition compliance training to employees. The hold-separate remedies in *II-VI/Finisar* (2019) can only be lifted upon application in at least three years while in *Cargotec/TTS* (2019), the hold-separate remedies will automatically expire in two years.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

According to the Interim Provisions on Review of Concentrations of Undertakings, remedies proposed by undertakings should be able to remove or reduce the negative effects that the concentration has or may have on competition and must be capable of being implemented. Written versions of the remedies should be clear and precise to allow their effectiveness and practicability to be properly evaluated.

The Interim Provisions on Review of Concentrations of Undertakings also set out the procedure to be followed to implement remedies, including the remedy negotiations, the selection of supervisory trustees and trustees' obligations, the implementation and monitoring of remedies, the varying and lifting of remedies, and the legal liabilities to which the undertakings and trustees are subject. Under the Interim Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings, which was abolished in May 2021, the notifying parties were required to provide a final remedy proposal 20 days before the end of the 'further review'. This requirement no longer exists under the Interim Provisions on Review of Concentrations of Undertakings. With respect to structural remedies, the Interim Provisions on Review of Concentrations of Undertakings require parties to find a buyer for the divested business within the time frame specified in the conditional clearance decision or, where no time frame is specified, within six months of conditional clearance (SAMR has the discretion to extend this period by a further three months at most). If the parties are unable to find a buyer in time, SAMR can appoint a divestiture trustee to do so. The divestment must be implemented within three months after the sales agreement is executed. Upon application by the notifying parties, SAMR has the discretion to extend the implementation period. SAMR can also require the parties to complete a divestment prior to implementation of the main transaction.

Undertakings may apply to vary or lift remedies when there are material changes to the parties, the transaction, or market conditions. In January 2015, MOFCOM announced that it had agreed to lift one of the remedies imposed in *Google/Motorola Mobility* in 2012 following Google's sale of its shares in Motorola Mobility to Lenovo on the grounds that Google was no longer active in the smartphone business to which the remedy applied. In October 2015, considering the changes in the competitive dynamics of the relevant markets, MOFCOM agreed to partially lift the hold-separate remedies in relation to Western Digital's acquisition of Hitachi's HDD business in 2012. It set a two-year period for the remaining elements of the hold-separate remedies to expire. In the same month, MOFCOM agreed to lift entirely the hold-separate conditions imposed on Seagate in relation to its acquisition of Samsung's HDD business in 2011. In June 2016, MOFCOM announced that it had agreed to lift all remedies imposed on Walmart following Walmart's acquisition of a 33.6 per cent stake in NewHeight in 2012. In February 2018, MOFCOM lifted the respective remedies imposed in *Henkel/Tiande Chemical*, following Tiande's acquisition of sole control over the joint venture, and *MediaTek/Mstar*, owing to changes in the market. In April 2020, SAMR lifted the remedies imposed in *Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho* given substantive changes of the competition landscape in the market.

Finally, the provisions also set out the legal liabilities for undertakings that do not comply with the remedies imposed, which include a fine of no more than 500,000 yuan, in addition to an order to correct the non-compliance. In December 2014, MOFCOM adopted two decisions against Western Digital Corporation for two separate instances of non-compliance with the hold-separate remedies imposed by MOFCOM in 2012 in *Western Digital Corporation/HGST*. In February 2018, MOFCOM fined Thermo Fisher Scientific 150,000 yuan for its failure to comply with one of the conditions imposed for its acquisition of Life Technologies. In addition, trustees or the buyers of the divested business who fail to fulfil their obligations under the provisions are subject to a fine of up to 30,000 yuan, in addition to a correction order.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, the vast majority of concentrations cleared subject to remedies involve foreign-to-foreign mergers. From 2008 when the AML entered into force to April 2021, 49 transactions have been cleared conditionally, of which 46 were foreign-to-foreign transactions.

Recent examples include *Dow Chemical/DuPont* (2017), *Brocade/Broadcom* (2017), *HP/Samsung* (2017), *Agrium/Potash Corporation* (2017), *Maersk Line/Hamburg Süd* (2017), *Advanced Semiconductor Engineering/Siliconware Precision Industries* (2017), *Becton Dickinson/CR Bard* (2017), *Bayer/Monsanto* (2018), *Essilor/Luxottica* (2018), *UTC/Rockwell Collins* (2018), *Linde/Praxair* (2018), *KLA Tencor/Orbotech* (2019), *Cargotec/TTS* (2019), *II-VI/Finisar* (2019), *Novelis/Aleris* (2019), *Danaher/GE BioPharma* (2020), *Infineon/Cypress* (2020), *Nvidia/Mellanox* (2020), *ZF/WABCO* (2020) and *Cisco/Acacia* (2021).

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is no track record to date on this question. Neither the AML nor the regulations or guidelines address ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Customers and competitors are routinely contacted for their views during the merger review process and are often invited to attend meetings with the authority.

The State Administration for Market Regulation (SAMR) has the authority to review a concentration that does not meet the relevant notification thresholds. That discretionary review may be initiated in the event of complaints from customers or competitors. Further, implementing regulations are expected to clarify third parties' rights to make representations, access documents or to be heard.

The *Microsoft/Nokia* decision in 2014 was the first time that the Ministry of Commerce (MOFCOM) seemingly highlighted specific concerns raised by third parties in its decision. In this case, several leading Chinese technology companies reportedly submitted opinions and complaints to MOFCOM flagging concerns over the potential impact of the transaction on patent licensing. Similarly, in the *P3 Prohibition* case in 2014, MOFCOM reportedly asked Chinese trade associations, shippers and container liner shipping companies to comment on the proposed P3 Network shipping alliance during its review, and two of China's largest container liner shipping companies and the China Shippers Association reportedly opposed the deal. In more recent remedy decisions, the authority explicitly notes that it consulted with relevant government departments or authorities, industry associations, and relevant enterprises regarding the definition of the relevant markets, market participants, market structure, and characteristics and future development of the relevant market.

These decisions illustrate the importance of third-party opinions in China's merger review process. The decisions are also a reminder of the importance of taking into account the potential reaction of different stakeholders and preparing, in advance, a strategy to deal with potential complaints from customers, suppliers or competitors.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Chinese Antimonopoly Law (AML) does not require SAMR to make public pre-merger notifications received, nor does it require it to publish unconditional clearance decisions. Only prohibition decisions and conditional clearance decisions are required to be published. In 2012, MOFCOM started to publish a list of unconditionally cleared concentrations on a quarterly basis, although the information it discloses is fairly limited (mainly relating to the undertakings' names and nature of the transaction). SAMR continued the same practice until April 2019, when SAMR started to publish a list of unconditionally cleared cases on a monthly basis and, two months later in June 2019, SAMR started to publish the case list on a weekly basis.

Further to the Guidelines on Notification of Simple Cases, SAMR will publish a notice of simple cases on its website for public comments for a period of 10 days. This is intended to enable third parties to challenge the simple treatment determination and raise any potential competition concerns about the contemplated transaction. The notice identifies the parties and includes a summary of their activities, the transaction and the basis on which the notifying parties sought simple treatment.

Notifying parties are required to mark content in their notification or in annexes to the notification as confidential if they do not wish the information provided to be published or disclosed to a third party. A non-confidential version of the notification and annexes must be provided at the same time. The implementing rules published by the authority indicate, for example, ranges to use when redacting market shares in the non-confidential version of the notification and annexes.

The AML provides that the competition authority and its staff shall keep confidential commercial secrets obtained during an investigation. The Notification Guidance and other implementing rules also impose confidentiality obligations on other organisations and individuals if they become aware of business secrets and other confidential information during the review process.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

While China is currently not a member of the International Competition Network, it has regular bilateral or multilateral meetings with other competition authorities, covering both general issues and also, on occasion, specific cases. MOFCOM entered into a memorandum of understanding (MOU) with the US Department of Justice and Federal Trade Commission in 2011 to enhance bilateral cooperation between China and the United States in the merger area. MOFCOM entered into similar arrangements in 2012 with the UK Office of Fair Trading (now the Competition and Markets Authority) and with the South Korean Federal Trade Commission. In May 2014, MOFCOM and the Australian Competition and Consumer Commission signed an MOU, which allows for information sharing between the two authorities, subject to confidentiality restrictions. MOFCOM and the Competition Authority of Kenya entered into an MOU in June 2014. In May 2015, MOFCOM and Canada's Competition Bureau entered into an MOU on antitrust cooperation. In April 2016, MOFCOM and the Japan Fair Trade Commission entered into an MOU. In May 2016, MOFCOM and the antitrust authorities of Russia, Brazil, India and South Africa entered into an MOU. Since the establishment of SAMR, SAMR has entered into MOUs or cooperative agreements with various jurisdictions including the European Union, the Philippines, Belarus, Serbia, Russia, Japan, Korea and the Republic of Seychelles.

In specific cases, SAMR may ask the notifying parties to grant a waiver so that it can discuss non-confidential aspects of a transaction with other competition authorities. In 2017, MOFCOM noted that it had cooperated with other competition authorities in more than 20 matters including *Dow Chemical/DuPont*.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Under the Chinese Antimonopoly Law, a notifying party who wishes to contest the authority's decision must appeal to the State Administration for Market Regulation (SAMR) for 'administrative reconsideration' in the first instance. If the notifying party is still not satisfied after this, it can then bring an administrative action to challenge SAMR's decision before a People's Court.

Time frame

33 | What is the usual time frame for appeal or judicial review?

A notifying party may appeal to SAMR for 'administrative reconsideration' within 60 days of becoming aware of the decision. The time frame for administrative reconsideration is 60 days.

If a notifying party is not satisfied after this, it may bring an administrative action within 15 days of receipt of SAMR's 'administrative reconsideration' decision. The time frame for the administrative action is three months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

An important development is the uptick in enforcement against failure to file reportable transactions. The State Administration for Market Regulation (SAMR) has taken action against several companies, particularly those active in the internet sector where variable interest entity (VIE) structures are commonly used. SAMR has also intervened to fine companies involved in minority share acquisitions, and its decisions show that it will not hesitate to fine a company even where it acquires a very small interest if that company has relevant veto or negative controlling rights to exercise decisive influence over the target business. SAMR is also increasingly scrutinising the creation of offshore joint ventures including those with no apparent nexus to China.

Since the entry into force of the Chinese Antimonopoly Law (AML) in 2008, the number of notifications reviewed by the Ministry of Commerce (MOFCOM) and now SAMR annually has increased. By the end of April 2021, MOFCOM and SAMR had between them concluded more than 3,500 cases, among which 49 cases were approved subject to remedies (46 of them concerned foreign-to-foreign transactions) and two were prohibited.

Based on public record, in 2020, SAMR unconditionally cleared around 460 cases and approved four cases subject to remedies. In 2020, SAMR imposed penalties in 13 cases for failure to notify.

The simple case procedure represents a significant improvement in the time taken to review transactions, given that previously the vast majority of such transactions resulted in clearance in Phase II. Recent experience shows that for 'simple cases', it may take SAMR up to four weeks to declare the notification complete. Declaration of completeness and case acceptance starts the 10-calendar-day public consultation period during which any third party may challenge the transaction's status as a 'simple case' and raise objections about the transaction. Nowadays, the transaction is cleared on average within about one to two weeks of the expiry of the 10-day public consultation period. This has enabled most simple cases to be cleared within Phase I. From the adoption of the simple case review procedure in April 2014 to April 2021, more than 2,000 simple cases had been concluded.

MOFCOM and now SAMR has vigorously enforced the merger control law. The year 2017 saw the largest number of remedies imposed in a given year. Following the *Glencore/Xstrata* (2013) and *Marubeni/Gavilon* (2013) decisions, it is expected that global transactions involving commodities that are strategically important to China are likely to be subject to close scrutiny. The *Google/Motorola* (2012), *Microsoft/Nokia* (2014), *Nokia/Alcatel Lucent* (2015), *Nvidia/Mellanox* (2020) and *Cisco/Acacia* (2021) transactions also suggest that the authority will pay close attention to transactions in the IT sector, particularly where standard essential patents (SEPs) (and in some cases non-SEPs) are in issue. The *MediaTek/MStar* (2013), *NXP/Freescale* (2015), *Advanced Semiconductor Engineering/Siliconware Precision Industries* (2017), *KLA-Tencor/Orbotech* (2018) and *Infineon/Cypress* (2020) decisions indicate that the semiconductor sector has continued to draw close scrutiny from the authority.

In addition, the authority continues to pay close attention to leveraging and tying or bundling effects theories of harm in conglomerate mergers, such as *Essilor/Luxottica* (2018), *UTC/Rockwell Collins* (2018), *KLA-Tencor/Orbotech* (2018), *Infineon/Cypress* (2020) and *Nvidia/Mellanox* (2020), as well as a transaction's potential adverse impact on innovation; for example, in *Dow Chemical/DuPont* (2017), *Becton Dickinson/CR Bard* (2017), *Bayer/Monsanto* (2018), *Danaher/GE BioPharma* (2020) and *ZF/WABCO* (2020).

Reform proposals

35 | Are there current proposals to change the legislation?

Early in January 2020, SAMR published proposed draft amendments to the AML for public comments. The proposed draft reflects a more aggressive enforcement policy, with the most significant amendments in the area of merger control. The key proposed changes for merger control include:

- significant increase in fines for merger control violations: the fining cap will significantly increase from 500,000 yuan to 10 per cent of the relevant undertaking's turnover in the previous year;
- 'stop the clock' during merger review: the proposed 'stop the clock' mechanism will allow SAMR to 'stop the clock' when SAMR awaits an RFI response; SAMR and the parties engage in remedy negotiations; or the notifying party so applies;
- potential flexibility to revise filing thresholds: the authority to design and amend the filing thresholds is delegated from the State Council to SAMR;
- transactions falling under the thresholds: the proposed draft clarifies SAMR's ability to investigate transactions falling under the turnover thresholds, but that have or are likely to have the effect of restricting competition; and
- introduction of a definition of control: the proposed draft includes a definition for the concept of control, which will be the first time that control is defined in the AML.

In April 2021, SAMR published its 2021 legislative plan, which notes that SAMR will continue to actively cooperate with the legislative body in advancing the proposed amendments to the AML. While details of the timing of adoption are unknown, the proposed amendments signal the dawn of a new AML era.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Since November 2020, the State Administration for Market Regulation (SAMR) has been strengthening regulation of the internet sector, including stepping up enforcement in failure to notify cases. Merger control in the digital economy has been a controversial topic for a long time. Given that variable interest entity (VIE) structures are frequently employed by platform operators and tech start-ups usually have limited turnover, a number of high-profile transactions involving digital platforms have not been subject to the merger control process. The Platform Guidelines adopted by the Anti-Monopoly Commission of the State Council of the People's Republic of China on 7 February 2021 provide some guidance on these controversial issues and signal that merger control in the digital economy will be a key area of antitrust enforcement for SAMR in the future. In particular, the Platform Guidelines:

- make clear that transactions involving VIE structures are caught by the merger control regime provided the filing thresholds are met. SAMR has since fined several leading Chinese online platforms and companies active in digital markets for failing to notify VIE-related transactions, signalling China's determination to crack down on potential non-compliance with the Chinese Antimonopoly Law in the platform economy sector;
- specify factors to be considered for turnover calculation purposes given the specific features of the platform economy. These include, among others, industry practice, fee models, business models and the role of a platform operator;
- reaffirm that SAMR is empowered to investigate a transaction that is likely to have anticompetitive effects even if the filing thresholds are not met, and highlight three situations that SAMR is closely monitoring and where it may take action, namely transactions involving start-ups and new platforms, transactions involving undertakings that provide services for free or in exchange for a low consideration, and transactions concerning highly concentrated markets; and
- propose tailored remedial measures for transactions in relation to the platform economy including divestment of, or opening access to, datasets and modification of platform rules or algorithms.

In addition to the new legislation, which marks a significant move in China's antitrust enforcement, SAMR has continued scrutiny of transactions that may lead to anticompetitive effects. In 2020, SAMR conditionally cleared four transactions. SAMR's merger review has remained largely unaffected by the pandemic.

On 28 February 2020, SAMR conditionally cleared the *Danaher/GE Biopharma* deal, which was a horizontal merger in the biotechnology sector. SAMR was concerned that the transaction would impede competition in 10 relevant markets, including the microcarriers market and the ion-exchange resins market, given the significant combined market share of the parties and the high concentration level of the markets both globally and in China. In addition, it concluded that substantial technological barriers to market entry would deter effective new entrants. To address these competition concerns, the parties were required to divest certain overlapping businesses consistent with decisions adopted in other jurisdictions, including the EU and the US. SAMR further required the parties to commit to continue a research and development project for two years following closing to address concerns around impact on innovation.

On 2 April 2020, SAMR conditionally cleared the *Cypress/Infineon* deal, which concerned a horizontal and conglomerate merger in the semiconductor industry. It identified four horizontal overlaps between Cypress and Infineon and five pairs of neighbouring markets. SAMR did not raise serious concerns with respect to the transaction's horizontal effects, but was concerned that the parties might have the ability and incentive to leverage their market power in the automotive insulated gate bipolar transistors and automotive NOR flash markets to eliminate or restrict competition in the neighbouring automotive microcontrollers (MCUs) market, for example, by tying, refusal to deal or compromising interoperability. It imposed a range of behavioural remedies to address its competition concerns. Specifically, the parties were prohibited from engaging in tying or refusal to deal, or imposing unreasonable transaction terms without justification. In addition, the parties committed to ensure:

- Chinese customers' freedom of choice as to whether to purchase the relevant products separately or as a package in future;
- the compatibility of their NOR flash with automotive MCUs supplied by third parties; and
- continued supply of the relevant products to Chinese customers based on FRAND terms.

These remedies will be in place for five years and then will automatically expire.

Shortly after the *Cypress/Infineon* decision, SAMR conditionally cleared *Nvidia/Mellanox*, which concerned a vertical and conglomerate merger in the semiconductor industry. As in *Cypress/Infineon*, it raised competition concerns around the transaction's conglomerate effects. In this case, SAMR was concerned that the merged entity would have the ability and incentive to restrict competition in certain markets since Nvidia is the market leader in the GPU accelerators market, and Mellanox has a significant market share in two neighbouring markets globally and in China. SAMR was concerned that the merged entity might engage in anticompetitive practices through tying, compromising interoperability of the relevant products with third parties' products or misusing competitively sensitive information of third parties. Therefore, SAMR imposed behavioural remedies that were similar to those in the *Cypress/Infineon* case. In addition, the parties were required to continue an open-source commitment with respect to certain software and put in place measures to protect third parties' information. The remedies will last for six years and can be lifted upon application and SAMR's approval.

On 15 May 2020, SAMR conditionally approved the *ZF/WABCO* deal, a vertical and conglomerate merger in the auto parts sector. SAMR imposed behavioural remedies to address foreclosure concerns related to the markets for automated manual transmission (AMT) controllers (upstream) and AMTs (downstream). SAMR determined that the merged entity would have the ability and incentive to foreclose raw materials supply given that the merged entity would have a dominant position in both the upstream and downstream markets, customers heavily rely on WABCO's supply in the upstream market and there are high market entry barriers. While the relevant geographic market for AMT controllers and AMTs were defined as global in scope, SAMR assessed the potential impact on the relevant markets in China as it usually does. SAMR required the parties to continue to supply AMT controllers or components to existing clients and to ensure that supply will not be compromised in terms of price, quality, quantity, delivery term, etc. SAMR also required the parties to continue to supply AMT controllers to, as well as provide opportunities to develop AMT controllers for, Chinese customers on FRAND terms. These remedies will automatically expire after six years.

It is noteworthy that these transactions either have been unconditionally cleared in other jurisdictions, such as *Nvidia/Mellanox*, or subject to different remedies, such as *Danaher/GE Biopharma* and *ZF/WABCO*. This indicates that SAMR is increasingly confident in charting its own course in relation to merger control enforcement if it identifies China-specific concerns. In addition, it is expected that transactions in the semiconductor industry will remain subject to strict scrutiny given the sensitivity and importance of this sector in China.

Colombia

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is Law 1340 of 2009, with additional regulation set forth in Resolution No. 76544 of 2019 and Resolution No. 2751 of 2021 (which modified Resolution 10930 of 2015), issued by the national competition authority, the Superintendency of Industry and Commerce (SIC).

In Colombia, SIC acts as the main enforcer of merger control rules; however, there are two exceptions: the Superintendency of Finance regarding mergers between financial institutions or other entities subject to its surveillance and the Civil Aviation Authority for mergers between aircraft operators. Whenever a merger is under review by the Superintendency of Finance, it must request a non-binding opinion from SIC; this request is not mandatory in the case of the Civil Aviation Authority, but it is still a common practice.

Besides antitrust merger control, SIC has powers in the following matters:

- investigation of anticompetitive conducts;
- unfair competition;
- consumer protection (judicial and administrative powers);
- intellectual property (judicial and administrative powers regarding trademarks and patents);
- legal metrology (administrative powers); and
- data privacy (administrative powers).

Scope of legislation

2 | What kinds of mergers are caught?

Mergers are subject to merger control by SIC if the following criteria are met (these criteria differ for the finance and aviation sectors):

- market overlap: the companies involved in the transaction develop the same business activity (horizontal merger) or carry out activities within the same value chain (vertical merger). In Colombia, conglomerate mergers are not caught by merger control;
- economic threshold: during the fiscal year preceding the merger, the parties to the transaction and all the companies that are controlled or have control over the parties and perform the same business activity or carry out activities within the same value chain, had, individually or in the aggregate, operating income or total assets amounting to an equivalent of 60,000 Colombian minimum legal wages (approximately US$16.4 million as at 2021). As a general rule, SIC only takes into account income and assets from undertakings in Colombia; however, if either one of the parties participate in the Colombian market only through exports and does not have any corporate vehicles in Colombia, global assets and operating income should be considered; and
- acquisition of competitive control: one of the parties in the transaction acquires competitive control over the economic activity of the target (including acquisition of competitive control over essential assets).

3 | What types of joint ventures are caught?

According to SIC's case law and guidelines, joint ventures are deemed as business mergers if they meet the full-functionality test, as per the following conditions:

- merger of a business line: the joint venture must have the effect of merging a business line or market, instead of specific operations;
- full-functionality: the joint venture must be autonomous or at least have the potential to develop its activity as a business separate from its parents; and
- lasting basis: elimination of competition between the parties to the transaction should take place on a lasting basis.

If the aforementioned conditions are not met, joint ventures would not be caught under merger control, and the transaction would be deemed as cooperation agreement between competitors.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

For antitrust purposes, 'control' is understood as the de facto possibility of influencing strategic decisions, regarding: corporate policy (including prices, investments, indebtedness or similar); initiation, variation or termination of business activity; and management of goods or rights that are essential for the performance of the company's economic activity. Therefore, contractual arrangements, management representation or even holding veto rights over certain strategic decisions could constitute competitive control, which should be assessed case by case.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The two relevant thresholds for merger control purposes are the following:

- economic threshold: during the fiscal year preceding the merger, the parties to the transaction and all the companies that are controlled or have control over the parties to the transaction and develop the same business activity or carry out activities within the same value chain, had, individually or in the aggregate, operating incomes or total assets amounting to an equivalent of 60,000 Colombian minimum legal wages (approximately US$16,4 million as at 2021). As a general rule, SIC only takes into account operating

incomes and assets in Colombia, unless the parties participate in the Colombian market only through exports and do not have a corporate vehicle in Colombia, in which case, assets and income are calculated on a global basis; and
- market shares threshold: if the parties' joint market share is 20 per cent or higher in any of the relevant markets, the transaction requires prior approval from SIC (prior approval). Otherwise, the transaction is deemed as authorised by law, and only a notification to SIC is required, providing the evidence that the transaction does not meet the market threshold.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing system for merger control is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Pursuant to the effects doctrine (article 2 of Law 1340 of 2009), if the undertakings concerned are engaged in economic activities with effects in Colombia, they are considered as market participants, regardless of whether they are domiciled outside Colombia.

Consequently, foreign-to-foreign mergers may be subject to merger control whenever the parties:
- have corporate vehicles in Colombia;
- conduct business in Colombia through subsidiaries;
- sell products in Colombia;
- own goods or assets in Colombia; or
- perform business operations that have effects in Colombia.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Regarding foreign investments, no specific rules apply for merger control. However, Colombian regulations prohibit some forms of foreign investment in certain industries, such as national security or environmental.

In the context of prior approval proceedings that take place in regulated or sensitive sectors, SIC is required to request non-binding opinions from relevant public agencies.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Filings must be delivered before closing. The breach of this duty is regarded as a violation of Colombian Competition Law, which may result in investigations against the parties and the responsible individuals.

10 Which parties are responsible for filing and are filing fees required?

All the undertakings taking part in the transaction are responsible for filing. Notwithstanding the latter, the filing could be made by any of the parties, as long as such party manages to submit all the required information before SIC.

Filing fees are required. Through Resolution No. 2103 of 2021, SIC established filing fees for all merger control procedures as described below:

1. Fast-track (abbreviated notice): if the aggregated market share of the parties to the transaction is below 20 per cent in all of the overlapping markets, the rate is of 2.62 million Colombian pesos (approximately US$750);
2. Phase 1: preliminary assessment: for the preliminary assessment the rate is of 14.2 million Colombian pesos (approximately US$4,060); and
3. Phase 2: in-depth study:
   - if, during the fiscal year preceding the transaction, the parties had, individually or in the aggregate, operating incomes or total assets amounting to equal or over three times 60,000 Colombian minimum legal wages, equivalent to 163,534,680,000 Colombian pesos (approximately US$46.8 million for 2021) the rate is of 37,380,000 Colombian pesos (approximately US$10,680);
   - if, during the fiscal year preceding the transaction, the parties had, individually or in the aggregate operating incomes or total assets amounting to equal or over two times 60,000 Colombian minimum legal wages (approximately US$31.2 million for 2021) the rate is of 31.77 million Colombian pesos (approximately US$9,077); or
   - if during the fiscal year preceding the transaction, the parties had individually or in the aggregate operating incomes or total assets amounting to below two times 60,000 Colombian minimum legal wages, equivalent to 109,023,120,000 Colombian pesos (approximately US$31.2 million for 2021) the rate is of 26.16 million Colombian pesos (approximately US$7,474).

Rates must be paid before submitting the filing

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11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Colombia applies a suspensory system, so that clearance is required prior to closing. For notifications (ie, the parties have joint market shares below 20 per cent in all the relevant markets), the parties can close immediately after filing, but SIC has the power to order a prior approval proceeding within 10 business days from the date of filing, if it considers that the parties are not to properly support the fact that the transaction did not meet the market shares threshold. Therefore, it is advisable to wait until SIC acknowledges receipt of the notification.

In pre-approval procedures, parties to the transaction must wait until the decision is approved.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing and performing integrated activities before clearance are violations of Colombian Competition Law to which the following sanctions apply:
- fines against the parties: up to 100,000 monthly minimum legal wages (approximately US$25 million as at 2020), or 150 per cent of the revenue or profit obtained from the infraction, whichever is higher;
- fines against individuals: up to 2,000 monthly minimum legal wages (approximately US$600,000 for 2020); or
- reversion of the transaction: if it is determined that the transaction it produced an undue restriction on competition (there are no legal precedents).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In theory, penalties would be applicable to foreign-to-foreign mergers, but they are difficult to enforce in practice.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In the context of a prior approval proceedings, parties can either file a formal carveout proposal to SIC to obtain its approval of the hold-separate mechanisms within five business days; informally notify SIC about the carveout remedies to be implemented, or apply private remedies without informing SIC, facing the risk of gun-jumping sanctions. For successful carveouts, the parties must guarantee that no transfer of control or exchange of sensitive information will occur on a lasting basis with respect to the business in Colombia.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

For public takeover bids, SIC can, on behalf of the interested party, request the target to submit the statutory information to carry out the merger control proceeding.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The level of detail depends on many factors and should be evaluated case by case. In general terms, Resolution No. 10930 of 2015 subrogated by Resolution 2751 of 2021 establishes the minimum required information. For prior approvals, the filing must include detailed information regarding the proposed transaction, the parties, relevant markets, competitors, customers and distribution channels. For notifications, it is necessary to provide the financial statements of the parties to the transaction, a description of the transaction, market definition and market shares of the parties to the transaction and their competitors.

Providing incomplete information may delay SIC's decision, as decision timings do not start until all information has been filed before SIC. Providing false or misleading information is subject to sanctions and could even face criminal prosecutions.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

For notifications, SIC has 10 business days to issue an acknowledgement of receipt, or to order a prior approval if it does not agree with the methodology used by the parties to define relevant markets or to calculate their market shares.

Prior approval proceedings are organised through phases, during which the information and assessment burdens increase. During the initial stage or Phase I, SIC may bring forward a preliminary assessment of the transaction within 30 business days (Phase I). SIC can thereafter decide to perform an in-depth analysis of the transaction by requiring additional statutory information (Phase II), as a result of which it has three additional months to take a decision from the time Phase II information has been provided in full form. In exceptional circumstances, SIC can make a single request for supplementary information to the parties, extending the time it has to make a decision for an additional three-month period (for the ease of understanding we refer to this circumstance as a Phase III, even though it is still part of Phase II). If SIC does not issue a decision within three months from the date the parties submit all the required information for Phase II or Phase III, it is understood that the transaction has been authorised by law.

18 What is the statutory timetable for clearance? Can it be speeded up?

While a decision can be issued at any time during a prior approval proceeding, the following is a timetable summarising each phase:

Phase I	• Phase I information provided by the parties. • Public announcement: the filing goes public for third parties to comment or request a private interest to be recognised in the proceeding. • Preliminary assessment: 30 business days – duration defined by law and cannot be modified.
Phase II	• Phase II information provided by the parties. • Comments by other regulatory authorities (when applicable). • In-depth study (remedies proposal). Three months from the time all Phase II information request has been provided.
Phase III	• Additional information request, which resets the three-month period once only. • Final decision. (Three months)

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test requires the transaction not to produce an 'undue restriction on free competition'.

This test should be applied in accordance with the objectives of Colombian Competition Law (ie, to protect the participation of businesses in the market, consumer welfare and economic efficiency), so the parties can request for an efficiencies or failing firm exemption, to obtain clearance in spite of potential anticompetitive effects.

20 Is there a special substantive test for joint ventures?

No.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The substantive test and goals of Colombian Competition Law have led to considering unilateral, coordinated, vertical and, occasionally, portfolio effects, as plausible theories of harm to free competition.

Likewise, the decision issued by SIC must respond to three goals: free market access, consumer welfare and economic efficiency.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

There are no cases that have been decided on explicit non-competition arguments.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is a possible, but very uncommon, defence for a transaction. The parties have the burden of demonstrating that the transaction is indispensable to produce positive or pro-competitive effects to the benefit of consumers, which outweigh any anticompetitive concern.

If successful, the transaction is cleared on the condition that the benefits are effectively passed on to consumers (as a behavioural remedy).

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Superintendency of Industry and Commerce (SIC) has the power to impose remedies or prohibit the transaction, by means of a reasoned resolution. The parties may file internal administrative appeals (reconsideration petitions) against those decisions.

SIC's decisions could be subject to judicial review, but in practice it is uncommon, since judicial review is usually non-suspensory and take a long time.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Structural, behavioural and hybrid remedies may be offered by the parties or directly imposed by SIC.

If market conditions change over time, the parties can request SIC to remove the remedies imposed, given that they no longer fulfil the purpose for which they were initially imposed.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no statutory regulations regarding remedies conditions or timing. It wholly depends on the criteria adopted by SIC on a case-by-case basis.

In most cases, remedies could be satisfied upon closing, but SIC has required compliance with certain remedies as a prior condition for the parties to close the transaction.

In addition, SIC usually monitors compliance through different instruments, including external audits and periodic reports. Surveillance efforts are to be paid by the parties through a yearly contribution, which rates are fixed depending on the complexity of the remedies to be verified; however, they cannot exceed one per thousand of the current assets of each company. SIC may also request the parties to obtain an insurance policy for compliance with the remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There are no records of remedies imposed on strictly foreign-to-foreign mergers with no corporate vehicles or assets in Colombia; however, it is common to see remedies imposed on foreign companies with locally incorporated companies, usually in line with other antitrust authorities.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Antitrust clearance is only issued in relation to the market effect of the merger (in Colombia, contracts are not required by the proceeding). It is still a matter of debate whether ancillary restraints could be cleared as part of the process or are instead always subject to ex post control by SIC.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Yes. First, they can provide their views within 10 business days after the transaction is made public. Likewise, the Superintendency of Industry and Commerce (SIC) may request information from third parties.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Prior approval proceedings require general details from the proposed transaction to be published in a newspaper or SIC's website. Nevertheless, the parties can request SIC to refrain from making the transaction public only on public policy grounds.

Additionally, the information submitted by the parties may be kept confidential, but it is necessary to file an explicit request justifying the legal grounds on which confidentiality must be granted. In that event, the parties also have to submit an executive summary of the confidential information for it to be incorporated into the public record.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Colombia is part of several international antitrust cooperation agreements. Most of these agreements were established through free trade agreements (FTAs) subscribed by the country. Some of these FTAs have a competition chapter that includes cooperation provisions. Additionally, there are several agreements with antitrust authorities, including the authorities of Brazil, Chile, Ecuador, Mexico, Panama, Peru, Spain, South Africa and the United States, and, in general, authorities of countries that are members of the International Competition Network and the Organisation for Economic Co-operation and Development.

Nonetheless, information exchanges between authorities are limited. For instance, SIC is not entitled to exchange the parties' information, unless they expressly provide a waiver.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Against the Superintendency of Industry and Commerce's (SIC) decision, a reconsideration petition can be presented. If the parties do not agree with the final outcome, they can request judicial courts to review the decision, but in the meantime, the decision generally comes into effect.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The parties have 10 business days to file reconsideration petitions before the SIC, once the decision has been notified. The term during which the Superintendent is expected to reach to a final decision is two months.

Judicial review may take years; therefore, parties are not always keen to request for court's review of the decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Superintendency of Industry and Commerce has recently started to use remedies as a tool to correct markets rather than to counteract any anticompetitive effects.

Reform proposals

35 | Are there current proposals to change the legislation?

Yes, the project of bill 180 is currently at Congress. This project has the aim of regulating aspects related to dominant position, includes provision related to national security as a base for clearing agreements that may restrict competition, increases the goals of competition law adding as a goal the creation of small and medium size undertakings and the employment generation, and sets forth sanctions such as the order of termination of competitive control by undertakings that breach competition law.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The main development was the definition of filing fees.

Likewise, under covid-19, merger control cases declined.

At the beginning of 2021, the transaction between the delivery platforms I-foods and Domicilios.com was approved.

Another relevant case was the acquisition of control of the cybersecurity company Sophos by private equity firm Thoma Bravo. This case was relevant since it is one of the very few cases in which the competition authority accepted a worldwide market definition.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Act for the Promotion of Competition and Consumer Defence is the main body of law. However, the Act for the Strengthening of Competition Authorities, which entered into force in 2019, also contains relevant dispositions and introduced significant changes to the legal framework.

Scope of legislation

2 | What kinds of mergers are caught?

The legislation uses a very broad definition of a 'concentration', defining it in general terms as any transaction that results in an acquisition of control of one entity over another, or the formation of a new economic agent under joint control. As such, almost all mergers may be caught under that definition, as long as they meet the thresholds set forth by the law.

3 | What types of joint ventures are caught?

Any joint venture that results in a change of control or joint control and reaches the thresholds, may be caught by the law.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

There is a broad definition of control that considers both positive and negative control. As such, the possibility of blocking strategic decisions is also considered as 'control'.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

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; and
- individual threshold: the individual sales or assets in Costa Rica of each party have to be more than 1,500 base salaries.

Transactions that fall below these thresholds are not subject to notification.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory. If the obligation to notify is triggered, there are no exceptions.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers have to be notified if the involved parties have executed any activities with an incidence in Costa Rica at any time during the previous two years (and if the economic thresholds are met).

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special rules on foreign investment. Prior to the new act, the financial, securities, insurance and pension sectors had some special dispositions regarding the concentration of entities participating in those markets. However, after the reform, only the telecommunications sector is subject to certain differentiations (mainly, that the procedure is directed by the Superintendency of Telecommunications and not by Coprocom).

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The transaction needs to be filed prior to closing. There are sanctions for not filing and they are applied in practice. These sanctions are mainly fines and measures to execute a demerger, should the Commission consider it necessary.

10 | Which parties are responsible for filing and are filing fees required?

All parties are responsible for filing. There are no filing fees.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The transaction is suspended prior to clearance. The parties may request a waiver in qualified and exceptional circumstances.

The waiting period depends on the transaction's complexity. Once it has been submitted, Coprocom will have 15 business days to execute its initial review and request additional information. 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. Should there be a risk identified, Coprocom will open a second phase, where it shall grant the applicant 10 business days to file its allegations or evidence to dispute the concerns identified by Coprocom. This second stage may be extended by up to 90 calendar days.

The waiting period is 30 days after all the required information has been submitted. However, this period may be extended up to 60 days in cases of special complexity. Once the second phase is finished, Coprocom may authorise the concentration or may grant 30 business days to the applicant to provide measures that may offset the anti-competitive effects that it has identified. After this, Coprocom shall determine whether the transaction is authorised with conditions or rejected.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There may be fines imposed and the Commission may order the demerger or reversal of the transaction that was not notified.

The fines imposed are determined based on the severity of the breach of the law and range from 0.1 per cent to 10 per cent of the economic agent's sales.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, sanctions may be applied in such cases.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under very qualified cases, and given that the parties provide the evidence to support their case, Coprocom may waive the suspensive effects of the notification and may authorise closing prior to clearance.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no applicable special rules for public takeover bids.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

If the filing is incomplete, Coprocom will issue a request for information. However, if the filing contains wrong or false information, there is a risk of a fine.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The different phases are as follows:

- Once it 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 10 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 this, 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.

18 What is the statutory timetable for clearance? Can it be speeded up?

The timetable depends on the transaction's complexity and its potential effects on the market. If there are no relevant anticompetitive effects, the transaction would be approved in 30 days after the required information has been submitted. If there are concerns of anticompetitive effects, the process may be extended by 120 days or more.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test for clearance consists of an analysis of the anti-competitive effects and the procompetitive effects of the transaction. If the transaction does not generate significant anticompetitive effects, or if the procompetitive effects offset those anticompetitive effects, the transaction is approved. Coprocom may also impose additional conditions to mitigate the anticompetitive effects.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

There is no definitive list set forth by the law that states the theories of harm that Coprocom will investigate. However, its precedents have shown that Coprocom analyses market dominance, unilateral effects (over prices, negotiation mechanisms, capacity, innovation and expansion possibilities of competitors), coordinated effects, vertical foreclosure and conglomerate effects.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

In theory, non-competition issues should not be relevant in the review process. The main reason for legal reforms that entered into force in 2019 was to grant Coprocom more independence from the Ministry of Economy, which previously had some influence over the Commission.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are considered where the transaction may result in anticompetitive effects. If the transaction does not generate anticompetitive effects, there is no need for Coprocom to analyse economic efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Coprocom has the powers to reject, divest or order the reversal of a transaction that was not notified. Coprocom may also impose hefty fines over the parties.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy competition issues. The law establishes the following potential remedies; however, the parties or Coprocom may suggest a remedy that is not expressly stated:

- divestment of undertakings or sale of assets;
- restrictions or limitations related to the sale of services or goods;
- obligation to supply certain goods or services to specific customers or competitors; and
- introduction of specific clauses in agreements signed with clients or suppliers.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The conditions and timing are determined on a case-by-case basis.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The authority has required remedies in some transactions. However, it there are no precedents of remedies being imposed on foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is no legal framework that establishes this beforehand. It would be determined by Coprocom on a case-by-case basis.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

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. Their right is 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.

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Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Coprocom creates two case files: one confidential case file that may be accessed only by the authority and the notifying parties; and another non-confidential, which is accessible to the public.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in 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 cooperation occurs, it is rarely something that is disclosed.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or 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.

Time frame

33 What is the usual time frame for appeal or judicial review?

An appeal is generally resolved within five business days. The judicial review does not have a clear time frame, and it may take between six months and two years.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

There does not seem to be a specific focus on a certain industry or sector.

In the last five years, there have been very few transactions rejected (but there are cases of rejections) and there have been other transactions that were accepted under certain conditions.

Reform proposals

35 Are there current proposals to change the legislation?

The Regulations to the Act for the Strengthening of Competition Authorities are expected to be published in 2020. However, those Regulations would only clarify certain points of this Act and would not represent any drastic changes.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The most relevant development was the Act to Strengthen the Competition Authorities, which introduced some relevant changes to the competition law legal framework 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 is an additional individual threshold that must be met by at least two of the parties of the transaction. Before, there were some acquisitions of minor companies with irrelevant participations in the market, which had to be notified if the purchaser was a large entity. Now, most of those smaller or irrelevant transactions do not need to be notified.

* *This chapter was accurate as at May 2020.*

Croatia

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control, as well as other aspects of competition law, has been substantially governed by the Competition Act, which entered into force on 1 October 2010. In addition, there are numerous regulations that set out the procedural framework and define the standards for its application. One of the most relevant regulations is the Regulation on the Notification and Assessment of Concentrations (Official Gazette 38/11), which provides information on the content and form of the notification and the assessment criteria for concentrations. In preparation for Croatia's accession to the EU on 1 July 2013, the Competition Act was substantially amended to comply with EU competition law. The Competition Act was most recently amended on 24 April 2021, primarily for the purposes of transposing EU Directive 2019/1 (ECN+ Directive) into Croatian law, but also introducing additional changes to the merger control regime.

Since Croatia's accession to the European Union, the EU Merger Regulation (EUMR) has been directly applicable. Hence, mergers falling within the scope of the EUMR are reviewed by the European Commission (one-stop-shop principle) and not by the Croatian Competition Agency (CCA), except for those cases in which the European Commission decides to refer the assessment of a particular concentration to the CCA under the terms of the EUMR. The CCA, at the same time, remains competent to review national merger control cases under the Competition Act, as further described below. The CCA is an independent authority. The decision-making body within the CCA is the Competition Council (the Council), which consists of five members, one of whom is the president of the Council.

More information about the CCA and its activities can be found at www.aztn.hr.

Scope of legislation

2 | What kinds of mergers are caught?

A concentration is constituted by:

- a merger of two or more independent undertakings or parts thereof;
- the acquisition of control or decisive influence of one or more undertakings over one or more other undertakings or a part of an undertaking, in particular by:
  - acquisition of the majority of shares or share capital;
  - obtaining the majority of voting rights; or
  - in any other way according to the provisions of the Croatian Companies Act; or
- the creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity.

A concentration does not arise if:

- banks or other financial institutions, investment funds or insurance companies, in their ordinary course of business, which includes transactions and dealing with securities, for their own account or for the account of third parties, hold shares on a temporary basis with a view toward reselling them, provided that they do not exercise their voting rights in respect of those shares for the purpose of determining the competitive behaviour of that undertaking (ie, they exercise such voting rights solely with a view toward preparing the disposal of the entire or a part of the undertaking or its shares, do not undertake any operation that may distort, restrict or prevent competition, and carry out the disposal within one year following the acquisition). If the disposal is not reasonably possible within this period, it may – upon request – be extended by the CCA;
- the acquisition of shares or share capital is the result of internal restructuring of an undertaking (intra-group merger); or
- control is acquired by an office holder or administrative officer in the event of a bankruptcy, liquidation or winding up of an undertaking in accordance with the bankruptcy laws and the Croatian Companies Act.

3 | What types of joint ventures are caught?

The creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

In general, 'control' may be obtained through the transfer of rights, contracts or other means, by which one or more undertakings, either separately or jointly, taking into account all legal and factual circumstances, gain the ability to exercise decisive influence over one or more undertakings on a lasting basis.

An undertaking is deemed to be controlled by another undertaking if the controlling undertaking, directly or indirectly:

- holds more than half of the share capital or half of the shares;
- may exercise more than half of the voting rights;
- has the right to appoint more than half of the members of the management board, supervisory committee or a similar administrative or managing body; or
- has the right to manage the business operations of the undertaking in another way, on the basis of a special agreement on the functioning of the undertaking, by which the possibility of exercising decisive influence on a more permanent basis is acquired.

Minority interests (including board or management representation and contractual arrangements) are caught, provided they confer control by any means described above.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The CCA must be notified of a concentration where in the business year preceding the concentration:

- the combined total worldwide business turnover of the undertakings concerned amounted to at least 1 billion kunas and at least one of the undertakings concerned has its seat or a subsidiary in Croatia; and
- the individual total business turnover realised in Croatia by each of at least two undertakings concerned amounted to at least 100 million kunas.

For the purpose of turnover calculation, the revenues from the sale of goods or the provision of services have to be taken into account. The turnover of an undertaking concerned includes:

1 the turnover of the undertaking concerned;
2 those undertakings in which the undertaking concerned, directly or indirectly owns more than half the shares or 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 of the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or has the right to manage the undertakings' affairs;
3 those undertakings that have in the undertaking concerned (acquiring or controlling undertaking) rights or powers listed in item (2);
4 those undertakings in which the undertakings referred to in item (3) have the rights or powers listed in item (2); and
5 those undertakings in which two or more undertakings as referred to in items (1) to (4) jointly have the rights or powers listed in item (2).

Turnover generated by sales or services between companies belonging to the same group, as well as turnover arising from taxes and parafiscal contributions, is not taken into account. In the case of an acquisition of one or more parts of an undertaking or of a group of undertakings, irrespective of whether such parts constitute independent legal entities, only the turnover pertaining to the parts subject to the concentration are taken into account for the purpose of the turnover calculation.

For the purpose of the turnover calculation of banks and other institutions that provide financial services, after the deduction of indirect taxes related to them, the sum of the following income items has to be taken into account:

- income from interest rates and similar income;
- income from securities (ie, income from shares and other variable yield securities, income from participating interests in economic entities, and income from shares in affiliated economic entities);
- commissions receivable;
- net profit on financial operations; and
- other operating income.

For insurance companies and companies that perform reinsurance activities, the value of the gross premiums, which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including reinsurance premiums, after the deduction of taxes and parafiscal contributions charged by reference to the amounts of individual premiums or in relation to the total premium volume, have to be taken into account.

Concentrations falling within the jurisdiction of the European Commission are, in general, not subject to Croatian merger control (one-stop-shop principle). According to article 19, paragraph 7 of the Competition Act, the European Commission may, however, decide to refer the assessment of a concentration to the CCA, irrespective of the concentration having a Community dimension and regardless of whether the Croatian national thresholds are met (since the higher turnover thresholds stipulated by the EUMR are met). Should this be the case, the parties to the concentration must submit a respective Croatian merger notification to the CCA within 30 days of the date of receipt of the relevant decision of the Commission.

Irrespective of whether the above-mentioned turnover thresholds are met, in specific situations in the media, postal or electronic communications sectors a filing with the CCA or the Croatian Regulatory Authority for Network Industries (HAKOM) may be required.

Except the situations described above, the general rule is that there is no obligation to notify the merger to the CCA if the thresholds from article 17 of the Competition Act are not met.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act, and if the statutory turnover threshold requirements are cumulatively met, the filing is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Act requires local effects insofar that – in addition to a certain domestic minimum turnover generated by at least two of the undertakings concerned – at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia. As a result, purely foreign-to-foreign mergers usually fall outside of the scope of the CCA's jurisdiction.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no provisions that would relate specifically to foreign investments. Inter alia, in the following sectors, provisions related to merger control exist.

Media sector

The CCA has sole competence to decide on concentrations involving media companies. However, the Electronic Media Act (Official Gazette, No. 136/13) defines in articles 54 and 55 specific threshold requirements for certain types of media undertakings that deviate from the general turnover thresholds. Moreover, according to article 57 of the Electronic Media Act, the Electronic Media Agency is authorised to order the shareholding structure of a media company to be changed (otherwise its media licence could be withdrawn). Furthermore, the Media Act (Official Gazette, No. 81/13) prohibits concentrations that would result in a combined market share of more than 40 per cent in the markets comprising all daily or all weekly newspapers in Croatia, respectively.

Postal and electronic communications sectors

According to article 68 of the Electronic Communications Act (Official Gazette, No. 72/17), operators with significant market power and operators who have been granted licences to use radio frequencies are obligated to notify HAKOM of any intention to merge or consolidate or of any other type of joint or coordinated action (irrespective of whether the turnover thresholds are met). Prior to the implementation of any such operation, HAKOM must issue an approval. If the intended operation also qualifies as a concentration exceeding the jurisdictional thresholds, a notification also has to be filed with the CCA. In the course of the assessment, the CCA may invite HAKOM to comment on the case.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no explicit filing deadline. However, the notification has to be submitted to the Croatian Competition Agency (CCA) prior to the intended implementation of the concentration and following the conclusion of the merger agreement or following the publication of the invitation to tender, on the basis of which control or decisive influence will be acquired by the controlling undertaking. The parties may submit the notification even before the conclusion of the merger agreement or the publication of the invitation to tender, if they are able to provide, in good faith, evidence of the proposed conclusion of the merger agreement or the announcement of the invitation to tender. In the case of a breach of the filing obligation, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover realised in the preceding business year.

10 Which parties are responsible for filing and are filing fees required?

There are two scenarios to consider.

In case of an acquisition of an entire undertaking or parts of one or more undertakings by another undertaking, the notification has to be submitted by the undertaking acquiring control.

In all other cases, the parties to the concentration have to submit a joint notification in relation to the concentration.

An initial filing fee of 7,000 kunas is payable prior to the submission of the notification, and proof of payment must be submitted to the CCA together with the notification. For notifications in the media sector where the general turnover thresholds are not met, the initial filing fee amounts to 3,500 kunas.

A fee of 105,000 kunas is payable if the CCA adopts its decision after an in-depth investigation.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The intended concentration must not be implemented prior to clearance (suspension obligation).

As to the waiting periods, there are two periods to consider.

First, following the submission of the notification, the CCA first assesses the completeness of the merger notification. The law does not provide for a specific time frame; in practice, it is thus recommended to be in contact with the authority during this stage to ensure that this period is short.

Second, once the CCA has issued the confirmation of completeness, it then assesses the intended concentration in one or two phases, depending on whether the intended concentration raises competition concerns or not.

In Phase I, the CCA has 30 days to clear the intended concentration. If no decision has been adopted prior to the expiry of this waiting period, the intended concentration is presumed by law to be approved in Phase I.

If, however, the authority takes the view that the intended concentration gives rise to competition law concerns, it shall adopt a procedural order on the initiation of Phase II proceedings. Once the CCA has initiated Phase II proceedings, it must issue a decision within three months (which may be extended by an additional three months, if this is necessary to carry out additional market analysis). If no decision has been adopted prior to the expiry of the waiting period, the intended concentration is presumed by law to have obtained clearance in Phase II.

According to article 19(6) of the Competition Act, the CCA may, in particularly justified cases, upon the request of the parties, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period. When deciding on such a request, the CCA takes into account all circumstances of the case, in particular the nature and gravity of the damages that might be posed to the parties to the concentration or third parties, and the effects of the concentration on competition. From publicly available information one can derive that such pre-clearance implementation is rarely granted.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There are two principal categories of sanctions for closing or integrating the activities of the merging businesses prior to clearance. The distinction between the two is made based on whether the notifiable concentration would have to be prohibited or not.

In case the concentration has been closed prior to clearance, and the requirements for obtaining a clearance have not been met (irrespective of whether a notification has been submitted to the CCA), the CCA may impose a fine of up to 10 per cent of the undertaking's total annual worldwide turnover generated in the preceding business year. The fine is imposed where the infringement has been committed intentionally or negligently. Notions of intent and negligence should be interpreted in line with the case law of the Court of Justice of the European Union, and not in line the meaning assigned to them in criminal matters.

Where the concentration could in principle obtain clearance, but has been closed prior to clearance (irrespective of whether a notification has been submitted or not), the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover generated in the preceding business year. A similar fine will be adopted if the merger filing provides incorrect or false information about the parties and their businesses.

In addition, the CCA may order any indispensable measures aimed at restoring effective competition in the relevant market, and set appropriate deadlines for their adoption. In particular, the CCA may:

- order acquired shares or share capital to be transferred or divested; or
- prohibit or restrict the exercise of voting rights attached to the shares or share capital, and order the joint venture or any other form of control by which the concentration has been put into effect to be removed.

There are no publicly available cases in which the CCA has recently imposed such sanctions to restore competition.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance (gun jumping) are also applicable in foreign-to-foreign mergers. However, we are not aware of these sanctions having been applied in practice to such mergers since the introduction of the Competition Act, as they usually fall outside the scope of the Croatian merger control regime (inter alia, a merger filing is only required if at least one of the undertakings concerned has its seat or a subsidiary in Croatia).

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Competition Act does not explicitly provide for hold-separate (carve-out) solutions. Foreign-to-foreign concentrations are therefore assessed and treated in the same way as local concentrations. The Competition Act includes an additional local jurisdictional threshold requirement, according to which at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia. If this (additional) requirement is not met, a concentration does not require a notification in Croatia. As a result, since the introduction of the Competition Act, most foreign-to-foreign mergers that could require hold-separate (carve-out) solutions fall outside the scope of the application of the Croatian merger control regime. The CCA may in particularly justified cases, upon the request of the parties, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Croatian Takeover Act (Official Gazette, No. 148/13) stipulates that the deadline for requesting an approval from the Croatian Financial Services Agency to publish the public offer for shares in stock companies is suspended until merger clearance is granted by the CCA. Therefore, potential acquirers are not required to submit their public offers before the CCA has issued the merger clearance.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The information and documentation to be submitted in a merger notification is set out in article 20 of the Competition Act and in the Regulation on the Notification and Assessment of Concentrations (the Regulation).

Inter alia, the following needs to be provided:

- information on the parties to the concentration (eg, names, registered seats, excerpts from the commercial register, nature of the business, ownership and control; description of the distribution and retail networks; and annual financial reports for the last preceding business year);
- power of attorney;
- description of the intended concentration;
- certified copies or originals of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- market shares held by the undertakings concerned on the relevant markets;
- information on main competitors and their market shares in the relevant markets;
- description of the distribution and retail networks in the relevant markets, relevance of research and development;
- economic rationale of the concentration;
- description of the benefits expected to result from the concentration for consumers; and
- (if available) copies of analyses, reports or studies related to the relevant markets.

The CCA may request additional information from the undertakings concerned, such as information on the number of their employees, their top five suppliers and customers, or sales figures (value and volume). If some of the information requested in the Regulation is not available to the parties, this must be stated in the filing, together with information as to where the undertakings tried to collect the data concerned, the reasons why this collection was not successful, and where the CCA could obtain the missing information.

The notification and all documents attached thereto need to be submitted in the Croatian language. In addition, all documents submitted to the CCA must be in the form of an original or a certified copy bearing an apostille (depending on the jurisdiction of origin of a particular document). If a document requires translation, both the original or a certified copy and its certified Croatian translation have to be provided.

The Competition Act also envisages the possibility to submit a short-form notification in cases that – from experience – usually do not give rise to competition law concerns. The Regulation, that defines the precise content of short-form notifications, has been published in the Official Gazette (No. 38/11) and came into force on 9 April 2011.

According to article 20 of the Competition Act, a short-form notification may be submitted if:

- none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (ie, no horizontal overlaps), or in a market that is upstream or downstream of a market in which another party to the concentration is engaged (ie, no vertical relationship);
- two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationship), provided that their combined market share is less than 20 per cent, and/or when one or more of the parties to the concentration are engaged in business activities in a relevant product market that is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationship), provided that none of their individual or combined market shares at either level is 30 per cent or more;
- a party to the concentration is to acquire sole control of an undertaking over which it already has joint control; or
- in cases in which two or more undertakings acquire control over a joint venture, where the joint venture has no, or negligible, actual or foreseen activities within Croatia.

However, even in these cases, the CCA may require a full notification to be made if it finds that the concentration may lead to a significant impediment of effective competition.

If the merger filing provides incorrect or false information about the parties and their businesses, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover generated in the preceding business year.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Following the submission of the merger notification, the CCA first assesses its completeness. The law does not provide for a specific time frame for the review of the completeness of the notification. Once the CCA has issued the confirmation of completeness, the CCA assesses the intended concentration in one or two phases, depending on whether the intended concentration raises competition concerns or not.

18 | What is the statutory timetable for clearance? Can it be speeded up?

In Phase I, the CCA has 30 days to clear the intended concentration. If no decision has been adopted prior to the expiry of this time period, the intended concentration is presumed to be approved in Phase I.

If the CCA initiates Phase II proceedings, it must issue a decision within three months. This waiting period may be further extended by an additional three months, if this would be necessary to carry out additional market analysis. If no decision has been adopted by the CCA prior to the expiry of the waiting period, the intended concentration is presumed by law to have obtained the clearance in Phase II.

From publicly available information it can be seen that the CCA usually tends to clear concentrations in Phase I (ie, within 30 days as of the day when the complete filing was submitted).

The Competition Act does not provide the possibility for the parties to obtain a waiver or to apply for expedited proceedings.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition Act introduced to the Croatian merger control regime the substantive test for the assessment of concentrations that is applied by the EU Merger Regulation (EUMR) (Council Regulation (EC) No. 139/2004). According to article 16 of the Competition Act, the Croatian Competition Agency (CCA) assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.

In assessing concentrations, the CCA regularly takes into account special circumstances revolving around the specific case. For instance, in a vertical merger between a meat products manufacturer and a grocery retail chain, as well as in another horizontal merger between two telecommunications operators, the CCA took into consideration the 'failing firm' defence raised by the parties to these concentrations.

20 | Is there a special substantive test for joint ventures?

Similar to the rules under the EUMR, if the effect or object of a full-function joint venture is the coordination of the competitive behaviour of undertakings that remain independent, such coordination will be appraised in the review process under rules on prohibited agreements.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In essence, the CCA investigates the intended concentration on the basis of the following:

- the structure of the relevant market;
- actual and potential competitors in the relevant market;
- supply and potential market supply;
- costs, risks, technical, economic and legal conditions necessary to enter into or withdraw from the relevant market;
- possible effects of the intended concentration on competition in the relevant market;
- market shares and market position, economic and financial power, business activities of the undertakings concerned in the relevant market;
- internal and external advantages for the parties to the concentration in relation to their competitors;
- possible changes in the business operations of the parties to the concentration following the implementation of the concentration; and
- effects of the concentration on other undertakings, especially relating to consumers' benefit, as well as other objectives and effects of the intended concentration, in particular:
  - decrease in prices of goods or services;
  - decrease in transportation, distribution or other costs;
  - specialisation in production; and
  - other benefits directly deriving from the implementation of the intended concentration.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Competition Act does not expressly mention non-competition issues such as industrial policy or public interest issues as being relevant for the assessment process. In practice, however, it is not unlikely that the CCA would take into account non-competition issues in a way similar to the European Commission.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are part of the appraisal of the concentration and are taken into account under the condition that they are advantageous to consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Based on the assessment of the concentration under the substantive test the Croatian Competition Agency (CCA) may, following the initiation of Phase II proceedings, issue:

- a clearance decision, by which the concentration is assessed as compatible with competition rules;
- a decision declaring the concentration conditionally compatible with the Croatian competition rules, provided that within given time limits certain measures are taken and conditions are met (provisional measures); or
- a decision prohibiting the implementation of concentration.

The CCA may also on its own initiative or upon request of a party to the concentration withdraw or amend a decision when the decision is based on incorrect or false information that has been essential for the decision-making, any of the parties to the concentration have not fulfilled the conditions and obligations determined in the decision of the CCA, or the parties to the concentration cannot duly fulfil the proposed conditions or observe the set deadlines because of unpredictable circumstances beyond their control.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

In practice, the CCA accepts both structural and behavioural remedies.

An example is the acquisition of a Slovenian food retail business by a Croatian major food production and retail conglomerate. In its decision, the CCA rendered a complex economic and behavioural analysis of the merger, and ordered a number of measures to counterbalance the anti-competitive effects of this concentration. In particular, these measures included the divestment of 96 retail outlets in the combined network of both undertakings (by either terminating lease agreements, or renting or selling the shops to third parties), and the obligation imposed on the acquirer to ensure that the three bestselling products of five of the target's largest suppliers are offered in its retail network for at least three years. The CCA appointed a monitoring trustee, to ensure that the measures are duly implemented.

In 2009, in the course of the acquisition of a local Croatian oil company by a Hungarian oil company, the CCA demanded that the Croatian target company sell one of its local subsidiaries. The CCA listed in the clearance decision certain requirements to be observed to ensure the future business integrity of the disposed subsidiary after being sold to third parties. In the same year, in a case regarding the acquisition of a local retail chain, the CCA ordered the disposal of certain retail stores. In both cases, the acquirer was ordered to nominate a monitoring trustee, to monitor compliance with the remedies.

In 2014, the CCA imposed a set of remedies on the parties to a concentration in the telecommunications sector. In this case, the CCA accepted the measures proposed by the parties to the concentration, aimed at eliminating negative effects of the concentration on competition. Among other remedies, the concentration was limited to a period of four years following the acquisition. This concentration was initially cleared by the CCA accepting a 'failing firm' defence, since the control over the target was acquired in a pre-bankruptcy settlement process. In this case, in 2017, the CCA partially repealed the initial clearance from 2014, imposing a revised set of remedies on the parties to the concentration. The new remedies were requested and accepted, due to the impact of extraordinary circumstances.

Also, in 2017, the CCA conditionally cleared another concentration in the telecommunications sector, imposing a combined set of structural and behavioural remedies on the parties to the concentration.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are two scenarios relating to remedies (including divestments) that may apply.

First, the parties to a concentration may at any time during the proceedings (eg, already in the notification) offer commitments, upon their own initiative, to remove serious doubts as to the compatibility of the concentration with Croatian competition rules.

Secondly, the CCA may, if it reaches the preliminary conclusion that a concentration may be cleared only subject to conditions or obligations, invite the undertakings concerned to suggest certain remedies to obtain merger clearance. Upon such notice, the parties have one month to propose suitable remedies to the CCA.

When assessing remedies, the CCA takes into account whether they are adequate to restore efficient competition. In the event the CCA does not or only partly accepts the proposed remedies, the CCA is authorised to impose other behavioural or structural measures, conditions, obligations and deadlines, to ensure effective competition (article 22 of the Competition Act).

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of any foreign-to-foreign mergers in which the CCA has requested remedies. According to the publicly available information of the CCA, no such mergers were assessed by the CCA in 2020, while in 2019 only two 'foreign-to-foreign' mergers were assessed by the CCA and cleared in Phase I without remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Act does not contain explicit provisions on ancillary restrictions. However, the CCA generally takes the European Commission's decisional practice into account. Therefore, in practice, ancillary restraints directly related to and necessary for the concentration are usually covered by the CCA's clearance decision.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Croatian Competition Agency (CCA) may gather information ex officio and also require from the undertakings concerned, as well as from third parties (eg, customers and competitors), additional information that it considers necessary for the assessment of the concentration.

Also, both the fact that a notification has been submitted and the fact that Phase II proceedings have been initiated are made public on the website of the CCA, inviting third parties to submit their observations and comments on the intended concentration.

Access to the CCA's case file may only be granted to the parties to the proceedings. According to the Croatian general administrative procedure rules, a 'party' may be an entity that has a right to be such to protect its legal interests. In practice, however, only the undertakings concerned are admitted as parties to the merger control proceedings and, accordingly, third parties may not be admitted as parties to the proceedings. The undertakings concerned have the right to access the case files only once they have received a statement of objections in Phase II. Besides the provisions of the Croatian General Administrative Procedure Act (Official Gazette, No. 47/09), the general rules stipulated in the Competition Act on third parties' rights in the proceedings apply. While they cannot be admitted as parties to the merger control proceedings, interested third parties may submit their comments and observations on the intended concentration, following the CCA's publication thereof.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As to the publicity given to the process, the fact that a notification has been submitted and the fact that Phase II proceedings have been initiated are made public on the CCA's website, inviting third parties to submit observations and comments on the intended concentration. Decisions made by the CCA are published on its website as well. Access to the case file may only be granted to the parties to the process.

The CCA may not disclose business secrets, namely, information that is defined to be a business secret by law or by the undertakings concerned. Business secrets, inter alia, encompass any business information that has actual or potential economic and market value, and the disclosure of which could result in an economic advantage for other undertakings.

In particular, the CCA does not consider the following to be covered by the secrecy obligation:

- information that is publicly available, including information available through specialised information services or information that is common knowledge among specialists in the field;
- historical information, in particular information that is at least five years old;

- statistical information; and
- data and documentation on which the decision of the CCA is based.

Against this background, it is generally advisable to explicitly mark any confidential information as such in the merger notification and any other comments, statements and documents sent to the CCA. Case-related information that is made public by the CCA is generally published in a non-confidential version.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CCA has concluded cooperation agreements with several national competition authorities, for example, Albania, Austria, Bosnia and Herzegovina, Bulgaria, Hungary, Kosovo, Northern Macedonia, Montenegro, Romania, Serbia and Turkey. In addition, the CCA is a member of the International Competition Network (ICN). Since 1 July 2013, the CCA has been a member of the European Competition Network (ECN), inter alia, participating in the ECN's Merger Working Group. The CCA also has participant's status in the OECD Competition Committee and it actively participates in its work and attends the meetings of the OECD Competition Committee. Members of the CCA also regularly participate in conferences, summits and other high-level meetings organised by other competition authorities, thereby ensuring that Croatia is involved in the international competition law dialogue. As for recent developments, the CCA carried out an EU twinning light project in Montenegro, aimed at strengthening the administrative capacities of the Montenegrin competition authority through training of its staff, particularly in relation to complex economic analyses, evidence collection procedures and surprise inspections (dawn raids). Furthermore, the transposition of EU Directive 2019/1 (the ECN+ Directive) into Croatian law, performed with the most recent amendments to the Competition Act that entered into force on 24 April 2021, is expected to further facilitate and streamline the cooperation between the CCA and national competition authorities in other EU member states.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

A legal action for judicial review against the decision of the Croatian Competition Agency (CCA) must be filed directly with the Croatian High Administrative Court within 30 days from the date on which the decision of the CCA was served. Decisions of the High Administrative Court may be further appealed, on limited grounds, before the Croatian Constitutional Court, which has recently shown a tendency to intervene in competition matters.

In past years, most of the judicial reviews brought before the then-competent Croatian Administrative Court (which was the competent court to decide in competition law cases until mid-2013) were dismissed, and the recent practice of the Croatian High Administrative Court has shown that the tendency of the judges to mostly reject these remedies has not changed. According to publicly available information, only a handful of judicial reviews have been undertaken in relation to merger control proceedings, while the vast majority of follow-on administrative disputes related to other infringements of competition law.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Previously, the judicial review performed by the Croatian Administrative Court could take up to two years. Depending on the complexity of the case, it could take even longer. Although the Croatian High Administrative Court (which took over the respective competency in 2013) has recently performed several judicial reviews in a much shorter period of time (ie, within a few months of the submission of the request for judicial review), showing an improvement in the overall duration of proceedings, other recent cases have shown that the judicial review process still tends to be rather lengthy.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Because of the relatively high domestic notification thresholds, the number of merger control cases is rather small in Croatia. According to publicly available data, only seven mergers were cleared by the Croatian Competition Agency (CCA) in 2020, out of which six mergers were cleared in Phase I and one merger was cleared in Phase II. In 2020, three notifications were dismissed, as the statutory requirements for the assessment of concentrations by the CCA were not met. Also, according to public information, the CCA cleared 14 concentrations in 2019 and 11 concentrations in 2018 – all but one were cleared in Phase I. In 2017, the CCA imposed a comprehensive set of measures, conditions and deadlines in one Phase II merger clearance decision and, in addition, partially repealed Phase II clearance in relation to a previous decision from 2014, imposing a revised set of remedies on the parties, both aimed at eliminating negative effects on competition in the telecommunications sector.

While there were, according to public information, no recent cases in which the CCA imposed fines for implementing concentrations prior to or without the CCA's approval, in previous years the CCA imposed a number of rather symbolic administrative fines, ranging from approximately €130 to €4,000, on undertakings operating in the media sector for violations of the merger filing obligation.

'Foreign-to-foreign' mergers usually fall outside of the scope of the Croatian merger control regime (inter alia, a merger filing is required only if at least one of the undertakings concerned has its seat or a subsidiary in Croatia). According to the information published by the CCA, no 'foreign-to-foreign' mergers were assessed in 2020, while two were assessed and cleared in Phase I in 2019.

A significant part of the CCA's work includes analysis of notifications of concentrations with an EU dimension, regularly referred from the European Commission. As stated in the CCA's report for 2019, the CCA received 473 notifications of concentrations involving an EU dimension throughout 2019, in which the CCA assessed whether these concentrations had any impact on the Croatian markets.

Reform proposals

35 | Are there current proposals to change the legislation?

The latest amendment of the Competition Act entered into force on 24 April 2021. These amendments were primarily enacted for purposes of transposing EU Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive) into national law. However, alongside aligning the Competition Act with the EU acquis communautaire, the amendments also encompassed changes to the merger control regime.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2018, the European Commission referred the assessment of a concentration that had an EU dimension to the Croatian Competition Agency (CCA). The referral was made upon request of the undertakings concerned, under the provision of article 4, paragraph 4 of the EU Merger Regulation. The reason for the referral was that this concentration was deemed to have an impact primarily on the upstream retail market for the supply of gas to large industrial customers in the relevant geographic area of Croatia, as well as on the downstream fertiliser production market, the relevant geographic scope of which was found to comprise the territory of the whole European Economic Area (EEA). The CCA cleared the concentration in Phase I. This merger control case involved intensive cooperation between the CCA and the European Commission.

In 2019, the CCA cleared the creation of a joint venture related to the markets for production and wholesale of sugar, after conducting an in-depth market investigation and an analysis of customer demand patterns. In this case, the CCA concluded that the relevant geographic markets comprised at least the territory of the EEA. In 2019, the CCA cleared a complex concentration, involving a mixed share and asset deal, part of the transaction of a portfolio of distressed assets and non-performing loans (NPLs). This was the first NPL transaction filed under the merger control regime in Croatia.

In January 2020, the CCA cleared a vertical concentration of a media services provider and a provider of telecommunications services in Croatia. In this case, one interested undertaking approached the CCA, asserting that the merger may result in anticompetitive effects on the market competition, supported by an opinion of a legal expert. Although there were no direct vertical overlaps, the CCA assessed the prospective spillover effects and the creation of prospective barriers on connected markets. After a detailed assessment by the CCA, the merger was eventually cleared in Phase II. In 2020, there were also three mergers in the food sector, two in the tourism and hospitality segment, and one in the markets relating to sales and services of motor vehicles, all of which were cleared in Phase I.

In 2021, the Croatian legislator enacted significant amendments to the Competition Act, transposing the relevant EU instruments into local law and introducing changes to the merger control regime.

As for current trends, the outbreak of covid-19 has slowed down economic activities throughout the EU in 2020 and 2021. It still remains to be seen how the pandemic will affect M&A, as well as what its impact on merger control proceedings in Croatia will be. In any event, it is expected that many companies will face economic issues, resulting in restructurings or bankruptcies. In this respect, companies with better market standing and access to funds may have the opportunity to purchase operations of their competitors, and we may see an increasing number of 'failing firm' defences.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law), is the statute regulating the control of concentrations between undertakings in Cyprus.

Enforcement of the legislation rests with the Commission for the Protection of Competition (CPC). The CPC has overall responsibility for implementing the Law and is the competent independent authority for the control of concentrations.

The CPC declares that a concentration is compatible or incompatible with the functioning of competition in the market. The investigation and procedural aspects of the notification of concentrations are implemented by the CPC's civil service (the Service).

Scope of legislation

2 | What kinds of mergers are caught?

The Law is applicable to transactions resulting in a permanent change of control. Such transactions are:

- mergers of two previously independent undertakings or parts thereof; and
- acquisitions by one or more persons already controlling at least one undertaking, or by one or more undertakings, directly or indirectly, whether by purchase of securities or assets, by agreement or otherwise, of control of one or more other undertakings.

3 | What types of joint ventures are caught?

Joint ventures performing all functions of an autonomous economic entity in a permanent manner are caught under the Law.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined under the Law as control stemming from any rights, agreements or other means that, either severally or jointly, confer the possibility of exercising decisive influence over an undertaking through:

- ownership or enjoyment rights over the whole or part of the assets of the undertaking; or
- rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the bodies of an undertaking.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Transactions caught by merger control constitute concentrations for the purposes of the Law. Nevertheless, only concentrations of major importance must be notified to the CPC.

For the purposes of the Law, a concentration of undertakings is deemed to be of major importance and, therefore, meets the jurisdictional thresholds if:

- the worldwide aggregate turnover achieved by at least two of the undertakings concerned exceeds, in relation to each one of them, €3.5 million;
- at least two of the undertakings concerned achieve a turnover in Cyprus; and
- at least €3.5 million of the aggregate turnover of all undertakings concerned is achieved in Cyprus.

The Minister of Energy, Commerce and Industry can declare a concentration as being of major importance on grounds of public interest with reference to the potential effects of the transaction on public security, media pluralism and due process.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of concentrations of major importance is mandatory.

However, notification is not required in the following cases, where a concentration between undertakings is not deemed to arise:

- a credit or financial institution or an insurance company, the normal activities of which include transactions and dealing in securities on its own account or for the account of third parties, holds on a temporary basis, securities that it has acquired in an undertaking with a view to reselling them, provided that:
  - the institution does not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking, or it exercises those voting rights only with a view to facilitating the disposal of all or part of that undertaking or of its assets or the disposal of those securities; and
  - any such disposal takes place within one year of the date of acquisition – a period that can be extended by the CPC on request, where it can be shown that the disposal was not reasonably possible within the period set;
- control is exercised by a person authorised under the legislation relating to liquidation, bankruptcy or any other similar procedure;
- the concentration of undertakings between one or more persons already controlling at least one or more undertakings is carried out by investment companies;

- property is transferred under a will or by intestate devolution; or
- it is a concentration between two or more undertakings, each of which is a subsidiary undertaking of the same entity.

The exemption relating to investment companies, refers to those companies the sole objective of which is to acquire holdings in other undertakings, to manage such holdings and turn them into profit, without involving themselves directly or indirectly in the management of those undertakings.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are caught under the Law. The test as to whether a foreign-to-foreign merger is caught as a concentration of major importance is satisfied where the jurisdictional thresholds are met, with the local effects dimension being the achievement of a turnover of at least two undertakings concerned in Cyprus and the combined Cyprus-achieved turnover of all undertakings concerned is at least €3.5 million.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Notwithstanding exceptions in relation to credit and financial institutions or insurance companies, there are no specific rules on foreign investments, special sectors or other approvals.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations of major importance must be notified to the Commission for the Protection of Competition (CPC)'s civil service (the Service) prior to their implementation, following the conclusion of the relevant agreement or the publication of the relevant takeover or the acquisition of a controlling interest. Notification can also take place where the undertakings concerned prove to the Service their bona fide intention to conclude an agreement or, in the case of a takeover offer or of an offer for the acquisition of a controlling interest, following a public announcement of an intention or final decision to make such offer.

Upon becoming aware of a concentration of major importance that ought to be notified but the undertakings concerned have failed to do so, the Service immediately notifies the undertakings concerned of their obligation to proceed with notifying such concentration in accordance with the provisions of the Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law). The time limit for the assessment of the concentration would then commence at the time of the Service receiving such notification.

Where the concentration has been partially or entirely implemented in the absence of clearance by the CPC, administrative fines may be imposed.

The CPC has the power to order the partial or total dissolution of a concentration of major importance to secure the restoration of the functioning of competition in the market, provided that the requirements of the Law are met.

10 Which parties are responsible for filing and are filing fees required?

Concentrations of major importance must be notified to the Service in writing, either jointly or separately by the undertakings participating in a merger or in the joint acquisition of control of another undertaking. In all other cases, the party responsible for notification is the undertaking acquiring control.

Filing fees are fixed by the Law at €1,000. Where a concentration becomes subject to a full investigation (Phase II), the undertakings concerned are bound to pay a fee of €6,000 to the CPC.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Within one calendar month from the date of submission of the notification or such additional information necessary for the notification to be considered complete and payment of the filing fee, the Service is required to inform the notifying undertaking of whether the concentration is cleared or whether it will proceed to a full investigation of the concentration.

If, owing to the volume of work or the complexity of the information contained in the notification, the Service is unable to comply with the one-month time frame, it shall, within seven calendar days prior to the lapse of the one-month period, inform the notifying undertaking of an extension of 14 calendar days.

In a Phase II investigation, the Service is required to prepare a report of findings to the CPC within three months as of the date of submission of the notification or such additional information necessary for the notification to be considered complete, provided that the relevant filing fee is settled.

In the case of a full investigation, the notifying party or parties must be informed of the CPC's decision no later than four months from the date of submission of the notification or such additional information necessary for the notification to be considered complete.

The Law expressly prohibits the partial or entire implementation of the concentration prior to clearance, infringement of which prohibition entails administrative fines.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Where a concentration is either partially or entirely implemented prior to the clearance of the CPC; prior to the lapse of the time frame within which the Service ought to inform the notifying undertaking of whether the concentration is cleared; or shall be fully investigated but the Service has not so informed, administrative sanctions may be imposed by the CPC.

An administrative fine of up to 10 per cent of the aggregate turnover achieved by the notifying undertaking during the immediately preceding financial year may be imposed on the notifying undertaking for the discussed infringement, which may be followed by additional administrative fines of €8,000 for each day the infringement persists.

There have been no cases where the undertakings concerned implemented a concentration prior to clearance by the CPC under the new regime. Nevertheless, taking into account the approach followed under the previous framework, it can be certain that the CPC will exercise its powers in relation to the implementation of concentrations in violation of the statutory provisions in a rigorous manner.

Moreover, the CPC has the power to order the partial or total dissolution of a concentration that has been implemented prior to obtaining clearance by the CPC.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Closing before clearance could lead to administrative fines being imposed, irrespective of whether such concentration is a foreign-to-foreign merger or not. Closing before clearance could also lead the CPC to order the partial or whole dissolution of the transaction.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Closing prior to clearance is not possible unless the Service fails to inform the notifying undertaking, within the statutory one-month period, of whether the concentration is cleared or a Phase II investigation will be carried out, in which case the concentration is deemed as cleared.

A temporary approval of a concentration is possible during a Phase II investigation, where the undertakings concerned can establish, upon a relevant application to the CPC, that they shall suffer substantial damage as a result of any additional delay to the implementation of the concentration. Temporary approval does not prejudice the CPC's final decision on the concentration and may be accompanied by conditions set by the CPC.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

In the case of public takeover bids, concentrations of major importance arising from the publication of a public takeover or the acquisition of a controlling interest must be notified to the CPC prior to their implementation and following such publication. Notification can also take place where the undertakings concerned prove to the Service of the CPC their bona fide intention of a takeover offer or of an offer for the acquisition of a controlling interest, following a public announcement of an intention or final decision to make such offer.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification of a concentration of major importance should include the information prescribed in Appendix III to the Law. The notification must be made in Greek and must be accompanied by various supporting documents and other information which may be in Greek or English, including but not limited to the following:

- a copy of all final or most recent documents that brought about the concentration either by agreement or following a public bid;
- in the case of a public bid, a copy of the public bid document;
- copies of the most recent annual reports and audited financial statements of all the undertakings participating in the concentration;
- copies of reports or analyses prepared for the purposes of the concentration;
- a list and short description of the contents of all analyses, reports, studies and surveys that were prepared by or for any of persons responsible for notification for the purpose of evaluating or analysing the proposed concentration in relation to the market and competition conditions;
- details of the concentration (including the nature and scope of the concentration, the financial and structural details of the concentration, and details regarding the turnover in Cyprus and worldwide of each undertaking);
- details of relationships of ownership and control as between each participant in the concentration and the undertakings connected with it;
- personal and economic ties as between each group of undertakings and any other undertaking operating within the affected market in which such group holds, inter alia, at least 10 per cent of the voting rights or shares;
- a description and analysis of the relevant markets; and
- a description and analysis of the affected relevant markets.

A fine of up to €50,000 may be imposed for a failure to provide requested information or clarifications, or for providing misleading or inaccurate information.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Phase I entails the preparation of a written report by the Service and an assessment of the concentration by the members of the CPC on the basis of the report prepared by the Service. The CPC will issue a decision on whether:

- the concentration does not fall within the ambit of the Law;
- the concentration is of major importance but does not raise any doubts as to its compatibility with the operation of competition in the market and is therefore declared compatible and cleared; or
- doubts exist as to the compatibility of the concentration with the operation of competition in the market and a full investigation (Phase II) must be initiated.

Phase II entails the preparation of a report of findings by the Service, which is submitted to the CPC within three months of the date of receipt of the notification, provided that the fees applicable in the case of a full investigation are paid. The CPC is then bound to assess the concentration under the light of the findings of the Service and accordingly declare the concentration as compatible, subject to conditions that it may decide to impose upon the undertakings concerned or incompatible with the operation of competition in the market and thus not cleared.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Within one calendar month from the date of submission of the notification or such additional information necessary for the notification to be considered complete and payment of the filing fee, the Service is required to inform the notifying undertaking of whether the concentration is cleared or whether it will proceed to a full investigation of the concentration.

If, owing to the volume of work or the complexity of the information contained in the notification, the Service is unable to comply with the one-month time frame, it shall, within seven calendar days prior to the lapse of the one-month period, inform the notifying undertaking of an extension of 14 calendar days. Moreover, where the Service sends requests for information or clarifications to the notifying undertakings, the 'clock stops ticking' and the assessment period will restart once the Service receives a response to its request.

In a Phase II investigation, the Service is required to prepare a report of findings to the CPC within three months as of the date of submission of the notification or such additional information necessary for the notification to be considered complete, provided that the relevant filing fee is settled.

In the case of a full investigation, the notifying party or parties must be informed of the CPC's decision no later than four months from the date of submission of the notification or such additional information necessary for the notification to be considered complete.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A concentration that would significantly impede effective competition in Cyprus, or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the functioning of competition in the market.

In assessing the compatibility of a concentration, there are no special circumstances that would be taken into account. The Commission for the Protection of Competition (CPC) takes into consideration the following criteria:

- the need to maintain and develop conditions of effective competition in the relevant markets, taking into account, inter alia, the structure of the affected markets, other markets upon which the concentration may have significant effects and the potential competition on behalf of undertakings within or outside Cyprus;
- the position in the market of the undertakings concerned and undertakings connected to it in a manner prescribed under Annex II to the Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law);
- the financial power of such undertakings;
- the alternative sources of supply of products or services in the affected markets or other markets upon which the concentration may have significant effects;
- any barriers of entry to the affected markets or other markets upon which the concentration may have significant effects;
- the interests of the intermediate and end-consumers of the relevant products and services;
- the contribution to technical and economic progress and the possibility of such contribution being in the interest of consumers and not obstructing competition;
- the supply and demand trends for the relevant markets; and
- the contribution on the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

20 | Is there a special substantive test for joint ventures?

The decisional practice of the CPC demonstrates that the judgment of the Court of Justice of the European Union in Case C-248/16, *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, Judgment of 7 September 2017, ECLI:EU:C:2017:643 is adhered to by the CPC. As such, when there is a change from sole to joint control in the over an existing undertaking, the criterion of a concentration is only fulfilled when the arising joint venture performs on a lasting basis all the functions of an autonomous economic entity.

A joint venture that is genuinely fully functional must be able to operate independently of its parents on an identifiable market. To do so, the joint venture must 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 its business activities on a lasting basis.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

While the Law is silent in this regard, the CPC's approach and analysis of harm is substantially aligned with the respective approach of the European Commission. Besides high market shares, the assessment usually takes into account the anticompetitive effects that could potentially arise out of a concentration, such as coordinated effects as well as unilateral effects.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The CPC only takes competition issues into account when considering its civil service's report and issuing its decision. However, the Minister of Energy, Commerce and Industry can, by issuing a justified order, declare a concentration as being of major public interest with regard to the effects it might have on public security, pluralism of the media and the principles of due process.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

In reviewing the compatibility of a concentration with the competitive market, the CPC takes into account the following:

- the structure of the affected markets, the structure of other markets where the notified concentration might have significant implications and the actual or potential competition from undertakings located either within or outside Cyprus;
- the market position of the participants;
- the economic power of all the undertakings in the market;
- any barriers of entry to the affected market;
- the interests of the intermediate and end-consumers of the products and services;
- the alternative sources of supply of the products and services that are traded in the affected markets and of their substitutes;
- the supply and demand trends for the relevant markets; and
- the contribution on the development of technical and economic progress provided that it is to the consumer's advantage and does not form an obstacle to competition.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Before reaching its final decision and subject to the time limits provided by the Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law), the Commission for the Protection of Competition (CPC) may, if it considers it expedient to do so, carry out negotiations, hearings or discussions with any of the interested parties or other persons. Furthermore, the CPC has wide investigative powers when assessing a concentration, including access to any premises, property, means of transport, books or records in the possession of the undertakings concerned or third parties.

In the context of a Phase II investigation, the CPC may impose conditions or remedies in relation to the implementation of the transaction, thus having the ability to interfere with the essence of the transaction. The CPC has at any given time the power to revoke decisions related to the compatibility of any concentration and to amend any of the terms of its decision if it determines that:

- its initial decision was based on false or misleading information or that necessary information relating to the concentration at hand was withheld by the notifying party or by any other undertaking concerned or by any interested person; or
- any condition attached to the decision and imposed on the participants to the concentration has not been satisfied or has ceased to be satisfied.

Where the CPC exercises its power of revocation, it may, following a study of its civil service (the Service)'s report, order either a partial or complete dissolution of the concentration to secure the restoration of the competitive market. It may do this, either in the course of exercising its powers of revocation of a previous decision or on establishing that a concentration has been implemented prior to clearance by the CPC.

Where the Minister of Energy, Commerce and Industry disagrees with a clearance decision of the CPC on the grounds of public interest with reference to the potential effects on public security, media pluralism and due process, the Minister can refer the concentration for assessment by the Council of Ministers of the Republic of Cyprus.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Competition issues can be remedied through the CPC exercising its discretionary power. In the course of remedying competition issues, the CPC may order the dissolution or partial dissolution of the concentration concerned in order to secure the restoration of the functioning of competition in the market, through the deprivation of any participation, shares, assets or rights acquired by any person participating in the concentration, or by the cancellation of any contracts that created the concentration or that arose from it, or by a combination of the two, or any other way the CPC deems necessary.

If the CPC ascertains that the notified concentration falls within the scope of the Law and raises doubts as to its compatibility with the competitive market, it will inform the Service of the need to conduct a full investigation. In such an event, the Service will request further information from the participants as well as other entities involved in the specific sector for the purpose of completing its investigation. Also, the Service notifies the participants that they may make suggestions to undertake remedies that will remove the CPC doubts as to the compatibility of the transaction within the time limit defined by the Service. Appendix IV of the Law is a form that the participants will be asked to submit when they are willing to undertake any remedies. The CPC accepts both divestiture and behaviour remedies. If, following its review of the additional information provided to it, the CPC's doubts as to compatibility have not been removed, the Service, if it finds any differentiations or modifications in the circumstances under which the concentration has been established that may result in the removal of the doubts, will commence negotiations with the participating undertakings.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The CPC is required to provide written notification to the undertakings concerned of any remedies as part of its decision, which it is bound to issue within four months as of the date of receiving the notification of the concentration and payment of the filing fees. Should the merger be cross-border, the CPC may liaise with the relevant foreign authority in relation to applicable remedies. Furthermore, any remedies have to be limited to those that are reasonably necessary for the protection of the competitive market.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Although there is an increasing number of local transactions in which remedies have been required, there is no case at present where the CPC has requested remedies of a material nature in foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The clearance decision issued by the CPC covers related agreements if such agreements are related to, and are necessary for, the implementation of the merger.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The CPC may request information from any party, including natural persons, legal persons and public authorities, in the course of exercising its powers and duties under the Law.

During a Phase II investigation, parties having a legitimate interest may apply to the Service of the Commission for the Protection of Competition (CPC), to provide their views in relation to the concentration under assessment.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CPC publishes a description of the notification in the Official Gazette of the Republic and on its website, indicating the names of the participants, the nature of the concentration and the economic sectors involved. In so doing, the CPC takes into account, as far as possible, the legitimate interest of the affected undertakings in the protection of their business secrets. The CPC also publishes in the Official Gazette of the Republic and on its website a non-confidential version of its decision. The undertakings concerned may request that any part of the decision remains confidential and the CPC will decide whether such information should be treated as confidential. The party to which the CPC addresses a written request for information should identify documents, statements and any material it considers to contain confidential information or business secrets, justifying its opinion, and provide a separate, non-confidential version within the time limit set by the CPC for the notification of its opinion.

The CPC and the Service are under a statutory duty of confidentiality, infringement of which is a criminal offence punishable with imprisonment of up to six months or a fine of up to €1,500 or both.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Pursuant to section 54 of the Law and the relevant provisions of the EU Merger Control Regulation No. 139/2004, the CPC cooperates with other national competition authorities in the European Union and the European Commission on the basis of the system of parallel competences and the exchange of views and information between them via the European Competition Network.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The decisions of the Commission for the Protection of Competition (CPC) are administrative executive acts issued by a public authority. As such, an aggrieved party having legitimate interest and seeking to annul a CPC decision has the right to file for administrative recourse.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The time limit for commencing an administrative appeal is 75 days from receipt of notification of the CPC's final decision or its publication in the Official Gazette.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Concentrations notified to the Commission for the Protection of Competition (CPC) are assessed under the legislative and policy rules in place and described above. The CPC is particularly keen to ensure, in the course of exercising its powers under the Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law), that effective competition in the Republic or in a substantial part of it, is not significantly impeded, in particular as a result of the creation or strengthening of a dominant position. As had been the case under the previous merger control framework, a considerable number of the notified concentrations concern foreign-to-foreign transactions.

Reform proposals

35 | Are there current proposals to change the legislation?

The Law came into effect in June 2014 and replaced the previous merger control regime in place since 1999. There are no current proposals to change the legislation.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

A number of important issues have been considered by the Commission for the Protection of Competition (CPC) over the past few years, which have shed more light on its decision-making practice.

Specifically, the CPC dealt with the first non-performing loans servicing transaction in Cyprus, which essentially created the relevant market. In the *APS/Hellenic Bank* case, the CPC defined the relevant product market as being the management of immovable property acquired by credit institutions through enforcement proceedings or payment of credit rights derived from mortgages, and the management of non-performing loans granted by credit institutions or other persons.

In the *VLPG* case, in which the CPC carried out a full investigation, clearance was granted subject to commitments by the participating undertakings. The case concerned the creation of a joint venture by Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd, Intergaz Ltd and Synergkaz Ltd, in which the said undertakings shifted part of their activities relating to the storage and handling of liquefied petroleum gas to the joint venture. The joint venture was held to potentially have the ability and motivation to exploit its dominant position and to hinder the expansion of other companies and potential competitors. The CPC also highlighted the potential for significant obstruction of competition as a result of the creation of the joint venture's dominant position.

The transaction was cleared subject to a number of remedies, including the exclusion of members of the boards of the parent undertakings from sitting on the board of the joint venture, confidentiality undertakings by the joint venture in relation to the parent undertakings, the appointment of a trustee and the introduction of criteria for the assessment of storage capacity requests from third parties, together with providing any new entrant that constructs LPG storage facilities in the area, access to the anchor and unloading pipes, to the extent that it will be under the control of the joint venture.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In the Czech Republic, merger control is primarily regulated in sections 12 to 19 of the Czech Competition Act No. 143/2001 (the Act).

The merger regulation in the Act is implemented in Decree No. 294/2016, which primarily provides for the form of a merger notification and specification of the documents required for a merger filing.

Soft law of the Czech competition authority is also relevant to merger control but is not binding. The Czech competition authority has so far published the following soft law concerning merger control:

- notice on requirements of the proposal to approve the concentration;
- notice on pre-notification contacts;
- notice on the calculation of turnover;
- notice on the concept of a concentration;
- notice on the concept of parties to the concentration;
- notice on the implementation of a concentration prior to the approval;
- notice on the competition defence for undertakings in economic difficulties; and
- notice on simplified procedure.

The authority responsible for enforcing merger control legislation is the Czech competition authority – the Office for the Protection of Competition (the Office).

Scope of legislation

2 | What kinds of mergers are caught?

Pursuant to section 12 of the Act, the following types of transactions are subject to the notification obligation:

- the merger of two or more independent undertakings;
- the acquisition by one or more persons already controlling at least one undertaking, or by one or more undertakings, of direct or indirect control over another undertaking or its part either by acquisition of shares or ownership interest or by an agreement or in a public auction or by any other means; and
- the establishment of a full-function joint venture.

The following transactions are not covered by the merger control rules:

1. the temporal acquisition of shares by a bank in an undertaking by setting off its claims against the undertaking, if the acquisition is made in the context of a restructuring process for a period not exceeding one year;
2. the temporal acquisition not exceeding a period of one year by an investment undertaking of shares in another undertaking only for the purpose of their sale, provided that the investment undertaking does not exercise its voting right to influence the competitive conduct of the controlled undertaking; and
3. the transfer of certain powers of statutory bodies of an undertaking to third parties pursuant to special legislation, particularly to a liquidator or an insolvency administrator.

The Office can extend the deadline of one year in (1) and (2) under certain conditions.

3 | What types of joint ventures are caught?

The merger control rules apply to the formation of a joint venture performing on a lasting basis all functions of an autonomous economic entity. Pursuant to section 12(6) of the Act, pertinent coordinative aspects of a full-function joint venture are assessed pursuant to the provisions of the Act regulating prohibited agreements.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

In section 12(4), the Act defines 'control' as the possibility to exercise decisive influence over another undertaking, in particular by:

- ownership or the right to use an enterprise of the controlled under-taking or a part thereof; or
- rights or other legal facts that confer decisive influence on the composition, voting or decision of the bodies of the controlled undertaking.

The Act does not stipulate a fixed shareholding threshold or any specific board and management representation, the meeting of which would constitute control. The Office always assesses the actual situation.

Not only the acquisition of control but also the change in quality of control is deemed a concentration within the meaning of the Act.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration is subject to approval by the Office if:

- the aggregate net turnover of all parties to the concentration in the last completed accounting period within the market of the Czech Republic exceeds 1.5 billion Czech koruna, and the aggregate net turnover of each of at least two of the parties to the concentration for the last completed accounting period within the market of the Czech Republic exceeds 250 million Czech koruna; or
- the aggregate net turnover of:
    - at least one undertaking being party to the merger (consolidation);

- an enterprise or its part being acquired;
- an undertaking whose control is being acquired; or
- at least one of the undertakings creating a concentrative joint venture, for the last completed accounting period within the market of the Czech Republic, exceeds 1.5 billion Czech koruna, and the aggregate worldwide net turnover of the other party to the concentration for the last completed accounting period exceeds 1.5 billion Czech koruna.

Aggregate net turnover is composed of the net turnover of:

- all parties to the concentration;
- all persons that will control the parties to the concentration and persons that will be controlled by the parties to the concentration after completion of the concentration;
- all persons controlled by the same person that will control the parties to the concentration after completion of the concentration; and
- all persons jointly controlled by two or more persons referred to in the previous items.

For the purpose of calculating the turnover, the turnover resulting from the sale of products between the parties to the concentration and those persons listed above in respect of the calculation of the net turnover shall not be taken into account.

If only part of an undertaking is subject to the concentration, only that portion of the turnover achieved by this part shall be taken into account when calculating the turnover.

The rules for the calculation of turnover of banks also apply to the calculation of turnover of credit and other financial institutions, with the exception of insurance companies. For banks, the net turnover is understood as the sum of the incomes, particularly interest incomes, incomes from securities, incomes from participating interest, incomes from charges and commissions and incomes from financial operations. For insurance undertakings, the net turnover should be understood as the total sum of premiums written resulting from all concluded insurance contracts.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act and exceeds the notification thresholds, filing is mandatory. No exemptions from the notification obligation apply.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

No special rules apply to foreign-to-foreign mergers. No local effects tests nor any kind of nexus test exist. Therefore, if a foreign-to-foreign transaction constitutes a concentration within the meaning of the Act and exceeds the notification thresholds stipulated by the Act, filing the transaction is mandatory.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

No. There are no special rules in respect of foreign investment or special sectors. There are only special rules for certain temporal transactions involving banks or investment undertakings as well as liquidation and insolvency situations. According to other special legislation, transactions in sectors such as banking may further require special approval from regulatory bodies other than the Office.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A concentration cannot be implemented neither before it is approved by the Office for the Protection of Competition (the Office) nor before a clearance decision of the Office enters into force. The notifying party may file the notification as soon as the legally binding transaction documents have been signed. The notification may even be submitted prior to the signing of the relevant transaction documents, provided the parties have, in principle, agreed on the structure and timing of the concentration.

There are no specific sanctions for not filing a notifiable merger. Failure to file is seen by the Czech Competition Act No. 143/2001 (the Act) as breach of the suspension clause.

10 Which parties are responsible for filing and are filing fees required?

A notification must be submitted in the case of:

- a merger by the merging parties;
- acquisition of sole control by the parties acquiring sole control;
- acquisition of joint control by the parties acquiring joint control;
- acquisition of an enterprise of another undertaking or a part thereof by the acquiring party or parties; and
- creation of a full-function joint venture jointly by all undertakings participating in the creation of a full-function joint venture.

The notification is subject to payment of an administrative fee of 100,000 Czech koruna.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is a deadline of 30 days from the date of opening the notification proceedings for the Office to assess a concentration within Phase I and decide:

1. that the concentration does not constitute a concentration that must be notified pursuant to the Act;
2. to clear the concentration; or
3. to open Phase II of the investigation because there are serious concerns that the concentration would significantly impede competition.

If the Office does not issue the decision according to (1) or (2) or does not open Phase II within the 30-day deadline, the concentration is deemed to be cleared.

The Phase II decision must be issued no later than five months from the date when the notification proceedings are opened. If the Office does not issue the decision within the given deadline, the concentration is deemed to be cleared.

If the notifying party proposes remedies, the respective deadline for Phase I or Phase II will be extended by another 15 days.

In the case of a simplified procedure, the Office must issue a decision within 20 days.

If the Office requires amendment of the notification by the notifying party, the Office's time frame for issuing the decision is suspended.

In our experience, the Office typically issues the respective decision shortly before the deadline.

The concentration may not be implemented until it has been approved by an effective decision of the Office.

Pursuant to section 18(3) and (4) of the Act, the Office might grant an exemption from the standstill obligation on the request of the notifying party if the parties to the concentration or any third party runs the risk of suffering substantial damage or another serious detriment. The Office has 30 days from the receipt of the request to decide. The Office might also grant only partial exemption or grant the exemption subject to certain conditions.

A request for exemption from the standstill obligation is subject to payment of an administrative fee of 10,000 Czech koruna.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

For closing the concentration before clearance, the Office may impose a fine of up to 10 million Czech koruna or 10 per cent of the net turnover of the undertakings that are in breach of the standstill obligation. The Office may further take measures that it considers necessary to restore effective competition on the relevant market, particularly a demerger obligation. There is also a risk that the respective transaction agreement will be deemed invalid. This question, however, is still not clear under Czech law.

In practice, the Office uses the right to impose a fine for breach of a standstill clause. When setting the fine, it takes into account the circumstances of the breach, if the parties knew about the breach and the length of the breach.

In the past year, one new gun-jumping decision was adopted by the Office, in the case of S0269/2020 *CSG/Skyport* (imposed fine: 4.487 million Czech koruna). Prior to this decision, the Office imposed a fine for gun jumping in decisions S104/2015 *Bohemia Energy entity* (imposed fine: 5.383 million Czech koruna) and S164/2015 (R21/2016) *Armex Oil* (imposed fine: 4.906 million Czech koruna), both from 2016.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same rules and sanctions for implementation of the notified concentration prior to clearance apply to foreign-to-foreign concentrations. To the best of our knowledge, there has been no such case so far.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act provides for a worldwide bar on closing. However, the Office may grant an exception from the standstill clause.

Because the Office is obliged to assess the negative effects of mergers only on markets within the Czech Republic, merging parties could be convicted by the Office for breach of the standstill obligation only if a merger closing before the adoption of the Office's clearance decision has an effect on markets within the Czech Republic. Therefore a 'hold-separate agreement' for the Czech part of a foreign transaction would probably not be seen as gun jumping.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The same rules and requirements apply to public takeover bids; however, pursuant to section 18(2) of the Act, the ban on closing does not apply to implementing a public offer to purchase or exchange stocks provided that the transaction was notified immediately and that the buyer does not exercise the voting rights arising from the acquired stocks.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification must be made on a notification form prescribed by Decree No. 294/2016. It can be downloaded at the Office's website. The notification form must be filed in Czech.

The Decree also specifies the documents that must accompany the filed notification. It is necessary to submit to the Office either the original documents or their authenticated copies. If any document is in a foreign language, it must be translated into Czech by an authorised translator. Long documents, such as annual reports and consolidated financial statements, do not have to be translated into Czech if the originals provided to the Office are in English or German. The Office may also decide on a case-by-case basis that parts of the agreements establishing the notified concentration or relevant studies and analysis, which are not necessary for the assessment of the notified concentration, do not need to be translated into Czech if the originals provided to the Office are in English or German. Detailed information is set out in the Office's notice on requirements of the proposal to approve the concentration.

The level of detail required in the preparation of a filing depends on the circumstances of the concentration. If there is no overlap in the activities of the parties to the concentration or their aggregate market share is below 15 per cent in the case of a horizontal concentration or the market share of any party to the concentration is below 25 per cent in the case of a vertical concentration, it is not necessary to fill in parts 6 and 7 of the notification form.

The Act also foresees a simplified procedure for certain types of concentrations, which allows the parties to the concentration to provide less information and fewer supporting documents. The simplified notification of the concentration may be filed when:

- none of the undertakings involved is operating in the same relevant market, or their combined share in the market does not exceed 15 per cent, and at the same time, none of the undertakings concerned is operating in a market vertically connected to the relevant market in which another undertaking operates, or their share in every such market does not exceed 25 per cent; or
- the undertaking acquires exclusive control over the joint venture in which it has participated in joint control so far.

Detailed information and requirements concerning the simplified procedure are set out in the Office's notice on the simplified procedure.

The sanction for not supplying full, correct and true business information is a fine of up to 300,000 Czech koruna or 1 per cent of net turnover achieved in the last accounting period.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The Office recommends the notifying party to have pre-notification contacts with it prior to filing the notification, the details of which are described in the Office's notice on pre-notification contacts.

Clearance procedure could be divided into two phases. The Office initiates Phase I after its receipt of the notification by parties to the concentration. Specifically, upon receipt of the notification, the Office publishes a short summary of the notification on its website as well as in the Commercial Gazette. In the case of a simplified procedure, the summary is published only on the website. The summary contains the names of the parties, a brief description of the type of concentration and the business sector concerned. Third parties are invited to provide their pertinent objections by a set deadline, usually five days.

The Office informs the notifying party in writing about the opening of the investigation, which constitutes Phase I. Within Phase I, the Office assesses whether the concentration falls within the scope of the Act and whether the concentration would significantly impede competition. In the event that the concentration might raise serious doubts of significant impediment of competition, the Office opens Phase II; otherwise, the concentration is cleared. If the Office needs clarification, further information or documents, it approaches the notifying party in writing. In such a case, the Office's time frame for issuing the decision is suspended.

The parties to the concentration can offer remedies to the Office either prior to the notification or at any time in the course of the investigation; however, at the latest within 15 days from obtaining the statement of objections.

If the Office intends to open Phase II, it informs the notifying party about this in writing in the course of Phase I.

Prior to issuing the decision, the Office will invite the notifying party to make itself acquainted with information and documents contained in the administrative file, which will be the basis for its decision.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Office has 30 days from the date of opening the notification proceedings to assess a concentration within Phase I and decide:

1. that the concentration does not constitute a concentration that must be notified pursuant to the Act;
2. to clear the concentration; or
3. to open Phase II of the investigation, because there are serious concerns that the concentration would significantly impede competition.

If the Office does not issue the decision according to (1) or (2) or does not open Phase II within the 30-day deadline, the concentration is deemed to be cleared.

The Phase II decision must be issued no later than five months from the date when the notification proceedings are opened. If the Office does not issue the decision within the given deadline, the concentration is deemed to be cleared.

If the notifying party proposes remedies, the respective deadline for Phase I or Phase II will be extended by another 15 days.

In the case of a simplified procedure, the Office must issue a decision within 20 days.

If the Office requires amendment of the notification by the notifying party, the Office's time frame for issuing the decision is suspended.

In our experience, the Office typically issues the respective decision shortly before the deadline. There is no other possibility for speeding up the proceedings besides using the simplified procedure.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Office for the Protection of Competition (the Office) assesses the notified concentrations against a test that basically corresponds to the 'substantial impediment to effective competition' test under the EU Merger Regulation. The Office prohibits implementation of concentrations that would significantly impede competition in the relevant market. A significant impediment to competition can be caused particularly by the creation or strengthening of a dominant position. The Czech Competition Act No. 143/2001 presumes that a concentration will not have as its result the significant impediment of competition where the aggregate market share of the parties to the concentration on the relevant market does not exceed 25 per cent.

Nevertheless, the substantive test is not only restricted to the creation or strengthening of a dominant position. There are a number of legal and economic aspects that must be taken into account when pursuing the test, such as the necessity of maintaining and further developing competition, the structure of all affected markets, the market shares of the parties to the concentration, the economic and financial power of the parties, the legal and other barriers to entry to the market, the ability of suppliers and customers of the parties to switch, the development of supply and demand in the affected markets, the needs and interests of consumers, and research and development. A concentration's impact on competition must be assessed with regard to all these combined criteria.

A concentration that otherwise does not meet the requirements for clearance may be cleared by the Office subject to conditions and obligations.

Regarding the 'failing firm defence' the Office published a soft law document, which is available at its website. Thus, the Office recognises this specific situation and after consideration of all relevant circumstances is willing to clear the concentration, although the conditions to satisfy the 'failing firm defence' are strict and the Office thoroughly assesses the characteristics of the market and the potential impacts that the concentration might have.

20 | Is there a special substantive test for joint ventures?

No, there is no special substantive test for joint ventures. It is not only theories of harm arising from the creation or strengthening of a unilateral or collective dominant position that are the subject of the Office's investigation; the possibility of the elimination of important competitive constraints on oligopolistic markets caused by a merger is also examined by the Office within the assessment of merger effects on relevant markets.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The test for clearance is whether the concentration significantly impedes effective competition. Within the scope of the test, the Office may rely on a number of theories of harm (eg, vertical foreclosure, conglomerate effects and collective dominance) to prove that the concentration would significantly impede effective competition. Thus, the Office investigates all potential risks and impacts on the relevant markets the concentrations might have.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

In merger cases, the Office does not consider any non-competition issue as a criterion for assessing whether a merger can or cannot be declared to be compatible with the Czech market. The only thing that is checked is whether a merger significantly impedes economic competition. When deciding on a concentration notification, the Office primarily assesses the necessity of preservation and further development of effective competition, the structure of all markets affected by the concentration, the shares of the parties to the concentration in those markets, their economic and financial power, legal and other barriers to enter relevant markets by other undertakings, the alternatives available to suppliers and customers of the parties to the concentration, the development of supply and demand in the affected markets, the needs and interests of consumers, and research and development, provided that it is to the consumers' advantage and does not form an obstacle to effective competition.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Office might take economic efficiencies into account in the review process. Where efficiencies are invoked in favour of a concentration, the party alleging the efficiencies bears the burden of proof. In practice, it is advisable to document the efficiencies through the opinions of economic experts.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Office for the Protection of Competition (the Office) will issue a prohibition decision if it considers that a concentration would significantly impede competition in the relevant market, particularly through the creation or strengthening of a dominant position of the parties to the concentration or some of them.

If the decision is not complied with, the Office may impose restorative measures to restore effective competition; for example, an order to sell the shares of the acquired undertaking or to abolish the agreement on which the concentration is based.

In addition, the Office may impose a fine of up to 10 million Czech koruna or 10 per cent of the net turnover if the transaction is closed despite its veto.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

To address the Office's competition concerns about the notified concentration, the parties to the concentration may offer remedies. The decision to accept the proposed remedies is fully at the discretion of the Office. The parties to the concentration may offer remedies prior to the notification of the concentration or at any time in the course of the investigation; however, it must be at the latest 15 days from the receipt of the statement of objections.

The Czech Competition Act No. 143/2001 (the Act) does not specify the nature of the remedies that might be proposed. Both structural and behavioural remedies are possible.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Act does not specify which remedies are acceptable. Both structural and behavioural remedies can be proposed, but the Office prefers structural remedies.

Remedies may be proposed prior to the notification of the concentration or any time in the course of the Office's investigation; however, they must be proposed at the latest 15 days after obtaining the statement of objections.

If remedies are proposed, the deadline for the decision of the Office within Phase I or Phase II shall be extended by 15 days.

The Office shall respect remedies proposed by the parties to the concentration and only those shall be binding. In practice, it is advisable to discuss intended remedies with the Office during pre-notification contacts.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In the past 10 years, there has been no such record. In 2003, the Office requested commitments or remedies in a few foreign-to-foreign mergers (S008/2003 *General Electric Company/AGFA Geavert* and S029/2003 *DSM/division Vitamins and Fine Chemicals Roche Group*).

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Pursuant to section 17(2) of the Act, the clearance decision also covers those restrictions to competition that the notifying party identified in the notification and that are directly related and necessary to the concentration. The Office accepts the European Commission's Notice on Restrictions Directly Related and Necessary to Concentrations as useful guidance on this matter.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Office for the Protection of Competition (the Office) publishes an announcement regarding the initiation of the notification proceedings on its website and in the Commercial Gazette without delay after the receipt of the concentration notification. In the case of a simplified procedure, the summary is published only on the website. The announcement contains the names of the parties to the concentration, a brief description of the type of concentration and the business sector concerned. The announcement also contains an invitation for third parties to submit any potential objections within the set deadline. Third parties may provide objections to or comments on the notified concentration at any time during the investigation, although the Office is not obliged to deal with them.

The Office may, on its own initiative, address information requests to competitors and customers or any third parties in the course of its investigation.

According to the case law of the Regional Court in Brno (62 Af 55/2011-174 and 62 Af 42/2012-116), which is in charge of reviewing the Office's decisions, third parties who provide their objections against the concentration within the set deadline and who are of the opinion that the Office did not properly deal with them in its first instance decision on the concentration can appeal the clearance decision of the Office. However, this case law was heavily criticised and was eventually dismissed by the Supreme Administrative Court (6 As 47/2014-82). At the same time, however, the Supreme Administrative Court suggested that third parties must have other possibilities to challenge the clearance decision. The specification of those possibilities was, however, left open.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

During the investigation, parties to the concentration must disclose all information and documents available, including those that might contain business secrets. To protect business secrets, the notifying party must provide the notification both in a version with business secrets and in a version with the business secrets redacted.

The Office publishes an announcement regarding the initiation of the notification proceedings on its website and in the Commercial Gazette.

The final decision of the Office is published on its website but without the business secrets indicated by the parties to the concentration.

With regard to access by third parties, it was generally accepted for a long time that only the notifying party could see the file. However, according to case law of the Supreme Administrative Court (9 Afs 29/2012-53), if a third party demonstrates a strong interest in obtaining access to the file, the Office must allow the third party to have such access, but only to documents in which the business secrets have been redacted. This conclusion has been confirmed by other case law of the Supreme Administrative Court (eg, 6 As 42/2015-75 and 6 As 47/2014-82).

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

At the level of know-how exchange, the Office cooperates with the European Commission and with the competition authorities of other countries within the European Competition Network, the International Competition Network and the Organisation for Economic Co-operation and Development.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The notifying party is entitled to appeal the decision of the Office for the Protection of Competition (the Office) within 15 days from the date of delivery of the decision on the concentration. The appeal body is the chair of the Office.

The decision of the chair of the Office can then be challenged by bringing an administrative action to the Regional Court in Brno. However, the administrative action has no suspensive effect on the decision of the Office unless the court grants it at the special request of the plaintiff.

According to the current case law of the Supreme Administrative Court, third parties must have other possibilities to challenge the clearance decision. The specification of those possibilities was, however, left open. Therefore, such specification must be clarified in the next decision-making practice.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An appeal of the first instance decision of the Office must be lodged within 15 days from the date of delivery of the decision. Administrative action against the second instance decision of the Office (ie, the decision of the chair of the Office) must be lodged within two months. There is no deadline for the chair of the Office to decide about the appeal against the first instance decision. There is also no deadline for a decision of the court about the administrative action against the second instance decision. The court usually decides within a year or so.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, the Office for the Protection of Competition (the Office) issued 48 decisions concerning concentrations, 34 of them within the simplified procedure and two of them within the Phase II procedure, with one other procedure within Phase II being terminated as the applicants withdrew their application. One clearance was subject to commitments. There have been no prohibition decisions by the Office in the past 10 years.

There has also been a decision concerning gun jumping, with a penalty of 4.5 million Czech koruna imposed on the undertaking Skyport.

There is no particular focus on any industries, sectors or issues in the Office's decision-making practice.

Reform proposals

35 | Are there current proposals to change the legislation?

There are three proposals to amend the Czech Competition Act No. 143/2001 being discussed at the time of writing, with the first being a substantive amendment and the other two merely ancillary. The first would amend the Act by implementing Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective in enforcing and ensuring the proper functioning of the internal market. The second would amend the Act with the purpose of digitisation of procedures of public authorities including data sharing between public authorities and the Office's proposal of the use of geolocation data for the purposes of agreements concerning competition. And the third would amend the Act by implementing Directive 2018/1972 to regulate the electronic communications market and the high speed internet infrastructure.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

With the introduction of the new chair of the Office for the Protection of Competition (the Office), the goals of the Office became increased transparency and communication with undertakings. The Office plans to tackle these goals with vigilance during the economic turmoil of the covid-19 pandemic.

Compared with 2019, although more concentration decisions have been taken by the Office overall, relatively fewer complex concentrations have needed closer analysis by the Office and, therefore, significantly more decisions have taken the form of the simplified procedure. The Office has also taken a gun-jumping decision for the first time since 2016.

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Competition law on digital markets and related issues remain hot topics. The Office also continues to cooperate with other competition authorities from neighbouring countries and with other public authorities, and to stress the importance of increased cooperation within the ECN+ framework. Regarding the complexity of competition law issues, it will be necessary for competition enforcers as well as other practitioners to cooperate and find new experts in diverse areas.

Despite the global economic downturn, the number of decisions on mergers and acquisitions delivered by the Office has increased from 2019 and so illustrates the continued viability of mergers during the covid-19 pandemic in the Czech Republic. Overall, the Czech Republic constitutes a stable and positive opportunity for foreign investments.

Denmark

Bart Creve, Erik Bertelsen, Jens Munk Plum and Morten Kofmann
Kromann Reumert

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The main legislation on Danish merger control is contained in the Danish Competition Act (Consolidated Competition Act No. 360 of 4 March 2021), which is modelled on European Union competition law. The Competition Act can be accessed online from the website of the Danish Competition and Consumer Authority (DCCA).

In the field of merger control, the provisions of the Competition Act are accompanied by the Executive Order on the Calculation of Turnover in the Competition Act (No. 1286 of 26 November 2019) and the Executive Order on the Notification of Concentrations (No. 690 of 25 May 2020). The European Commission's jurisdictional notice and ancillary restraints notice provide guidance.

Furthermore, on 1 July 2020, a new Danish regulation on notification of mergers entered into force and the DCCA updated its merger guidelines accordingly. Although the new executive order has not entailed any significant changes to the current rules, the parties to a transaction must use a revised notification form when notifying a merger to the Danish competition authority. While the executive order in itself does not introduce any key amendments, the revised notification form increases the level of detail required in a notification. The additional requirements focus on the description of all plausible market segmentations, a more exhaustive list of internal documents to be submitted, and a higher standard for describing and documenting claimed efficiency gains. Furthermore, the parties are now required to submit contact details of the main competitors, customers, etc in an Excel-compatible document.

The DCCA is the principal enforcer of competition law in Denmark. The Competition Council, which is part of the DCCA, consists of seven members appointed by the Minister for Business and Growth: a chair, a vice chair, two members with knowledge of competition law or other relevant academic background, two members with managerial background from the business world, and one member with special knowledge of consumer affairs. The Competition Council has the overall responsibility for the administration of the Competition Act and regulations issued thereunder. In addition, the Council shall make decisions on matters of principle or of particular importance.

The DCCA, which is also the secretariat of the Competition Council, is in charge of day-to-day administration of the Competition Act. The DCCA prepares the decisions of the Council and issues decisions in matters not dealt with by the Competition Council. The DCCA is divided into units in charge of different areas of business and industry. The DCCA also has transversal units and a management and administration secretariat.

The decisions of the competition authorities are subject to appeal before the Competition Appeals Tribunal, which is made up of a Supreme Court judge, and four other members with expertise in either economics or law. The Appeals Tribunal forms part of the administration and its decisions are in turn subject to appeals by the undertakings before the ordinary courts.

However, following an amendment of the Danish Competition Act in 2021, appeal to the Competition Appeals Tribunal became optional, meaning that an undertaking is now able to decide if it wants to bring substantive decisions before the Tribunal or directly before the courts in order to obtain a full judicial review of a decision taken by competition authorities or a proposed fine.

Scope of legislation

2 | What kinds of mergers are caught?

The provisions of merger control apply to 'concentrations'. In accordance with the EU Merger Regulation, a concentration will be deemed to arise where either:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

The preparatory documents accompanying the Competition Act explicitly refer to the European Commission's notices on merger regulation.

3 | What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a concentration. In this respect, the preparatory documents make explicit reference to the European Commission's notices.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Act contains a precise definition of control that is consistent with the law and practice under the EU Merger Regulation: control shall be constituted by rights, contracts or any other means that, either separately or jointly, confer the possibility of exercising decisive influence over an undertaking.

In cases where outright legal control is not acquired, rights attached to shares or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues may be considered. In the case of the acquisition of minority shareholdings, the Competition Council will assess the situation by looking at the strength of voting rights and other factors. Such considerations may lead to the conclusion that the possibility of exercising control as defined exists. It does not matter whether control has actually been exercised. The European Commission's practice will be followed.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions apply to concentrations where either:

- the combined aggregate turnover in Denmark of all the undertakings concerned is at least 900 million Danish kroner and the aggregate turnover in Denmark of each of at least two of the undertakings concerned is at least 100 million kroner; or
- the aggregate turnover in Denmark of at least one of the undertakings concerned is at least 3.8 billion kroner and the aggregate worldwide turnover of at least one of the other undertakings concerned is at least 3.8 billion kroner.

The preparatory work to the Danish Competition Act states that 'undertakings concerned' is to be interpreted in accordance with the Commission's practice. Moreover, it is stated explicitly in the Competition Act that where the concentration consists of the acquisition of parts (regardless of whether they are constituted as legal entities such as assets constituting a separate business) of one or more undertakings, only the turnover relating to the parts that are the subject of the transaction will be taken into account with regard to the seller or sellers. Two or more transactions that take place within a two-year period between the same persons or undertakings will be treated as one and the same concentration arising on the date of the last transaction.

Concentrations below the thresholds may in exceptional circumstances be referred to the European Commission under article 22 of the EU Merger Regulation.

On 3 April 2020, the Danish Competition and Consumer Authority (DCCA) referred a proposed merger between Mastercard and Nets to the European Commission, since the DCCA came to the conclusion that the merger could affect markets in a number of other EU member states. This is the first time that the DCCA has requested a referral to the European Commission.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of merger notifications in Denmark is mandatory if the turnover thresholds are met.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers satisfying the turnover thresholds are subject to Danish merger control even where no actual effects in the Danish market can be shown. The thresholds have been defined so as to require actual turnover in Denmark (generally interpreted as sales to customers located in Denmark) of a substantial magnitude.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

On 1 July 2015, a sector-specific threshold was introduced. Within the sector of public electronic communications networks, the second limb of the primary thresholds (ie, that each of at least two of the undertakings concerned is more than 100 million kroner) has been abolished. If a merger is within this sector, and the combined aggregate turnover in Denmark of all the undertakings concerned is more than 900 million kroner, the jurisdictional threshold is met and the merger must be notified (regardless of the aggregate turnover of the individual undertakings).

Furthermore, exemptions apply with regard to the calculation of the turnover of associations of companies and financial institutions. These exemptions are set out in the Executive Order on the Calculation of Turnover in the Competition Act (No. 1286 of 26 November 2019), sections 5 to 7.

Special rules apply to financial undertakings (eg, banks, mortgage-credit institutions and investment management institutions). Hence, such financial undertakings are not allowed to merge without permission from the Ministry of Industry, Business and Financial Affairs. That is stipulated in section 204 of the Financial Business Act (Act No. 937 of 6 September 2019).

The acquisition of a controlling shareholding in a public limited liability company registered on the Copenhagen Stock Exchange creates an obligation to make a general bid to purchase the remaining shares.

In May 2021, the Danish parliament passed the Investment Screening Act. The proposal should be seen in light of the European Foreign Direct Investment Regulation, which became effective on 11 October 2020, and the Danish government emphasising the need for an FDI regime that secures Denmark's security and public order but does not undermine Denmark's position as an open economy or jeopardise its ability to attract foreign investments.

The goal of the Investment Screening Act is to prevent foreign direct investments and certain economic agreements from posing a threat to national safety and the public order in Denmark. The bill thus proposes a Danish screening instrument that may be used to assess foreign investments and specific economic agreements and makes it possible to take action and set out requirements for the investment or agreement or completely prohibit it, insofar as it poses a threat to national security in Denmark.

The Act provides for a mandatory authorisation regime for all foreign investors investing in particularly sensitive sectors and a voluntary cross-sectoral notification regime for non-EU/European Free Trade Association investors.

The mandatory sectoral authorisation regime requires foreign investors intending to acquire a 'qualifying holding' in a Danish undertaking that operates in a particularly sensitive sector to apply to the Danish Business Authority for authorisation.

The Act defines a qualifying holding as 'direct or indirect possession or control of no less than 10 per cent of the shares or voting rights or similar control by other means'. Investors seeking to set up new businesses (greenfield investments) must also apply for authorisation if the business will be operating in a particularly sensitive sector.

Finally, non-EU/EFTA investors and investors in the EU/EFTA that are controlled by a non-EU/EFTA owner wishing to enter into a special financial agreement (such as a joint venture or a service and operating agreement) with a Danish business operating in a particularly sensitive sector must also apply for authorisation.

According to section 6 of the proposed Act, particularly sensitive sectors, which will be defined later in an executive order, include businesses:

- in the national defence industry;
- providing IT security services or processing classified information;
- manufacturing dual-use items (as defined in Article 1(1) of Council Regulation (EC) 428/2009 (as amended);
- providing critical technology other than the types mentioned above; and
- in critical infrastructure industries.

Authorisation must also be obtained where an existing ownership interest is increased to more than one-fifth, one-third, half, two-thirds or total ownership. Further, a new authorisation must be obtained if the ownership structure of the foreign company authorised to make the investment changes. If, for instance, a Chinese subsidiary of a Chinese group has been authorised to acquire 50 per cent of a Danish undertaking in a particularly sensitive sector, and the Chinese subsidiary is later acquired by a Japanese group, then it must apply for a new authorisation in Denmark.

The voluntary cross-sectoral notification regime provides an opportunity for investors outside the EU/EFTA to notify the Danish Business Authority of investments in Danish undertakings, whereby they, directly or indirectly, gain 'possession or control of no less than 25 per cent of the shares or voting rights'.

Under the Investment Screening Act, non-EU/EFTA investors may also notify the Danish Business Authority of 'special financial agreements', if the investment or agreement is likely to pose a threat to national security or public order in Denmark.

A guide will be prepared to make it easier for investors to determine when to use the voluntary cross-sectoral notification regime if the investment may constitute a threat to national security or public order.

Unlike the mandatory sectoral authorisation regime, the cross-sectoral notification regime does not apply in connection with the setting up of a business (greenfield investments).

Investments falling within the cross-sectoral notification regime will be subject to notification only if they qualify for the mandatory sectoral authorisation regime. By notifying the Danish Business Authority in any circumstances, the investor is sure to have authorisation, thus eliminating any future doubt as to whether the investment threatens national security or public order.

If no notification is made, the Danish Business Authority may, for a period of up to five years after the date of the investment, decide to undertake a scrutiny to determine if the investment constitutes a threat to national security or public order. If so, the Danish Business Authority may issue an unwinding order.

The Investment Screening Act enters into force on 1 July 2021, but will only apply to investments that were not closed on 1 September 2021.

In addition to the Investment Screening Act, the Danish Act on War Material (consolidated Act No. 1004 of 22 October 2012) is the only legislative act that regulates foreign acquisitions and investments on the basis of national security interests in Denmark. It follows from the Danish Act on War Material, that special FDI screening mechanisms apply to undertakings producing materials constructed for military purposes (eg, firearms, ammunition, gunpowder and explosives).

The Act on the Continental Shelf and Certain Pipeline Installations on Territorial Waters is, besides the Danish Munitions Act, the only other act that partially takes foreign and national security interests into consideration. The Act stipulates that authorisation must be granted before placing certain pipelines in Danish waters, irrespective of whether the company is Danish or foreign, and that national security interests must be considered before granting authorisation.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations falling within the thresholds must be notified to the Danish Competition and Consumer Authority (DCCA) after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest; and in any event before implementation.

Fines may be imposed for failure to notify and unlawful implementation. To date, three fines in the range of 4 million to 6 million kroner have been imposed on companies that had failed to notify a merger to the DCCA.

10 Which parties are responsible for filing and are filing fees required?

In principle, all the parties involved in a concentration are responsible for filing. In practice, however, the filing of acquisitions is often made by the acquiring party. The fee amounts to 50,000 kroner for simplified notifications and 0.015 per cent of the parties' turnover for non-simplified notifications. However, the filing fee is capped at a maximum of 1.5 million kroner.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A concentration that is notifiable to the DCCA must not be put into effect before it has been approved by the DCCA or the Competition Council's time limits have expired.

This creates waiting periods of 25 working days (Phase I) or additionally 90 working days (Phase II) after the expiry of the first waiting period. A Phase I review can be extended by 10 working days if the undertakings propose new or revised commitments. A Phase II review can be extended by 20 working days in three scenarios:

- if the undertakings propose new or revised commitments late in the process (ie, if 70 working days or more have passed from the decision to initiate Phase II);
- at the request by the parties; or
- with the parties' consent.

Hence, the maximum extension in Phase II is 2 × 20 working days (ie, if 70 working days or more have passed from the decision to initiate Phase II). The DCCA must declare whether a notification is complete within 10 working days. In practice, the DCCA may have several additional questions and sometimes even begin negotiations with the parties on possible commitments with the effect that the deadlines are not triggered.

There are two exceptions to this rule: first, a (conditional) derogation may be granted by the DCCA; second, an exception applies in respect of public bids that have been notified, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DCCA.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Fines may be imposed for unlawful implementation of a concentration prior to clearance. However, since the introduction of merger control in Denmark in 2000, the Competition Authority has only once used its powers to ask the Public Prosecutor's Office to pursue matters of failure to notify. (We are aware of at least one instance where the parties to a 'foreign-to-foreign' transaction notified considerably later than the one-week deadline, which applied at the time.)

Generally, the size of any fine will depend on factors such as the size and turnover of the undertakings concerned, the duration of the violation and whether the merger has impeded effective competition in the relevant market. Aggravating and mitigating circumstances may also be taken into account. However, the fine imposed can amount to up to 10 per cent of the undertaking's revenue. Substantive violations of the competition rules may trigger fines according to the following base amounts: up to 4 million kroner for minor violations, 4 million to 20 million kroner for serious violations, and more than 20 million kroner for very serious violations. However, fines for procedural infringements are likely to be significantly lower than these base amounts, probably in the magnitude of 10,000 to 500,000 kroner.

Where clearance is subsequently denied or made conditional, the transaction will have to be annulled or otherwise reopened and modified.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In principle, the same sanctions are applicable to notifiable foreign-to-foreign mergers as to other notifiable mergers. However, the administrative practice and case law hold no examples of sanctions for filing late in foreign-to-foreign merger cases.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Solutions such as 'ring fencing' or 'hold separate' would normally not be acceptable to merit a derogation from the 'stand-still' obligation. Most often, the best way to proceed is to demonstrate the absence of any effect on Danish markets, which may likely accelerate the process of obtaining an early clearance decision.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Competition Act does not prevent the implementation of a public bid that has been notified to the DCCA, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DCCA.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filing under the Competition Act requires the use of a specific form known as Annex 1. The form requires the provision of information about the parties, the markets, customers, suppliers and competitors, and is only a little less detailed than the Form CO used under the EU Merger Regulation. For straightforward cases that are unlikely to raise competition concerns, a simplified 'short-form' filing using a form known as Annex 2 is also possible. This form is similar in structure to Annex 1 but requires less information to be submitted. Both forms require the lodging of a non-confidential version, which is intended to be used for market testing.

Fines may be imposed for supplying wrong or missing information. Fines of 50,000 kroner have been imposed in two unrelated merger cases involving the submission of incomplete information in one instance and omitting to correct previously submitted incorrect information in another.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

It is clear that pre-notification consultations with the DCCA may and should take place. Very often these consultations can have a significant impact on the outcome and provide the undertakings concerned with the opportunity to address possible competition concerns early in the process so as to ensure that the review process is accelerated. The informal pre-notification consultation is often initiated on the basis of a briefing paper or an early draft of the notification, which is shared with the DCCA.

The time frames (Phases I and II) are inspired by article 10(1) and (3) of the EU Merger Regulation. The Competition Authority may approve a concentration before the expiry of the initial investigation (Phase I). The Competition Authority cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if there are serious doubts regarding the concentration's compatibility with the Competition Act. The Competition Authority may 'stop the clock' at any time during the formal review periods in Phase I and II if the parties do not provide requested additional information within the time frame given.

18 What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance is the same whether the merger is filed under the simplified procedure or the full-form notification procedure. Within 10 working days of the filing, the DCCA shall either declare the notification complete – thereby confirming that the time began running upon notification – or specify any missing information to be submitted. In cases of simplified notifications, the Competition Authority has 10 working days to decide whether to accept the simplified procedure or demand a full-form notification.

Unless the notification has been accepted as complete during the pre-merger notification consultation, the parties are often sent such requests, which will in effect extend the waiting period.

The DCCA must make its decision on the substance within 25 working days (Phase I) of the receipt of a complete notification. The Phase I deadline of 25 working days can be extended to 35 working days (extended Phase I) if one or more of the participating undertakings are proposing commitments. The Competition Council will decide to either approve the concentration or initiate further proceedings. In the latter case, the Competition Council must make a final decision within 90 working days (Phase II) after the expiry of the original 25 working days.

The time limit of 90 working days may be extended by 20 days if the undertakings propose new or revised commitments at a late stage (ie, if 70 working days or more have passed from the decision to initiate Phase II). The review period is thereby extended to 110 days irrespective of the number of days remaining of the original deadline. The deadline can also be extended by up to 20 days on request by the parties or with the parties' consent.

Similarly to the EU Merger Regulation, the Danish merger control scheme builds on close contacts as early in the process as possible. Cases that do not pose any substantive issues can often be cleared according to a simplified procedure. After a complete notification has been received, the DCCA decides within 25 working days whether a concentration may be approved on the basis of a simplified procedure. In practice, an approval on the basis of a simplified procedure will be given quickly, depending on the nature of the pre-notification.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test to be applied by the Competition Council is whether the concentration significantly impedes effective competition (SIEC), in particular as a result of the creation or strengthening of a dominant position. Unless this is the case, the concentration must be approved.

The substantive test for clearance of concentrations that have as their object or effect the coordination of the competitive behaviour of undertakings is similar to that set out in the EU Merger Regulation. Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of the Competition Act, which are the domestic equivalents of article 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU). This test applies in addition to the SIEC test.

20 | Is there a special substantive test for joint ventures?

In the case of full-function joint ventures, which may also have the object or effect of coordinating the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions of the Competition Act applying to anticompetitive agreements (similar to article 101(1) TFEU).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Danish Competition and Consumer Authority and the Competition Council tend to follow the European Commission's practice with regard to the applicable 'theories of harm'.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Competition Authority is expected to apply the above substantive test without taking account of non-competition issues.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

There is no express efficiency defence. However, section 1 of the Competition Act states that the purpose of the Competition Act is to promote 'efficient resource allocation' and, consequently, it can be argued that efficiency should be considered. In practical terms, an efficiency argument can be raised if available, and will be considered in the assessment of the case. However, in raising the efficiency defence the undertakings concerned might risk the competition authorities interpreting the argument as an indication of increased dominance, as the efficiency gained will make competition even more difficult for competitors that do not benefit from similar efficiencies. Therefore, the efficiency defence should be applied with due caution.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The transaction may be approved, approved with conditions, or prohibited. Commitments may be offered to eliminate competition concerns. The Competition Council has the power and duty to impose conditions; therefore, it may not, according to the principle of proportionality, prohibit the transaction if the parties can design suitable remedies that eliminate competition concerns. The parties to the merger might therefore be in the position of deciding whether to proceed with the transaction on the basis of remedies accepted by the Competition Council.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the competition authorities assess that the concentration cannot be approved without conditions, the undertakings concerned will enter into a dialogue or negotiation with the competition authorities to agree on suitable commitments. The commitments agreed with the competition authorities will be formulated as conditions in the approval of the concentration. Such conditions can be appealed separately after approval of the concentration, even though they are agreed during the negotiations with the competition authorities. The Competition Authority may attach conditions including divestment orders or behavioural remedies for clearance of a concentration and may also issue orders to ensure that the parties fulfil these.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Based on the administrative practice to date, it appears that where relevant, divestments are conducted by way of an irrevocable power of attorney granted to an independent trustee. The trustee will generally be entitled to sell the relevant activity within a certain period, although the length of this period will not be publicly disclosed. In one case, the Danish Competition and Consumer Authority has accepted that if it is not possible to fulfil the divestment order within a certain period, the remedy is considered to have lapsed.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Only on rare occasions have remedies been necessary in foreign-to-foreign mergers. However, in one foreign-to-foreign merger with the acquirer having a subsidiary and the target having sales in Denmark, the parties were required to give an undertaking not to discriminate between customers to avoid a possible vertical foreclosure problem.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is for the undertakings concerned to assess whether any individual terms of the merger agreement are to be categorised as ancillary restrictions. The practice in previous Danish merger decisions, as well as decisions made by the Commission, may serve as guidance to the undertakings in their assessment of ancillary restrictions associated with a merger. If a merger involves restrictions of a nature that is not covered by prior practice or that has not been dealt with by the Commission in its Notice on restrictions directly related and necessary to concentrations, the Competition Council may, upon request from the parties, assess the ancillary restrictions at the same time as it assesses the merger itself. Merger notifications in which the undertakings concerned request an assessment of ancillary restrictions cannot be processed by the simplified procedure.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Depending on the particular circumstances, the Danish Competition and Consumer Authority (DCCA) may conduct market tests. Customers and competitors also frequently submit their observations to the DCCA. In practice, these processes may well affect the design of any remedies attached to a conditional clearance decision.

Third parties do not have a right to appeal the DCCA's decisions to the Competition Appeals Tribunal, but can lodge a complaint with the courts.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The DCCA will make a public statement about the fact that a merger notification has been made and invite comments from third parties. The statement includes information on the identity of the parties, the nature of the concentration and the affected industry. As part of the review process, the DCCA will often seek comments from the market and perhaps perform 'market testing'.

All merger decisions are published on the DCCA's website. Generally, the DCCA issues press releases after it adopts decisions in important cases. Pre-merger notification consultations take place secretly. Confidential information is always omitted in public versions of decisions.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Subject to reciprocity, the DCCA may exchange information with competition authorities in other countries. This right applies explicitly to information covered by the DCCA's secrecy obligations. An agreement dated 8 September 2017 exists between Denmark, Iceland, Norway, Sweden and Finland for the exchange of data. The DCCA also generally cooperates with the Commission and competition authorities in other member states.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The competition authorities' decisions may, generally, be appealed to the Competition Appeals Tribunal. The Tribunal's decisions may in turn be appealed to the ordinary courts by the undertakings. However, following an amendment of the Danish Competition Act in 2021, appeal to the Competition Appeals Tribunal became optional, meaning that an undertaking is now able to decide if it wants to bring substantive decisions before the Tribunal or directly before the courts in order to obtain a full judicial review of a decision taken by the competition authorities and proposed fines.

Commitments in merger cases agreed to by the undertakings during negotiations with the competition authorities can be appealed independently to the Competition Appeals Tribunal. A recent example is the *Nykredit* case in which the Nykredit Group claimed that commitments made in connection with a 2003 merger had been fulfilled after some eight years in force. This was challenged before both the Competition Appeals Tribunal and the Maritime and Commercial Court, and appealed to the Supreme Court. The Supreme Court recently ruled that the commitments were given without any time limit, as such a time limit was not explicitly stated as part of the commitments. In its ruling, the Supreme Court made it clear that the commitments form part of the basis for the authority's decision and that it is the undertakings that bear the risk of any ambiguities.

The Western High Court adopted a judgment on the issue of whether the DCCA could demand a full-form notification of a merger instead of simplified notification. When Salling Group acquired Wupti.com in 2015, the parties notified the DCCA of the merger using the simplified procedure. However, the DCCA found that the information in the simplified procedure was insufficient to determine the nature of the merger. The DCCA therefore ordered Salling Group to file a full-form notification, increasing the filing fee significantly. The merger between Salling Group and Wupti.com was cleared on the basis of the full-form notification report, but Salling Group subsequently complained to the Competition Appeals Tribunal, claiming that a short-form notification under the simplified procedure would have been sufficient. The Competition Appeals Tribunal upheld the DCCA's finding. The case was appealed before the Court of Aarhus, which also found for the authority. Salling Group then appealed the decision before the High Court, which agreed that there was no basis for setting aside the DCCA's finding, thus emphasising that the DCCA has a wide margin of discretion when they determine the merger notification procedure.

Time frame

33 | What is the usual time frame for appeal or judicial review?

To date, no merger decisions have been subject to judicial review. In most antitrust cases, an appeal to the Competition Appeals Tribunal should be expected to take between three and 12 months, while a subsequent appeal to the ordinary courts can take between one and three years.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

From 2000, when merger control was introduced in Denmark, until 1 October 2010 when thresholds were lowered, the Danish competition authorities approved approximately 95 mergers; approximately four out of five were cleared without commitments or other conditions, and the rest were approved after the undertakings concerned agreed to commitments. Since 1 October 2010 (and the introduction of new merger rules), the Danish competition authorities have approved approximately 440 mergers. So far, only one merger has been prohibited formally (in 2008), but we are aware of some five to 10 cases that were abandoned late in the filing process in recognition of the fact that substantive assessment posed serious challenges.

For mergers, the authorities' enforcement concerns will always depend on the concentrations notified. Over the past year or so, financial services and foodstuffs have continued to dominate the area, but industries such as energy, transport and telecommunications remain as important as always.

Another area of focus is notification – specifically, striking the right balance between allowing the use of the simplified procedure as opposed to requiring a full notification. As mentioned in the Salling Group case, the Western High Court acknowledged that the DCCA has a wide margin of discretion when determining the notification procedure.

Reform proposals

35 | Are there current proposals to change the legislation?

Most recently, as part of the implementation of the ECN+ Directive in Denmark, the enforcement rules in the Danish Competition Act were amended and a new two-tiered investigation and sanction system was introduced, making it possible for the authorities to impose so-called 'civil fines' on undertakings. The amendments were necessary in order to implement the ECN+ Directive, which required all member states to provide the national competition authorities with certain enforcement and sanctioning powers. In order to prevent having multiple investigation and sanction systems, in Denmark it was decided that the amendments prescribed by the ECN+ Directive were to apply to all types of competition cases regardless of the type of case. Merger cases therefore also fall within the scope.

Currently, there are no proposals or plans for further amendments to the legislation.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

A recent area of focus for the Danish Competition and Consumer Authority (DCCA) is potential harmful effects of cross-holdings. In December 2020, the DCCA published a report on the extent of cross-holding in Denmark. The report was focused on horizontal cross-holding, where competing undertakings partly or totally own each other or have a mutual owner. In Denmark, the merger control regulations do not apply to minority stake acquisitions, but with this report, the DCCA seeks to spark a debate on whether these acquisitions should be subject to the DCCA's regulatory authority. The DCCA expressed concern that horizontal cross-holdings would harm the competition. Even though the minority shareholders do not have a significant de jure influence, they might acquire a de facto influence (eg, through opportunities to facilitate meetings between the two competitors). The reach of the report is extensive since it lists groups as examples of cross-holdings. On the other hand, the DCCA does not consider the positive aspects of cross-holding, such as the possibility to spread qualifications across multiple companies. Even though the report warns of the possibility of a de facto influence to compete less effectively, it does not examine whether this happens in practice, especially since this will often hurt the majority shareholders. As a result, the report is unlikely to have a significant impact.

Furthermore, a current focus area is to find the balance between permitting the use of the simplified procedure for notification and requiring a full notification. In that regard, while the DCCA initially adopted a flexible and user-friendly approach, and is open to discuss the issue, it has been settled by the Competition Appeals Tribunal that, if the DCCA deems it relevant, it can always ask for a complete notification, even if in the end, the case is cleared as simplified. Apart from making the process more burdensome, it also has implications on the level of filing fees that need to be paid. Furthermore, in January 2020, the Danish Western High Court held that the DCCA has a wide margin of discretion when determining whether a merger can be notified in accordance with the simplified procedure. As a general rule, a full-form notification must be submitted in connection with a notifiable transaction, and the simplified procedure should only be used by way of exception from that general rule.

Furthermore, in 2021, the DCCA had the opportunity to decide on the approach that it will take in mergers within the pharmaceutical market, including setting out relevant market definitions in this area.

In 2021, the EU's ECN+ Directive was implemented in the Danish Competition Act. With it came among other things a two-tiered investigation and sanction system. This sanction system authorises the DCCA to press civil charges and impose 'civil fines' on undertakings without the involvement of the Danish State Prosecutor for Serious Economic and International Crime. The amendment applies to all types of competition cases regardless of type, including merger control.

Moreover, in March 2021, the European Commission revised their guidelines regarding the 'Dutch clause' in the regulation on the control of concentrations between undertakings article 22 about the ability of member states to refer a merger. The revisions encourage the competition authorities to refer transactions when one parties' turnover does not reflect its actual or potential position on the market, such as start-ups within the IT or pharmaceutical sectors. These referrals are not limited to transactions above the merger thresholds according to the new guidelines. This article has only been used once by the DCCA, but with the revised guidelines, the Danish companies should be aware of the possibility of a referral to the Commission for examination. However, the DCCA has not yet provided any information on their envisaged approach in light of the European Commission's revised article 22 guidelines, although we expect that it will be in line with that of EU practice.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The primary law regulating the control of economic concentrations in Ecuador is the Organic Law for Market Power Control (the Antitrust Law), which was enacted on 13 October 2011. The main secondary laws are the Regulation of the Antitrust Law, published on 7 May 2012, and Resolution No. 002 by the Antitrust Regulation Entity, in respect of Turnover Thresholds for Concentration Operations, published on 22 October 2013.

The oversight entity in antitrust matters is the Superintendency for Market Power Control (SCPM), which is the antitrust entity, while the regulatory entity is the Antitrust Regulation Entity. The investigation entity of the SCPM is the Economic Concentrations Investigation and Control Intendancy, and the resolution entities are the First-Instance Resolution Committee and the SCPM (second instance at the administrative stage).

The Economic Concentrations Investigation and Control Intendancy is the entity in charge of investigating and processing economic concentrations' control procedures, and the First-Instance Resolution Committee is in charge of approving, rejecting or subordinating approval to compliance with behavioural or structural conditions.

On 20 April 2020, the SCPM issued Resolution No. SCPM-DS-2020-018, which introduces a new fast-track procedure for the competition authorisation of mergers and acquisitions in this jurisdiction.

Scope of legislation

2 | What kinds of mergers are caught?

The kinds of mergers caught include:

- transfers of an entire business;
- acquisitions of rights representing capital, shares or equity interests;
- relationships stemming from common administration; and
- any other agreement for transferring assets from one economic operator to another or granting the decisive control or influence in making decisions.

Premised on Ecuadorian antitrust legislation, economic concentration is defined basically by a change of control of one or more economic operators.

To be considered an economic concentration under Ecuadorian antitrust legislation, the concentration must be between local economic operators or, if between foreign companies, must produce effects in Ecuador. The Antitrust Law establishes two thresholds that economic concentration operations must meet to determine whether the operation requires the prior approval of the SCPM. Both these thresholds need not be met; rather only one needs to be fulfilled for the operation to be subjected to analysis and approval by the oversight authority.

One threshold concerns the market share of the economic operators participating in the operation, while the other involves business turnover.

In respect of which party is obliged to notify the economic concentration operation, notification to the SCPM must be provided by the party acquiring control of the company and that wishes to carry out the economic concentration, or the acquirer, depending on each case.

Resolution No. SCPM-DS-2020-018 establishes that the economic concentrations operations that may be subject to the abbreviated procedure are 'those that do not have the potential to generate detrimental effects on competition and free competition'. They must meet at least one of the following criteria:

- the economic operator that takes control does not carry out economic activities in Ecuador directly or indirectly (through related companies that belong to the same economic group);
- in horizontal economic concentration operations, the joint participation of the economic operators involved and the companies or economic operators that belong to their economic group must be less than 30 per cent in the relevant market, and in the event that the economic concentration operation generates horizontal integration in several relevant markets, this criterion must be met in each of them;
- in horizontal economic concentration operations, prior to the operation, the Herfindahl-Hirschman Index (HHI) of the market resulting from the economic operation must be less than 2,000 points, and, as a consequence of the operation, it must generate a variation of less than 250 points;
- in vertical economic concentration operations, the economic operators involved and the companies or economic operators that belong to their economic group must have a participation quota of less than 30 per cent in the relevant vertically integrated markets, and in the event that the economic concentration operation generates vertical integration in several relevant markets, this criterion must be met in each of them;
- in vertical economic concentration operations, the HHI of vertically integrated markets as a result of the economic concentration operation must be less than 2,000 points, and in the event that the economic concentration operation generates vertical integration in several relevant markets, this criterion must be met in each of them; or
- the economic concentration operation involves economic operators that are at risk of bankruptcy.

3 | What types of joint ventures are caught?

Joint ventures that produce effects in Ecuador, surpass the thresholds established in the Antitrust Law and cause a change in the control in one of the economic operations by decisively influencing the decisions of the other must notify the SCPM. The scope of application of the Antitrust Law includes state-owned enterprises; therefore, joint ventures involving this kind of economic operation are also subject to prior control by the SCPM.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Article 12 of the Regulation of the Antitrust Law defines control as 'the result of contracts, acts or any other means which, taking factual and legal circumstances into account, confer the possibility of asserting substantial or decisive influence over a company or economic operator. Control may be joint or exclusive'. The position of the SCPM is that control implies the power resulting from the economic concentration that the acquirer has to decisively influence the decisions of the economic operator emerging from the transaction. There are no minority and other interests less than control caught under the merger control regulation.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Antitrust Law stipulates that if an economic concentration operation complies with one of the following conditions, the operation must be subjected to analysis and the prior approval of the SCPM:

- the turnover in Ecuador of all participants in the economic concentration in the preceding fiscal year exceeds the amount expressed in the unified basic salary (RBU) (US$400 for 2020) established by the Antitrust Regulation Entity; and
- if the economic concentration involves economic operators engaged in the same economic activity and, as a consequence thereof, the acquired or increased share in the relevant market is equal to or surpasses 30 per cent.

By way of Resolution No. 009, the Antitrust Regulation Entity sets the thresholds in terms of the amount of the turnover in Ecuador of all participants in the economic concentration operation, over which prior notification to the SCPM is mandatory when the turnover of all participants in the economic concentration in the fiscal year preceding the transaction is more than 3.2 million RBUs for economic concentrations involving the domestic financial system and securities market, 214,000 RBUs for concentrations involving insurance and reinsurance companies, and 200,000 RBUs for economic operations not falling under either of the two preceding cases.

To calculate the turnover of economic operators participating in the economic concentration, the turnover of the following economic operators must be added together:

1 the economic operator in question;
2 economic operators in which the economic operator in question directly or indirectly has:
   - more than half of the subscribed and paid-in capital;
   - the power of exercising more than half of the voting rights;
   - the power of designating more than half of the members on administrative bodies; or
   - the right to direct the economic operator's business;
3 companies or economic operators with the rights and powers listed in (2) with regard to a company or economic operator involved;
4 economic operators in which an economic operator listed in (3) has the rights listed in (2); and
5 economic operators in question in which various economic operators listed in (1) to (4) jointly have the rights listed in (2).

The Antitrust Law requires presenting the economic concentration notification within eight calendar days of the date of execution of the agreement, irrespective of the method of the economic concentration. The notification must be made in writing.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The economic concentration notification is mandatory when the concentration produces effects in Ecuador so long as it exceeds the thresholds set by the antitrust regulation entity. Although the law stipulates that if the concentration does not surpass the thresholds, no prior authorisation from the SCPM will be required, the SCPM may, directly or upon the petition of a party, request that the economic operators involved in the concentration notify the concentration for informative purposes. If the SCPM requests notification for informative purposes, notification must be submitted within 15 days of the date that the SCPM serves notice of the request.

The Antitrust Law also establishes that when an economic concentration exceeds the thresholds but involves the acquisition of shares, bonds, obligations or other convertible bonds without voting rights, as well as acquisitions of economic operators liquidated or that have not reported any activities in the country in the last three years, it is exempt from the mandatory notification to the SCPM.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Provided that the foreign-to-foreign mergers produce effects in Ecuador, the operation must be notified to the SCPM, and the prior authorisation of the SCPM must be requested. The thresholds established in the law for determining whether an economic operation is subject to notification are calculated based on economic figures in Ecuador.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In Ecuador, there is no special rule or law that exclusively governs economic concentrations for foreign investment. The regulation for all kinds of economic concentrations (including economic concentrations outside Ecuador that produce effects in the country) is found in the Antitrust Law, and the entity that analyses and resolves in that regard is the SCPM.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentration operations requiring prior approval must be notified to the Superintendency for Market Power Control (SCPM) within a period of eight days from the execution of the agreement. The Organic Law for Market Power Control (the Antitrust Law) states that executing an economic operation before notifying the Antitrust Law will be regarded as a serious offence punishable by law with a fine of up to 10 per cent of the breaching economic operator's total turnover in the fiscal year preceding that of the fine. All offences listed in the Antitrust Law are, in practice, sanctioned by the SCPM.

10 Which parties are responsible for filing and are filing fees required?

In the case of a merger, the party responsible for notifying the SCPM is the acquiring economic operator. For transfers of the assets of a business, it is the economic operator that is the recipient of the transfer. For the acquisition of rights representing capital, shares, or equity interests, it is the acquiring economic operator. For relationships because of common administration, it is the economic operator whose members on the administrative board become part of the administrative boards of the other economic operator. For the transfer of assets from one economic operator to another, it is the economic operator acquiring those assets.

When there are various economic operators involved in the acquisition of control of another or other economic operators, the notification must be made collectively, for which a common attorney must be appointed.

For the notification of economic concentrations, the economic operator providing notification must pay filing fees to the SCPM in a sum equal to the higher of the following: 0.25 per cent of income tax, 0.005 per cent of the sales volume, 0.01 per cent of the assets or 0.05 per cent of the equity. These sums are calculated taking the economic operators with presence in Ecuador into account. The fee payment voucher must be attached to the notification.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In accordance with the Antitrust Law, the SCPM must issue its decision in respect of the economic operation within 60 working days from the date it acknowledges receipt of the submitted notification. The SCPM may suspend the term for up to 60 calendar days. In addition, the initial term of 60 working days may, on an exceptional basis, be extended for up to 60 working days. The SCPM usually takes about three months between the date of the notification of the economic operation and the date of the resolution. The economic concentration operation can neither be closed nor perfected until authorisation from the SCPM is secured.

The economic concentrations subject to the fast-track procedure will be resolved within a maximum period of 25 days working days from the date on which the SCPM office becomes aware of the operation.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Antitrust Law stipulates that executing an economic concentration operation that must be notified but has not been authorised by the SCPM is a serious offence. This kind of offence is sanctioned with a fine of up to 10 per cent of the breaching economic operator's total turnover in the fiscal year preceding that of the fine. To date, no economic operators that have closed the transaction before securing SCPM approval have been sanctioned; nonetheless, the SCPM has the power to start administrative procedures to sanction.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The relevant sanctions also apply to foreign-to-foreign economic concentrations that produce effects in Ecuador. The SCPM has signed cooperation agreements with other antitrust authorities for collaborating in this type of case.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Premised on its legal power to subject the approval of an economic concentration to compliance with structural conditions, and as part of the conditions for approving an economic concentration in which the disinvestment of an asset package to be transferred to a third party had been ordered, in 2016, the SCPM resolved that the economic operators involved in an economic concentration had to sign a hold-separate arrangement until the ordered disinvestment was made. The reason was that the parties forming part of the economic concentration in Ecuador had to maintain their independence and competition in the market to avoid a monopoly. This took place in a stock purchase in the parent company between two subsidiaries that held the entire market share in Ecuador.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There is only one economic concentration system in Ecuador, and there are no special rules or systems for public takeover bids. In other words, if, as a consequence of a public takeover bid, the thresholds and conditions set by the Antitrust Law are met, then it must be notified to the SCPM. Nonetheless, there are no secondary competition rules in Ecuador governing the execution of or compliance with a structural condition ordered by the SCPM that must be observed for a public takeover bid.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There is a form pre-established by the authority for notifying an economic concentration that was approved by way of an SCPM resolution. The form requests information related to the economic sector in which the economic operators involved in the concentration do business, a summary of the terms and conditions under which the operation will be carried out, the total value of the economic concentration, information regarding the goods or services offered, the chain of distribution, a list of the providers of the economic agents involved in the concentration, general data of all operators forming part of the concentration operation, the relevant market, the total turnover of the participants, their market shares, the level at which the operation applies (national, regional or international), competitors at each of the markets and the existence of barriers to entry.

Together with the form, copies of the financial statements, a draft of the legal document or agreement concerning the economic concentration, a sworn statement that the information furnished is true, market analysis supporting the information supplied and a confidentiality request must be submitted in the Spanish language.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Once the economic concentration notification is filed, it will be investigated by the Concentrations Control Intendancy, which will follow the process and request information from the notifying economic operator as well as from its competitors, providers and clients. Once the analysis stage is completed, it will submit a report to the First-Instance Resolution Committee. That committee will either approve, reject or subject the request to compliance with a behavioural or structural condition.

18 What is the statutory timetable for clearance? Can it be speeded up?

In accordance with the Antitrust Law, an economic concentration must be resolved within a term of 60 working days upon notification by the SCPM that it has received the filing. The SCPM, however, may suspend that term up to 60 calendar days and may also request an extension of up to 60 working days. No other time periods apply. The time it takes the authority to complete the administrative procedure for analysing the concentration will depend on the magnitude thereof.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

Normally, the Superintendency for Market Power Control (SCPM) performs an analysis of the defined relevant market structure, concentration indexes, barriers to entry, efficiencies, supply and demand structure of the relevant market, benefits for or detriment to consumers as a result of the concentration, and competitive pressures.

In its analyses of economic concentration operations, the SCPM has used economic concentration indexes of the relevant market as its tool for calculating. For this purpose, it uses the Stenbacka threshold calculation and the Herfindahl-Hirschman Index.

20 Is there a special substantive test for joint ventures?

There is no specific test in Ecuador for joint ventures. All concentration tests are conducted pursuant to the same substantive test by the SCPM.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The SCPM analyses and investigates all economic concentration indexes of the defined relevant market, the degree of market power of the operators doing business in that market, the tendency to abuse such market power, unilateral effects, coordinated effects, etc.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

When analysing and deciding on economic concentration interests, the SCPM always looks at the public interest or general interest of consumers and users. This is because the purpose of the Organic Law for Market Power Control is precisely to procure the general well-being of consumers and users.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

When analysing economic concentration operations, the SCPM examines the effects that the operation will bear on the relevant market and, among those effects, its analysis considers efficiency in supply that could entail minor costs, productive efficiency and dynamic efficiency, among other things. After reviewing SCPM resolutions within this ambit, the authority has considered that a large part of concentrations generate efficiencies and, therefore, most cases have been approved.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Superintendency for Market Power Control (SCPM) has the power to approve, reject or subject the approval of an economic concentration to compliance with the conditions that it orders. In that context, based on an analysis of a case in question, the authority has the power to reject a concentration operation should it find it detrimental to the market. Obviously, if the SCPM denies an economic concentration, the concentration may not be perfected in Ecuador.

If the SCPM subjects approval of the economic concentration to compliance with conditions, the conditions will be either behavioural or structural.

With these conditions, the SCPM looks to maintain the competitive pressures existing in the relevant market prior to the concentration.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible. The Organic Law for Market Power Control (the Antitrust Law) confers upon the resolution entity the power to implement structural and behavioural remedies to stop an economic concentration from causing distortions at the market in question as a consequence. This power is broad, and the Antitrust Law does not specifically describe the type of conditions that the SCPM could order.

In respect of structural remedies, the SCPM has ordered the sale of industrial plants, assets for product distribution, transfer of intellectual property rights and intellectual property licences, among other things. In turn, with regard to behavioural remedies, the SCPM has banned the implementation of exclusivity clauses and agreements with clauses conditioning the obligation of clients to acquire a minimum percentage of monthly purchases or clauses aimed at giving benefits to the concentrated economic operator to the detriment of its competitors, suppliers or clients.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The conditions are clearly described in detail in the SCPM resolution subjecting approval of an economic concentration to compliance with those conditions. The resolution grants the notifying economic operator a term of 90 days to sign and submit a commitment to the SCPM that must specifically describe how each condition will be met and executed. During that term, the notifying party must write up the commitment and send it to the SCPM for its review. Nonetheless, approval by the SCPM must be given within a maximum term of 90 days from the date of issuance of the resolution. There must be a time period for implementing and complying with each condition.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, the SCPM has not had a case in which all the parties in an economic concentration operation were foreign companies without any assets in Ecuador. The economic concentration of foreign companies with subsidiaries or assets in Ecuador have, in certain cases, been subject to conditions.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

To date, the SCPM has not had an economic concentration case where it had to analyse ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In its analysis, the Superintendency for Market Power Control (SCPM) reviews the information provided by the notifying party with regard to its competitors and providers, as well as the supply and demand structure in the market in question. Furthermore, when analysing an economic concentration, the SCPM will repeatedly require information from the competitors of the economic operators involved. The clients or competitors with a legitimate interest are entitled to file a special review appeal against the economic concentration resolution issued by the SCPM.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

With the economic concentration notified to the SCPM, the notifying economic operator will then have to submit a confidentiality request concerning all the information furnished or that part thereof that it deems pertinent. The SCPM keeps confidential the sensitive information with which it is furnished, and only the parties involved in the process have access to the information not declared by the SCPM as confidential. The SCPM publishes on a webpage an extract of the resolutions available to the public in general. The resolutions do not contain information that the SCPM has declared confidential, which is the sensitive information of economic operators.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Presently, the SCPM has cooperation agreements signed with the antitrust authorities of Argentina, Austria, Brazil, Chile, the Dominican Republic, El Salvador, France, Greece, Honduras, Italy, Mexico, Paraguay, Russia, Spain, Tunisia and Uruguay. The SCPM frequently holds meetings with sister authorities to exchange opinions and benefit from the experience of other countries in antitrust matters. The SCPM may sign agreements with sister authorities to share information that could be of benefit to both parties.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The Organic Law for Market Power Control offers three appeal remedies at the administrative level:

- reconsideration motion filed with the First-Instance Resolution Committee;
- appeal review filed with the Superintendency for Market Power Control (SCPM); and
- special appeal review filed with the SCPM.

Resolutions may also be appealed at the judicial level before the Administrative Litigation Jurisdiction.

All remedies, whether at the administrative or judicial level, bear devolutive but not suspensive effects.

Time frame

33 What is the usual time frame for appeal or judicial review?

Reconsideration motions and review appeals must be filed within 20 working days of the date the resolution is served. Special review appeals may be filed within three years of the date the resolution becomes final. This means when a resolution had not been the subject of an appeal, the parties were served notice thereof within 20 days thereafter.

The term for filing a subjective appeal at the judicial level before the Administrative Litigation Jurisdiction is 90 days from the date the resolution is notified, while the period for filing an objective or nullity appeal at the judicial level before the Administrative Litigation Jurisdiction is three years from the time the resolution comes into effect.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In view of the time the Organic Law for Market Power Control (the Antitrust Law) has been in effect and the Superintendency for Market Power Control (SCPM) has been in operation, we may conclude that the majority of economic concentration notifications in Ecuador have been approved by the authority; however, some have been denied, while others were the subject of significant structural or behavioural conditions.

Considering that the SCPM has been operating a little under 10 years, the economic concentration system in Ecuador faces many challenges, particularly with regard to educating economic operators about the rules governing this area of the law and the prior concentration notification processes. In this regard, the SCPM has focused on training and has also published a technical guide for analysing economic concentration operations. The guide is a public document containing a clear

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explanation about how concentrations are examined, the thresholds for notification, a definition of relevant market, turnover calculations, offences and sanctions, among other things.

The treatment given to foreign-to-foreign mergers is the same as that of a local merger.

Especially in terms of concentration indexes, the SCPM has ongoing analyses being performed in the following economic sectors: food, biotechnology, clothing, footwear, energy, pharmaceutical, metal mechanic, transportation, construction, forest timber products, environmental services, technology, automobile and petrochemical.

Reform proposals

35 | Are there current proposals to change the legislation?

In 2016, the Antitrust Law was amended by eliminating the possibility of the SCPM ordering the sale of a stock percentage in companies involved in a concentration operation to their workers as part of a structural condition. One concern about the Antitrust Law is the eight-day term that starts to run from the agreement execution date, as required by the Law, to notify the concentration as it is usually too short. There is also some ambiguity regarding the Spanish term *conclusión del acuerdo*, translated herein as 'agreement execution'.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There have been no material changes in the law. The same principles still apply. However a fast-track procedure for mergers may be applicable on certain cases.

The main case regarding mergers and acquisitions was *AmBev/Sab Miller*. Although the transaction closed several years ago, effects remain from the conditional approval.

* *This chapter was accurate as at June 2020.*

Egypt

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The overarching competition regulation is promulgated by virtue of Law No. 3 of 2005 (the Competition Law). The Competition Law has since been amended on three occasions: in 2008, 2010 and 2014.

The Egyptian Competition Authority (ECA) is entrusted with the task of overseeing the implementation of the Competition Law and is, therefore, considered as the primary designated regulator of competition in Egypt. Although the ECA administratively follows the Ministry of Trade and Industry, it is actually managed by a board of directors constituted by the Minister, which includes representatives of various ministries, independent experts and representatives of trade unions and industry associations.

An amendment to the Competition Law was issued, in July 2014, that grants the ECA more autonomy by allowing its board of directors to initiate criminal procedures without the previous prerequisite approval of the Minister of Trade and Industry.

The Competition Law is not the only competition-related regulation in Egypt, nor is the ECA the only regulator. Sectors such as telecommunications and banking are also regulated by other regulators that work in close coordination with the ECA to ensure application of the principles of the Competition Law, albeit in wide and general terms, and the banking and telecommunications regulations. Yet, despite the overlapping jurisdiction of the various regulators in respect of competition matters, the merger notification regime instated by article 19 of the Competition Law remains applicable to all sectors under the sole jurisdiction of the ECA.

For telecommunications, the National Telecommunications Regulatory Authority (NTRA) applies articles 4 and 24 of Telecommunications Law No. 10 of 2003 to regulate competition and to ensure economic freedom in the sector. The NTRA controls mergers indirectly through reviewing the licence requirements of any given operator. Although there are no particular provisions in the Telecommunications Law regarding merger control, the NTRA usually assesses and evaluates any merger on the basis of its possible impact on competition. In the absence of specific penalties, the NTRA may simply block any merger by revoking or threatening to revoke the merging entities' licences.

In the banking sector, the Central Bank of Egypt (CBE) exerts more power in managing competition in the sector and explicitly approving or disapproving transactions over shares in banks and financial institutions operating under the Banking Law umbrella. Basing itself on article 12 of the Banking Law No. 101 of 2004, the CBE has the right to review all applications to own more than a 10 per cent stake in a bank or any other percentage that would enable the acquirer to exert control over the management and the decision-making within said bank. The CBE retains all discretion to evaluate the application technically, financially and from a competition impact point of view.

According to article 12, applications to own more than 10 per cent (or any controlling stake) must be presented to the CBE along with a long list of required documents (strategic plans, financial statements of the acquirer, credentials in the banking business, etc) 60 days prior to the date on which the acquisition is planned to take place. Historically, the CBE has demonstrated a high level of selectivity by imposing strict qualitative requirements before approving any merger or acquisition in the banking sector.

Finally, public utilities are excluded from the scope of application of the Competition Law either automatically by law, if they are managed by a public sector entity, or by explicit request if they are managed by private sector companies. If a private sector company runs a public utility, it should file an application with the ECA requesting its exclusion from the application of the Competition Law, and the ECA may grant this exclusion on the grounds of public interest alone.

Scope of legislation

2 | What kinds of mergers are caught?

According to article 19 of the Competition Law, introduced by Law No. 190 of 2008 as an amendment to Law No. 3 of 2005, each party – with an annual turnover of more than 100 million Egyptian pounds generated in Egypt – that acquires assets, proprietary rights, usufruct or shares, or sets up a union, a merger, an amalgamation or a joint management transaction, must notify the ECA within 30 days after its date of completion. The scope and extent of applicability of the merger notification requirement is quite vast and may include a very wide range of transactions undertaken or contemplated by medium-sized and large businesses.

Although the notification is simple and not disruptive to business, it remains a mandatory endeavour that requires a certain level of disclosure on a probably recurrent basis for active companies on the Egyptian market. No approval from the ECA is currently required, but this may change in the future.

Although the text of the Competition Law itself suggests extraterritoriality, the ECA initially published its notification guidelines, explicitly excluding foreign-to-foreign transactions from the scope of notification even if those transactions have an impact on the Egyptian market; however, the notification guidelines were modified in June 2018 to impose notification on foreign transactions if either party generates a turnover in Egypt in excess of 100 million Egyptian pounds. These guidelines took effect on 1 September 2018.

Despite the currently applicable post-merger notification framework instated by the Competition Law, the ECA issued, on 23 October 2018, a first-of-its-kind decision in which the ECA explicitly requested Uber and its regional competitor Careem to obtain a pre-approval from it before they complete their contemplated merger, which the ECA learnt about through media reports. In an unexpected turn of events, the ECA threatened to use the provisions of article 6 related to collusions and cartels to go after the two ride-hailing giants if they go through with the notification without the approval of the ECA. Uber and Careem decided to ultimately cooperate with the ECA and received a conditional approval of their transaction.

Since then, the ECA has, however, blocked several high-profile transactions on the grounds that said mergers would unlawfully disrupt competition.

3 What types of joint ventures are caught?

According to article 19 of the Competition Law, introduced by Law No. 190 of 2008 as an amendment to Law No. 3 of 2005, each party – with an annual turnover of more than 100 million Egyptian pounds generated in Egypt – that acquires assets, proprietary rights, usufruct or shares, or sets up a union, a merger, an amalgamation or a joint management transaction, must notify the ECA within 30 days after its date of completion. The scope and extent of applicability of the merger notification requirement is quite vast and may include a very wide range of transactions undertaken or contemplated by medium-sized and large businesses.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

From a competition protection perspective, only the Banking Law specifies a threshold of an acquired stake above which the approval of the regulator is required. There are, however, in Capital Market Law No. 95 of 1992, provisions that oblige the acquirer of a stake exceeding 33 per cent of any listed company to launch a mandatory tender offer to acquire up to 100 per cent of the shares of the company. The requirement is intended for transparency purposes and to provide minority shareholders with an equal opportunity to cash in on their investments at the same level of economic benefit available to majority shareholders.

The Financial Regulatory Authority (FRA) regulates the tender offer process and must grant its approval before the process is launched. The tender offer approval requirements are listed in article 334 et seq of the Capital Market Law (as regularly amended), and the full application must be presented to the FRA, which must examine and approve, reject or modify the application within set time limits.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The threshold for the required notification of the merger is the size of the annual cumulative turnover of parties involved generated in Egypt. According to article 19 of the Competition Law, when the annual turnover of the acquirer or merging entity exceeds 100 million Egyptian pounds, the notification becomes mandatory, and failure to make the notification is a criminal offence that is punishable by a fine ranging between 20,000 and 500,000 Egyptian pounds, which can be doubled for a repeated offence. The threshold for notification is 100 million Egyptian pounds in combined turnover generated in Egypt.

Theoretically, there are no circumstances where a notification would be due if the quantitative threshold is not met; however, the *Uber/Careem* decision may suggest that notification may be conceptually required if the two parties to the merger are the sole actors in a given market, regardless of the currently generated turnover.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification is mandatory by law. It should be served within 30 days of completion. In principle, no approval from the ECA is to be sought; however, the ECA approach, following the *Uber/Careem* decision, suggests that the ECA will force itself into having a say about certain high-profile transactions.

A new law instating a post-closing merger control regime has been approved by the Cabinet and is being discussed in Parliament at the time of writing.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Based on the principle of extraterritoriality of the Competition Law, foreign-to-foreign transactions are theoretically supposed to fall within the scope of application of article 19 of the Competition Law if they are considered to have an impact on the Egyptian market.

The wording of the Competition Law itself is quite far-reaching and general in respect of the notification requirement. It does not state that the annual turnover that triggers the notification requirement must be generated in Egypt; it also does not state otherwise. However, the ECA's latest guidelines explicitly include foreign-to-foreign transactions in the scope of notification. According to the guidelines, the threshold for notification is the turnover generated in Egypt alone.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The acquisition of public-owned assets or shares in public sector companies by foreign investors (privatisation) is subject to the approval of the Cabinet of Ministers and is usually granted after a thorough set of procedures. The acquisition of state-owned assets is generally subject to the Public Tendering Law and may not be authorised through a direct order without a duly publicised bidding process, unless in cases where public interest so requires.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Transactions must be notified within 30 days of closing. The notification is merely informative in principle, and no clearance or approval would be a priori sought or granted. The sanction for failing to notify is a criminal penalty that ranges between 20,000 and 500,000 Egyptian pounds.

In practice, the Egyptian Competition Authority (ECA) actively seeks to enforce the provisions of article 19 and has brought many entities to admit breach and settle out of court against a fine that the ECA deems appropriate.

The amount of the settlement fine usually being considered negligible (ie, almost 1 per thousand of the minimum turnover threshold on average, based on ECA statistics published on its website) means that all those accused in recent years have opted to settle out of court with the ECA. The alternative route would be litigious and involves being investigated by the Public Prosecutor and eventually being referred to the Criminal Economic Court, with all the associated reputational damage, costs and expenses.

Having said that, we note that the ECA has, in the *Uber/Careem* decision, requested that the merger must be approved before closing. The application will be reviewed by the ECA, and a response would be given within 60 days from the date on which all the supporting documents requested from the ECA are provided. The ECA emphasised in the above-mentioned decision that its request to review and pre-approve the *Uber/Careem* merger is based on the fact that those two are the only actors in the relevant market and that their agreement to merge is a form of disguised collusion (penalised by a fine that does not exceed 500 million Egyptian pounds). The ECA based its decision on article 20(2) of Law No. 3 of 2005 (the Competition Law), which allows the ECA to proactively anticipate and prevent all acts or transactions that it reasonably suspects would have harmful effects on consumers and on competition itself.

10 Which parties are responsible for filing and are filing fees required?

The acquirer of assets or shares and the merging entity of a merger process are required to make the notification. In case of joint management or joint venture, any of the parties to the transaction, especially those with an annual turnover exceeding 100 million Egyptian pounds, are obliged to make the filing.

In the latter case, they may opt to undertake the process jointly or each on their own.

No filing fees are required, but lawyers' services may be needed to follow up with the ECA and to make sure that the notification process has been duly completed to the satisfaction of the ECA after fulfilling all mandatory requirements and providing all requested information and documents. Partial or incomplete notification may not avert the risk of prosecution.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The notification obligation is post-closing; therefore, there is no suspending effect on the transaction itself. However, if the ECA gets its way, certain transactions would have to wait for at least 60 days before being cleared by it as has happened in the case of *Uber/Careem*. The ECA decision to suspend the merger provided the sole grounds based on which Uber and Careem knew they had to obtain a clearance from the ECA or face prosecution for illicit collusion.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Not applicable. When approvals of special regulators are required, such as the approval of the National Telecommunications Regulatory Authority or the Central Bank of Egypt, the parties attempting to execute the transaction before obtaining those approvals would be blocked at the share transfer level, which must be undertaken through the stock exchange even if the concerned target is not publicly listed.

If in the unlikely scenario where a transaction takes place without due approval, the regulators always retain the right to cancel operational licences in the case of an unauthorised change of control (for banks, the threshold is 10 per cent).

In cases similar to *Uber/Careem* case, failing to notify and file for the ECA clearance prior to closing would expose the two undertakings to a criminal fine that can reach up to 500 million Egyptian pounds, to be doubled for ignoring the ECA decision requesting them explicitly to obtain the clearance.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The obligation to notify is a post-closing obligation. In the case where the notification is explicitly requested to be made before closing, penalties would apply irrespective of whether the transaction has a local component or is merely foreign-to-foreign.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Not applicable a priori. However, if the ECA requests a pre-notification, there would be technically no solution but to either challenge the ECA decision in court or file for its approval. According to media sources, Uber and Careem may have decided to follow the latter route.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Other than the requirements stipulated under the Capital Market Law, which are intended to guarantee transparency and equal opportunity for both bidders and sellers, the standard notification requirements apply as far as the ECA is concerned. The approval of the Financial Regulatory Authority (FRA) before the launching of the tender offer is mandatory, and no public takeover bid may be launched without the terms of takeovers and all necessary disclosure being approved by the FRA and published as part of the invitation to sell shares to the offering buyer.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

According to article 44 of the Executive Regulations of Law No. 3 for 2005, the notification must include the following information:

- the name of the notifying party and the related parties, their respective nationalities, the addresses of their headquarters and their main places of business;
- the details of the transaction along with its date and the legal position it creates;
- the licences and approvals obtained from other regulators;
- the annual turnover of the concerned entities; and
- all supporting documents.

Failure to supply the required documents would be deemed as failure to meet the obligation to notify and is punishable by a fine not exceeding 500,000 Egyptian pounds. If false information is intentionally provided to the ECA, the fine can reach 1 million Egyptian pounds.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

If it comes to the knowledge of the ECA, either independently or through a third party's complaint, or through its constant monitoring of the M&A market, that a transaction has occurred but not notified in accordance with the Competition Law or is contemplated in a manner to cause harm to consumers or competition, it would notify the concerned parties that they are being investigated for breach of article 19 of the Competition Law, or in the latter case, it would issue a preventive decision forcing the parties to the contemplated transaction to file for ECA approval prior to closing. The ECA would then initiate a criminal procedure against the infringing party, and the file would be sent to the Public Prosecutor's Office, which would confirm the infringement and would refer the matter to the competent court. In practice, all those accused so far have opted to settle the matter out of court with the ECA against payment of a fine to be determined by the latter.

18 What is the statutory timetable for clearance? Can it be speeded up?

There is no time limit in the law itself, but the notification process typically takes up to one week between the date the notification is filed and the date on which the ECA confirms receipt of the notification if no further documents or information are required.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

Not applicable in general, but when explicitly required via a decision of the Egyptian Competition Authority (ECA), the merger must not cause harm to consumers nor to competition.

20 Is there a special substantive test for joint ventures?

Not applicable.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

Not applicable in general, but it may be applicable under the new ECA approach on selective transactions.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The industrial policy, public interest, national security, economic efficiencies, user or consumer interest and the protection of minority shareholders are all factors considered when clearance and pre-approval are needed in specific sectors, such as telecommunications and banking. Other than in those cases, those factors are not of consequence from a strict competition law perspective as the approval and the clearance of the ECA is neither required nor granted.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The industrial policy, public interest, national security, economic efficiencies, user or consumer interest and the protection of minority shareholders are all factors considered when clearance and pre-approval are needed in specific sectors, such as telecommunications and banking. Other than in those cases, those factors are not of consequence from a strict competition law perspective as the approval and the clearance of the ECA is neither required nor granted.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Not applicable, except in certain fields of industry. The National Telecommunications Regulatory Authority (NTRA) and the Central Bank of Egypt (CBE) may block the execution of the transaction in the cases where their written authorisation is required to proceed with the execution.

To our knowledge, all banking and most telecommunication licences contain provisions that would require the approval of the CBE and the NTRA respectively. Having said that, the new approach of the Egyptian Competition Authority (ECA) suggests that the ECA will try to give itself the power to block certain transactions if it deems that those transactions are harmful to the consumer and to the competition and the labour market in general, as alluded to in one of the ECA's press statements. The law does not explicitly grant the ECA such power, but this would have to be confirmed through court once the ECA approach is challenged in court.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Not applicable in general. In cases like *Uber/Careem*, the ECA may conceptually request certain remedies to allow certain transactions to go through. Uber and Careem for example have been cleared to merge subject to some behavioural remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Not applicable in general and no precedent exists.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Not applicable. In specialist fields of industry, foreign-to-foreign transactions rarely come to the attention of the regulators as the laws regulating those fields are strictly territorial by essence. However, if the regulators (including the ECA) conclude that a foreign-to-foreign transaction would fundamentally hurt competition or affect the strategic ownership and management of the locally based entities subject to its jurisdiction, the ECA would go after the foreign entities for colluding on the Egyptian market, but no action would be directly taken against the foreign entity by the other regulators, although the operating licences of the local entities would be revoked or suspended for reasons related to transparency, public interest or national security, for example.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Not applicable in general, and there is no precedent to support the ECA's new perception and approach.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Not applicable in general, but the new approach of the Egyptian Competition Authority (ECA) in the *Uber/Careem* case invited all stakeholders to express their feelings and concerns about the contemplated merger and gave them time to present their feedback.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Commercially sensitive information is not usually required for the purpose of the notification. Generally, the ECA seems to be reasonable in addressing the notifying parties' concerns regarding sensitive commercial information. Furthermore, according to article 16 of Law No. 3 of 2005, the ECA and all its employees are bound with a strict confidentiality obligation. Any ECA employee that has access to commercial information of a given entity is also prohibited from working for a competitor of the concerned party for a period of two years from the date the employee gained access to the confidential information. The breach of the confidentiality of information about the filing party is a criminal offence.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Generally, yes. To the author's knowledge there are a few protocols of cooperation that have been signed with various regulators in other jurisdictions, the details of which have not been publicised or made publicly available. Egypt is also party to the Common Market for Eastern and Southern Africa (COMESA) treaty, and the COMESA notification theoretically supersedes and replaces the local Egyptian notification. In practice, the ECA would still require local notification, but because, unlike the COMESA notification, the ECA notification is a priori post-closing, the ECA would require sight of the COMESA clearance as part of the required local filing documentation.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Because the sanctions are not administrative in nature and may only be imposed through a criminal court order, the means of appeal are those generally available for defendants in criminal law cases. The deadline for filing an appeal of a first-degree court ruling is 10 days from the date of issuance of the ruling.

Time frame

33 What is the usual time frame for appeal or judicial review?

There is no specific time frame, but in criminal law matters, procedures are fairly expeditious. Between the first-instance court and final appeal, the usual time frame is around 12 to 16 months.

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ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Egyptian Competition Authority (ECA) is actively seeking to enforce article 19 on all sectors of industry (telecommunications, healthcare, building materials, transport, etc). A published list of investigated cases and their outcomes are listed in the ECA activity report published on its website.

Reform proposals

35 Are there current proposals to change the legislation?

A new law instating a pre-closing merger control regime has been approved by the Cabinet and is being debated in Parliament at the time of writing. The new law is expected to be issued imminently.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The most important update is the decision by the Egyptian Competition Authority (ECA) to request the review of several high-profile transactions and to block a few of them despite the fact that the law only provides for a post-merger notification.

The ECA approach basically relies on two elements: (1) the power granted to the ECA to proactively prevent any act or transaction that it reasonably suspects will have an adverse impact on consumers or on competition (article 20 of Law No. 3 of 2005); and (2) its interpretation that the agreement to merger is a disguised agreement to collude on a given market to dominate it and thwart competition.

Practically speaking, parties contemplating a merger are supposed to follow the normal post-notification process as required by law, but they will have to consider whether to obtain the approval of the ECA before closing if and once the ECA issues a decision explicitly requiring them to do so.

European Union

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The European Union's merger control rules, which apply to large-scale merger and acquisition transactions, are set out in Council Regulation (EC) No. 139/2004 (the EU Merger Regulation (EUMR)). The regime applies to the European Economic Area (EEA) – the 27 EU member states of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and the three members of European Free Trade Association (EFTA) – Iceland, Liechtenstein and Norway. The United Kingdom left the European Union on 31 January 2020, and since the end of the Brexit transition period on 31 December 2020, UK turnover is no longer taken into account when assessing whether a transaction needs to be notified to the European Commission.

The EUMR is enforced by the Directorate-General for Competition of the European Commission (DG Comp) in Brussels.

EUMR notifications are reviewed by sector-specific units within DG Comp, which have integrated merger control competence. In addition to the sector-specific merger units, the Commission's internal decision-making process involves a number of other stakeholders: the chief economist team and the case support and policy unit (within DG Comp), and the Legal Service and the sectoral directorates-general (eg, Transport and Energy) (outside DG Comp). The Commission also uses 'peer review panels' in Phase II cases to test the validity of the case team's arguments. The panels consist of a team of lawyers and economists from DG Comp, who are independent of the original case team. In addition, two hearing officers, who are independent of DG Comp and report directly to the competition commissioner, organise and conduct oral hearings in Phase II cases and act as independent arbitrators if a dispute on the effective exercise of procedural rights between parties and DG Comp arises.

The Commission has published a series of notices and guidelines to assist in the interpretation of a number of key issues under the EUMR. These include:

- notices on jurisdictional and procedural issues, including:
  - the Consolidated Jurisdictional Notice (2008);
  - the Notice on the Simplified Procedure (2013); and
  - the Notice on Case Referrals (2005);
- guidelines on issues of substance, including:
  - the Guidelines on the Assessment of Horizontal Mergers (2004); and
  - the Guidelines on the Assessment of Non-horizontal Mergers (2008);
- the Remedies Notice (2008); and
- the Notice on Ancillary Restraints (2005).

In addition, the Commission has published a number of Best Practices, including the Best Practices on the Conduct of Merger Proceedings (2004) and the Best Practices for the Submission of Economic Evidence (2011). These and other notices are important reading in all potential transactions. They are available on the Commission's website.

The EUMR is based on the 'one-stop shop' principle, whereby once a transaction has triggered notification to the Commission, the national authorities of the member states are precluded from applying their own competition laws to the transaction (except in the circumstances in which transactions may be investigated). In addition, the ability of national authorities to apply other non-competition laws is circumscribed. However, member states have tested the ambit of these principles (eg, Spain in *E.ON/Endesa* (2006), Italy in *Abertis/Autostrade* (2006), and Poland in *Unicredito/HVB* (2005)).

Scope of legislation

2 | What kinds of mergers are caught?

A 'concentration' is defined in the EUMR as a merger of two or more previously independent undertakings (or parts of undertakings) or the acquisition of direct or indirect control of the whole or parts of another undertaking, which brings about a durable change in the structure of the undertakings concerned. The EUMR applies to concentrations that have a 'Union dimension' (ie, meet certain turnover thresholds).

3 | What types of joint ventures are caught?

Provided that the applicable turnover thresholds are met, the creation and change of control over full-function joint ventures are caught by the EUMR. A full-function joint venture is an autonomous economic entity resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents.

Non-full-function joint ventures, such as strategic alliances and cooperative joint ventures (eg, production joint ventures), are not governed by the EUMR but by the Treaty on the Functioning of the European Union (TFEU) rules on restrictive practices, notably article 101 TFEU, which prohibits agreements between undertakings that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition. According to Regulation 1/2003, article 101 TFEU can be enforced by the Commission or by national competition authorities. However, non-full-function joint ventures can trigger merger control in a number of member states (eg, Germany and, in some circumstances, Austria) by the acquisition of a minority interest.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' means the possibility of exercising 'decisive influence' over an undertaking on the basis of rights, contracts or other means. When outright legal control is not acquired (eg, through the acquisition of shares with the majority of the voting rights), the Commission will consider whether the acquirer can still exercise legal or de facto control over the undertaking through special rights attaching to shares or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues.

There is no precise shareholding or other tests for decisive influence and each case is decided on its facts. For example, in *News Corp/Premiere* (2008), the Commission found that, based on the historic pattern of attendance at annual general meetings, the acquisition by News Corp of a 24.2 per cent shareholding was sufficient to confer on it a de facto majority of the voting rights, resulting in a notifiable concentration; by contrast, in *Ryanair/Aer Lingus* (2007), a holding of over 25 per cent was deemed not to amount to either de jure or de facto control. The definition of 'control' was considered by the General Court, upheld by the Court of Justice of the European Union, C-84/13 P, when it confirmed the Commission's decision to fine Electrabel for closing a transaction prior to notification and clearance (*Electrabel/Compagnie Nationale du Rhône*). The Court agreed with the Commission that Electrabel had obtained de facto control of the target in 2003, three years prior to notification, and said that the relevant question was the ability of Electrabel, at that time, to impose its decisions on the target. The shareholding structure was the key factor in support of this conclusion: Electrabel held 49.95 per cent of the target's shares, had a voting agreement in place with the next largest shareholder (with 22 per cent) and the remaining shares and voting rights were widely dispersed among almost 200 entities with a poor track record of participation at general meetings.

The General Court has also considered the extent to which minority shareholdings come within the scope of the EUMR. Following Aer Lingus' appeal against the Commission's decision not to order Ryanair to divest its minority shareholding in the wake of its 2007 prohibition decision, the Court confirmed that the EUMR does not empower the Commission to deal with minority shareholdings, where these do not lead to an acquisition of control under article 3(2) EUMR.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The purpose of the EUMR is to review those concentrations that have a Union dimension, the criteria are designed to ensure that only large-scale acquisitions, mergers and joint ventures are caught. Thus, a concentration will be caught by the EUMR where:

- the aggregate worldwide turnover of all the parties exceeds €5 billion; and
- the aggregate Union-wide turnover of each of at least two parties exceeds €250 million unless each of the parties achieves more than two-thirds of its aggregate Union-wide turnover in one and the same member state.

In an attempt to reduce the need for businesses to make multiple applications for clearance at the national level within the European Union, the EUMR also applies to smaller concentrations that have an impact in at least three member states. These concentrations are caught by the EUMR where:

- the aggregate worldwide turnover of all the parties exceeds €2.5 billion;
- the aggregate Union-wide turnover of each of at least two parties exceeds €100 million;
- in each of at least three member states, the aggregate turnover of all the parties exceeds €100 million; and
- in each of at least three member states mentioned immediately above, the turnover of each of at least two parties exceeds €25 million unless each of the parties achieves more than two-thirds of its aggregate Union-wide turnover in one and the same member state.

Turnover is deemed to be the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year. The turnover of the whole group to which the relevant undertaking belongs is taken into account according to detailed tests set out in the EUMR. The calculation can be complex and may involve certain adjustments being made to the turnover figure in the latest audited accounts, for example, to account for certain recent disposals or acquisitions.

In an acquisition, the turnover of the vendor is irrelevant except for that of the business being acquired. In the case of joint ventures, the whole turnover of the parents (and their groups) intending to share joint control of the venture is taken into account. In addition, there are rules for the calculation of turnover in specific sectors, in particular for banks and other financial institutions and insurance undertakings, as well as principles based on case experience for the geographic allocation of turnover in particular sectors such as airlines, telecommunications and financial services.

The EUMR establishes a system of referrals to ensure that a concentration is examined by the authority best placed to conduct the assessment (in line with the principle of subsidiarity). Under articles 4(4) and 9 of the EUMR, in certain cases, the national competition authority or the merging parties can request that a transaction that meets the EUMR thresholds is reviewed – in whole or in part – by the national competition authority. By the same token, under articles 4(5) and 22 of the EUMR, provided that certain conditions are met, the merging parties or one or more member states may request the Commission to review a merger that does not meet the EUMR thresholds (eg, *Fincantieri/Chantier de l'Atlantique* (2019), *Apple/Shazam* (2018), *Dolby/Doremy/Highlands* (2014), *Facebook/WhatsApp* (2014) and *SCJ/Sara Lee* (2010)).

On 26 March 2021, the Commission published a policy paper in which it reported on an evaluation started in 2014 on whether the jurisdictional thresholds in the EUMR leave an enforcement gap, and whether the administrative burden on merging firms and other market participants is proportionate. The evaluation found that the current jurisdictional thresholds generally suffice to capture transactions that merit EU review.

However, the Commission did express concern that some 'killer acquisitions', especially in the digital and pharma sectors, might have flown under the radar in recent years. In order to close this gap, the Commission published guidance on a new policy to encourage and accept referral requests from member states under article 22 EUMR even where transactions do not meet the national merger control thresholds of the referring member states. The first case referred to the Commission under this new policy is *Illumina/Grail* (2021).

The policy paper closes the debate on two topics: the Commission decided not to introduce a transaction value threshold, and the Commission is no longer considering extending the EUMR to capture non-controlling minority shareholdings.

The policy paper also concludes that the Commission's latest simplification package was effective in reducing the administrative burden on merging firms, but acknowledges that there remains some scope for improvement. This has led the Commission to launch a new public consultation on the further simplification of EU merger control procedures.

On 5 May 2021, the Commission published its proposal for a regulation on foreign subsidies distorting the internal market. One of the elements included in this proposal is the introduction of a mandatory notification system for certain subsidised transactions. This would represent an independent ex-ante notification procedure for transactions with dedicated thresholds, timelines and sanctions. The proposal as it currently stands would require an ex ante notification if the following conditions are met:

- concentration in the form of change of control on a lasting basis, including full-function joint ventures;
- target/merging party/joint venture or one of its parents is established in the EU and generates an aggregate turnover of at least €500 million in the EU; and
- undertakings concerned received foreign subsidies exceeding €50 million on an aggregated basis over the past three years.

The proposal provides that even if these thresholds are not met, the Commission can still call in any concentration where it suspects that the undertakings concerned may have benefitted from foreign subsidies in the three prior years. The procedural rules including the review periods, penalties and rules on gun jumping would mirror EU merger control rules.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for concentrations with a Union dimension. There are no exceptions and the EUMR empowers the Commission to fine undertakings that fail to notify. In certain circumstances, however, parties may request that a transaction that meets the EUMR thresholds be referred wholly or partly to a member state.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The EUMR applies to all concentrations that have a Union dimension. Because the turnover thresholds are based on geographic turnover and not on the location or registered office of the parties, even foreign-to-foreign transactions essentially involving non-EU groups are caught if the financial thresholds are met.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The EUMR applies to all transactions that meet the relevant turnover thresholds. There are no sector-specific rules. Foreign direct investment is governed at the member state level. However, pursuant to a new EU framework regulation for the screening of foreign direct investments that became fully applicable on 11 October 2020, the Commission has the power to issue an opinion when an investment poses a threat to the security or public policy of more than one member state. The new framework enhances the cooperation between the Commission and the member states in their actions on foreign investments.

On 5 May 2021, the Commission published a proposal for a regulation on foreign subsidies distorting the internal market which seeks to introduce a mandatory notification system for certain subsidised transactions.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for making a filing under the EU Merger Regulation (EUMR). According to article 4 of the EUMR, proposed concentrations (with a Union dimension) 'shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest'. A notification may also be made where the undertakings concerned demonstrate to the European Commission a good faith intention to conclude an agreement, or in the case of a public bid, where they have publicly announced an intention to make such a bid.

However, the proposed concentration must be notified and cleared prior to implementation (this is known as the 'suspensory effect' of the EUMR). The EUMR provides the Commission with powers to impose fines of up to 10 per cent of aggregate worldwide turnover on the parties if they intentionally or negligently fail to notify a merger with a Union dimension. In 2014, the Commission imposed a fine of €20 million on Marine Harvest for acquiring de facto sole control of Morpol prior to formal notification (M.7184 (2014)). This decision was upheld by the General Court (T-704/14 (2017)) and the Court of Justice (C-10/18 P (2020)). In 2018, the Commission issued two decisions imposing fines for infringing the standstill obligation. In *Altice/PT Portugal*, the Commission imposed a fine of €125 million on Altice for implementing the acquisition of PT Portugal before obtaining the Commission's clearance. In *Canon/Toshiba*, the Commission imposed a €28 million fine on Canon for partially implementing the acquisition of Toshiba's medical equipment business prior to obtaining clearance. Appeals against both decisions are pending before the General Court.

In *EY/KPMG* (C-633/16 (2018)), the Court of Justice provided guidance on what constitutes gun jumping in response to a reference for a preliminary ruling by stating that ancillary and preparatory steps in a merger context only breach the standstill obligation if they contribute, as such, to the change of control of the target undertaking. However, the Commission in practice seems to interpret *EY/KPMG* narrowly.

10 Which parties are responsible for filing and are filing fees required?

In the case of either the acquisition of joint control or of a merger that creates a new undertaking, the notification must be jointly submitted by the parties to the merger or by the undertakings acquiring joint control. In the case of acquisition of sole control, the acquirer alone must notify. No filing fees are required.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Notification under the EUMR has a suspensory effect, meaning that a transaction that is subject to notification may not be implemented until clearance is obtained. Public takeover bids, however, are not subject to the full suspension obligation. The Commission can and will investigate any mergers that have closed without prior notification, and could order the unwinding of any notifiable merger that has been implemented prior to clearance. The Commission has shown its willingness to prevent 'gun jumping' in the form of early implementation between the merging parties. The EUMR empowers the Commission to conduct inspections (ie, dawn raids) if it suspects that the parties have implemented the transaction prior to clearance. The Commission carried out dawn raids at the premises of merging parties suspected of gun jumping in the *Ineos/Kerling* case in 2008 and in the *Caterpillar/MWM* case in 2011 (these acquisitions were ultimately cleared without conditions, and no finding of gun jumping was reached).

In exceptional circumstances, the Commission may grant a derogation from this suspension obligation if it is satisfied that the detriment to the notifying parties or to a third party resulting from the suspension exceeds the threats to competition posed by the transaction. According to the Commission, an applicant must demonstrate that the standstill obligation poses a real threat to the business, not merely a hypothetical one (eg, *SCJ/Sara Lee* (2011)). The Commission has recognised that undue delay could potentially be fatal to a proposed emergency rescue package and has granted derogations on a limited number of occasions – mostly during the global economic downturn in 2008 and 2009. In 2020, the Commission published three decisions granting derogation from the suspension obligation: *Liberty/Ascoval/Hayange* (M.9917), *Jingye/Ascoval/Fri* (M.9887) and *Connect Airways/Flybe* (M.9287).

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Commission may impose fines on companies (of up to 10 per cent of aggregate worldwide turnover) for closing a transaction before clearance has been obtained, irrespective of whether clearance is ultimately obtained. In *Marine Harvest* (C-10/18 P (2020)), the Court of Justice confirmed that the EUMR allows the Commission to impose two separate fines for implementing a concentration before it has been notified and implementing a concentration before it has been authorised.

The Commission may also order interim measures to restore or maintain conditions of effective competition.

The General Court has confirmed that the fact that a concentration has no adverse effect on competition and is ultimately cleared by the Commission is pertinent only insofar as it may be a relevant factor in determining the amount of the fine to be imposed (see *Electrabel/Compagnie Nationale du Rhône*). Similarly, the Court also took the view that a finding that an infringement was committed negligently, rather than intentionally, does not prevent a characterisation of that infringement as grave or serious.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The Commission has the same powers to impose sanctions in cases involving closing before clearance in foreign-to-foreign mergers as in mergers of domestic (ie, European Economic Area (EEA) or European Free Trade Association (EFTA) companies). To date, there are no examples of such sanctions having been applied in foreign-to-foreign mergers, but most companies take care not to breach the notification obligations in such cases.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

A foreign-to-foreign merger cannot be implemented outside the EU without breaching the EUMR suspension obligation unless the Commission grants a derogation. At a late stage in the investigation, the Commission may be prepared to grant a derogation to allow the closure of a transaction if the competition issues have been resolved. However, these situations are rare, and parties must usually await clearance before closing. It is not permissible under EU merger control rules to close a transaction globally while suspending implementation of closing in the European Union (ie, by way of a carveout).

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The EUMR does not prevent the implementation of a public bid that has been notified to the Commission, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission. These derogations are difficult to obtain and do not apply where a controlling stake is acquired by the purchaser through the acquisition of a single package of shares from one seller only (*Yara/Kemira Growhow* (2007)). In 2008, the Commission exceptionally granted such a derogation in the context of a Phase II investigation (*STX/Aker Yards* (2008)). In *Marine Harvest* (C-10/18 P (2020)), the Court of Justice stressed that the exception for public takeover bids must be interpreted strictly and that it cannot be used to cover a prior transaction that already caused a change of control.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Notification is made to Directorate-General for Competition of the European Commission (DG Comp) using a Form CO. The parties are required to provide the Commission with:

- detailed information regarding the transaction;
- the undertakings involved (corporate details and structure);
- the definition of the relevant markets;
- the effect of the merger on the affected markets (including information on competitors and customers and economic evidence in more complex cases); and
- possible efficiencies arising from the transaction.

Supporting documentation needs to be submitted along with the Form CO, including:

- transaction documents;
- audited accounts; and
- relevant internal documents, such as:
    - board presentations;
    - the parties' ordinary course analyses and reports; and
    - strategic plans relating to any potentially affected market.

The filing must be complete for the review clock to start running. As a result of the covid-19 pandemic, the Commission is accepting electronic rather than hard copy submissions. Notification can be made in any of the European Union's official languages.

Although the Commission can grant waivers from the obligation to provide information (a process that has been formalised and clarified) the significant amount of detail and senior management time required to complete a Form CO should not be underestimated. In complex cases, it is not uncommon for the review process to last seven to eight months; this is in addition to the time it takes to complete pre-notification discussions, which are not subject to any statutory time limits. The Commission has implemented changes as part of a 'merger simplification project' with the aim of streamlining the notification process and reducing the administrative burden on notifying parties.

Mergers that qualify for assessment under the simplified procedure (broadly, when the merger is unlikely to raise competition concerns, according to prescribed criteria set out in the notice on the simplified procedure) are notified through the submission of a Short Form CO, which requires less detailed information from the parties. Recent amendments to the notice on the simplified procedure and the Short Form CO have extended the categories of merger cases suitable for the simplified procedure. The Commission may, however, require the submission of a full Form CO where it appears either that the conditions for using the Short Form CO are not met, or, exceptionally, where they are met but the Commission nonetheless determines that a full Form CO notification is required for an adequate investigation of possible competition concerns. The Commission is evaluating whether to expand the scope of the simplified regime to additional categories of transactions and to further reduce the administrative burden for the notification of non-problematic transactions, such as by introducing a tick-box type notification form for simplified notifications.

The Commission can impose a fine of up to 1 per cent of aggregate worldwide turnover if incorrect or misleading information is supplied during its review. Periodic penalty payments not exceeding 5 per cent of average daily turnover can also be imposed for each day that the infringement persists. For these purposes, the EUMR empowers the Commission to conduct inspections (ie, dawn raids) if it suspects that the parties have provided incorrect or misleading information. The Commission has recently been active in penalising procedural infringements, imposing sizable fines in *Facebook/Whatsapp* (2017) and in *General Electric/LM Wind* (2019).

The Commission's Best Practice Guidelines 2004 and the Notice on the Simplified Procedure summarise key aspects of the notification procedure, in particular the desirability (and usually the necessity) of pre-notification contacts with the Commission.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Most (if not all) proceedings begin with pre-notification contacts with the Commission. These contacts are not strictly mandatory, but are nonetheless highly advisable and, in practice, essential, even for simplified procedure cases. Depending on the complexity of the transaction, this pre-notification stage may involve the submission of a finalised draft Form CO or a briefing memorandum for the Commission's consideration and possibly attending a meeting with Commission officials. The Best Practice Guidelines also provide that the Commission may undertake informal fact-finding exercises in the pre-notification period, so long as the transaction is in the public domain and the merging parties have had the opportunity to express their views on such measures.

Following the formal notification, the Commission will initiate a Phase I review. In this context, the Commission will contact relevant third parties such as customers, suppliers and competitors to collect their views on the transaction and may require them to complete detailed questionnaires on the relevant markets. During the course of the investigation, the Commission will often demand further information at short notice. Calls and meetings are also frequently held with the case team. As explained in the Best Practice Guidelines, state-of-play meetings may be held with the parties at various key stages of the investigation and the Commission may also instigate tripartite (or triangular) meetings with the merging parties and interested third parties to allow points of concern to be discussed. In complex merger cases, the Commission commonly issues extensive and tailored document requests. Following the Phase I investigation, the Commission may decide to clear the merger unconditionally, to clear the merger subject to conditions and obligations offered by the parties, or to initiate an in-depth investigation if it considers that the transaction raises serious doubts as to whether it may give rise to a significant impediment to effective competition (Phase II).

For the notifying parties, a Phase II inquiry will involve responding to many requests for information and may lead to a statement of objections. If a statement of objections is issued, the parties will be granted access to the Commission's file and with the agreement of the parties, an oral hearing will take place (often involving complainants). The oral hearing is organised and conducted by one of the two hearing officers. Following the Phase II investigation, the Commission may decide to clear the merger unconditionally, to clear the merger subject to conditions and obligations or to prohibit the merger.

18 What is the statutory timetable for clearance? Can it be speeded up?

The Commission must reach a Phase I decision within 25 working days of the effective date of notification. This period may be increased to 35 working days if the Commission receives a referral request from a member state or the parties submit commitments (remedies) to resolve competition issues. The review period under the simplified procedure is also 25 working days.

Should the Commission initiate a Phase II investigation, the decision must be taken within 90 working days of the date on which the proceedings were initiated (ie, from the beginning of Phase II). This period may be extended to 105 working days if the parties offer commitments after the 55th day of Phase II proceedings. Further, the investigation period may be extended if the parties request a one-off extension of the investigation period (they must do so within 15 working days of initiation of Phase II proceedings) or if the Commission decides to extend the Phase II investigation period with the consent of the parties. In both cases, the cumulative extension cannot exceed 20 working days.

These time periods may be suspended (thereby stopping the clock) if, for circumstances imputable to one of the undertakings involved, the Commission has to issue a decision to request information or to order an inspection.

Pre-notification discussions with the Commission are a standard part of all merger review processes (including simplified cases) and can be expected to take a minimum of two weeks. This period can be considerably extended even for relatively straightforward cases.

There are no formal means of accelerating the review under the EUMR. However, the Commission has shown some flexibility in certain cases, notably by issuing 'accelerated' clearance decisions during the financial crisis even in cases that raised significant competition concerns and required remedies (eg, *BNP Paribas/Fortis* (2008)).

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The EU Merger Regulation (EUMR) prohibits concentrations that significantly impede effective competition in the European Economic Area (EEA), or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. Full-function joint ventures are appraised under the same test. In its appraisal, the European Commission must (formally) take into account substantiated claims of efficiencies brought about by the merger and evidence that one of the merging parties (or the acquired undertaking) is a failing firm (also referred to as a 'rescue merger'). In practice, such defences play limited roles in merger reviews and, up until now, the Commission has never cleared an otherwise problematic merger only on the basis of efficiencies claimed by the parties for all markets where competition concerns were found and has only accepted failing firm defences in very few cases. The economic consequences of the covid-19 pandemic have not resulted in a softening of the Commission's stance on this issue.

20 Is there a special substantive test for joint ventures?

In addition to examining whether the joint venture will significantly impede effective competition, the Commission will also assess under article 101 of the Treaty on the Functioning of the European Union (TFEU) whether it is the object or effect of the transaction to coordinate the competitive behaviour of two or more parents to the joint venture. Such coordination can occur where two or more parents retain activities in candidate markets; namely, activities either in the same market or on an upstream, downstream or closely related neighbouring market to that of the joint venture. The significance of this spillover effect is assessed and can be cleared with the merger – if justified – under the criteria set out in article 101(3) TFEU. Full details of overlapping activities of the parents in candidate markets must be given in the notification.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

In accordance with the guidance set out in the Commission's guidelines on horizontal mergers and non-horizontal mergers, the Commission will consider, in its assessment, whether the merger will lead to a significant impediment to effective competition (SIEC) through unilateral or coordinated anticompetitive effects.

In horizontal mergers, anticompetitive unilateral effects may occur when the merger removes relevant competitive constraints over the merging firms to the extent that it contributes:

- to the creation or strengthening of a dominant position, for example:
  - *ThyssenKrupp/Tata Steel* (2019);
  - *Siemens/Alstom* (2019);
  - *London Stock Exchange/Deutsche Börse* (2017);
  - *Pfizer/Hospira* (2015);
  - *Ryanair/Aer Lingus III* (2013); and
  - *Deutsche Börse/NYSE Euronext* (2012); or
- to the weakening of competitive pressure in an oligopolistic market, for example:
  - *Hutchison 3G UK/Telefónica UK* (2016);
  - *Orange/Jazztel* (2015);
  - *UPS/TNT Express* (2013) (Commission decision overturned by General Court on appeal, T-194/13);
  - *Hutchison 3G Austria/Orange Austria* (2012);
  - *EDF/Segebel* (2009); and
  - *T-Mobile Austria/Tele Ring* (2006).

The Commission assesses the parties' ability and incentives to profitably increase prices, reduce output, choice or quality of goods and services, but also to diminish innovation. Potential loss of innovation as a result of the merger is increasingly investigated by the Commission (eg, *Dow/Dupont*, *J&J/Actelion* (both 2017) and *Bayer/Monsanto* (2018)). In 2020, the General Court in *CK Telecoms UK Investments Ltd v Commission* for the first time ruled on the legal standard the Commission needs to meet when establishing a significant impediment to effective competition under article 2(3) EUMR when a merger does not lead to a dominant position or coordinated effects in oligopolistic markets (ie, so-called 'gap cases'). The General Court's judgment found that the Commission can only intervene in such mergers where it can – based on an overall significance assessment – demonstrate merger effects that are equivalent to those resulting from the creation or strengthening of a dominant position. An appeal is currently pending before the Court of Justice (C-376/20).

In non-horizontal mergers, the main concern of the Commission with regard to unilateral effects lies in the ability and incentive of the merging firms to engage in input or customer foreclosure, owing to vertical links (eg, *Wieland/Aurubis* (2019), *BASF/Cognis* (2010), *TLP/Ermewa* (2010), *RWE/Essent* (2009), and *TomTom/Tele Atlas* and *Google/DoubleClick* (both in 2008)) or to portfolio effects (eg, *Qualcomm/NXP* (2018), *Essilor/Luxottica* (2018), *Microsoft/LinkedIn* (2016) and *Intel/McAfee* (2011)).

Coordinated effects may arise when the merger alters the competitive conditions prevailing on the market, allowing competitors to coordinate their behaviour (eg, *Celanese/Blackstone/JV* (2017), *AB InBev/SAB Miller* (2016), *ABF/GBI Business* (2008), *Sony/BMG* (2007 and 2004) and *Johnson & Johnson/Guidant* (2005)). The conditions for the Commission to demonstrate such coordinated effects are set out in the *Airtours* judgment of the General Court (T-342/99 (2002)).

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Under the EUMR, the Commission can only prohibit a concentration that significantly impedes effective competition in the European Union, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. When applying the test, the Commission looks only at competition-related criteria, and economic efficiencies are also relevant. In certain cases, however, member states may have limited jurisdiction to intervene to protect their non-competition legitimate interests. In Phase II cases, the full College of Commissioners, rather than just the commissioner for competition, is involved in the final decision, and they may consider issues other than pure antitrust in forming their views. The competition portfolio (under Commissioner Vestager) is part of project teams concerning digital, energy, jobs, growth, investment and competitiveness. The Commissioner must, therefore, cooperate with colleagues with responsibilities for these other portfolios.

In the context of the global economic downturn after 2008, the Commission was required to consider how the grant of state aid (ie, support from a government) might affect the substantive analysis in merger control proceedings (eg, in relation to the financial strength and future market positions of the parties). However, in most cases (eg, *BNP Paribas/Fortis*, *Santander/Bradford & Bingley Assets* (both in 2008)) DG Comp concluded that the state measures in question did not affect its competition analysis, as such aid was the subject of a separate assessment under the state aid rules.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The European Commission, in its Horizontal Guidelines, has stated that it will consider substantiated efficiency claims in its overall assessment of the merger. According to the Horizontal Guidelines, the Commission will only take into account efficiencies that are of direct benefit to consumers, merger-specific, substantial, timely and verifiable, thereby counteracting the adverse effects of the merger. Efficiency considerations are highly unlikely to be taken into account where the merger results in the creation of a monopoly or a quasi-monopoly. In practice, this means that significant evidence will need to be adduced by the parties to satisfy the requisite criteria. The Form CO includes a section specifically dealing with efficiencies, although it is not obligatory for parties to complete this section.

The Commission has accepted efficiencies claims in a very few cases (eg, *FedEx/TNT* (2016), *UPS/TNT Express* (2013), *Microsoft/Yahoo!, Search Business* (2010) and *TomTom/Tele Atlas* (2008)) but it has never cleared an otherwise problematic merger purely on the basis of efficiencies claimed by the parties.

Indeed, the Commission has routinely rejected parties' claims for merger efficiencies in the past on the basis that the burden of proof is on the parties in respect of efficiency claims. However, in 2020, the General Court (*CK Telecoms UK Investments Ltd v European Commission*) held that the Commission should take into account 'standard efficiencies' when conducting an economic analysis of the likely price effects of a merger.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The European Commission is empowered to prohibit a concentration that will significantly impede effective competition in the European Union, or a substantial part of it. Since the entry into force of the first EU merger control regime in 1990, the Commission has blocked 30 mergers (as of March 2021). Even though the Commission recently blocked several mergers (*London Stock Exchange/Deutsche Börse* (2017), *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* (2017), *Siemens/Alstom* (2019), *Wieland/Aurubis Rolled Products/Schwermetall* (2019) and *Tata Steel/ThyssenKrupp* (2019)), prohibition decisions are expected to remain relatively rare. This statistic does not, however, take into account transactions that were abandoned by notifying parties as a result of initial objections raised by the Commission either during 'pre-notification' discussions or during the course of a formal notification (most recently *Fincantieri/Chantier de l'Atlantique* (2020)).

If the parties implement a notifiable merger before clearance has been obtained or after a prohibition decision has been issued, the companies concerned may not only incur fines but may also be ordered to dissolve the merger in its entirety. The Commission may also impose interim measures or take any other action that it considers appropriate to restore conditions of effective competition.

The Commission may revoke its clearance decision (whether granted in Phase I or II) if it subsequently transpires that the decision was based on incorrect information, or where there has been a breach of an obligation attached to the decision. In such a case, the Commission may also order the dissolution of the merger.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

During the course of a Commission investigation, the parties can offer undertakings to the Commission to remedy competition issues identified by the latter. Proposed remedies will need to be submitted in a Form RM, introduced by the Remedies Notice (2008). Remedies have regularly been accepted to avoid prohibiting a transaction, or indeed a Phase II referral. The Commission has a strong preference for structural rather than behavioural undertakings, but its Remedies Notice (2008) and Best Practice Guidelines for Divestiture Commitments (2013) state that the Commission will also accept behavioural undertakings in limited circumstances.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The most basic condition applicable to a divestment or other remedy is that it must be capable of restoring effective competition in a timely fashion while being simple enough to allow the Commission to determine this with sufficient certainty.

The Commission has a clear preference for structural remedies, in particular divestments, as it believes that the most effective way of restoring competition will be either to create a new competitive entrant or strengthen existing competitors through divestments. According to the Commission's Best Practice Guidelines for Divestiture Commitments, divested activities must constitute a viable business able to compete over the long term on a stand-alone basis. In this regard, the Commission will consider a broad range of divestiture remedies and where appropriate alternative structural remedies to facilitate market access, such as the granting of licences. In *T-Mobile/Orange* (2010), in addition to a divestment remedy, the parties concluded a revised network sharing agreement with a competitor to secure its position as a competitive force on the market. In *Hutchison 3G Austria/Orange Austria* (2012), in addition to a divestment remedy, Hutchison committed to providing wholesale access to up to 30 per cent of its network to 16 mobile virtual network operators for a period of 10 years. Divestments can only be made to a suitable purchaser, approved by the Commission, and the sale must be completed within a specified time limit (usually six months). If the parties do not find an acceptable purchaser within the disposal deadline, a 'divestiture trustee' will handle the disposal of the business at no minimum price. Any divestment remedy must be accompanied by a proposal to safeguard the business in the interim and the parties will need to propose a monitoring trustee to oversee compliance with the preservation measures.

A principal concern of the Commission is the practical efficacy of the remedies proposed by the parties and, in particular, the need to ensure the long-term viability of the 'remedy-taker' or divestment purchaser. When there are doubts about the viability of the business to be divested, an 'upfront purchaser' may be required. The Commission may also require a 'fix-it-first' remedy, meaning that the parties must identify a purchaser for the divestment business and enter into a binding agreement with that purchaser during the Commission's merger control review. The viability of the business to be divested was an important part of the Commission's assessment in the cases of *GE/Alstom* (2015), *Chemchina/Syngenta* (2016), *London Stock Exchange/Deutsche Börse* and *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* (both 2017).

The Commission may also accept other non-divestment structural remedies such as the severing of links with competitors or important players in a supply chain. For example, the Commission intervened in *Glencore/Xstrata* (2012) because of concerns that the merged entity would have the ability and incentive to raise prices of zinc metal. To remedy concerns, Glencore committed to severing links with Nyrstar (the largest European zinc metal producer). This included, among other things, the termination of an exclusive long-term offtake agreement and committing not to buy zinc metal quantities from Nyrstar for 10 years.

In certain (but more limited) circumstances, behavioural remedies can be accepted, such as in *Microsoft/LinkedIn* (2016), which was granted conditional clearance in Phase I on the basis of the parties' commitments to allow PC original equipment manufacturers using Windows not to install the LinkedIn application and to ensure interoperability and provide access to all necessary information to LinkedIn's competitors. Similarly, in *ASL/Arianespace* (2016) the Commission was satisfied with behavioural commitments that included the implementation of information firewalls and restrictions to employee mobility between the merging parties. In other cases (eg, *Universal Music Group/EMI Music* (2012)) the Commission has accepted behavioural remedies as part of a package including other divestment and structural commitments.

Recently in *Google/Fitbit* (2020), the Commission accepted a data silo and an access commitment for the first time. The Commission cleared the transaction subject to Google offering a package of commitments whereby it would silo personal health data collected from Fitbit and would not use Fitbit's data to drive its Google Ads business for at least 10 years.

Alternatively, primary and secondary remedies can be offered in circumstances where the preferred primary remedy may be difficult to implement owing to external factors. The second alternative remedy must be equal to or better than the first remedy, and will typically involve divestiture of the parties' crown jewels. This twofold structure has been used in a number of cases including *Pfizer/Wyeth* (2009), *Teva/Ratiopharm* (2010) and *Swissport/Servisair* (2013).

Under the Remedies Notice, the Commission has the discretion to review the need for commitments when the parties are able to establish that a significant change in market circumstances has occurred.

This review is of particular relevance for non-divestment type remedies (eg, *Newscorp/Telepiu* (2010) and *Hoffmann-La Roche/Boehringer Mannheim* (2011)). Typically, such commitments will include a review clause and the Commission has been willing to accept detailed review clauses specifying certain criteria of particular relevance for the future assessment of the need for the commitments (eg, *T-Mobile/Orange* (2010) and *SNCF/LCR/Eurostar* (2010)).

The Commission will accept undertakings both in Phase I and Phase II. In Phase I, the commitments must be submitted to the Commission within 20 working days from the date of receipt of the notification (and, in practice, in draft form earlier). The notifying parties can also in some circumstances withdraw their notification and resubmit it following appropriate changes to the original concentration in an attempt to avoid the need for second-stage proceedings. In Phase II, undertakings must be submitted to the Commission at the latest within 65 working days of initiation of the Phase II investigation.

The General Court has shown a willingness to accept deviations from the strict procedural rules, particularly in relation to timing in cases of 'late remedies' (eg, Case T-87/05 *EDP v Commission* (2005), and Case T-212/03 *MyTravel* (2008)).

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Commission can require the same type of remedies in foreign-to-foreign mergers as in domestic EU mergers. When analysing remedies, the Commission may liaise with other competition authorities that are examining the same merger on the basis of confidentiality waivers by the parties. For example, in *UTC/Goodrich* (2012), the Commission cooperated with the US and Canadian authorities on remedies, and in *Panasonic/Sanyo* (2009) the Commission cooperated with the Japanese and US authorities including as to the identity of a suitable purchaser for divested assets.

Other examples of EU–US cooperation include *Johnson & Johnson/Guidant* (2005), *Inco/Falconbridge* (2006), *Agilent/Varian* (2010), *Intel/McAfee* (2011) and *Thermo Fisher Scientific/Life Technologies* (2013).

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The treatment of ancillary restraints (such as non-compete obligations or transitional supply agreements) is set out in the EUMR and the Commission's notice on restrictions directly related and necessary to concentrations, published in March 2005 (the Ancillary Restraints Notice). The EUMR provides that any Commission decision approving a merger will automatically cover restrictions that are directly related and necessary to the implementation of the merger. The Commission is obliged to assess the restrictions only if the parties so request and the issues raised are novel and give rise to genuine uncertainty. Consequently, merging parties will usually need to assess for themselves, by reference to the Ancillary Restraints Notice, whether or not their restrictions are permissible.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Third parties can play a significant role in EU Merger Regulation (EUMR) proceedings. The European Commission publishes a summary of all notifications in the Official Journal of the European Union. This provides a preliminary opportunity for third parties to express their opinions on the likely impact of the transaction. In publishing the notice, the Commission is obliged to consider the parties' legitimate interests in relation to the protection of business secrets. Third parties may also act as 'informants' by contacting the Commission or member states authorities by bringing to their attention a concentration that, in their opinion, could be a candidate for a referral under article 22 EUMR (without any guarantees that this would in fact lead to a referral request).

More importantly, the Commission also sends out detailed questionnaires to third parties (usually to customers, suppliers, competitors and trade associations) seeking their views on the transaction. This is done by means of a web-based electronic questionnaire that provides respondents with a secure web-based workspace to submit their replies to the Commission. Third parties that show a sufficient interest (including worker representatives) may also apply to be heard by the Commission, by giving oral or written evidence. They may further be given a non-confidential copy of the statement of objections in Phase II proceedings, enabling them to submit comments to the Commission on its preliminary assessment. Active complainants will often attend the oral hearing with the notifying parties.

Third parties can also appeal a Commission clearance decision to the General Court if they can show sufficient interest. Examples include Impala's appeal against the Commission clearance decision of *Sony/BMG*, Editions Odile Jacob's appeal in relation to the *Lagardère/Vivendi Universal Publishing* (2004) merger against the Commission's clearance decision (rejected by the General Court T-279/04, which was confirmed by the CJEU C-551/10), the Commission's approval of Wendel as the purchaser of certain divestment assets (upheld by the General Court T-452/04 and confirmed by the CJEU C-553/10) and Cisco Systems' appeal against the Commission clearance decision of *Microsoft/Skype* (rejected by the General Court T-79/12). Another example is KPN's successful appeal of the Phase II clearance decision *Liberty Global/Ziggo* (2015) (T-394/15 (2017)). The General Court in 2021 dismissed a second challenge by KPN against the Commission's re-issued clearance decision of the *Vodafone/Ziggo* concentration (Case T-691/18 (2021).

Third parties will usually need to have played an active role in the Commission's proceedings to have standing to appeal. The General Court rejected an application by Canonical, an open-source software developer, to intervene in support of the Commission in the proceedings brought by Monty Program against the *Oracle/Sun Microsystems* clearance decision. In 2011, the General Court clarified that consumer associations enjoy a right to be heard during the administrative proceedings provided that they lodge a written application to be heard by the Commission during the administrative proceedings (*Association belge des Consommateurs Test-Achats/European Commission*, T-224/10).

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Upon receipt of a notification, the Commission publishes a non-confidential notice of the fact of notification in the Official Journal inviting third-party comments. The parties to the transaction provide a draft of this notice as part of the Form CO (section 1.2 of the Form CO). The Commission also issues a press release following the adoption of its decision at the end of every Phase I and Phase II examination (and upon referring a case to a Phase II investigation). A non-confidential copy of the final decision is made available on the Commission's website, after the Commission and the parties have agreed on which information qualifies as business secrets and, therefore, should be redacted. In addition, final decisions issued following a Phase II examination are published in the Official Journal (with business secrets redacted). In the case of a short-form decision for simplified procedure cases, the Commission will publish a notice of the fact of the decision in the Official Journal.

Dedicated antitrust press follow cases very closely and report on developments and speculation on a daily basis.

The confidentiality of business secrets is protected under article 339 of the Treaty on the Functioning of the European Union (TFEU) and under article 17 of the EUMR (see also articles 18 and 19, and recital 42). These provisions require the Commission (and the member states, the European Free Trade Association Surveillance Authority and the EFTA states, their officials and other servants) not to disclose information covered by the obligation of professional secrecy that they have acquired through the application of the EUMR.

If a party believes that its interests would be harmed if any of the information supplied were to be published or otherwise divulged to other parties, this information should be submitted separately with each page clearly marked 'business secrets'.

Parties should also give reasons why this information should not be divulged or published. In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

The Commission has published Guidance on the preparation of public versions of Commission decisions under the Merger Regulation as well as Best practices on the disclosure of information in data rooms (both 2015).

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Cooperation with national competition authorities in the European Union

The member states' national competition authorities (NCAs) have the opportunity throughout the Commission's investigation to express their views on the concentration. Within three days of receipt of a notification, copies are sent to the NCAs for their comments. The NCAs have a particularly active role to play in Phase II decisions as part of an advisory committee that opines on the Commission's draft decision and any commitments before its final adoption. This opinion is published.

In addition, despite the one-stop-shop principle, a member state may have limited jurisdiction to intervene to protect its noncompetition legitimate interests, such as public security, the plurality of the media, and the prudential supervision of financial institutions (see article 21 EUMR), and in certain defence-related matters (see article 346 Treaty on the Functioning of the European Union). The list of legitimate interests in article 21 EUMR is not exhaustive and a member state can claim additional legitimate interests in consultation with the Commission, though the Commission has attempted to limit a wider application. This provision has received scrutiny recently.

The national competition authorities also cooperate with the Commission in the context of the referral system foreseen in the EUMR.

For other instances where a transaction does not qualify for review by the Commission but does require merger clearance at the national level in several member states, the Commission published Best Practices on Cooperation between EU National Competition Authorities in Merger Review (2011) with a view to improving cooperation between the European NCAs, streamlining the approval process across the different jurisdictions and avoiding conflicting outcomes, in particular by facilitating information sharing between the national authorities.

Cooperation with the United Kingdom

Following Brexit and the end of the transition period, the EU and the UK have signed the EU–UK Trade and Cooperation Agreement (2020) to govern trade relations, including provisions regulating antitrust enforcement and cooperation. The agreement contains a shared commitment to monitor restrictive agreements, abuses of market power and anticompetitive mergers. It also encourages the EU and the UK competition authorities to share information and to cooperate. The agreement entered into force on 1 January 2021.

Cooperation with the United States

The Commission routinely seeks to cooperate with the US antitrust authorities that are also reviewing a proposed transaction. Cooperation is based on the 1991 US–European Community Agreement on the Application of Competition Laws (as amended), under which the Commission is required to keep the US antitrust authorities informed of mergers involving US interests, and vice versa, and also on the US–EU Best Practice Guidelines on Bilateral Cooperation published in October 2011, which aim to enhance coordination on the timing of reviews, collection and evaluation of evidence and communication between the reviewing agencies. In view of this cooperation, and in particular the exchange of information between the EU and US authorities, parties to transatlantic mergers should carefully coordinate their merger clearance procedures and, to the extent possible, ensure that any remedies offered will not produce inconsistent results in the United States and European Union.

Examples of high-profile cases in which the EU and US agencies have closely cooperated include *Intel/McAfee* (2011), *Medtronic/Covidien* (2014), *NXP/Freescale* (2015), *Wabtec/Faiveley* (2016), *Smiths/Morpho* (2017), *Dow/Dupont* (2017) and *Bayer/Monsanto* (2018).

Cooperation with Brazil, Canada, China, India, Japan, South Korea and Switzerland

Several other cooperation agreements with third countries exist.

The EC–Canada cooperation agreement was signed in June 1999 and contains similar provisions to the US agreement.

An agreement with Japan on cooperation and anticompetitive activities entered into force in August 2003 (currently under review by the EU and Japan), with the aim of facilitating bilateral cooperation in major merger and acquisition cases. Close cooperation with the Japanese Fair Trade Commission proved successful in the *Sanyo/Panasonic* case (2009), which was granted a Phase I clearance subject to conditions.

For several years, the EU and China have been increasing their cooperation on competition policy (agreement on the terms of reference of a bilateral competition policy dialogue from May 2004; memorandum of understanding on cooperation from September 2012; and best practices cooperation framework from October 2015). In April 2019, the EU and China agreed, on a memorandum of understanding on dialogue in the area of the state aid control regime and the fair competition review system, and on the terms of reference of the EU–China competition policy dialogue.

The European Union has also entered into a bilateral competition cooperation agreement with South Korea, and into a memorandum of understanding with the Brazilian Ministry of Justice and the heads of the Brazilian Competition Authorities to ensure closer cooperation.

In March 2011, the European Union and Russia signed a memorandum of understanding for cooperation in the area of competition policy, legislation and enforcement.

The European Union has been working in close technical cooperation with the Competition Commission of India.

On 1 December 2014, a cooperation agreement entered into force between the European Union and the Swiss Confederation.

In addition, the Commission actively participates in the International Competition Network's working group on multi-jurisdictional merger control, which was established in 2001 with the aim of promoting best practices and international cooperation.

The Commission played a key role in the adoption in 2015 of the ICN Merger Working Group Practical Guide to International Enforcement Cooperation.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The EU Merger Regulation (EUMR) provides for appeal to the General Court against European Commission decisions on both procedural and substantive grounds. A further appeal can be made to the Court of Justice of the European Union (CJEU). An appeal can be made either by way of an expedited procedure (only suitable for cases where the appeal is based on limited grounds) or following the normal appeal procedure.

Both merging parties and third parties who show standing can lodge an appeal before the General Court to challenge Commission decisions. Member states can also appeal merger decisions.

The appeal process for substantive appeals is rigorous, with the General Court engaging in a detailed forensic analysis of the Commission's decision. The judgments have led to a clarification of the standard of review and the type of evidence that the Commission can rely upon. For example, in February 2005, in *Commission v Tetra Laval BV*, the CJEU confirmed that, even though the Commission has a margin of discretion with regard to economic matters, the General Court must establish whether the evidence relied upon by the Commission is factually accurate, reliable and consistent, whether that evidence contains all the information necessary to assess a complex situation and whether it is sufficiently capable of substantiating the Commission's conclusions.

In more recent cases, the General Court has put emphasis on procedural grounds and reinforced due process and transparency standards in merger control procedures. In *UPS v Commission* (2017), the General Court held that the Commission had infringed UPS's rights of defence when handling economic evidence and it annulled the Commission's decision. The General Court has also recently asserted the Commission's obligation to lay out a complete reasoning justifying its decisions in *KPN v Commission* (2017).

If the EU Courts annul a merger decision, the parties need to re-notify their deal, as was the case in *Sony/BMG*, approved by the Commission in October 2007 after reassessment subsequent to the Court's decision.

In addition to judicial review remedies, actions have been brought against the Commission for non-contractual liability arising from its decisions in the merger control area (article 340 of the Treaty on the Functioning of the European Union).

Time frame

33 | What is the usual time frame for appeal or judicial review?

The average time for the adjudication of a merger decision case before the General Court is about 30 months, although in some cases the process can take a number of years. When used, the expedited procedure has shortened the waiting period to between seven and 18 months from the date of the Commission's decision. Consequently, for cases that are not expedited (and even some that are), the delay involved will usually represent a major factor against bringing an appeal.

Appeals to the CJEU of the General Court's findings generally take in excess of two years to be concluded.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The majority of mergers notified to the European Commission are cleared in Phase I without commitments. For example, in 2020, 334 cases were approved in Phase I (without commitments), 13 were cleared in Phase I (with commitments) and three were decided upon in Phase II (all three were cleared with commitments; no cases were prohibited). Further, the majority of Phase I clearances (278 out of 334) were subject to the simplified procedure. Prohibition decisions are rare, although there were three prohibition decisions in 2019, there were none in 2018, 2020 and 2021 (as of 1 May 2021).

The Commission analyses foreign-to-foreign mergers in the same way as EU-to-EU mergers. EU merger control applies equally to all industries and sectors.

Reform proposals

35 | Are there current proposals to change the legislation?

There are no pending changes to the EUMR.

In March 2020, the Commission applied a number of measures in response to the covid-19 outbreak in the context of merger control and these measures still apply today. Relevant parties were encouraged to use electronic means to notify potential transactions. Further, the Commission announced that it would temporarily accept, and indeed encourage, submissions in digital format. This could be done by email to the functional mailbox of the merger registry, or electronically through eTrustEx. The delivery of paper originals could then be arranged at a later time.

A public consultation on the review of the Commission's Market Definition Notice was launched in April 2020, and was completed in October 2020. The market definition notice dates from 1997 and provides guidance as to the Commission's application of the concept of relevant product and geographic market definition in its antitrust and merger control enforcement. The pubic consultation served to gather evidence to assess whether the market definition notice is still up to date, taking into account the developments in the Commission's decisional practice and the Courts' case law since the adoption of the notice. The results of the assessment are expected to be released in the course of 2021 and the legislative amendments are expected in 2022.

On 26 March 2021, the Commission launched a new public consultation on the further simplification of EU merger control procedures. The consultation seeks input from the market on whether to expand the scope of the simplified regime to additional categories of transactions and to further reduce the administrative burden for the notification of non-problematic transactions, such as by introducing a tick-box type notification form for simplified notifications.

On 5 May 2021, the Commission published a proposal for a regulation on foreign subsidies distorting the internal market, which seeks to introduce a mandatory notification system for certain subsidised transactions.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Latest high-profile prohibitions and abandoned transactions

On 6 February 2019, the European Commission announced the prohibition of the proposed acquisition of Alstom by Siemens. On the same day, the Commission announced the prohibition of Wieland's proposed acquisition of Aurubis Rolled Products and Aurubis' stake in Schwermetall. On 11 June 2019, the Commission announced the prohibition of the creation of a joint venture by Tata Steel and ThyssenKrupp.

The *Siemens/Alstom* and the *Wieland/Aurubis* transactions would have led to the merging parties becoming global leaders in their individual industries. The prohibition of the *Siemens/Alston* deal proved particularly controversial and led to the German and French Economic and Finance Ministers voicing their dissatisfaction with the Commission's approach. France and Germany also unveiled a 'Common manifesto for a European industrial policy fit for the 21st century' to facilitate the creation of 'European champions'.

The *Tata Steel/ThyssenKrupp* prohibition came at a difficult time for the steel industry, in an era of cheap imports, high tariffs and geopolitical uncertainty.

The three high-profile prohibitions amounted to the highest number of annual prohibitions since 2001 and led to a heightened debate about the competitiveness of European Industry, as well as further calls to amend the EUMR to allow for the development of 'European champions'. Since the end of 2019, the Commission has not adopted any other prohibition decision (as of May 2021).

However, in January 2021, Fincantieri abandoned its proposed acquisition of French shipyard Chantier de l'Atlantique following concerns from the Commission that the concentration would lead to a dominant position in the market for cruise ship building.

Landmark ruling on the SIEC-test

On 28 May 2020, the General Court handed down a landmark judgment upholding CK Hutchison Holdings' appeal against the Commission's prohibition of the proposed acquisition of Telefónica UK (O2) by Hutchison 3G UK3 (Three). In its judgment, the Court addresses for the first time the legal test of significant impediment to effective competition (SIEC) under the EU Merger Regulation (EUMR) introduced in 2004 and the Commission's Horizontal Merger Guidelines, and is therefore of great importance for European merger control in all sectors of the economy.

As a result of the judgment, the Commission will have to reconsider its practices, its approach to economic modelling and analysis, and the collection of evidence under the EUMR, and it will be required to produce more convincing evidence before prohibiting mergers or requiring remedies. The Commission lodged an appeal before the Court of Justice seeking to have the judgment of the General Court set aside.

New guidance on article 22 EUMR referrals to capture possible 'killer acquisitions' in tech, pharma and beyond

The Commission revised its article 22 referral policy to close a perceived enforcement gap and due to concerns that some 'killer acquisitions', especially in the digital and pharma sectors, might have flown under the radar in recent years. In guidance published on 26 March 2021, the Commission states that it will encourage and accept referral requests from member states under article 22 EUMR, even where transactions do not meet the national merger control thresholds of the referring member states. The Commission considers that this change of approach is needed in light of the gradual increase of transactions involving low-turnover firms that play or may develop a significant competitive role. Despite a strong focus on the digital and pharma sectors, the Commission's change in practice will impact businesses doing M&A across many sectors. While some clarity is provided in the guidance, the Commission's considerable discretion to accept referrals (including post-closing) is bound to result in significant uncertainty.

The Commission has recently put its new policy into practice. In *Illumina/Grail,* the Commission accepted referral requests submitted by six national competition authorities to assess the proposed acquisition between the biotech companies, regardless of the fact that the companies' combined turnover fell below the national and EU merger control thresholds.

Merger control and sustainability

The recent focus on sustainability and competition law has also found its way to merger control.

The Commission has clearly opened the door to consider the environmental impact of mergers. At the end of 2019, the Commission opened a Phase II investigation in the merger between copper refiners Aurubis and Metallo, citing among other things concerns relating to the significant role copper plays in electric mobility and digitisation. The Commission referred to the importance of a well-functioning circular economy in copper to ensure a sustainable usage of resources, and its role in achieving objectives set out in the European Green Deal, which aims to make the EU carbon neutral by 2050. The Commission also raised preliminary concerns in the merger of US aluminium producers Novelis and Aleris, noting that their lightweight aluminium automotive body sheets are necessary to produce vehicles that are more fuel-efficient and reduce emissions. Although the Commission ultimately cleared these deals (the latter with conditions), the reference to environmental considerations presents a shift away from previous decisional practice.

In order to get a better understanding of how competition rules and sustainability policies should work together, in October 2020 the Commission called for contributions from the public. Whereas the results of this consultation are yet to be published it is arguable that the EUMR leaves room for the Commission to take sustainability concerns into consideration, for example when assessing the relevant product market or closeness of competition between the merging parties, by taking into account the positive environmental impact when evaluating efficiencies or in the context of remedies.

Faroe Islands

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The main legislation on Faroese merger control is contained in the Faroese Competition Act (No. 35 of 3 May 2007, as amended on 27 April 2012). The Faroese Competition Act has been modelled on the Danish Competition Act, with the intention to also ensure conformity with competition law in the European Union and the European Economic Area (EEA). An English version of the Faroese Competition Act can be accessed on the Faroese Competition Authority's website.

The Faroese Competition Council is the principal enforcer of competition law in the Faroe Islands. It consists of a chair and four members appointed by the Minister of Trade and Industry. The Council must have comprehensive insight into public as well as private enterprise activity, including expertise in legal, economic, financial and consumer-related matters. The chair and two members of the Council must be independent of commercial and consumer interests. In practice, however, the Competition Authority, which is the secretariat of the Competition Council, is in charge of the day-to-day administration of the Competition Act and prepares the decisions of the Council.

The decisions of the competition authorities are subject to appeal before the Competition Appeals Council, which is made up of four members appointed by the Minister of Trade and Industry. The chair and the vice chair of the Appeals Council must be qualified lawyers.

Scope of legislation

2 | What kinds of mergers are caught?

The provisions on merger control apply to 'concentrations' where either:

- two or more previously independent undertakings merge (amalgamate); or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by the purchase of securities or assets, or by contract or any other means, direct or indirect control of the whole or parts of one or more other undertakings.

3 | What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a merger. Non-full-function joint ventures are not encompassed by the Faroese Competition Act. The distinction between full-function joint ventures and non-full-function joint ventures is made in accordance with EU competition law.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is constituted by rights, contracts or any other means that, either separately or jointly, confer the possibility of exercising decisive influence over the operations of an undertaking. Minority shareholdings are caught if the possibility of exercising decisive influence over the operations of an undertaking is conferred upon a minority shareholder.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions apply to concentrations where the participating undertakings have a total turnover of 75 million Danish kroner in the Faroe Islands and at least two participating undertakings have a turnover of at least 15 million Danish kroner in the Faroe Islands, or at least one of the participating undertakings has a turnover of 75 million Danish kroner in the Faroe Islands and at least one other of the participating undertakings has a turnover of 75 million Danish kroner worldwide. The Competition Authority does not have the power to investigate transactions falling below the thresholds.

The Minister of Trade and Industry has issued Executive Order No. 9 of 11 March 2008 laying down detailed rules on the notion of a concentration and the calculation of turnover.

Official guidelines have been published in the Faroese language only.

The Competition Authority has not referred any cases below these thresholds to the European Commission.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing a merger notification is mandatory if the turnover thresholds are met. Clearly unproblematic mergers may be notified by short notice, the rules of which are laid down in accordance with EU competition law.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are caught, if at least one of the parties to the transaction is active in the Faroe Islands. Where no actual effects on the market can be shown, the merger can generally be notified – and approved – by short notice.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special merger control rules relating to foreign investment at present. However, in May 2021 the Danish parliament passed an Investment Screening Act enacting two different foreign investment screening mechanisms in Denmark. However, this Act does only apply to investment in undertakings established and incorporated in Denmark proper. However, the prime minister of Denmark has stated that the Danish government will discuss what foreign direct investment regimes to implement in Greenland and the Faroe Islands with their respective local governments, since business matters are devolved matters under the authority of the local governments of Greenland and the Faroe Islands, while the foreign policy of the Kingdom of Denmark is a reserved matter for the government of Denmark.

The fishing industry is subject to specific antitrust rules that are stricter than the merger control regime under the Faroese Competition Act. Mergers that are permissible under the specific fishing industry rules are therefore generally also permissible under the Faroese Competition Act. Such mergers may be notified by short notice.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations falling within the threshold must be notified to the Faroese Competition Authority no later than one week after:
- the conclusion of the merger agreement;
- the merger is publicly notified; or
- the acquisition of control over the target company.

Fines may be imposed for implementation before clearance.

The Faroese and Danish languages are of equal status in the Faroe Islands. Filing can therefore be made in either language. It may also be possible on a case-by-case basis to make arrangements with the Faroese Competition Authority to file in other languages (such as English).

10 Which parties are responsible for filing and are filing fees required?

In principle, all the parties involved in a concentration are responsible for filing. No filing fees apply.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The implementation of the transaction is suspended prior to clearance. The parties can ask for dispensation from this rule. The Competition Authority has the power to make dispensations conditional upon specific terms.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Fines may be imposed for implementation before clearance. Where the Competition Council finds that the merger will significantly impede effective competition, it has the power to annul the merger and issue an order demanding the undertakings already merged to separate their businesses. Furthermore, the Competition Council is entitled to make approval of the merger subject to conditions.

There are no recent cases that illustrate the sanctions.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

To date, no sanctions have been applied in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

So far, there has not been an opportunity to test under which circumstances a dispensation may be obtained.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Competition Act does not prevent the implementation of a public bid that has been notified to the Competition Authority.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The level of detail depends on the filing form. For a merger that can be filed by short notice, the level of detail is less than when the merger must be filed by ordinary notice. The provisions on whether a merger can be filed by short or by ordinary notice are in Executive Order No. 2 of 17 May 2012, section 3.

With the permission of the Faroese Competition Authority, the participating undertakings can omit information from a notice. The competition authorities will then assess the short-form notification, and may require a full notification if the merger has an impact on the Faroese market.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Pre-notification consultations with the Competition Authority may and should take place. Very often these consultations can have a significant impact on the outcome and provide the undertakings concerned with the opportunity to address possible competition concerns in the notification - with the effect that the procedure is accelerated. To initiate this informal procedure, a briefing paper is often delivered to the Competition Authority.

18 What is the statutory timetable for clearance? Can it be speeded up?

Within 30 working days of the Faroese authorities' receipt of a complete filing submission, the Competition Council will notify the participating undertakings if further investigations are required, or alternatively whether the merger can be approved. If the authorities have not given this notification within the 30-day time limit, the authorities can no longer annul the merger. Merger notifications submitted by short notice are generally approved before the expiry of the 30-day period.

The Competition Council must make its final decision within 90 working days of the above-mentioned notification being sent to the participating undertakings. This deadline can be extended by up to 20 working days when commitments are proposed, and again by up to 20 working days with the parties' consent.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Section 15 of the Faroese Competition Act applies the substantial impediment of effective competition (SIEC) test.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for full-function joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

A concentration that will not significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, will be declared compatible with the Faroese Competition Act. The creation or strengthening of a dominant position alone is therefore not a sufficient reason to prohibit a concentration, nor is it a requirement to prohibit a concentration. In its substantive assessment, the Competition Authority also considers the likely impact of the concentration on third parties and the affected markets in general. In that respect, documented efficiency gains that will be passed on to the consumers can speak in favour of approving the concentration.

In connection with the Competition Authority's assessment of the market, it should be considered whether the market is open for potential international competition.

Due to the application of the SIEC test and the intention to ensure conformity with competition law in the European Union and European Economic Area (EEA), the Faroese Competition Council relies heavily on the case law of the European Courts and the administrative practice of the European Commission.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Competition Council is expected to apply the above substantive test without taking into account non-competition issues.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

There is no express efficiency defence. However, section 15 of the Competition Act provides that the SIEC test is applicable. Furthermore, the Faroese Competition Authority has stated that documented efficiency gains that are passed on to consumers can have an exempting effect on a concentration that otherwise would have been prohibited.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The transaction may be approved unconditionally, conditionally or prohibited.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the competition authorities assess that the concentration cannot be approved without conditions, the Faroese Competition Council may attach conditions to their approval of the concentration.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Competition Authority has stated that an approval of a concentration can be made subject to certain conditions, including:

- divestments of companies or parts of companies;
- dissolving of cooperation with other companies on the market; and
- admission of third-party access to, for example, distribution systems, production systems or other systems of strategic importance for the participating undertakings.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

No practice is available on this issue.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The merger control provisions in the Faroese Competition Act do not contain any regulation on ancillary restraints. However, the Faroese Competition Authority has confirmed that reasonable and necessary ancillary restraints that do not have a harmful effect on competition can be accepted. The Competition Authority uses the rules laid down in Council Regulation No. 139/2004 and the Commission Notice No. 2008/C 95/01 as guidelines.

The Competition Authority has considered several cases where competition clauses have been modified. In one particular case, the Competition Council has confirmed that competition clauses should be limited to no more than two years where goodwill is the subject of the transfer, and no more than three years if both know-how and goodwill are included.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Faroese authorities have not promulgated any procedures on this issue. However, it is likely that customers and competitors will be heard in connection with the Faroese Competition Authority's review.

So far, the Competition Authority has only involved customers in the review process.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Competition Authority and the Faroese Competition Council publish all decisions with the exception of sensitive information, business secrets and the like, which are redacted. The authorities can also allow the merging parties to exclude other information.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Authority maintains close cooperation with the competition authorities in the other Nordic countries, and according to the Faroese Competition Act, the Authority can also cooperate with other jurisdictions, such as in relation to the exchange of information. Knowledge-sharing is common practice.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Generally, the Faroese Competition Council's decisions may be appealed to the Competition Appeals Council and its decisions may in turn be appealed to the ordinary courts.

There are currently no cases where this has occurred.

Time frame

33 | What is the usual time frame for appeal or judicial review?

To date, no merger decisions have been subject to judicial review.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2019, one merger was cleared. Four mergers were cleared in 2018. At this point in time, there does not seem to be a special focus on particular industries or sectors.

Reform proposals

35 | Are there current proposals to change the legislation?

The Faroese Competition Act was amended as of 27 April 2012. There are no current proposals for any further changes.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No updates at this time.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Act (No. 948/2011) (the Competition Act), which entered into force on 1 November 2011, repealing the Act on Restrictions on Competition (No. 480/92). Provisions on merger control were first included in the now repealed Act on Restrictions on Competition on 1 October 1998. The Competition Act introduced a few substantive amendments to the merger control provisions, which further harmonise the Competition Act with EU rules.

The Finnish Competition and Consumer Authority (FCCA) investigates a concentration in the first stage and either clears it, with or without conditions, or requests the Market Court to prohibit it. Only the Market Court is empowered to block concentrations.

Scope of legislation

2 | What kinds of mergers are caught?

The Competition Act applies to concentrations defined as:

- the acquisition of control of an undertaking;
- the acquisition of the whole or part of the business of an undertaking;
- a merger; and
- the creation of a joint venture performing all the functions of an autonomous economic entity on a lasting basis.

3 | What types of joint ventures are caught?

The establishment of a joint venture that performs all the functions of an autonomous economic entity on a lasting basis, that is, a full-function joint venture, will be caught by the Competition Act. A full-function joint venture must have sufficient resources, be independent of its parent companies, have its own staff, including operative management and operate on a permanent basis. The competition authorities interpret the concept of full-function joint venture in accordance with the guidelines set out by the European Commission.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

There is no definition of control in the Competition Act. In practice, the competition authorities interpret the concept of control in accordance with the European Commission's practice. Consequently, acquisitions of minority shareholdings and other interests less than majority control may establish joint or sole control, and therefore be caught by the merger control rules.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration must be notified to the FCCA if the combined aggregate worldwide turnover of the parties exceeds €350 million and the aggregate turnover in Finland (including, for example, imports into Finland) of each of at least two of the parties exceeds €20 million.

In the calculation of the relevant turnovers, the turnover of the whole buyer group will be taken into account, whereas of the seller's turnover only the amount relating to the target of the acquisition is relevant. The rules concerning the parties whose turnover will be taken into account as well as the manner of calculating the turnover correspond for the most part with the provisions of the EU Merger Regulation.

If the target company is acquired in stages, all the acquisitions from the same seller over a period of two years are taken into account in the turnover calculation.

In cases of uncertainty as to whether the turnover thresholds are exceeded or not, the matter can be discussed with the FCCA.

The FCCA cannot under any circumstances investigate transactions that fall below the turnover thresholds.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory if the turnover thresholds are met, with no exceptions. However, concentrations meeting the thresholds set down in the EU Merger Regulation fall under the exclusive jurisdiction of the European Commission.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions will be caught if the turnover thresholds are met. The Competition Act does not contain any provisions on a particular local effects test. In practice, the FCCA applies a similar substantive test to foreign-to-foreign transactions as it applies to other transactions.

Joint ventures may have to be notified in Finland even if the joint venture does not have any operations in or sales into Finland. It is sufficient that the turnovers of the parent companies of the joint venture (which are the undertakings concerned) exceed the turnover thresholds.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In certain insurance transactions, a notification to the FCCA is exempted if the Financial Supervisory Authority has requested a statement from the FCCA, and the FCCA has found no objections to the concentration. If such statement has not been requested, the concentration shall be notified to the FCCA after the parties have received an approval or a non-opposition decision from the Financial Supervisory Authority.

Acquisitions of defence industry companies, companies that produce or supply critical products or services related to the statutory duties of Finnish authorities essential to the security of society (security sector companies), and companies otherwise critical for securing the vital functions of society by a 'foreign owner' are subject to the Act on the Screening of Foreign Corporate Acquisitions in Finland (No. 172/2012). In the defence industry, monitoring covers acquisitions by all natural persons, organisations or foundations domiciled outside Finland and by Finnish organisations or foundations in which such a foreign owner holds at least 10 per cent of votes or has a corresponding de facto influence. In respect of security sector companies and companies otherwise critical for securing vital functions of society, monitoring covers only acquisitions by natural persons, organisations or foundations domiciled outside the EU/EFTA area and by organisations or foundations domiciled in the EU/EFTA area but in which either a natural person, organisation or foundation domiciled outside the EU/EFTA area has the shareholding or de facto influence referred to above.

The Act covers acquisitions in which a foreign owner as defined above acquires at least 10 per cent, at least 33 per cent or at least 50 per cent of votes in a limited liability company or a corresponding de facto influence in a monitored entity. The filings have to be renewed when passing a threshold and thus increasing control. For a specific reason, a filing may be required even if a threshold is not passed. Acquisitions of defence industry companies and security sector companies are subject to mandatory prior approval by the Finnish Ministry of Economic Affairs and Employment, whereas acquisitions of companies considered critical for securing the vital functions of society are only subject to a voluntary notification. However, the Ministry may also separately require a notification to be made for acquisitions of companies considered critical for securing vital functions of society. The Act on the Monitoring of Foreign Corporate Acquisitions in Finland was amended on 11 October 2020 to meet the requirements of the EU Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for filing a notification. Notification must be submitted to the Finnish Competition and Consumer Authority (FCCA) following the conclusion of the acquisition agreement, the acquisition of control, or the announcement of the public bid but prior to the implementation of the concentration. A concentration may also be notified to the FCCA as soon as the parties demonstrate with sufficient certainty their intention to conclude a concentration, for example, by a letter of intent or a memorandum of understanding signed by all parties to the concentration or by a public announcement of the intention to make a public bid. As there is no specific deadline for filing, sanctions are only relevant when the concentration is implemented before the FCCA has cleared it.

10 Which parties are responsible for filing and are filing fees required?

The acquirer of control, or those acquiring joint control, the acquirer of business, the parties to the merger or the founders of a full-function joint venture are responsible for filing. There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Under the main rule, no steps may be taken to implement the transaction prior to its clearance. However, when the Market Court is investigating a transaction on the basis of the FCCA's request to block it, the prohibition on the implementation ceases in one month from such request, unless the Market Court orders the suspension to continue. There is a pending proposal to amend this deadline from one calendar month to 23 working days. The amendment is expected to enter into force in 2021.

The FCCA and the Market Court may, upon request, permit certain implementing measures to be taken during the investigation period. Further, a party that has launched a public bid can purchase the shares offered prior to clearance, even though it may not use its voting rights to determine the competitive behaviour of the target company. The same rule applies in certain cases where shares are redeemed.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the transaction is closed before clearance, a fine of up to 10 per cent of the total turnover of the relevant undertakings may be imposed. The fine is imposed by the Market Court on the basis of the FCCA's request. When the amount of the fine is set, attention is paid to the nature, extent, degree of gravity and duration of the infringement. The fine will be imposed, unless the infringement is considered minor or the imposition of the fine is otherwise unnecessary in view of safeguarding competition.

Further, the Market Court may – at the request of the FCCA – prohibit the concentration or order the concentration to be dissolved or annulled, for example, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of the joint control to restore the conditions of effective competition. The Market Court may, instead of prohibiting the concentration, attach conditions on its clearance. The request of the FCCA must be notified to the parties within one year from the closing of the transaction.

There are no decisions to date where sanctions would have been imposed for closing before clearance.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same rules apply to foreign-to-foreign mergers. However, there are no decisions to date where sanctions have been imposed for closing before clearance in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Implementation of a merger before clearance is, under the main rule, prohibited also in foreign-to-foreign mergers. However, under the Competition Act, the FCCA has the possibility to decide to grant permission to implement a merger before clearance.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No. However, a party that has launched a public bid can purchase the shares offered prior to clearance, even though it may not use its voting rights to determine the competitive behaviour of the target company.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification form is broadly similar to Form CO of the EU Merger Regulation. Various types of information must be given – depending on the details of each case – inter alia, on the parties, the transaction structure, relevant markets, competitors, customers, suppliers, market conditions, entry barriers, trade associations and ancillary restraints. The notification form must be completed in Finnish or Swedish; appendices to the notification are generally also accepted in English. Standard appendices include corporate documents of the parties, the agreements bringing about the transaction being notified, certain internal analysis of the transaction itself, as well as the markets relevant to the assessment of the transaction. Generally, the FCCA has been less stringent on requiring internal documents to be produced (in comparison, for example, to the European Commission).

In certain circumstances, the notification may be filed with the FCCA using the 'short-form' notification. The short-form notification is mainly used in notifying joint ventures that do not have connections to the Finnish markets. Such a situation may be deemed to exist where the joint venture – or the jointly controlled undertaking, as the case may be – has no business activities in Finland and generates no turnover from Finland.

The FCCA may, in individual cases, grant waivers in respect of the information to be given if certain information is deemed unnecessary for the investigation or if the transaction affects competition only to an insignificant extent.

The provision of wrong or misleading information to the FCCA is sanctioned by a fine or even imprisonment of up to six months under the Criminal Code (39/1889).

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Under the main rule, the FCCA will, after it has received a notification, send a market inquiry to the competitors, customers and suppliers of the parties to the concentration. The aim of the procedure is to establish the structure of the market and the competition conditions therein, and to afford the relevant market players the possibility to be heard on the planned concentration.

Should the FCCA decide to initiate a second-phase investigation, more detailed questions may be sent to competitors, customers and suppliers. The statements, as well as other issues pertinent to the case, will be discussed with the parties.

Parties are generally advised to engage in pre-notification consultations with the FCCA in all cases and in cases where the horizontal overlap or vertical links between the parties' activities are considerable, it is recommended to approach the FCCA as early as possible, even prior to definitive signing of the transactional agreements, so as to ensure that the process starts as early as possible.

18 What is the statutory timetable for clearance? Can it be speeded up?

In the first phase, the concentration will be examined by the FCCA. In Phase I, the FCCA has a period of 23 working days during which it has to clear the concentration as such or with conditions, conclude that the transaction will not be caught by the Competition Act or decide to initiate a Phase II investigation.

If the FCCA decides to initiate a Phase II investigation it must, within 69 working days of such decision, either clear the concentration as such or with conditions, or request the Market Court to block it. The Market Court can extend the deadline by 46 working days, giving the FCCA a maximum of 115 working days for a Phase II investigation. Having received the FCCA's request to block a concentration, the Market Court has three months to clear the concentration as is, clear it with conditions or prohibit it. There is a pending proposal to amend the Market Court's investigation period from calendar months to working days to bring it in line with the FCCA's investigation periods. According to the proposal, the Market Court's investigation period would be amended from three calendar months to 69 working days. The amendment is expected to enter into force in 2021.

With the Market Court procedure included, the maximum aggregate investigation period of a concentration may amount to over nine months (which includes the possible 46-working-day extension of the FCCA's second-phase investigation period). However, this is expected only in cases where there is significant overlap between the parties' activities and the resulting market shares are high; under the main rule, most concentrations are cleared in the first phase. Depending on the complexity of the case, the FCCA's first phase investigations typically take approximately two to four weeks.

The time limits set for the FCCA's decision-making will not start running until a complete notification has been filed. In addition, the FCCA has the power to 'stop the clock' if the parties fail to respond to the FCCA's request for additional information within the set time limit or provide essentially insufficient or incorrect information. In such cases, the FCCA may extend the time limits for decision-making by the corresponding number of days during which the requested information was outstanding.

The merger review procedure in the FCCA may be speeded up by pre-notification discussions, to which the parties are generally encouraged by the FCCA. Pre-notification discussions will in most cases de facto speed up the merger review, but they do not affect or change the time limits prescribed for the review.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

A concentration may be prohibited if it significantly impedes effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position (SIEC test). The SIEC test, also applied by the European Commission, was introduced in the 2011 reform of the Competition Act and replaced the dominance test applied previously. However, finding of a dominant position remains as a typical example of a situation amounting to a significant impediment of effective competition. Under the Competition Act, an undertaking is considered dominant if it can significantly influence the price level, terms of delivery or other conditions of competition at a given level of production or distribution. In addition to dominance cases, the SIEC test is primarily intended to enable intervention in certain arrangements between competitors on markets that can be considered as oligopolistic, where, however, the market leader is not involved and no dominant position is created.

The substantive test may be countered with the failing, or 'flailing', firm defence. In the recent *Kesko/Lähikauppa* case, the Finnish Competition and Consumer Authority (FCCA) allowed the acquisition of Lähikauppa by one of the major retail grocery chains Kesko even though the market shares of the combined entity in some of the relevant regional markets was nearly 100 per cent.

20 | Is there a special substantive test for joint ventures?

No. The competition authorities will apply the SIEC test as with respect to other concentrations.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The 'theories of harm' based on which the FCCA assesses the notified transactions and the increase in market power include the horizontal effects as well as the vertical and conglomerate effects of the transaction. When assessing whether the concentration may significantly impede effective competition based on these effects, the FCCA takes into account, for example, the market shares of the parties, the economic and financial strength of the concentration, the amount and nature of residual competition, the bargaining power of customers and suppliers, potential competition, barriers to entry and saturation of the markets.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the FCCA's review process.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

In the review process, the authorities will take into consideration the increase in production efficiency and dynamic efficiency resulting from the concentration that appear in the Finnish market, provided that the efficiency gains are passed on to customers and may only be achieved through the concentration. The weight given to economic efficiency considerations depends, inter alia, on the significance of the efficiencies and the likelihood of their achievement. In general, the principles established in the European Commission's Horizontal Merger Guidelines are also applicable in Finland.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Finnish Competition and Consumer Authority (FCCA) investigates a concentration and either clears it, with or without conditions, or requests the Market Court to prohibit it. If the impediment to competition may be avoided by attaching conditions to the implementation of the concentration, the FCCA shall primarily order such conditions to be followed. However, the FCCA can only impose conditions that the parties have approved. Thus, if the FCCA and the parties cannot agree on suitable conditions, the FCCA has to make a proposal to the Market Court to prohibit the concentration.

If the Market Court finds that the concentration would significantly impede effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, the Market Court may prohibit the concentration. If the transaction has already been implemented, the Market Court may order it to be dissolved, for example, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of joint control, to restore the conditions of effective competition. Further, the Market Court may, instead of prohibiting or ordering the dissolution of the concentration, attach conditions for its clearance.

If the parties implement a transaction before clearance or without regard to a prohibition of the concentration or conditions imposed by the competition authorities, an administrative fine of up to 10 per cent of the total turnover of the relevant undertakings may be imposed.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Both the FCCA and the Market Court may clear a concentration on the condition that certain undertakings are given by the parties to the concentration. In fact, under the Competition Act, the FCCA should always endeavour to impose conditions rather than request that the Market Court prohibits a concentration. Typically, competition concerns identified by the FCCA may be resolved by imposing conditions on the clearance. Thus far, the FCCA has proposed that a concentration be prohibited only five times, although several cases have entered the second-phase investigation and have been resolved by commitments given by the parties. The Market Court has prohibited only one of these five concentrations. One of the remaining four concentrations was abandoned during the Market Court process and the remaining three were approved subject to conditions by the Market Court. However, one of these concentrations was abandoned owing to the strict conditions imposed and one restructured and re-notified to the FCCA. Where conditions are imposed, the authorities usually prefer structural remedies, such as divestments, but behavioural undertakings have also been accepted.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The FCCA may impose conditions on the implementation of a concentration if the harmful effects on competition (the significant impediment of effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position) can thus be avoided. The FCCA may not require a remedy that does not strictly address and have an effect on the harmful effects that the Competition Act aims to avoid. The remedies may be structural or behavioural. The possibility of imposing conditions should be explored prior to prohibiting the concentration. The conditions imposed should not be more severe than necessary for the removal of the anticompetitive effects of the concentration. The FCCA can only impose conditions that the parties have approved.

Until recently, the FCCA accepted post-closing implementation of remedies within a certain time period, for example, six months for a divestment. However, in a recent merger between Altia Plc and Arcus ASA, the FCCA used, for the first time, a fix-it first obligation, where the transaction cannot be implemented before the parties have entered into a binding agreement to sell the divested business to a buyer approved by the FCCA. It has become clear that the FCCA's merger control unit has in several previous cases seen that finding a suitable buyer in the Finnish market has proved to be challenging. It remains to be seen whether this marks a shift in the FCCA's attitude towards post-closing implementation of remedies. The FCCA supervises the implementation of the conditions in accordance with its decision. The appointment of a trustee to monitor the implementation of the conditions and to report to the FCCA has become common practice.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Up to this point, there have been no foreign-to-foreign merger cases in which the FCCA would have required remedies.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is possible to request in the notification form that the FCCA also clears any restrictions ancillary to the notified concentration. Typically, accepted ancillary restrictions are limited to non-compete obligations on the seller, supply or purchase agreements and licence agreements.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Under the main rule, competitors, customers and suppliers of the parties to the concentration will be heard in the investigation. However, the Supreme Administrative Court has held that competitors are normally not allowed to appeal against a decision to clear a concentration, as the right to appeal requires that the decision may have had a direct effect on the complainant's rights, obligations or interests.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Finnish Competition and Consumer Authority (FCCA) lists the received notifications on its website (the names of the parties and the notification date). Otherwise, the FCCA is reluctant to comment publicly on pending merger control procedures. Third parties may request access to public versions of documents provided to the FCCA during or after the FCCA's investigation period. Confidential information is protected by clearly indicating the business secrets in all documents submitted to the FCCA.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Yes, the FCCA cooperates on a regular basis with other antitrust authorities in other jurisdictions. The FCCA is part of the European Competition Network (ECN), which is a cooperation forum of the European Commission and the national competition authorities of the member states. The operation of the ECN is based on Council Regulation No. 1/2003 and facilitates the exchange of information and case allocation between the participating authorities. While the work of the ECN does not directly relate to merger control, the members of the ECN engage in cooperation and exchange of best practices in the area of merger control in the context of the EU Merger Working Group. The FCCA is also a member of the European Competition Authorities (ECA). One of the main focuses of the ECA is the cooperation of national authorities in relation to multinational merger control processes. As regards the allocation of and information exchange between the national authorities and the European Commission in merger cases, please refer to the EU Merger Regulation. In addition to the European cooperation networks, the FCCA cooperates closely with competition authorities in other Nordic countries and, in 2017, joined the Cooperation in Competition Cases Agreement between Denmark, Iceland, Norway and Sweden. The Nordic competition authorities meet annually and form special working groups to facilitate the cooperation. All in all, the FCCA participates in approximately 30 different international working groups relating to competition policy. In recent cases, it has been clear that in transactions notified in various Nordic countries the competition authorities of the Nordic countries cooperate very actively.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The Finnish Competition and Consumer Authority (FCCA)'s decision on whether it will initiate a second-phase investigation may not be appealed. Further, in the 2011 reform of the Competition Act, the right of the notifying party to appeal a decision whereby the FCCA has conditionally approved a transaction was removed.

As a general rule, other decisions of the FCCA made under the merger control rules may be appealed to the Market Court by such parties whose rights, obligations or interests the FCCA's decision has directly affected. Decisions of the Market Court may be further appealed to the Supreme Administrative Court.

Both the Market Court and the Supreme Administrative Court have confirmed that the FCCA's clearance decision does not normally have a direct effect on the rights, obligations or interests of the competitors of the undertakings concerned, and thereby the competitors do not generally have the right to appeal such decisions to the Market Court.

Time frame

33 | What is the usual time frame for appeal or judicial review?

When decisions of the FCCA are appealed to the Market Court, the Market Court does not have a time limit on its decision-making. However, when the FCCA proposes to the Market Court that a concentration be prohibited, the Competition Act sets a three-month time limit on the Market Court to rule on the case. There is a pending proposal to amend the Market Court's investigation period from three calendar months to 69 working days. The amendment is expected to enter into force in 2021.

In 2020, the Market Court handed down six decisions in merger control cases. One of these was the first prohibition decision in Finland (*Kesko Oyj/Heinon Tukku Oy*, MAO:50/20). Another proposal by the FCCA to prohibit a concentration was deemed dismissed after the parties abandoned the transaction (*Mehiläinen yhtiöt Oy/Pihlajalinna Oyj*, MAO:581/20). Both of the aforementioned decisions were delivered in three months owing to the time limit set in the Competition Act for such decisions. The remaining four decisions concerned extension of the FCCA's Phase II investigation period, which were delivered in a few days owing to their urgent nature.

In other types of cases, the handling times in the Market Court vary greatly depending on the nature of the case. To give some examples, in 2009, the Market Court delivered a decision concerning an appeal against the conditions imposed by the FCCA on the clearance of an acquisition (acquisition of *C More Group AB by TV4 AB*, MAO:525/09), which was delivered in approximately 10 months. A similar decision on appeal against conditions imposed on the clearance of an acquisition delivered in 2008 (acquisition of *E.ON Finland Oyj by Fortum Power and Heat Oy*, MAO:123/08) took approximately 20 months. Interim decisions, such as interim injunctions concerning remedies, are typically made within one to three months. For example, in 2009, a decision concerning an application for an interim injunction to avoid implementing conditions imposed on the clearance of an acquisition while the appeal against the conditions was pending (acquisition of *C More Group AB by TV4 AB*, MAO:580/08/KR) was delivered in approximately two months.

The Market Court's decisions (eg, decisions to prohibit a transaction) can be appealed to the Supreme Administrative Court. The handling times of the Supreme Administrative Court vary significantly depending on the nature of the case. The Supreme Administrative Court did not rule on any merger control cases between 2011 and the first half of 2021. In 2010, the Supreme Administrative Court ruled on only one merger control case, where it dismissed the FCCA's appeal against the Market Court's decision that removed the conditions imposed on the acquisition of E.ON Finland Oyj by Fortum Power and Heat Oy. The decision was issued by the Supreme Administrative Court in approximately 28 months. In 2009, the Supreme Administrative Court delivered one merger control decision concerning an interim injunction, where the decision was issued in approximately three months owing to its urgent nature. In all competition law cases decided by the Supreme Administrative Court in 2019, the average decision-making time was 25.7 months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

At the time of writing, the Finnish Competition and Consumer Authority (FCCA) has issued six unconditional clearance decisions in Phase I and opened a Phase II investigation in two cases during 2021. One of the Phase II investigations is still pending and the other one (merger between *Altia Plc and Arcus ASA*) has been cleared subject to conditions.

In 2020, the FCCA issued a total of 24 decisions in merger cases, the vast majority of which were unconditional Phase I clearance decisions. Four cases required a Phase II investigation. Two of these cases were cleared subject to conditions after a Phase II investigation (*Donges Teräs Oy/Ruukki Building Systems Oy* and *Loomis AB/Automatia Pankkiautomaatit Oy*) and one resulted in a prohibition proposal to the Market Court (*Mehiläinen Yhtiöt Oy/Pihlajalinna Oyj*). In addition, one notification was withdrawn by the notifying party during the Phase II investigation.

The FCCA has not officially identified any particular sectors or issues as its current enforcement concerns. However, on the basis of recent decisions by the FCCA and the statements given by officials of the authority in the national media, it appears that the FCCA has a particular interest in the social and health services, grocery and other consumer goods markets, transportation, telecommunications, intellectual property rights, digital goods and services, energy, construction, primary production and competition neutrality of public sector services.

Reform proposals

35 Are there current proposals to change the legislation?

The reform of the Competition Act, which was initiated in 2015, reached an important juncture on 14 March 2017 when a working group appointed by the Finnish Ministry of Economic Affairs and Employment (MEE) published its final report (the Final Report). In the Final Report, the working group proposed a full spectrum of changes to the Competition Act concerning inspections, sanctions and information exchange between competition authorities, among others. The reform of the Competition Act takes place in two phases.

The first phase was initiated in December 2017 when the MEE submitted a draft government bill based on the Final Report for public consultation. The government bill was presented on 24 May 2018 and passed by the Finnish parliament on 7 March 2019 (HE 68/2018 vp). The legislative package passed by the parliament also includes amendments to the merger control investigation deadlines. The amendments entered into force on 17 June 2019.

The second phase concerns the implementation of the Directive to empower the competition authorities of member states to be more effective enforcers and to ensure the proper functioning of the internal market (2019/1) (the ECN+ Directive). In June 2019, the MEE appointed a working group to prepare the national implementation of the ECN+ Directive. The working group submitted a draft government bill for public consultation on 14 May 2020 and the final government bill was presented to the Finnish parliament on 5 November 2020 (HE 210/2020 vp). In addition to amendments implementing the ECN+ Directive, the government bill proposes amendments to increase predictability of fine levels. Further, the government bill also includes a technical amendment to the Market Court's investigation deadline of the FCCA's proposal to prohibit a transaction. The proposed amendments are expected to enter into force in 2021.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The year 2020 will remain in the history books as the year when the Market Court delivered its first-ever decision to prohibit a concentration. In February 2020, the Market Court handed down a decision prohibiting the proposed acquisition of Heinon Tukku Oy by Kesko Oyj (MAO:50/20), both active in wholesale of groceries. The Finnish Competition and Consumer Authority (FCCA) requested the Market Court to prohibit the acquisition, as it would have significantly impeded effective competition in the market for broadline distribution of groceries to Finnish food service customers, such as hotels and restaurants. According to the FCCA, the parties' combined market share in this market ranged between 60 and 70 per cent and a substantial number of customers considered the parties as their first or second choice in the supply of groceries. Therefore, the FCCA considered that, without the competitive constraint from Heinon Tukku, one of the few other full-range distributors, Kesko would have been able to increase its prices to the detriment of food service customers, and in the end raise the average bill paid by consumers. The parties argued, inter alia, that the acquisition does not raise competition concerns, as they face competition also from specialist distributors and food manufacturers offering a more limited range of products. However, the Market Court agreed with the FCCA's market definition and found that the proposed acquisition would have created or strengthened Kesko's dominant position in the market and, thus, would have led to significant impediment of competition. The Market Court found that the prohibition of the acquisition was the only way to safeguard effective competition in that case, as the behavioural remedies offered by Kesko did not adequately address the identified harm to competition. Kesko did not appeal the Market Court's decision, which became final.

The FCCA also submitted another prohibition proposal to the Market Court in September 2020, this time to prohibit the acquisition of Pihlajalinna Oyj by Mehiläinen Yhtiöt Oy. Both companies operate in the health and social services market, competing in almost every sector of private healthcare services. Following a long and eventful investigation, during which the time limit for processing the merger was extended twice by the Market Court, the FCCA found that the merger would have strengthened the already concentrated structure of the healthcare markets in Finland, leading to a distortion of competition in several market segments. As the merger would likely have led to a significant increase in prices, the FCCA concluded that the competition problems could not be solved with the proposed remedies. In the course of the final weeks of the Market Court procedure, Mehiläinen announced that it was not going to carry out its original tender offer. Accordingly, in December 2020, the Market Court deemed the case dismissed as the notifying party no longer had an interest in obtaining approval for its proposed acquisition.

One of the FCCA's conditional clearance decisions in 2020 – the acquisition of Automatia Pankkiautomaatit Oy by Loomis AB – concerns a vertically affected market. Loomis AB is a Swedish company providing cash management and transportation services for valuable goods whereas Automatia is responsible for the maintenance of cash services in Finland. Due to the vertical link between the parties' activities, the merger would have caused competition concerns in the already concentrated markets for cash in transit and cash handling services. Further, according to the FCCA, without sufficient remedies, Loomis' main competitor, Avarn, would have been foreclosed from the market. As a solution, the parties agreed to provide both existing and new cash management and transportation service providers with access to Automatia's cash register and Ottonet interface for the next five years. In addition, the parties agreed to continue buying cash management and transportation services from Avarn for the next two years with the current terms and conditions, and for the following three years with a modified minimum purchase obligation. As the proposed remedies were considered sufficient to remove the identified competition concerns, the FCCA conditionally cleared the merger.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

French merger control rules are set out in the French Commercial Code (the Code).

An independent administrative authority, the Competition Authority (the Authority), has jurisdiction over merger control cases in France. However, the Minister for the Economy holds residual powers in two circumstances: even if the concentration is cleared by the Authority at the end of the first phase, the Minister can ask that the Authority open a second phase in-depth review of the concentration (although the Authority has discretion to act upon this request or not) and, in addition, whatever the final decision of the Authority at the end of the second phase, the Minister can substitute his or her own decision based on public interest grounds.

In 2020, the Authority published updated merger control guidelines (the Guidelines), replacing the 2013 guidelines. Although non-binding, these should generally be followed by the Authority.

Scope of legislation

2 What kinds of mergers are caught?

The French definition of 'mergers' is aligned with the definition set out in the EU Merger Regulation (EUMR). The French legislation thus applies to 'concentrations', which may occur when:

- two or more formerly independent undertakings merge; or
- one or several persons who already control at least one undertaking, acquire, directly or indirectly, control of all or part of one or several other undertakings.

3 What types of joint ventures are caught?

Joint ventures are treated under French law as under the EUMR. It follows that the creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity, constitutes a concentration. A concentration also occurs when a joint venture that was not initially full-function becomes fully fledged (*DCNS/Priou* case, 2016).

The French *Adrexo* case (2008) involved an interesting scenario. There, it was considered that a shift from joint control to sole control over a joint venture could, even in the absence of any change in its shareholding, result solely from the change of control over another joint venture, independent from the first one, but owned by the same parent companies.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The notion of 'control' under French law is similar to that of the EUMR – control arises from rights, contracts or any other means that enable the party to exercise a decisive influence on the activity of an undertaking, be it on an individual or joint basis, and having regard to the factual and legal circumstances, in particular:

- ownership rights and possession of all or part of the assets of an undertaking; and
- rights or contracts that confer a decisive influence on the composition or the resolutions of the decision-making bodies of an undertaking.

De jure or de facto control is relevant to qualify a concentration (see, for instance, the 2018 *AG2R La Mondiale/Matmut* case concerning a de facto merger). As under the EUMR, joint control based on strategic veto rights is also caught by the French merger control regime.

Minority and other interests that do not reach the standard of negative sole control or joint control are not subject to merger control.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Three alternative sets of turnover-based thresholds currently exist in France.

Turnover calculations under French law are very similar to those set out in the EUMR and the French Commercial Code expressly refers to article 5 of the EUMR on this subject. The turnover of an undertaking is thus calculated by taking into account the whole group to which the undertaking belongs, and the seller is not taken into account.

First, French merger control applies where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €150 million;
- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in France exceeding €50 million; and
- the transaction is not caught by the EUMR.

Second, lower thresholds apply to concentrations involving undertakings in the retail trade (ie, where two or more parties to a concentration operate retail premises). French merger control is thus applicable where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €75 million;

- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in the retail trade sector in France exceeding €15 million; and
- the transaction is not caught by the EUMR.

Third, lower thresholds apply to concentrations involving undertakings operating in French overseas departments and French overseas communities (ie, where at least one party to a concentration is active in one or more French overseas departments, in the Mayotte department, in the Wallis-et-Futuna islands or in the French overseas communities of Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy). French merger control is thus applicable where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €75 million;
- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover exceeding €15 million (this threshold is reduced to €5 million in the retail trade sector) in at least one French overseas department or French overseas community concerned. These €15 million or €5 million thresholds do not have to be achieved by all the undertakings concerned within the same overseas department or community; and
- the transaction is not caught by the EUMR.

The scope and interpretation of these tests are clarified by the Guidelines, which contain very specific additional rules and illustrations of how the thresholds should be applied and interpreted.

Retail trade is primarily defined in the Guidelines as the sale of goods to consumers for domestic use, including a number of non-exhaustively listed activities such as the sale of second-hand goods and a number of handicraft activities, but excluding, inter alia, banking, insurance or travel agency services and restaurants, as well as undertakings achieving all their turnover through online sales. Premises qualify as retail premises where more than half of the turnover achieved in these premises (of which at least one must be located in France) is generated through such activities (note that the Guidelines take the view that if this 50 per cent threshold is met, 100 per cent of the turnover achieved in the premises, retail and non-retail alike, must be taken into account for checking whether the €15 million threshold is achieved – presumably, the same approach should prevail with respect to the €5 million threshold).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory, and no exceptions are provided for by the law.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Where the relevant turnover thresholds are met, mergers, including foreign-to-foreign mergers, fall under French merger control rules, and must be notified and obtain clearance prior to completion. There is thus no need to conduct a 'local effects test' as such. It is not relevant whether the parties are incorporated under French law or have subsidiaries in France.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Under French Treasury rules, foreign investments in France are unrestricted. However, certain foreign investments must be declared, for administrative and statistical purposes, to the Minister for the Economy and the Banque de France.

Where the foreign investment concerns a 'strategic' French sector (such as a sector that might affect public policy), prior authorisation may be necessary. In a number of 'strategic' sectors (eg, defence, security, weapons and ammunition, cryptology, security of information systems, gambling, private security, research against bioterrorism, materials used for intercepting correspondences and conversations, dual-use technologies) prior authorisation is required. This list was extended in 2014 to include procurement of energy (including gas, electricity, hydrocarbons), procurement of water, transport, electronic communications, vital construction works and protection of public health, where the concerned activity is crucial for the integrity, security and continuity of one of these sectors. The scope of the 'strategic' French sectors was further extended in 2018 to include the following sectors: technical devices for the interception of communications, remote sensing or capture of computer database, security of information systems, research and development for activities relating to weapons, ammunition, powder and explosive substances intended for military purposes or for war materials and related materials, spatial operations, specific electronic and computer systems necessary for the exercise of public security missions, activities of data hosting and research and development activities in the areas of cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, dual-use goods and technologies. The Decree and Ministerial Order of 31 December 2019 again expanded the scope of the strategic sectors to activities related to the press, food security and research and development in the field of energy storage and quantum technologies. Biotechnology was added to the list in April 2020.

All foreign investments in these sectors must be formally approved by the Minister for the Economy prior to implementation. For this purpose, 'foreign investment' means the acquisition of control in a French entity pursuant to article L 233-3 of the Code or the acquisition of all or part of a branch of activity of a French entity. In addition, non-European investments fall under stricter requirements than European investments, since prior approval of the Minister is also required for them when 25 per cent (this threshold was lowered from 33.3 to 25 per cent in 2019) of the voting rights in a French entity is exceeded (directly or indirectly) or when 10 per cent of the voting rights in a French listed company is exceeded (this 10 per cent threshold was introduced in April 2019 and will be in force until at least 31 December 2021 as a consequence of the covid-19 pandemic). To identify the ultimate controlling entity of an investor, the Decree of 31 December 2019 provides that where no control can be established on the basis of French corporate law concepts, control will then be assessed under French merger control rules.

Following notification, the Minister of Economy has 30 business days to indicate whether the notified foreign investment falls outside the scope of control, is cleared unconditionally or requires further analysis. In that latter case, the Minister has an additional period of 45 business days to clear the foreign investment (with or without conditions) or to prohibit it. Such review entails a standstill obligation. Where an investment is deemed to threaten national interests, approval may be conditional upon the parties' implementation of specific remedies, including divestments, set in proportion to the importance of the national interest at stake.

Failure to comply with the notification requirement entails very significant risks (in particular, a significant fine, nullity of the relevant agreements and an injunction to restore the status quo ante). The law dated 22 May 2019 strengthened and expanded the powers of the Minister for the Economy. In particular, the law strengthens the power of injunction of the Minister and also empowers the Minister to impose interim measures if the protection of national interests is compromised or likely to be compromised (eg, suspension of the voting rights attached to the shares acquired by the investor without approval). This law also expands the Minister's powers to fine the investor in the events acquisition without prior approval, approval obtained by fraud, non-compliance with the remedies or breach of an injunction (the Minister may, in these circumstances, impose a fine capped at the highest of the following amounts: twice the amount of the investment, 10 per cent of the target's annual turnover, €1 million for natural persons and €5 million for legal persons).

In addition, there are a certain number of sectors in which specific merger rules apply, such as:

- the audiovisual sector, in which, unless otherwise agreed in international conventions to which France is a party, a foreign legal entity may not hold more than 20 per cent of the capital or voting rights of an audiovisual company that exploits an audiovisual communication system in French. There are also specific rules on cross-media ownership. If a concentration in the audiovisual sector is reportable to the Authority, the Authority must seek the opinion of the French Audiovisual Authority;
- the press sector, in which a single individual or legal entity may not control daily publications that represent more than 30 per cent of the total circulation on the national market of similar publications; for publications in French, the 20 per cent rule as described above applies;
- investment services and insurance (where specific authorisation from the relevant French authorities is required); and
- in the banking sector, a non-binding opinion would be requested from the Credit Institutions Committee during the Authority's second phase investigation.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The obligation to notify is not framed within any particular time limits. Filing may be made at any time once the project is sufficiently well advanced, and in particular is normally possible when the parties have entered into a gentlemen's agreement or signed a letter of intent, or after the publication of the purchase or exchange offer.

Sanctions for not filing fall on the notifying parties (acquirers) and are as follows:

- the parties may be directed, subject to a periodic penalty, either to file the concentration or to demerge;
- in addition, the Competition Authority (the Authority) may fine the concerned party as follows (maximum fines):
- corporate entities: 5 per cent of pre-tax turnover in France from the previous financial year (plus, where applicable, the turnover in France of the acquired party over the same period); and
- individuals: €1.5 million.

Failures to notify reportable mergers have been fined repeatedly (eg, a €392,000 fine imposed in 2012 on Colruyt France for failure to notify the acquisition of UGCA Unifrais, or a €400,000 fine imposed in 2013 on the Reunica group for failure to notify the merger with the Arpège group). A €4 million fine was imposed in 2013 on Groupe Castel for deliberate failure to notify the acquisition of six companies of the group Patriarche so as to accelerate completion of the operation. The highest administrative court ultimately reduced the fine to €3 million in 2016, considering that the Groupe Castel did not intentionally omit to notify and that it was cooperative with the Authority when notifying the relevant operations.

In the *Colruyt France* case, which was confirmed by the highest administrative court in 2013, the Authority clarified that such infringements are subject to a five-year limitation period from the date when the change of control materialises.

10 Which parties are responsible for filing and are filing fees required?

Those subject to an obligation to notify are entities that acquire control of all or part of an undertaking. In the case of the creation of a joint venture, the parent companies are under an obligation of joint notification.

There is no filing fee.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Filing has a suspensive effect: a concentration that requires notification must not be completed before approval has been obtained from the Authority. In addition, the powers of the Minister for the Economy to intervene within a certain period may extend the suspension period. If the Authority clears the transaction expressly in the first phase, it should *a priori* be possible to complete the transaction without waiting for the end of the five-day period granted to the Minister to request the opening of a second phase in-depth review. If the time period for the Authority to authorise the transaction in the first phase has expired (tacit authorisation), the transaction remains suspended until the end of the Minister's five-day period. Should the Authority authorise the transaction in the second phase, whether the Minister intervenes or not, the transaction should not be completed before the end of the Minister's 25-day period. Should the Minister for the Economy ultimately intervene, transactions must not be completed before the Minister has issued its decision.

Derogations may be granted to make it possible to proceed with the completion of all or part of the concentration without awaiting the decision of the Authority, or of the Minister as the case may be, provided that these derogations are necessary and duly justified. Derogations, which remain exceptional, are generally granted in cases where the target is subject to insolvency proceedings. The law dated 6 August 2015 provides that exemption from the standstill obligation may be granted subject to conditions and that the exemption will cease to be valid if the Authority does not receive complete notification of the transaction within three months of its implementation. In 2020, the Authority granted 27 derogations to the suspensive effect, seven of which concerned the clothing and footwear sector. In 2018, in the *GPG/Tati Group* case, the Authority granted the derogation and subsequently required structural and behavioural remedies to approve the concentration and that, in the *FinancièreCofigeo/groupe Agripole* case, the Authority granted the derogation and then imposed divestment injunctions after a Phase II investigation.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing before clearance (gun jumping) is considered as equivalent to an absence of filing and triggers the same sanctions.

On 8 November 2016, the Authority jointly fined Altice Luxembourg and SFR Group €80 million for having prematurely implemented two mergers that had each been notified and cleared in 2014 (ie, the acquisition of SFR by Numericable (an Altice subsidiary) and that of OTL Group by Numericable).

This decision, which followed complaints from competitors and dawn raids, is the first decision of the Authority dealing with gun-jumping practices (ie, completion of merger before clearance) and was then unprecedented internationally in terms of the scale of the practices concerned and of the amount of the fine imposed (which is, however, the result of a settlement).

This heavy fine in particular reflected: the accumulation of various gun-jumping practices, the fact that the practices involved all the targets' activities and that they started before the notification and occurred throughout the merger control proceedings, the fact that certain practices related to competition law risks identified by the Authority in one clearance decision, the scale of the transactions concerned by the infringements (two large mergers were affected), and the fact the Authority found that the behaviour was deliberate.

The gun-jumping practices sanctioned by the Authority in the *Altice* case notably consisted of:

- the intervention by Altice in SFR and OTL's operational management before clearance:
  - in the SFR transaction, the contract provided for an 'ordinary course of business' limitation, but the latter was applied in the sense that 'over the threshold' decisions were nevertheless permitted with the acquirer's prior authorisation; therefore, the actual implementation of the contract amounted to gun jumping; and
  - in the OTL transaction, the 'ordinary course of business' limitation had very low financial thresholds and the contracts provided that 'over the threshold' decisions were only possible with the acquirer's prior authorisation;
- exchange of confidential information: Altice and SFR exchanged large quantities of strategic information in readiness for their integration. Such information was confidential and concerned individualised data, SFR's recent commercial performance and forecasts for the coming months. In the OTL merger, Altice set up an economic performance reporting mechanism allowing it to access weekly OTL's commercially sensitive information (monitoring comparable to that exercised by a controlling shareholder);
- far-reaching closing preparation and premature anticipation of commercial opportunities: Altice asked and SFR agreed to suspend a promotion during the standstill period and also replaced Vivendi (SFR's owner before the transaction) in the acquisition of a third-party operator (OTL). The Authority accordingly held that SFR ceased to behave as an economic entity independent from Altice. Moreover, the two undertakings have jointly and systematically studied new commercial opportunities or the extension of existing contracts. The decision reports examples of two new projects that started with the announcement of the transaction (eg, Altice and SFR took advantage of the suspensive period to negotiate and operationally prepare the launch of new offers under the SFR brand and using Numericable's network); and
- anticipated assignment of managers: OTL's managing director began to carry out his duties within the SFR-Numericable group before clearance and was involved in SFR's new commercial projects and also received commercially sensitive information.

The Authority, however, indicated after the decision was released that each of the above practices would not necessarily constitute a stand-alone gun-jumping infringement and that there had been an accumulation effect. In particular, pre-closing covenants should not be regarded as automatic gun jumping, and an assessment of the threshold is always necessary.

In that respect, the new Guidelines introduce some clarifications as to which actions the parties to a concentration are allowed – or not allowed – to implement prior to the Authority's clearance. In particular, the Guidelines stress that the prohibition of gun jumping prevents the parties to the transaction from ceasing, prior to the clearance, to behave like competitors and prevents the acquirer from prematurely exercising control over the target (in law or in fact). The Authority will assess whether the parties to the transaction behaved prematurely as a single entity already sharing a single objective, focusing in particular on the information exchange between them, the acquirer's interference in the internal management of the target, the reduction in the target's autonomy or the adoption by the parties of any commercial behaviour that they would not have adopted before the transaction. It is also highlighted that the agreements that may be adopted between the acquirer and the target to protect the value of the acquirer's investment must not go beyond the protection of the interests of the acquirer (ie, the acquirer must not exercise a decisive influence on the target as a result of such agreements).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The fact that the transaction is foreign-to-foreign is irrelevant and sanctions would apply in cases of closing before clearance.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No specific solutions permitting closing before clearance are provided for under French law in foreign-to-foreign transactions, other than the general possibility available in any transaction to seek from the Authority a derogation from the suspension requirement.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Public bids may fall within the scope of French merger control if they involve stocks or shares that confer sole or joint control over an undertaking listed on the French Stock Exchange and otherwise meet the applicable jurisdictional thresholds. As a derogation to the suspensive effect of the merger control process, the stocks or shares in question may be purchased and transferred, so long as the acquirer does not exercise the voting rights attached to them before the Authority clears the transaction. Where a transaction is realised in stages, namely, an acquisition of a first block of shares triggers an obligation to launch a public bid to purchase the rest of the share capital, the derogation applies to both stages; therefore, both the shares acquired privately and those acquired through the public bid can be transferred but are subject to the obligation not to exercise the voting rights.

Therefore, under merger control rules, a public bid may be approved by the French Stock Exchange regulatory authority and the stocks or shares transferred before the Authority's authorisation is granted. Theoretically, therefore, a public bid could be cancelled, or substantially modified, on competition law grounds after having been implemented, possibly obliging the acquirer to divest the stocks or shares purchased.

However, a provision making the offer conditional upon clearance of the transaction by the competition authorities (the European Commission, the competition authorities of EEA member states, US competition authorities and any other foreign competition authority provided that its merger control procedure is compatible with a maximum time frame of 10 weeks) at the end of the first phase of the review process can be inserted into the offer documents. In such case, the offer lapses and becomes void if any of the relevant competition authorities opens a second phase review. For these purposes, the offer period is extended until the end of the first phase.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filings have notably to include:
- a copy of the merger agreement or draft agreement and a memorandum giving details of the legal and financial aspects of the transaction and its likely impact, in particular on competition;
- the identity of the parties concerned (including the entities economically linked to them);
- a definition of the relevant product and geographic markets, as well as the criteria used to identify any substitutable products or services; and
- a description of the position in the relevant market of the parties involved in the transaction.

Filing most often involves the provision of detailed information about the parties and their business. The time necessary to prepare a non-complex filing will, in general, range from 15 days to a month, depending on the size of the transaction, the markets concerned and the cooperation of the parties to the transaction. Filings also have to include a declaration certifying that the data provided is complete and accurate.

A distinction must be drawn between the markets 'concerned' by the concentration and those that are 'affected' by the transaction.

Markets 'concerned' are relevant markets on which the concentration will have an influence, either directly or indirectly. An 'affected' market is (1) a market on which at least two undertakings party to the merger are active and hold a combined market share of 25 per cent or more, or (2) a market on which at least one undertaking party to the merger is active, another one being active on an upstream, downstream or related market, where, on either of those markets, the combined market share of all the undertakings is 30 per cent or more (this threshold was recently raised from 25 to 30 per cent in 2019 to simplify the merger control review). The information required for the notification is more detailed if the concentration involves 'affected' markets.

The Guidelines provide that transactions that should not, prima facie, raise anticompetitive issues, may be eligible for a simplified procedure with less onerous information requirements.

In the Guidelines, the Authority emphasises the benefits of the simplified procedure and lists its conditions, allowing the concerned parties to obtain the transaction's clearance within a shorter time period (of 15 to 20 working days on average) where no competition issues are anticipated. Previously, it was only limited to transactions where there was no horizontal or vertical overlap and where the parties were not active in neighbouring markets. The simplified procedure has been extended to the following types of transactions:
- transactions with horizontal overlap where the combined market share is below 25 per cent or where the combined market share is below 50 per cent and the increment is inferior to two points;
- transactions with vertical overlap where the combined market share is below 30 per cent;
- transactions involving activities on neighbouring markets with market share below 30 per cent on the neighbouring markets;
- transactions consisting in a change from joint to sole control;
- transactions consisting in a creation of a full-function joint venture exclusively active outside the French territory; and
- transactions consisting in an acquisition of joint control of a real estate asset for sale in the future state of completion.

However, even in these situations, the Authority may still ask for a full filing if justified by the 'case specificities'.

In 2019, the Authority also launched an online notification form (including both a pre-notification form and a formal notification form) for mergers that benefit from the simplified procedure, which concerns the following notifiable transactions:
- transactions where the purchaser operates neither on the same market as the target, nor on upstream, downstream or related markets (which covers most of the transactions carried out by investment funds);
- transactions relating to food distribution and that do not involve a change of trading name of the retail stores concerned; and
- transactions relating to motor vehicle distribution.

This online procedure is expected to cover about half of the notifications submitted to the Authority and is expected to allow the Authority to issue a decision more quickly (within around three weeks instead of five weeks).

Since entry into force of the Decree in 2019, the parties only have to submit one copy of the filing (annexes included) to the Authority. This decree also simplifies the financial data that the parties have to provide to the Authority.

Providing inaccurate information or omitting information may result in fines of up to 5 per cent of the undertaking's turnover (taking into account the circumstances leading to the omission or misrepresentation, the conduct of the undertakings vis-à-vis the Authority). In addition, the clearance decision may be withdrawn, meaning that the parties must notify the transaction again within one month of the withdrawal (otherwise, a fine may be imposed for gun jumping).

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The Mergers Unit of the Authority examines concentrations notified to the Authority.

Before the pre-notification phase, the parties can ask for the appointment of a case handler, and the Authority has to reply within five days. If the parties do not request the appointment of a case handler, the case handler will be designated within five days of pre-notification or formal notification.

Informal pre-notification contacts are often necessary and highly recommended in the Guidelines to identify (and possibly resolve) potential issues. The Authority invites the parties to get in touch with its services at the earliest opportunity to anticipate any possible competition concerns. Although not compulsory under the French Commercial Code (the Code), pre-notification has now become systematic in practice.

Formal notification triggers the first phase review. The new Guidelines provide that the case handlers will indicate whether the file is complete or incomplete 'generally' within 10 working days from the notification filing. The Authority may request information not only from the parties, but also from other market players, including the parties' suppliers, customers and competitors. This is done notably through 'market tests' performed by the Authority. There is also a notice posted on the Authority's website to allow for spontaneous comments by third parties. In addition, the Authority has the power to conduct onsite investigations, although the use of such powers remains exceptional. In cases raising competition concerns, the parties may propose remedies to avoid a second phase.

Should the Authority consider that a case raises major competition difficulties or should the Minister decide to request a second phase review of a case despite the clearance granted by the Authority at the end of the first phase (and should the Authority accept such request), an in-depth investigation is conducted by the Authority's case handlers, who generally request additional information from the parties, in writing and, possibly, during hearings. The case handlers may also submit questions to the parties' suppliers, customers or competitors and, where necessary, conduct onsite investigations. The case team issues a report to which the parties may reply in writing, and a formal hearing is then organised at the end of the second phase, during which third parties (customers, experts, etc) may be heard in the absence of the notifying parties. With the new Guidelines, at the beginning of the in-depth investigation, a provisional timetable (although not-binding) outlining the main steps of the forthcoming procedure is expected to be provided by the case-handlers.

In its final decision, the Authority can authorise the concentration with or without commitments proposed by the parties, or it can prohibit the transaction. In 2020, the Authority prohibited for the first time a transaction (the *Leclerc/Casino* case). The Authority considered that the acquisition of joint control of a Géant Casino hypermarket located in the municipality of Barberey-Saint-Sulpice (Aube) by Soditroy and Association des Centres Distributeurs E Leclerc would have locally created a duopoly as well as tacit collusion, noting also that the consumer's choice would fall from three to two undertakings. The parties proposed to reduce the acquired supermarket's commercial surface, but this was deemed insufficient by the Authority, which ultimately blocked the acquisition.

For the second time ever, in 2021, the Authority blocked another concentration (*Ardian/SMPR*), after a Phase II investigation. The Authority raised several competition concerns, considering notably that (1) the relevant target's SPMR pipeline infrastructure was an essential facility, (2) Ardian would obtain the exclusive power to decide the pipeline's commercial policy and (3) the French state would not, under its sectoral regulatory powers, have enough control over Ardian market's power. Ardian proposed commitments that were deemed insufficient, leading the Authority to prohibit the concentration.

The Authority may also, if need be, by injunction impose conditions that were not proposed by the notifying parties (in the 2018 *FinancièreCofigeo/groupe Agripole* case, the Authority used, for the second time ever, its injunction power: in the absence of suitable commitments from the parties, it granted clearance subject to appropriate remedies it imposed to protect competition).

The Minister for the Economy has the power, after a second phase decision of the Authority, to review the case and to take the final decision on public interest grounds, which it did for the first time in the 2018 *FinancièreCofigeo/groupe Agripole* case.

Finally, to comply with French labour law, the labour or employees' organisation (works council) of a French company involved in a merger has to be informed and consulted before signing of the transaction and a meeting of the works council is compulsory following the publication of the notification release on the Authority's website.

18 What is the statutory timetable for clearance? Can it be speeded up?

The Authority's formal examination of a concentration takes place in up to two phases and the clearance timetable is as follows.

The first phase (maximum 60 working days, unless clock is stopped by the Authority):

- This phase is common to all concentrations. The Authority may authorise the concentration within 25 working days of the date at which the notification is considered complete.
- This review period may be extended for an additional 15 working days if the notifying parties submit commitments.
- Two 'stop-the-clock' procedures exist:
  - the parties may ask for suspension of the review for a period of up to 15 working days if necessary for, inter alia, the finalisation of commitments. In this case, the first phase can last up to 60 working days (including the five working days granted to the Minister for the Economy under its intervention powers); and
  - the Authority may suspend the review period where the notifying parties fail to promptly inform the Authority of a new relevant fact or fail to provide requested information within the allocated deadline, or where third parties fail to do so for reasons pertaining to the notifying parties. Such suspension lasts as long as its cause exists.

Where no competition issues are anticipated, the simplified procedure allows the parties to obtain clearance within a shorter time period (ie, on average after 15 working days following the filing of a complete notification).

The Authority may also shorten its first phase review when one of the undertakings is facing financial difficulties or is subject to legal proceedings.

At the end of the first phase, the parties must still comply with the waiting period granted to the Minister (five working days, see below) if the Authority does not adopt a decision in writing but instead does not issue any decision by the end of first phase (ie, grants tacit approval).

The second phase (maximum 130 working days from the opening of the second phase, unless clock is stopped by the Authority):

- Where, after a first-phase review, the concentration raises serious doubts as to its compatibility with competition on the relevant markets in France, the Authority will initiate an in-depth examination of the concentration. This will be the case where the concentration may lead to the creation or strengthening of a dominant position or the creation or strengthening of purchasing power that may lead to a situation of economic dependence for suppliers. The factoring of efficiencies into the competitive assessment may be also considered.
- The Authority will issue its decision within 65 working days of the opening of the second phase. The parties may submit commitments. The period of 65 working days is maintained if the commitments are submitted within 45 working days following the beginning of the review period. If the commitments are submitted less than 20 working days from the expiry of the 65-working-day deadline, the review period is extended by 20 working days from the receipt of such commitments. This extension is also applicable in case of a modification of already submitted commitments proposed less than 20 working days from the expiry of the 65-working-day deadline. In any case, the review cannot extend further than 85 working days.
- Two 'stop-the-clock' procedures exist:
  - the parties may ask for suspension of the review for a period of up to 20 working days if necessary for, inter alia, the finalisation of commitments; and
  - without any time limit, the Authority may also suspend the review if the parties fail to inform it of a new fact as soon as it occurs or fail in their duty to provide information or if third parties, as a result of the parties' negligence, fail to provide the requested information. The review period starts to run again as soon as the issue giving rise to the suspension is resolved.

At the end of the second phase, the parties must still comply with the waiting period granted to the Minister (25 working days, see below).

Powers of the Minister for the Economy

The Minister for the Economy no longer has jurisdiction over merger control. However:

- after the first phase, within five working days after the notification of the Authority's clearance decision to the Minister, the latter can ask the Authority for an in-depth examination of the case. However, the Authority has a discretion as to whether to allow this request or not and has indicated that it would decide on the fate of such request within five working days from receiving it; and

- after the second phase, within 25 working days from the notification of the decision of the Authority to the Minister, the latter has, at his or her initiative, the power to review the case and take the final decision on the concentration on public interest grounds. These may include industrial and technological progress, companies' competitiveness in an international context and social welfare, but not competition grounds. The law dated 6 August 2015 provides that, where the parties have failed to timely comply with the commitments provided for in the Minister's decision, the latter may withdraw his or her decision (thus obliging the parties to re-notify the transaction within one month), or enjoin the parties to comply with the relevant commitments subject to periodic penalty, or enjoin the parties to comply with new injunctions (replacing the initial commitments that were not complied with) subject to periodic penalties.

Since these powers were introduced in 2008, the Minister has used its power to review a merger on public interest grounds only once.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance is whether the transaction significantly lessens competition, especially by creating or strengthening an individual or collective dominant position. Unilateral effects, even in the absence of dominance, are taken into account in practice. In addition, at the end of the second phase, the Minister is entitled to call the case and take into account the economic and social effects (ie, effects other than the impact on competition) of the concentration to prohibit or authorise it.

20 | Is there a special substantive test for joint ventures?

No, there is no special test for joint ventures. A joint venture performing, on a lasting basis, all the functions of an autonomous economic entity, is treated like any other type of merger. However, possible coordination issues between parent companies will be examined.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Competition Authority (the Authority) broadly uses the same analytical framework as the European Commission. In addition to the level of market shares, it may take into consideration a wide variety of elements in its assessment of unilateral and coordinated effects in horizontal, vertical and conglomerate mergers.

In the *Castel/Groupe Patriarche* second-phase case (2012) the Authority used the upward pricing pressure test to analyse the incentives of the new entity to increase the prices of wines. The 2020 Guidelines stress the increasing importance of such tests in the competitive assessment of transactions.

The Authority used the gross upward pricing pressure index (GUPPI) test in *Casino Guichard-Perrachon/Monoprix* (2013) as part of its analysis to impose divestments. Conversely, in *Orlait/Terra Lacta* (2014), the Authority also used the GUPPI test to conclude that a price increase was unlikely to result from the merger, in view of the highly competitive market structure and the strong countervailing buyer power.

To quantify online competition in local markets, the Authority used for the first time a 'scoring method' in *Fnac/Darty* (2017), in addition to the market shares and GUPPI methods. Based on diverse evidence, each competitor was thus applied a weight (or 'score') reflecting the different levels of competitive constraint they imposed on the merging parties.

In *Elsan/MediPôle-Partenaires* (2017), in the healthcare sector, the Authority for the first time took account of the impact of the concentration on the quality of the medical treatment offer and required corresponding divestiture commitments. The assessment of non-price effects of mergers is however not unprecedented. For instance, the Authority previously took into account media pluralism issues in its merger assessment and again recently did so in *Mondadori France/Reworld Media* (2019), where Reword Media had to divest one car magazine to maintain sufficient competition and to guarantee pluralism in the car magazines market.

Under the in-depth investigation (Phase II) of the *Axel Springer Group (SeLoger.com)/Concept Multimédia (Logic-Immo.com)* merger, which, for the first time, involved two online platforms, the Authority took into account network cross-effects and focused particularly on the importance of data.

Market definition is sometimes key in assessing the possible theories of harm and the Authority may accept innovative market definitions. In *Fnac/Darty* (2016), following an in-depth investigation, the acquisition of Darty by Fnac was cleared by the Authority subject to the divestment of six stores, to maintain sufficient competition in the market for retail distribution of electronic products in Paris and its suburbs. This was the first case in which the Authority has ever defined a relevant market as including both in-store and online retail channels. It held that competitive pressure exerted by online sales had become significant enough to be integrated in the relevant market, whether it comes from pure players or from the bricks and mortar stores' own websites. The Authority also implemented this approach to toy distribution in the context of *Luderix International (Picwic)/Jellej Jouets (Toys'R'Us)/undivided ownership Mulliez*. It considered that the characteristics of the toy distribution market justified analysing online sales and physical outlets as belonging to one and same relevant market, which was the first time such a conclusion was reached in the European Union in the toy sector. In *Fnac Darty/Nature & Découvertes* (2019), the Authority applied this approach again, considering that the retail market for books and the retail market for toys each included both the physical and the online channels.

However, such conclusion as to online and physical sales channels is not systematic. For instance, in *Sarenza/Monoprix* (2018) and *André/Spartoo* (2018), while the Authority took into account the competition exerted by e-commerce players on the brick and mortar distributors, it did not conclude that there was a single relevant market for both channels. In *Dimeco/Cafom group* (2018), concerning a merger of two domestic electrical goods distributors active in Guadeloupe the Authority considered that the specificities of the French overseas markets (notably the low development of online sales and the insular location of Guadeloupe), required the relevant markets to be defined as brick-and-mortar retail points only.

Other recent decisions offer examples of innovative market definitions and of corresponding competitive assessment. In *Webedia/Elephant* (2019), the Authority scrutinised, for the first time, the monetisation industry of 'influencers' (whose activities take place on content-sharing platforms and social networks). The Authority focused on the risk of vertical effects in relation to the positions of Webedia (as regards management services proposed to 'talents and influencers'), and of Elephant (as a distributor of audiovisual program rights). Such a risk could have consisted in excluding competitors from those two markets, by establishing contractual ties between the influencers managed by Webedia and the productions of Elephant, to create unavoidable offers on those markets. However, given the limited positions of the parties, no sufficient leverage effect was found and the merger was cleared unconditionally. Also, in the *Ineos/OGC Nice* merger (2019), the Authority focused, for the first time, on identifying the relevant markets in which football clubs operate in France and, in particular, for the first time, defined a relevant market for the transfer of professional players.

In *Fnac Darty/Nature & Découvertes* (2019), the Authority assessed for the first time the risk of exclusion of competitors from shopping centres as a result of Fnac Darty's increased bargaining power vis-à-vis shopping centre managers.

Finally, in *Storengie/DMSE* (2021), the Authority examined the hydrogen production and distribution markets for the first time, as well as the market for the development, construction and installation of hydrogen stations. Although DMSE would be the only operator active on the hydrogen distribution market in the Dijon area, the Authority held that, in an emerging market in an expansion phase, high market shares are not necessarily indicative of market power. Given the existence of potential competitors and the absence of barriers to entry on this market, the Authority found no competition concerns and cleared the acquisition without conditions.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Authority only considers competition issues in its assessment, possibly with efficiency defence arguments.

However, since 2008, at the end of a second phase, the Minister for the Economy may decide to examine the case. Although the Minister cannot challenge the findings of the Authority on competition analysis, he or she can make a decision based on grounds of public interest justifications other than the maintenance of competition. Notably, the Minister's decision may be based on factors such as industrial development, maintaining of employment or the competitiveness of the undertakings in international competition. The decision of the Minister will then supersede that of the Authority.

In 2018, the Minister used this power for the first time in the *Financière Cofigeo/groupe Agripole* transaction. In this case, the Authority had cleared, following an in-depth investigation, the acquisition by Financière Cofigeo of certain securities and assets of Agripole group (carrying a ready-made meal business), subject to divestment injunctions. On the very day of the clearance, the Minister announced that the transaction needed to be assessed on public interest grounds, in particular the maintaining of employment and industrial development. The Minister stressed that his review was taking place in the exceptional context of the serious fraud that led to the financial difficulties of the target which required state intervention. He cleared the transaction, without divestment but subject to the maintenance of employment within the group during two years. The Minister considered that the divestment would have implied a material risk for employment. Besides, the Minister considered that his decision would allow Cofigeo to stimulate the markets on which it is active, which would have a positive impact on the whole sector.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Code requires the Authority, during the second phase, to assess whether the transaction makes a sufficient contribution to economic progress to offset the damage to competition. To be taken into account, efficiencies must be both quantifiable and verifiable, they must be specific to the concentration, and at least some of their benefit must be passed on to consumers. The Authority can compel the parties to respect requirements aimed at ensuring that a sufficient contribution is made to economic progress to offset the damage to competition.

For example, in *Ardian/SPMR* (2021), the Authority considered that Ardian had not demonstrated that the notified transaction would generate efficiency gains offsetting the anticompetitive effects of the transaction and therefore blocked the transaction, owing to the insufficient commitments proposed and the impossibility of issuing injunctions in the specific situation of this case.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

In addition to the standard a priori merger control review further to a notification, the Competition Authority (the Authority) also has ex post merger control powers for all concentrations in the following strictly defined scenario: the Authority may, in the event of an abuse of a dominant position or of a state of economic dependence, enjoin by a reasoned decision the undertaking or group of undertakings concerned to amend, supplement or terminate, within a specified timetable, all agreements and all acts by which the concentration of economic power allowing the abuse was brought about. This provision is applicable to concentrations below the notification thresholds that were not notified, as well as to those that have been subject to a merger control procedure. Under the former merger control regime, the Minister for the Economy, who used to be in charge of merger control in France, enjoyed similar powers, but used these only once, in 2002, to terminate joint venture arrangements on the market for drinking water supply.

In this respect, in January 2020, the Authority rejected a complaint lodged by Towercast challenging TDF's takeover of Itas, claiming that this merger, which fell below the notification thresholds, strengthened TDF's dominant position. The Authority rejected the complaint, considering that such a merger could not constitute an abuse of dominant position. The Authority also noted that article 22 of the European Merger Control Regulation No. 139/2004 had not been used in this case and that the conditions to apply the above-mentioned ex post powers.

However, with the announcement in 2020 of the European Commission's new policy on acceptance of referrals by national competition authorities, pursuant to article 22 of the EU merger regulation, of concentrations that do not have a Community dimension, even when these mergers do not exceed the national notification thresholds of the referring member state, the Authority now has a tool to capture transactions after their implementation.

Finally, the Authority recently issued its first two prohibition decisions (see *Leclerc/Casino* (2020) and *Ardian/SPMR* (2021)).

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Between filing and the final decision of the Authority, the notifying parties may submit amendments to the transaction to remedy competition issues. The parties may put forward various remedies (behavioural as well as structural), such as commitments to sell assets to third parties (those third parties should then be approved by the Authority), to execute a contract (eg, a trademark or patent licence), to amend conditions of sale, to keep the Authority informed of any change in the structure of the relevant market (such as an increase in the parties' market share) or even sometimes to freeze their market share. Remedies can be submitted either in Phase I or in Phase II. However, not all second-phase investigations end in remedies, as shown by *Axel Springer/Concept Multimedia* (2018) that was ultimately cleared without commitments.

The Authority can delay the concentration until the commitments are fulfilled. In the case of a divestment commitment, the parties may be required to prepare an equally or more effective alternative solution ('crown jewels'), in case the initial divestment turns out to be either unlikely or impossible.

The Guidelines introduced a standard form of divesture commitments and a standard form of trustee mandate to habilitate a trustee to monitor and audit fulfilment of the commitments.

A few recent cases illustrating the large possible scope of remedies are set out below. In the new Guidelines, the Authority reaffirmed its preference for structural remedies and said that behavioural remedies shall in principle have at least a five-year duration.

In *Elsan/MediPôle Partenaires* (2017), the Authority accepted alternative divestments (ie, the notifying party had to divest one healthcare facility and could choose among several identified in a given area, the divestment of any one of them being able to solve the competitive concerns identified). In 2020, the Authority again required divestment commitments in the medical laboratories sector to maintain competition even in a geographically limited area (see *Biogroup/Laborizon* and *Biogroup/Dyomedea-Neolab* (July 2020)).

In the retail sector of gardening, DIY, pet and landscaping products, the Authority cleared *Groupe InVivo/Jardiland* (2018) subject to commitments to divest six outlets and to terminate five franchise contracts, which must be taken on by one or more competing chains. Alternative divestment and termination ('crown jewels') commitments were also agreed upon. In 2019, several decisions also made binding commitments to divest retail points of sale (eg, *Audilab/Demant* in the sale of hearing aids sector, *Frans Bonhomme/Point P Travaux Publics* in markets for distribution of building materials for public works and *D'Aucy/Triskalia* in the gardening, DIY, landscaping and pet product retail distribution market).

In 2018, the Authority cleared under conditions the creation of the joint venture Cash Paris Tax Refund by Global Blue and Planet Payment. The joint undertaking was to operate at the end of the refund process, acting as a 'desk' carrying out the VAT refund procedure for tourists. Its clients were to be its parent companies and their competitors. The establishment of the joint venture, which was also to access information on the parent companies and their competitors, could have enabled its parent-companies to coordinate their behaviour in the upstream markets of VAT refund services in France. To remedy this issue, a commitment was taken to erect a firewall between the common undertaking and the parent companies to bar the latter from access to strategic information on their competitors.

In 2019 and for the third time ever, the Authority required a 'fix-it-first' commitment to clear the acquisition of Alsa by Dr. Oetker (Ancel). The new entity would have become the leader in the market for production and marketing of dessert mixes to supermarkets and hypermarkets, with a market share well above 50 per cent, by combining the two main brands of this market (Ancel and Alsa). Dr. Oetker thus committed to enter into an exclusive trademark licensing agreement for Ancel dessert mixes for five years, renewable once. The Authority approved the proposed licensee before giving its clearance. To further ensure the existence of a credible alternative supplier in this market, Dr. Oetker committed to enter into an outsourcing contract with the licensee (for the supply of Ancel dessert mixes products) for a transition period of three years, to avoid supply disruption and to enable the licensee to immediately stimulate competition, independently of the development of its own production capacities.

'Fix-it-first' divestment commitments were also required in the *Bernard Hayot/Vindémia* case (2020) and in *Ronsard/LDC Group* (2021). In the *Bernard Hayot/Vindémia* case, unprecedented behavioural remedies were also taken to protect overseas local suppliers. This included (1) maintaining current levels of supplies from local producers, by sourcing each year from them up to 25 to 35 per cent of the total purchases made by Bernard Hayot's large food stores, (2) setting up an internal procedure designed to support local suppliers in a state of economic dependency and (3) including in contracts with suppliers a provision specifically designed to protect them from any risk of negative effects relating to their state of economic dependence on Bernard Hayot.

In the *SAFO/NDIS* case (2019), the Authority required, for the first time, an 'up-front buyer' commitment to remedy competition concerns deriving from the strengthening of SAFO's market share in the relevant wholesale distribution markets. SAFO undertook not to implement the transaction until it had divested the target's wholesaler-importer business and obtained the Authority's approval of its purchaser. SAFO also granted a behavioural commitment not to operate the acquired hypermarket under one of Carrefour's brands and to run such hypermarket autonomously from its master-franchisor, in order to avoid the removal of an independent retail operator from the market.

In *Salto/TF1/France Télévisions/M6* (2019), TF1, M6 and France Télévisions made several commitments to address the competition concerns raised by the creation of their joint venture Salto in the audiovisual sector. These commitments aim at preventing coordination risks between TF1, France Télévisions and M6, as well as risks identified concerning: the upstream market for the acquisition of broadcasting rights, the market for editing and marketing television channels, the market for the distribution of pay TV services and advertising markets. Despite the numerous competition concerns and corresponding commitments, the Authority cleared the merger in Phase 1, following a continuous dialogue with all stakeholders (several market tests) and an opinion of the French Superior Council of the Audiovisual.

More recently (2020), in the health facilities sector, the Authority cleared Elsan's acquisition of HSM, subject to structural and behavioural commitments. Although the Authority considered that the transaction would generate efficiency gains for obstetric patients care, it held that these would not be sufficient to offset the risks of (1) reduction in the healthcare offering, (2) rate increases and decline in the quality of ancillary services and (3) reduction, via exclusivity provisions, in the pool of practitioners for healthcare facilities. Therefore, Elsan committed (1) to transfer the entire activity from one facility to another one and to maintain such activities until March 2028, (2) to maintain the standard of quality and content of its ancillary services (eg, access to a private room, television) without increasing their price above the level of inflation and (3) to refrain from inserting certain exclusivity clauses binding the practitioners.

In the *Coopérative Dauphinoise/Terre d'Alliances* case, in the agriculture sector, the parties committed to both a structural and a new kind of behavioural commitment to address the competition concerns identified in the markets for cereal, protein and oilseed crop collection and retail distribution of gardening, DIY, landscaping and pet products. Indeed, the parties committed not only to divest four platforms and a silo but also, pursuant to the principle of the 'sunrise clause', to submit to the prior approval of the Authority certain strategic decisions (eg, changes of shops name) relating to the stores in the areas in which the transaction gives rise to an overlap of activities between the parties.

From May 2020 to May 2021, the Authority was fairly active in the field of commitments, with eight clearances subject to remedies.

Finally, as to merger behavioural remedies, the Authority issued in January 2020 a comprehensive report on its decision-making practice in this field, notably revealing that a third of the commitments taken in French merger cases are behavioural ones (among the highest rates in Europe).

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Undertakings can be submitted to the Authority at any time from the notification of the case, during the first 25 working days in the first phase and 65 working days in the second phase. Where the parties submit undertakings in the first phase, the review period of 25 working days is extended by 15 additional working days. Parties may also ask for a 'stop the clock' of up to 15 working days to finalise undertakings. During the second phase, where undertakings are submitted or modified more than 45 working days after the opening of the second phase, such in-depth review period is extended by 20 working days from the date when such remedies are proposed. On a few occasions, the Authority has required 'fix it first' commitments requiring the notifying party to identify, prior to the adoption of the decision, a suitable acquirer to take on the asset that it has committed to divest. In 2019, the Authority for the first time authorised a merger with an 'up-front buyer' commitment, whereunder the transaction cannot be implemented until the buyer has been approved by the Authority (*Super NKT/SAFO*).

Undertakings imposed on the parties by the Authority (ie, injunctions) aim at remedying anticompetitive effects of the operation. Moreover, remedies can be imposed by the Minister for the Economy to deal with other negative consequences.

Failure to implement a remedy can result in the imposition of fines:

- for corporate entities – up to 5 per cent of their turnover in France in the previous financial year (plus, where applicable, the turnover in France over the same period of the acquired party); and
- for individuals – up to €1.5 million.

Moreover, the Authority may also:

- withdraw the decision authorising the operation. In such case, and except where the situation that existed prior to the concentration is restored, the parties will be bound to notify the transaction a second time within one month of the withdrawal of the decision;
- enjoin the parties to comply, within a certain deadline, with the orders, injunctions or undertakings provided for under its decision, under periodic penalty; and
- enjoin the parties, subject to periodic penalty, to comply with new injunctions or orders that will replace the initial commitments that were not complied with.

In 2011, further to remedies agreed by Canal Plus in the 2006 *Vivendi Universal/CanalSat/TPS* case, the Authority considered in the course of a monitoring process that Canal Plus had breached several remedies and therefore decided to withdraw its authorisation and to fine the company €30 million. Vivendi and Canal Plus then re-notified the operation and in 2012 the Authority opened a second-phase investigation and cleared the operation subject to several injunctions. The case was confirmed on appeal. The Authority's decision provided that the injunctions, taken for five years, could be renewed for five additional years (2017–2022), should the circumstances warrant it. Against this background, the Authority launched in July 2016 a public consultation to determine whether these obligations in force since 2012 should be lifted, adapted or renewed. The Authority's analysis revealed that Canal Plus's position was increasingly challenged, leading the Authority in 2017 to modify the injunctions initially imposed: certain injunctions were lifted, or adapted to take into account the evolution of the markets, while others were maintained until 2019.

In 2016, the Authority imposed a fine of €15 million on Altice/Numericable group for breach of remedies agreed in the 2014 *Numericable/SFR* case, relating to the divestment of Outremer Telecom. The Altice/Numericable group had undertaken to maintain the viability, market value and competitiveness of this business to favour its acquisition by a competitor. It subsequently appeared that Outremer Telecom's tariffs rose by 17 to 60 per cent, giving customers the opportunity to terminate their subscriptions without incurring cancellation fees. As a result, cancellation rates were three times higher in January 2015 than in January 2014. This constituted a reversal in Outremer's business strategy aiming at capturing new customers through aggressive competitive pricing. The Authority considered that this new strategy put the competitiveness of Outremer Telecom's offer at considerable risk, thus breaching the commitments.

In addition, in 2017, the Authority jointly fined Altice and SFR Group €40 million for breach of other remedies made binding under the same 2014 *Numericable/SFR* decision. In this case, SFR had basically committed to continue to perform the contract (the Faber contract) it had entered into with Bouygues Telecom for their co-investment in the development of optical fibre infrastructure in high-density areas. However, the Authority held that Altice/SFR Group had only very partially fulfilled this commitment. This case was also the first in which the Authority imposed injunctions subject to periodic penalty payment, in order to further secure their implementation.

In 2018, the Authority for the first time fined a company for non-compliance with structural commitments consisting of divesting assets within a given deadline. It fined Fnac Darty Group €20 million for failing to divest three stores, as per the commitments, and ordered it to divest two specific stores in lieu of those that were not disposed. The Authority considered that, confronted with difficulties in finding a buyer for these three other stores, it was Fnac Darty's responsibility to take the appropriate measures to fulfil its commitments, for example, by asking the Authority to substitute other stores for those it wasn't able to sell.

It is also possible for the Authority to review remedies adopted for clearance of an operation in view of changes in circumstances. The Authority used this possibility for the first time in *Bigard/Socopa* (2011) where it authorised the enforcement of a review clause included in the clearance decision, changing a trademark licence remedy into a trademark sale remedy. However, in this case, the Authority also fined Bigard €1 million for various practices aimed at reducing the value of the trademark and at discouraging candidates.

As part of the re-examination of the commitments submitted in relation to the acquisition by Vivendi and Groupe Canal Plus (GCP) of Direct 8 and Direct Star, the Authority had to decide upon a proposal of modified commitments formulated by GCP. The Authority's investigation revealed that Canal Plus's position is increasingly challenged, leading the Authority to modify in 2017 the initial commitments: certain of them were lifted, or adapted to take into account the evolution of the markets, while others were maintained. The new framework applied until the end of 2019. This review was made in parallel to the re-examination of the injunctions imposed by the Authority on GCP in the context of the *Vivendi Universal/CanalSat/TPS* case.

Likewise, in 2019 the Authority had to review the remedies made binding in 2014 for the acquisition of Mediaserv (now Canal + Telecom) by Canal Plus Overseas (now Canal + International) for an initial duration of five years after which a new competitive analysis would be performed to examine whether or not they should be maintained. The Authority reviewed the new commitments proposed by Canal + and market tested them, concluding that certain existing obligations should be maintained, while other could be eased. All the commitments maintained or modified were renewed for a period of five years, namely until 2024.

In 2019, the Authority had to decide whether Altice's commitments in relation to its acquisition of SFR (*Numericable/SFR* case in 2014) should be renewed. In 2014, these commitments were indeed taken for a five-year duration that could be renewed once if the market conditions require so. The Authority considered unnecessary to renew the 2014 commitments owing to the evolution of the markets since then and the emergence of credible alternative to Altice's offers. However, as regards the injunctions imposed on Altice by the Authority in 2017 in relation to the Faber contract, and that Altice was also seeking to remove, the Authority ruled that the injunctions without periodic penalty payments shall be lifted, while those with periodic penalty payments shall be upheld.

The Authority is clearly minded to exercise a more systematic ex-post control of the implementation of undertakings, and insists, with the new Guidelines, on the use of a trustee to monitor the commitments.

However, this enforcement policy does not systematically lead to findings of infringements. Further to ex officio proceedings initiated by the Authority in 2018 to verify compliance with the commitments taken by Altice France in the 2014 *Numericable/SFR* case and consisting in the disposal of Completel's DSL network, the Authority considered that there was no evidence establishing that Altice had not complied with its commitment. On this occasion, the Authority highlighted that, when reviewing compliance with a commitment, its control is limited to the framework set by its previous decision making the commitment binding (rather than a broad competitive analysis power it holds in the context of the notification of mergers).

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign mergers do not prevent the Authority reviewing the merger and if necessary requiring remedies (eg, the behavioural injunctions imposed in the *Boeing/Jeppesen* case (2001) and the divestment undertaking in the *GE/Invision Technologies* merger (2004)).

For obvious ease of enforcement purposes, remedies concerning the French national market are normally preferred. However, specific provisions exist for international coordination on remedies in cases where the affected markets are wider than national, or where competition on a single product market is affected in various countries.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

French decisional practice is not as developed as the European Commission's on the issue of ancillary restraints. However, it was considered on a number of occasions that restrictions that are both necessary and directly related to a merger are covered by the clearance decision. As to the types of arrangements that may be covered, national practice closely follows (and often expressly refers to) the approach of the European Commission.

The Guidelines for the first time dedicated specific provisions to ancillary restraints. The Authority is therefore ready to treat as ancillary restrictions provisions such as non-compete clauses in favour of the purchaser (provided their scope and duration are not excessive), licence agreements as well as purchase and supply contracts (provided they are of a limited duration and are not exclusive).

The Authority has used these provisions and examined ancillary restraints in several cases (eg, *Visa Europe/SAS Carte bleue* (2009), *Terrena/Groupe Bigard* (2010), *GFI-Bus/Thalès 'Business Solutions'* (2012), *Roullier/Fertilore* (2013), *Carrefour/Unibail* (2014)).

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Authority (the Authority) may interview any third parties during the review of the concentration and it may also seek comments from any person who may be considered relevant for the review process. The Authority may hear third parties in the absence of the notifying parties. Moreover, the works council (employees' representative body) of the notifying parties shall be heard by the Authority at their request.

Third parties, such as complainants, are not directly involved in the merger control process as they have no automatic rights to be consulted or informed beyond the general information published on the Authority's website concerning pending procedures. Third parties do not have access to the notification file, but they can intervene through their response to the 'market test' that may be carried out by the Authority in the first and second phases (and, if the notifying party agrees, even in the pre-notification phase).

Third parties may also challenge the Authority's decision before the administrative courts. There is, however, no legal obligation for the Authority to consult third parties when the commitments are amended. In the 2014 *Wienerberger* case, following the 2013 *Bouyer-Leroux/Imerys* clearance decision, a third party, the Wienerberger company, challenged the legality of the Authority's decision as it had not been consulted on the modified commitments submitted by the notifying parties. The complaint was dismissed on appeal by the French Supreme Administrative Court.

In 2018, the Authority opened an in-depth examination into the *Axel Springer Group (SeLoger.com)/Concept Multimédia (Logic-Immo.com)* merger in the online property portal sector. To evaluate the capacity of current potential competitors to stimulate competition following the merger of two of the main operators in the French online property advertising market, the Authority launched a broad consultation, analysed numerous internal documents of the parties and, for the first time, issued an online questionnaire to more than 30,000 estate agencies.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Information on previous and pending decisions of the Authority is publicly available on the Authority's website. When a transaction is notified, a brief release is published on the Authority's website. It includes the identity of the parties concerned, the nature of the operation and the markets concerned.

The Authority's decisions are made public and parties may ask the Authority not to refer to confidential information in the public version of the decision. The Authority's Rapporteur Général is in charge of the management of confidentiality of business secrets.

Decisions issued by the Minister for the Economy are published in the ministerial official publication, the electronic 'Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes' on the Minister's website.

Press releases from both the Authority and the Minister, if any, may also be found online. For important decisions, the press release is also published in English.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Within the framework of the European Competition Network, competition authorities of EU member states inform each other of merger cases pending before them, in particular to be able to jointly request referrals of cases to the European Commission under article 22 of the EUMR. On 11 September 2020, the European Commission announced that its policy on article 22 is now to encourage such requests in certain circumstances even when the transaction does not meet the national notification thresholds of the referring member state if they may have a 'significant impact on competition in the internal market'. The Authority became the first agency to make use of this new policy when it referred *Illumina/Grail* (2021) to the European Commission.

In this case, Illumina, a US-based genomic sequencing company, announced its intention to acquire the US-based innovative biotech company Grail, a transaction with a value of approximately US$8 billion. After a preliminary analysis, the Authority asked the European Commission to review the case, although the national thresholds were not met, considering that the criteria of affecting trade between member states and significantly affecting competition on French territory were met satisfied. The Authority indeed considered that, following the transaction, Illumina could make access to its input more complex for Grail's competitors, by increasing their price or by degrading their quality.

The European Commission accepted the case in April 2021 (after the appeal against the Authority's decision to refer this case to the European Commission was dismissed by the French Council of State).

The Authority also cooperates with non-EU antitrust agencies.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Decisions of the Competition Authority (the Authority) and of the Minister may be challenged before the French Supreme Administrative Court (the Council of State) on the grounds of abuse of power or for breach of a procedural rule.

In 2016, the Council of State partially annulled the decision of the Authority clearing the acquisition of Totalgaz by UGI (2015), in the liquefied petroleum gas sector. While the decision was confirmed for three of the four relevant markets, the Council of State considered that the scope of the competitive assessment was too narrow in relation to the fourth one and annulled the clearance decision and the relevant commitments in respect of this market.

In 2016, the Council of State rejected one request for suspensive interim measure on the grounds that the claim did not show an urgent need to suspend the implementation of the decision, nor raise serious doubts as to the existence of an assessment error by the Authority. The applicants had sought to suspend the Authority's conditional clearance of the acquisition of Agri-Négoce by Axéréal Participations, claiming that the commitments were insufficient to meet the competition concerns on the market for seed collection in a given French area.

In 2017 and 2018, the Council of State reviewed a number of appeals relating to the *Fnac/Darty* merger. As regards the scope of the commitments, a third party, who had entered into a lease agreement with Fnac, unsuccessfully lodged an appeal against the Authority's decision, in that it provided for the divestiture of the store concerned by the lease. Besides, as regards the implementation of the commitments, the Fnac/Darty group (as vendor) and the Dray group (as a contemplated acquirer of divested stores) respectively challenged the Authority's refusals to approve the contemplated purchaser as a suitable purchaser of the divested stores, and to extend the commitments' implementation deadline. All these appeals were rejected by the Council of State.

In 2019, the Council of State rejected the request for suspensive interim measure lodged by Mondadori's works council, which sought to suspend the Authority's conditional clearance in the *Mondadori France/Reworld Media* case.

In the *Illumina/Grail* (2021) case, the Council of State dismissed the appeal against the Authority's decision to refer the case to the European Commission pursuant to the new interpretation of article 22 EUMR. The Council of State considered the Authority's referral was inseparable from the review of the concentration by the European Commission, and that the whole procedure could only be reviewed by the European Court of Justice, so that the Council of State had no jurisdiction over such appeal.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Appeals against decisions of the Authority and of the Minister can be brought by the parties within two months of the date when the decision is notified, and by third parties within two months of publication of the decision on the Authority's website. In principle, appeals do not result in the suspension of the decisions. However, an action to suspend a decision issued by the Authority can be lodged before the Council of State through a specific procedure, the request for a suspensive interim measure. Such a suspension can be granted if the parties demonstrate that there is an emergency and that there is a serious doubt concerning the legality of the decision. This emergency procedure was first used in the *Cegid/CCMX* case in 2004, in which the Council of State ruled that, in view of the high combined market share of the parties, the approval decision would have had irreversible effects on the structure of competition on the market. In this particular case, however, the merger was eventually cleared by the Council of State in its final decision in 2006.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Merger control activity has slightly decreased this year with approximately 200 clearance decisions rendered from May 2020 to May 2021, of which eight were conditional clearances, mainly in the sectors of health, media, agriculture and distribution/retail, and two prohibition decisions (in the gas pipeline and distribution/retail industries).

In the past year, several concentrations taking place in French overseas territories were examined, this kind of merger often being resolved with commitments, given the specificity of the overseas markets and local vertical integration issues. For instance, in 2020, the Authority cleared the acquisition of the Pain Frotté group, which operates bakeries in La Réunion, by the groups Kin Siong, Lam Tow and Yong Wai Man, subject to the divestment of one bakery. Further, upon the announcement of the acquisition of Vindémia, active in La Réunion and Mayotte, by Groupe Bernard Hayot, the Authority announced that case handlers would travel to La Réunion to interview the economic operators and stakeholders affected by this takeover, since this concentration would be the largest acquisition ever to be examined by the Authority in overseas territories. This acquisition was cleared in 2020 subject to 'fix-it-first' divestiture commitments and unprecedented behavioural commitments.

Three merger cases were referred by the European Commission to the Authority in 2020–2021, upon request of the parties.

To address the question of retailers' buying power, parties to joint purchasing agreements in upstream retail are obliged to inform the Authority of any contemplated buying alliance, even if such arrangements do not fall within the scope of merger control (eg, because it is considered as a non-full-function joint venture). This obligation applies where the following cumulative thresholds are met:

- all the undertakings that are party to the contemplated arrangement achieved, during the previous financial year, a worldwide combined pre-tax turnover exceeding €10 billion; and
- all the undertakings that are party to the contemplated arrangement achieved in France, during the previous financial year, a combined pre-tax purchase turnover of over €3 billion.

In 2018, the Authority opened two market investigations in relation to notified purchasing alliances (one between Auchan, Casino, Metro and Schiever, and another between Carrefour and Tesco). In October and December 2020, the Authority issued two decisions making legally binding commitments proposed by these undertakings. In particular, to address the Authority's concerns (notably the risk of weakening suppliers, particularly SMEs and very small businesses), the parties committed to exclude several product groups from their cooperation and to limit the cooperation to 15 per cent of market volume for others. These commitments were made for five years and will be verified by a trustee approved by the Authority.

Following the law dated 30 October 2018, the Authority must now be informed at least four months prior to completion (instead of two) and the Authority is entitled to carry out a competitive assessment of the implementation of the agreement and the parties shall also agree to undertake appropriate remedies where anticompetitive effects are identified. The Authority now also has the power to order interim measures (including an injunction to return to the status quo ante or to request a modification of said agreement).

Reform proposals

35 | Are there current proposals to change the legislation?

As regards the introduction of an ex post (ie, post-closing) merger control review, the Authority announced, among its priorities for 2020, that it will endeavour to review more closely operations that currently fall 'below the thresholds' but, however, impact the competitive dynamics of markets. In that respect, the Authority indicated that it welcomed the decision of the European Commission to accept referrals by national competition authorities pursuant to article 22 of the EU merger regulation for concentrations that do not have a Community dimension even when they do not meet the national notification thresholds. In particular, the Authority mentioned that it had, on several occasions, called for such a change to the application of article 22 to better address predatory or consolidating acquisitions 'under the thresholds', which have been observed in particular in the digital economy, as well as in the pharmaceutical or biotechnologies sectors, and in a number of highly concentrated industrial sectors. This new possibility was used by the Authority early 2021 for the acquisition of Grail, an innovative biotech company, by Illumina, which will be reviewed by the European Commission: this referral was the first to be made under the new policy, showing a clear focus of the Authority on problematic concentrations that do not meet the French notification thresholds.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

As a result of public consultations, a number of measures were implemented in 2019 to alleviate the burden on companies triggering merger control.

This trend was continued with the revised Guidelines, issued in 2020 (replacing the 2013 guidelines) aiming at providing a new and more informative framework enabling companies to better anticipate the Competition Authority (the Authority)'s approach.

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Germany

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

German merger control provisions are enforced by the Bundeskartellamt (Federal Cartel Office (BKartA)) in Bonn. The current legislation can be found in Part 1, Chapter 7 of the Act against Restraints of Competition of 1958 (GWB). An English translation of the GWB is available at www.bundeskartellamt.de.

The BKartA is a federal authority that is responsible to the Federal Ministry for Economic Affairs and Energy, but is independent in its decision-making and does not receive political orders. The BKartA is subdivided into 13 decision divisions. The first to ninth decision divisions have jurisdiction for the full range of competition law enforcement areas in a specific economic sector, including merger control. The 10th to 12th decision divisions specialise in prosecuting hardcore cartels. The last decision division is in charge of consumer protection but is also responsible for the full range of competition law enforcement areas (including merger control) in specific economic sectors (not covered by the first to ninth decision divisions). The BKartA is supported by its Chief Economist Team, which is part of a division responsible for general competition law questions. Andreas Mundt has been President of the BKartA since 2009.

Scope of legislation

2 What kinds of mergers are caught?

The GWB sets out a comprehensive list of events constituting a concentration, which includes not only the acquisition of control and the creation of joint ventures, but also the acquisition of minority shareholdings or of a material competitive influence below the level of control. The most important events constituting a concentration are:

- the acquisition of (direct or indirect) control over another enterprise or parts thereof by one or several enterprises;
- the acquisition of all or a substantial part of the assets of another enterprise;
- the acquisition of a share in a company's capital or voting rights resulting in an overall shareholding of 25 per cent (or more) or 50 per cent (or more); and
- any other combination of companies enabling one or several companies to directly or indirectly exercise a material competitive influence on another company (this covers some acquisitions of minority shareholdings of below 25 per cent).

3 What types of joint ventures are caught?

The creation of a joint venture or the acquisition of a share in an existing joint venture qualifies as a concentration if it involves the acquisition of a share in a company's capital or voting rights of 25 per cent (or more).

The acquisition of a share of 25 per cent or more is not only a concentration between the acquirer and the joint venture, but is also regarded as a concentration between the parent companies (ie, the acquirer and those parent companies that hold a share of at least 25 per cent in the joint venture). This means that the other parent companies' consolidated turnover must also be taken into account – separately from the joint venture's turnover – for the calculation of the turnover thresholds. However, the latter concentration is limited to the markets in which the joint venture is active.

The GWB does not differentiate between full-function and non-full-function joint ventures so that the creation of a joint venture that does not perform all the functions of an autonomous economic entity on a lasting basis may be notifiable in Germany.

In addition, joint ventures are not only subject to merger control, but may also fall under the provisions on restrictive practices (GWB, section 1, and article 101 of the Treaty on the Functioning of the European Union). This means that they require merger control clearance by the BKartA and may also be challenged under the restrictive practices provisions.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The concept of 'acquisition of control' has largely been adopted from the European merger control regime. Although there is no definition of 'acquisition of control' under the GWB, the provisions describe how control can be acquired, namely by rights, contracts or any other means that, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence over another enterprise, in particular through ownership or the right to use all or part of the assets of the enterprise; or rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of the enterprise. A change of control must occur on a lasting basis to be considered a 'concentration'.

German merger control also catches acquisitions of interests below the level of control. An acquisition resulting in an interest (shares or voting rights) of 25 per cent (or more) constitutes a concentration. In addition, the acquisition by one or several enterprises of a material competitive influence over another enterprise constitutes a concentration. This covers situations where (1) a shareholding of below 25 per cent is acquired, provided additional factors that make the situation comparable to an acquisition of 25 per cent are present and, at the same time (2) the acquired influence is 'relevant for competition' (the acquirer obtains an influence which can have an effect on the way the target company competes on the market or its potential to compete). Such factors can include any that may give the acquirer the possibility of influencing the target (such as the right to appoint members of the supervisory board, information rights as a shareholder, specific rights agreed in the shareholders' agreement, etc, known as 'plus factors'). For example, in a 2008 decision (*A-TEC Industries AG/Norddeutsche Affinerie AG*), confirmed by the Higher Regional Court of Düsseldorf, the BKartA determined that both (together or taken independently) the acquisition of 13.75 per cent of the target's share capital (which amounted to a de facto blocking minority of 25 per cent because of consistently low shareholder attendance at the target's annual shareholder meetings) and the right to appoint three of 12 members of the target's supervisory board enabled the acquirer to exercise a material competitive influence over the target. Also decisive was the fact that the acquirer was the only shareholder in the target with market knowledge of the target's business and had a proven strategic interest in the target's competitive behaviour. The Higher Regional Court of Düsseldorf explicitly mentioned that for a material competitive influence to exist, the acquisition of the shares must confer an influence over the decision-making process and the market behaviour of the target, and that this is the case if the acquirer possesses an overwhelming market and industry knowledge that the other shareholders do not have. When assessing the existence of the 'plus factors', more weight will be given to qualitative considerations (representation and possibility of influence in the decision-making bodies, sector-specific knowledge of the minority acquirer) than to purely quantitative indicators (percentage of the shares acquired, distribution of the remaining shares). Another interesting case in that respect concerned the creation of a joint venture between EDEKA, the largest food retailer in Germany, and Budnikowsky, a drugstore company with 181 outlets in the Hamburg metropolitan area, which the BKartA cleared in May 2017. The two companies planned to hive off Budnikowsky's procurement, IT, e-commerce, administrative and logistic activities into the joint venture in which EDEKA would hold 25.1 per cent. However, while EDEKA did not acquire any shares in Budnikowsky or vice versa, the BKartA still considered that EDEKA's shareholding in the joint venture allowed it to exert material competitive influence over Budnikowsky. The decision of the BKartA to even consider EDEKA's supposed influence over Budnikowsky under merger control rules can be described as game-changing, as up to that point there had to be some kind of corporate influence for a transaction to result in the ability to exert 'material competitive influence', whereas here there was no such link between the parties. Thus, for legal certainty, it may be advisable to notify cooperation agreements like this to the BKartA in the future. Some commentators have also described this case as a way of using merger control to obtain an individual exemption for cooperation agreements.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are two alternative sets of thresholds, which were increased by the last amendments of the law that entered into force on 19 January 2021.

According to the first set of thresholds, a concentration must be notified prior to its completion if in the last financial year:

- the combined worldwide turnover of all participating enterprises exceeded €500 million;
- one participating undertaking had a turnover exceeding €50 million within Germany; and
- at least one further undertaking had a turnover in Germany exceeding €17.5 million.

The GWB also provides for a second set of thresholds, which catch concentrations that do not meet the thresholds in the first set, in an attempt to give the BKartA the power to review certain transactions, inter alia, in the fast-moving digital sector. According to this second set of thresholds, a concentration must be notified prior to its completion if, in the last financial year:

- the combined worldwide turnover of all participating enterprises exceeded €500 million;
- one participating undertaking had a turnover exceeding €50 million within Germany, but neither the target nor any other participating undertaking had a turnover in Germany exceeding €17.5 million;
- the value of consideration for the transaction exceeds €400 million; and
- the target is active in Germany to a significant extent (local nexus).

However, if the parties to a concentration fulfil the first set of thresholds, they will be exempted from the notification obligation if the concentration relates to the combination of public undertakings as a consequence of a 'reform of communal territory'. This exemption does not apply if the parties to a concentration fulfil the second set of thresholds.

Other exceptions exist in relation to members of a banking association and the hospital sector.

Turnover figures must be calculated by reference to an undertaking's last completed financial year, on a worldwide consolidated group basis excluding intra-group sales and VAT. In specific sectors, the calculation of turnover is a two-step process: for example, in the case of goods traded (ie, goods that are simply purchased and resold), only 75 per cent of the turnover achieved is to be taken into account. There are special rules for credit institutions and building societies, as well as companies active in the broadcasting sector or producers and distributors of newspapers or magazines.

Transactions that meet the above thresholds, but have no 'appreciable [domestic] effects' within the territory of Germany are exempt from the notification requirement.

The question of whether the target is active in Germany to a significant extent (which is relevant for the application of the second set of thresholds) is different from the question of whether the transaction can have an 'appreciable effect' in Germany and should, therefore, be dealt with separately. In July 2018, the BKartA, together with the Austrian competition authority, published a joint guidance paper. However, in case of doubts – given that the threshold is still relatively new, with little practical experience – it is advisable for the parties to seek informal guidance from the BKartA. Recent experience shows that the BKartA is open to such informal discussions and provides guidance quickly.

German merger control is not applicable to any transaction that falls within the scope of the EUMR (with exceptions provided for in the EUMR, such as the EUMR referral process). Similarly, merger control under the GWB is not applicable to any transaction that falls below the German turnover or transaction value thresholds and the BKartA cannot investigate such cases.

However, the last reform of the GWB gave the BKartA new powers to impose an obligation on selected companies to notify all future concentrations in one or several economic sectors, if certain cumulative criteria are met. First, the company must have had worldwide revenues above €500 million. Second, there must be objective elements that indicate that competition in Germany, in the relevant sectors, could be significantly impeded. Third, in the relevant economic sectors, the company concerned must represent at least 15 per cent of supply or demand in Germany. Finally, the target company must have achieved revenues of more than €2 million, at least two thirds of which in Germany. The BKartA can impose such an order only if it has previously conducted a sector inquiry in at least one of the economic sectors concerned. The order is valid for a period of three years (renewable).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory if the jurisdictional thresholds described above are met and if the requirements of the appreciable (domestic) effects clause are met.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are subject to German merger control only if they have an 'appreciable effect' within the territory of Germany. The BKartA has always applied the concept of 'appreciable effect' broadly. In practice, it is likely that almost all foreign-to-foreign concentrations caught by the first set of thresholds will have an 'appreciable effect' within the territory of Germany, even if the parties have no subsidiaries or other assets within Germany.

The only exception where the local effects test still plays a role relates to foreign joint ventures, as the turnover thresholds may, in these cases, be met by the parent companies alone and through activities that are not (directly) related to the joint venture. To ensure greater clarity, the BKartA updated its guidance in 2014 'to relieve concentrations that do not affect Germany of unnecessary bureaucracy'. The guidance provides concrete examples as well as a flowchart to illustrate how to apply the concept of 'appreciable effects'.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, under the applicable Foreign Trade and Payments Ordinance (AWV) there are two different tests under which the Ministry for Economic Affairs and Energy (the Ministry) assesses foreign investments: the cross-sectoral examination and the sector-specific examination. Both regimes have been frequently amended in recent years, leading to a tighter control over acquisitions of domestic companies. Some of the recent changes were adopted to implement Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the EU Screening Regulation). However, the German government has chosen to define many of the sectors and activities that are described by the EU Screening Regulation in more detail.

Cross-sectoral examination

The cross-sectoral examination is applicable in all cases where investors from outside the European Union or EFTA – directly or indirectly – acquire 25 per cent or more of the voting rights in a German enterprise. This right of scrutiny applies to all sectors and enterprises and allows the Ministry to initiate a review of the investment. In cases where non-EU or non-EFTA investors acquire at least 10 per cent (or in some cases at least 20 per cent) of the voting rights in a German enterprise engaged in a number of defined activities that are considered to be particularly sensitive, such as the operation of 'critical infrastructure' or the development or manufacturing of certain 'critical technologies', a mandatory filing obligation and a standstill obligation apply. For all other acquisitions, filings are voluntary, but may be advisable if the acquirer concludes that there is a risk of a call-in of the acquisition for review by the Ministry. If no filing is made, the Ministry has up to five years from signing to open an investigation (and in the worst-case scenario, unwind the transaction). The cross-sectoral examination also applies to acquisitions by acquirers from within the European Union or EFTA, if one of their (indirect) shareholders comes from a non-EU or non-EFTA member state and holds 25 per cent or more (or, if the lower thresholds are applicable, 10 per cent or 20 per cent, or more) of the shares in the acquirer. Since 2021, the review right and mandatory filing obligations also apply to acquisitions below the applicable voting rights thresholds, if 'atypical control' is acquired, such as by means of a certain number of seats on the board or management, or in the form of certain veto rights.

Critical infrastructure that is subject to the mandatory regime includes certain facilities and systems in the following sectors: energy, information technology and telecommunications, transport and traffic, health, water supply, food, finance and insurance. These are described in more detail by type and threshold in one of the applicable regulations (BSI-KritisV). Critical technologies are defined in detail in the AWV and include, inter alia, automated or autonomous vehicles, unmanned drones, semiconductors and certain types of industrial robots. Most of these categories are defined in even more detail either in the AWV itself or in industry-specific regulations. In addition to critical infrastructure and critical technologies, the mandatory regime applies to a range of other activities, such as software for the operation of critical infrastructure, cloud-computing services, the media, the extraction/processing of certain raw materials and a very broad range of activities in the health sector. In light of the covid-19 pandemic, the mandatory filing obligation was extended to include companies that develop, manufacture or distribute (components for) personal protective equipment, certain pharmaceuticals or certain medical products.

In its review, the Ministry assesses whether the acquisition is likely to pose a threat to the public order or security of the Federal Republic of Germany, of another member state of the European Union or in relation to projects or programmes of EU interest within the wording of article 8 of the EU Screening Regulation.

The Ministry may either restrict the acquisition or prohibit it altogether, rendering the purchase contract invalid. The review period is two months starting from the day of the submission of the complete filing. If an in-depth investigation procedure is opened and the parties have sufficiently addressed all questions raised in the opening decision, the Ministry has four months to clear the case (unconditionally or with conditions), enter into negotiations with the purchaser (which stops the clock) or to prohibit the transaction. This review period can be extended by another three months in factually or legally complex cases and is suspended in the case of information requests from the Ministry. Furthermore, Germany has implemented a cooperation mechanism to allow the European Commission as well as other member states to provide comments in relation to foreign investments undergoing screening in Germany.

Sector-specific examination

The sector-specific test applies to all non-German purchasers, including from within the European Union or EFTA. The test focuses on acquisitions falling within certain strategic sectors: acquisitions of 10 per cent or more of the voting rights in domestic companies that produce or develop goods listed in Part I, section A of the German export control list (war weapons, ammunition, defence goods), certain cryptographic systems or certain other defence goods must be notified to the Ministry. The Ministry may prohibit or restrict the acquisition to safeguard Germany's essential security interests. The transaction may not be closed without the approval of the Ministry, which is obliged to issue a written statement of clearance if there are no objections to the notified investment.Like in the cross-sectoral examination, the in-depth review that follows the initial two-month period can take up to four months, while negotiations of remedies and requests for information stop the clock. The review period can be extended by another four months in legally and factually complex cases.

Sanctions

In July 2020, Germany introduced criminal sanctions (prison terms up to five years or financial penalties, or both) for closing without obtaining prior clearance and certain activities that are considered to be gun jumping (eg, the exchange of sensitive information). The same applies to violations of enforceable orders by the Ministry prohibiting or restricting an acquisition.

For transactions that do not trigger a mandatory filing, the Ministry may still open a review procedure ex officio and, in the worst-case scenario, the transaction may have to be unwound. Where the suspensory regime applies, failure to notify may lead to the transaction being invalid until clearance. In addition, violations of enforceable orders by the Ministry prohibiting or restricting an acquisition may give rise to administrative fines.

Special sectors

Besides the general foreign investment regime, there are some other sector-specific rules, such as in relation to radio and television broadcasting.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no legal deadlines for a notification of a concentration, but notifiable concentrations must not be completed before clearance. It is possible to file a pre-merger notification even prior to the signing of the transactional documents. The obligation to submit a mandatory post-completion notice to the BKartA was abolished by the last reform of the GWB.

Fines can be imposed for closing before clearance as well as for submission of incorrect or incomplete filing. Those sanctions are regularly applied in practice.

10 Which parties are responsible for filing and are filing fees required?

In principle, all parties involved in a merger (ie, typically the purchaser and the target company) are responsible for filing. In the case of an acquisition of shares or assets, the vendor must also notify. In practice, the filing is often done by the acquiring firm on behalf of all parties involved.

Filing fees payable to the BKartA can amount to up to €50,000 (in cases of minor importance or with insignificant effect on the German market, the filing fees normally range between €3,000 and €15,000). In exceptional cases, a fee of up to €100,000 is possible. The BKartA determines the fees by taking into consideration both its administrative (ie, personnel and material) expenses and the economic significance of the transaction notified. In addition to the fees, the BKartA can recover costs for external consultants (eg, economists) from the merging parties.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Mergers that are subject to merger control may not be completed before either the BKartA has cleared the transaction or the relevant waiting periods of one month (first phase) or five months (first and second phases together) after submission of a complete notification have expired without the BKartA having prohibited the transaction.

Case law of 2008 clarified that the suspension obligation also applies to transactions that are notified to the BKartA even where there is no formal notification obligation. Therefore, the decision to submit a 'precautionary notification' of a transaction where the question of the notification requirement is not entirely clear (eg, in possible cases involving the acquisition of material competitive influence) must be carefully made, as the notification, once submitted, triggers the waiting periods until a final decision of the BKartA is rendered. The BKartA can, upon the submission of an application, grant an exemption from the suspension obligation if there are compelling reasons to do so. This is the case, in particular, if the parties involved can establish that an exemption would prevent severe damage to one of the undertakings involved or to a third party. However, both the BKartA and the courts interpret this exemption restrictively. Stock market, staff loss or competitiveness risks usually would not suffice – exemption tends to be limited to situations of imminent insolvency.

The parties have the right to withdraw their notification at any time, unless the BKartA itself has delivered a decision ending the procedure (such as an explicit or implicit clearance decision or a prohibition decision). Such withdrawal automatically ends the merger control procedure.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The completion of a notifiable merger prior to clearance can lead to severe penalties: fines of up to €1 million or, in the case of undertakings, of up to 10 per cent of their total worldwide group turnover in the preceding business year, can be imposed. The BKartA regularly imposes fines for closing notifiable transactions prior to clearance. Since the end of 2007, the BKartA has imposed five fines (up to €4.5 million) for closing before clearance.

In a recent judgment in the case *Edeka/Kaiser's Tengelmann*, the Higher Regional Court of Düsseldorf decided that a partial implementation of a concentration before clearance also violated the suspension requirement. In that case, the merging parties had already started implementing some aspects of the merger agreement (one party agreeing to close outlets in an interim period before clearance and joint purchasing cooperation). This decision has been confirmed by the German Federal Court of Justice (Bundesgerichtshof) in November 2017 that decided that measures or behaviour, which themselves cannot constitute a concentration per se, but which are made in the context of the intended concentration and can (at least) partly create the effects of that intended concentration, constitute gun jumping. In another judgment relating to the same case, rendered on 17 July 2018 (*Edeka/Kaiser's Tengelmann II*), the German Federal Court of Justice also confirmed the possibility for the BKartA to formally issue interim measures against existing or merely imminent gun-jumping acts of the parties (and according to the BKartA this approach also holds in the context of the Court of Justice of the European Union's *Ernst & Young* judgment).

In cases of negligent disregard of the notification obligation, the BKartA normally informs the parties to the transaction of their obligations and insists on the submission of a post-completion notice containing all the details that are normally required in a pre-merger notification. If the parties comply with this request, they may in many cases escape a fine, if it was their first violation of the obligation to notify. However, if the concentration involves parties with significant business activities in Germany who have already submitted a number of notifications in prior transactions, fines are more likely. In cases of deliberate disregard of the notification obligation, the BKartA normally will impose a fine. Fines are much more likely if there is already a negative track record.

The BKartA does not treat notifications of transactions that occur after their (complete or partial) completion as 'proper' notifications but will rather consider them as post-completion notices. The BKartA assesses the competition issues triggered by the proposed transaction directly as part of a 'merger dissolution procedure'. As a consequence, the one-month period for first-phase cases does not apply. Should the BKartA reach the conclusion that the transaction raises substantial issues, it may directly order the dissolution of the transaction. As a consequence, it is easier for the BKartA to undo a consummated merger that fulfils the prohibition conditions in the Act against Restraints of Competition of 1958 (GWB) quickly, as there is no longer a need to issue a formal decision prohibiting the merger before opening a merger dissolution procedure.

Further, any transaction implementing a merger in violation of the clearance requirement is regarded as invalid under civil law (at least in German law) until final clearance is given.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions for closing before clearance are applied to any notifiable concentration. Whether the concentration involves national undertakings or foreign undertakings is irrelevant. The largest fine ever imposed by the BKartA for closing before clearance related to a foreign-to-foreign merger (fine imposed on Mars in 2008 for having closed the non-German parts of the acquisition of Nutro Products).

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Hold-separate arrangements that are entered into between the parties for the purpose of closing a foreign-to-foreign transaction prior to clearance without breaching the suspension obligation may be possible if they ensure that the closing will not have an impact on the market in Germany. However, because they are unusual under German merger control rules, they require analysis in each individual case, and in practice, it is difficult to design hold-separate arrangements in a way that clearly excludes effects on the German market. This was made particularly clear after the BKartA's fining of Mars for having closed its acquisition of Nutro before clearance. Mars had notified its intention to acquire all shares in Nutro. Nutro had no assets in Germany and all sales of Nutro products into Germany were made through an independent third-party distributor located outside Germany. Following clearance by the FTC in the United States, Mars acquired the majority of the shares in Nutro prior to the BKartA's clearance. Prior to the transfer of the Nutro shares, the seller and Mars agreed to transfer and carve out the German activities that remained with the seller. The BKartA found that this was not sufficient as, in the BKartA's view, the German business could not be separated from the remaining Nutro business. It therefore concluded that the acquisition of the foreign Nutro assets had an impact on the German market and that the transfer of the shares therefore constituted an infringement of the German standstill obligation.

It is generally advisable to discuss all kinds of carveout or hold-separate solutions with the BKartA beforehand to avoid fines. In cases that do not raise competitive issues, asking the BKartA for a quick clearance may be the preferable option.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

German merger control rules are aligned with article 7(2) EUMR, allowing the notifying parties under certain conditions to consummate the public takeovers prior to clearance. The GWB does not prevent the implementation of a public bid that has been notified to the BKartA, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the BKartA.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Germany is one of the few jurisdictions worldwide that requires only a limited amount of information in a notification. The GWB requires, as a minimum, a description of the transaction and, in respect of all participating enterprises: name, place of incorporation, type of business, turnover of the parties involved (worldwide, in the European Union and in Germany), market shares of the parties in Germany and the basis of its own calculation if the combined market shares amount to 20 per cent or more, and in the case of an acquisition of shares in another company, information about the shares already held in the target company and the shares to be acquired. In the case a transaction is notified because the second set of thresholds is met, the value of consideration for the transaction as well as the principles dictating its computation are also required pieces of information. It is advisable, and may accelerate the proceedings, to provide at least some basic information on the markets concerned by the transaction. The level of information and analysis will depend on the extent to which the merger raises substantive competition law issues. The usual form of notification is a simple letter setting out the necessary information.

The notification must be submitted in German. The relevant waiting period begins after a complete notification has been received by the BKartA.

Foreign parties must appoint an authorised representative in Germany, on whom documents in the merger proceedings can be formally served. In contrast to EU merger control law, there is no obligation to submit the acquisition or merger agreement or any additional documents such as internal reports or annual reports and accounts to the BKartA. However, the BKartA sometimes requests such documents. Similarly, the BKartA does not usually require the submission of powers of attorney.

Fines for the following administrative offences can be imposed. If a filing is made with incorrect or incomplete information, a fine of up to €100,000 can be imposed. A fine of €90,000 was imposed in a case in which one notifying party did not disclose a majority participation in a company, although this participation was relevant for the substantive assessment of the notified concentration with another company (*Clemens Tönnies/Tummel*, January 2013). A fine of up to €1 million or, in the case of an undertaking, up to 10 per cent of its total worldwide group turnover in the preceding business year, can be imposed if the notifying parties intentionally include or make use of incorrect or incomplete information in the notification with a view to causing the BKartA to refrain from issuing a prohibition decision or from opening a second-phase investigation. External lawyers advising the notifying parties can also be fined if they intentionally submit incorrect information. Several external lawyers have already been or are subject to such an infringement procedure. Fines for incomplete filings have, to date, been rare in practice. Early in 2016, the BKartA imposed a fine of €90,000 on Bongrain Europe SAS for submitting incorrect (under-evaluated) market shares in a merger control filing. Where the parties intentionally submit incorrect information, the BKartA is likely to impose significant fines (eg, a fine of €250,000 has previously been imposed on a US company that provided incorrect information on its market share).

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

If the BKartA has sufficient data on the relevant markets, a decision is likely to be issued after internal discussions within the BKartA's division responsible for the case. If it requires more information (which is often the case) or needs to verify the information provided by the parties, it often contacts other market participants (such as competitors, customers, suppliers or business associations) to seek their views and information on their activities and the relevant markets, as well as often requiring the notifying parties to provide further information.

In the vast majority of cases, the BKartA is able to ascertain during the first-phase investigation that the case does not raise substantive competition problems in Germany. In these cases, the BKartA will issue an informal clearance letter within the first phase. The clearance letter is not reasoned and not subject to appeal by third parties.

If competition concerns are identified during the first-phase investigation, the BKartA must inform the parties (usually, but not necessarily, in writing) within one month that a second-phase investigation will be initiated. If the initial concerns are not confirmed during the second phase, the BKartA will either clear the concentration directly or, especially if there are intervening third parties, issue a draft clearance decision. If the second-phase investigation confirms the competition concerns, the BKartA will set out the identified issues in a written statement of objections. Both the statement of objections and the draft clearance decision provide an opportunity to submit comments. In addition, upon request of the notifying or the intervening third parties, the BKartA will also allow them to present their comments in a meeting with the case team.

Merging parties can submit proposals for commitments at any time of the procedure, provided that the BKartA still has sufficient time to review and market test the proposal. At the end of a second phase, the BKartA will either issue a clearance decision, a clearance decision with commitments or a prohibition decision. All three types of decisions are formal administrative decisions, which means that they must be reasoned and are subject to full judicial review.

The BKartA is open to pre-filing consultations in cases that are high-profile, are likely to raise competition concerns or present an unusual degree of complexity. Such discussions will usually help with the efficient preparation of the notification, as they will identify the areas in which the BKartA would like to receive more information etc. In fact, the President of the BKartA, Andreas Mundt, welcomed this explicitly by stating the following in its annual 2018 end-of-year press release: 'Companies often approach us first, in particular in cases which might be critical. Some of these projects will then not even be notified. After taking preliminary soundings in the extensive *Karstadt/Kaufhof* case we were able to send out formal requests for information to around 100 companies on the actual day of notification. This ultimately meant that the merger could be examined very quickly and at the same time very thoroughly.' In various press releases issued by the BKartA in 2019–2021 for merger cases (and particularly in retail mergers with many local markets), the BKartA mentions that a Phase 1 clearance could be granted due to intensive analysis having been conducted, in agreement with the parties, even before the parties had formally submitted their notification. By contrast, in simple cases, pre-filing consultations with the authority appear unnecessary.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The BKartA must decide within one month of complete notification whether to clear the merger or, if the transaction raises competition concerns, whether to commence an in-depth second-phase investigation. Decisions in second-phase proceedings must be issued within five months of the notification date. The five-month period may be further extended, provided that the notifying parties consent. This is applied in many cases after commitments have been proposed by the parties to allow the BKartA to properly market test the commitments, and there is an automatic one-month extension of the second phase if the parties submit commitments. In addition, there is a stop-the-clock mechanism in second-phase proceedings should the notifying parties not fully respond to an information request of the BKartA.

In practice, decisions are usually issued within the initial investigation (first phase) period of one month (more than 95 per cent of all notifications).

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A merger must be prohibited by the BKartA if it 'would significantly impede effective competition', in particular if it leads to the creation or strengthening of a dominant market position.

In 2013, the dominance test was replaced by the European significant impediment to effective competition (SIEC) test. However, the dominance test remains the key standard example of SIEC. In the context of dominance (as an example of an SIEC), the principles set out in the 2012 Guidance document on the dominance test continue to be relevant. The BKartA applies the analytical framework of the SIEC test in a similar way to the European Commission. In a recent judgment of the German Federal Court of Justice, it was clarified that a strengthening of a dominant position does not need to be significant to justify a prohibition decision (judgment of 12 January 2021 relating to the BKartA's prohibition decision in *CTS Eventim/Four Artists*). Any strengthening of a dominant position can therefore constitute an SIEC (leading to a prohibition decision).

According to the definition of dominance under the Act against Restraints of Competition of 1958 (GWB), a dominant position exists if one or more enterprises have no competitors at all, are not subject to material competition, or are in a superior market position that enables them to act independently of competitors, customers and other market participants. The GWB contains a number of rebuttable presumptions as to the existence of dominant market positions. There is a presumption of single dominance where a single company has a share of at least 40 per cent of the market. Collective dominance is presumed if three or fewer enterprises have a combined market share of at least 50 per cent, or if five or fewer enterprises have a combined market share of at least two-thirds. Collective dominance is an issue that was at the heart of a number of recent high-profile mergers reviewed by the BKartA and the German courts. In contrast to the presumption of single firm dominance, the parties themselves must rebut the presumption of collective dominance (by showing, inter alia, that there would be no implicit collusion between the presumed jointly dominant companies). Because the BKartA is under a statutory obligation to fully investigate all relevant factors, these presumptions function more like soft safe harbours. Before the courts, they continue to play a slightly more important role.

The BKartA often considers complex economic arguments. Besides market share levels, the factors it takes into account include the competitive structure of the market (including overcapacities on the market – see for example *Rhenus/Deutsche Binnenreederei*), barriers to entry and potential competition (see the recent prohibition of proposed acquisition of MBO group by Heidelberger Druckmaschinen AG), the closeness of competition (a factor whose weight appears to have gained importance in recent years – see for example *GlobalWafers/Siltronic*), switching costs (see the recent press release regarding withdrawal by IBM of its notification of its acquisition of staff, hardware and software from T-Systems' mainframe business), access to customers (eg, the importance of distribution networks and brands), access to suppliers (or purchasing patterns of customers – see, for example, *GlobalWafers/Siltronic*), vertical integration, structural links to competitors, suppliers and customers, and also, if relevant, the parties' financial resources. In

2020–2021, numerous retail mergers, either in food retail (numerous concentrations examined following the divestment of the Real supermarkets to numerous competitors) or specialist retail such as book retail (concentrations involving bookstore chain Thalia) or furniture retail (*XXXLutz/Tessner*) confirm that the BKartA will look in-depth at both the customer-facing and the procurement sides of retail businesses, with many of those cases having been looked at in second-phase, ultimately leading to conditional clearances. The Guidance on Substantive Merger Control sets out the analytical framework for review. In 2019–2020, the negotiation power of the customers or suppliers of merging parties often played an important role in justifying clearance (eg, *Vue Group (Cinemaxx)/Cinestar* movie theatre mergers: no competition concerns on the procurement market owing to a high concentration on the supply side represented by the large Hollywood film studios as film distributors; *Kemper/Reinert* meat and sausage producers merger (strong countervailing buying power of food retail companies); *Harry-Brot/one production asset of Kronenbrot*: high buyer power of food retailers like Edeka, Rewe and Kaufland as customers; and *Rewe/Lekkerland* merger: strong buyer power of the large oil companies as customers).

There are three exceptions to this rule. A concentration cannot be prohibited by the BKartA even if it would significantly impede effective competition in three situations.

The first is where the parties can show that the merger will result in an improvement of market conditions on another market, which outweighs the detrimental effects on competition. The most recent application of this clause can be found in the clearance by the BKartA of the takeover of Mediengruppe Frankfurt by the Ippen Group, with both companies publishing newspapers in the Hesse region in Germany (possible negative effects existed on some regional reader markets; however, improvements on the reader market in another region were viewed, on balance, as being significantly more important).

The second applies if the SIEC concerns exclusively relevant markets that have been in existence for at least five years and that had – in aggregate – a total annual value of less than €20 million in the last calendar year (de minimis market clause). This rule does not apply where a concentration is notifiable pursuant to the second set of thresholds. This de minimis rule also does not apply in relation to markets in which the service is provided free of charge to users. For the purposes of assessing the €20 million threshold, only the value of the German part of the market has to be taken into account, even if the geographical market is wider than the national market. If the relevant geographical market is narrower than the national market, the relevant geographical market must be taken as the reference point for the calculation.

The third exception is a specific rule for the failing firm defence in the press (newspaper and magazine) sector. Dominant publishers will be allowed to acquire a small or medium-sized competitor even if this leads to the strengthening of a dominant market position, provided that the acquired publisher meets specific financial underperformance criteria (which are clearly defined by the law and differ from the failing firm defence criteria) and that no other acquirer could be found.

20 | Is there a special substantive test for joint ventures?

Under the GWB, all joint ventures have to pass the SIEC test under the merger control rules.

In addition to the SIEC test under merger control, all cooperative aspects of the joint venture are reviewed under the restrictive practices provisions of the GWB (this is in contrast to the EUMR, where potential coordination effects between the parent companies are assessed as part of the merger control process). This review is not automatically integrated into the merger procedure but may be performed either in parallel or after the merger procedure (eg, after a merger control clearance – for two recent examples on those two different reviews, see the press releases of the BKartA relating to the advertising joint venture between the newspapers Süddeutsche Zeitung and Frankfurter Allgemeine Zeitung of 28 July 2020 as well as for *Carglas/ATU* dated 18 December 2020). A joint venture will raise competition issues if it leads to coordination between the parent companies. Coordination will be more likely in cases where the parent companies continue to be active on the same market as the joint venture. Spillover effects on neighbouring or other markets are less likely, but can also occur (eg, if the joint venture carries substantial weight compared to the parent companies' other activities). However, a joint venture is unlikely to violate the restrictive practices provision if the following conditions are met:

- it is a full-function joint venture that acts as an independent market participant;
- the parent companies are not active in the joint venture's relevant product markets; and
- the joint venture is not exclusively or predominantly active in markets upstream or downstream of its parent companies' activities.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The BKartA examines all aspects of competition in the relevant markets. This covers unilateral and coordinated effects in horizontal, vertical and conglomerate mergers. A detailed summary of how the BKartA will typically approach the analysis can be found in its revised Guidance on Substantive Assessment. In July 2019, the BKartA prohibited a concentration in the used packaging waste disposal and recycling sector (*Remondis/DSD*), for reasons of both vertical foreclosure risks (customer and input foreclosure – raising rivals' costs) on the one hand, and horizontal overlaps leading to dominance on the other. This prohibition decision was confirmed on appeal (the Court only analysed horizontal overlaps).

With regard to unilateral effects, key aspects of the BKartA's analysis relate to market shares, concentration ratio, capacity restrictions, customer preferences and switching costs, IP and know-how factors, market phase, access to procurement or sales markets, links with other companies, financial resources, potential competition and market entry, neighbouring substitution and countervailing buying power. In vertical mergers, the BKartA focuses its assessment on input and customer foreclosure effects.

With regard to coordinated effects, the BKartA's assessment focuses on the question of whether coordination becomes more stable, for example, because a significant outside competitor is acquired (eg, *Magna/Karmann* of 21 May 2010), or the companies participating in coordination become more symmetric (eg, *Axel Springer/ProSiebenSat.1* decision of 19 January 2006, confirmed by the Federal Court of Justice on 8 June 2010). For a recent example on a decision having reviewed in-depth to which extent coordinated effects could be expected in a situation of (very) high combined market shares, please see the case summary relating to the clearance of the *Syburger Verlag GmbH/motorbike business unit of Reiner H Nitschke Verlags-GmbH* in April 2020. See also the press release and case summary for *GlobalWafers/Siltronic* in 2021.

The identification of competition issues in conglomerate mergers is rather rare. The only example of this goes back over 10 years. It is the *Axel Springer/ProSiebenSat.1* case (2006), where one of the issues was cross-media effects and foreclosure. In the *Tokyo Electron/Applied Materials* case (2014) a significant conglomerate merger was cleared because the investigation did not confirm allegations by complainants that the merging parties would have the ability and incentive to foreclose rivals.

The protection of companies' incentives and ability to compete play an increased role in the BKartA's substantive assessment, and the degree of innovation capabilities is a factor that is taken into account by the BKartA in its substantive assessment. While the BKartA has had no prominent recent case, there is no reason to believe that the approach of the BKartA would be any different to the recent approach of the European Commission in innovation.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant and may not be taken into account by the BKartA. The BKartA regularly reiterates that its prerogative is the control of concentrations from a pure competition perspective. For example, when it cleared the acquisition of the newspaper General-Anzeiger by Rheinische Post in 2018, it noted that, while it is part of merger control to examine whether readers still have alternative sources to choose from, the BKartA cannot use diversity of opinion per se as an assessment criterion in its examination. It has also constantly taken the view that public interest and foreign investment grounds should be dealt with in a separate process by another authority.

However, the BKartA's decision to prohibit a merger can be overruled by the Federal Minister for Economic Affairs and Energy (the Ministry) if the negative effects of the merger on competition are outweighed by benefits to the economy as a whole or if the merger is justified by an overriding public interest. The decision may also include conditions imposed on the parties. The Minister enjoys a wide margin of appreciation with regard to the criteria for granting an authorisation, but the decision is subject to judicial review on questions of substance as well as on procedural questions. In addition, before an authorisation can be granted by the Minister, an elaborate procedure has to be followed. In particular, the Monopolies Commission, an independent but government-sponsored competition policy think tank has to issue a public opinion on the public interest issue. Afterwards, a public hearing has to be held.

Cases of ministerial authorisation being granted are rare. Since the introduction of merger control in 1973, a ministerial authorisation has only been granted without conditions in three cases and with conditions in seven cases (recently in the *Edeka/Kaiser's Tengelmann* and *Miba/Zollern* cases). In total, there have been only 23 applications (according to the number communicated by the Ministry as at end of September 2019).

The ninth reform of the GWB in 2017 introduced new provisions on certain procedural aspects of a ministerial authorisation, in particular speeding up the procedure and allowing the Ministry of Economic Affairs and Energy to issue guidelines about details of the procedure. The minister is supposed to authorise a merger within four months from receiving the application; if a decision is not reached after six months, the application will be deemed to be denied.

In addition, the reforms limit the scope of third parties' ability to appeal against a ministerial decision: in contrast to the legal situation before the amendment, where an economic impact would suffice, now only persons or companies that can show an infringement of their own rights will have sufficient legal standing. Because the requirements for such an own right are quite high, it remains to be seen if the option of an appeal against the ministerial decision will retain any practical relevance in the future.

These changes to the law follow the recent case of *Edeka/Tengelmann* where a merger was initially authorised by the minister, but then later blocked by the Higher Regional Court of Düsseldorf following appeals of competitors.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Efficiency arguments have so far not played a major role in the BKartA's practice. It is unlikely to accept efficiency arguments where the transaction would lead to the creation or strengthening of a dominant market position. However, in such cases, a clearance can still be granted if the parties can demonstrate that the merger will also result in an improvement of market conditions that outweighs the disadvantages of market dominance. Efficiencies could only be considered as such an improvement of market conditions if the efficiency gains would be passed on to the consumer (balancing clause). In this respect the BKartA will require a high level of proof that the parties will pass on the efficiencies. As the BKartA works on the understanding that a dominant company will often have little or no incentive to pass efficiency gains on, it is difficult to succeed with efficiency arguments in cases involving the creation or strengthening of a dominant position. However, efficiencies will be thoroughly investigated by the BKartA (for a positive outcome, see case report dated 7 June 2021 in the case *Charité/Deutsches Herzzentrum Berlin*). Whether efficiencies will be accepted as a defence in SIEC cases that do not create or strengthen a dominant position is an open question. Efficiency arguments can play a certain role in proceedings regarding a ministerial authorisation.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the statutory conditions for prohibition are fulfilled, the Bundeskartellamt (Federal Cartel Office – BKartA) will prohibit the merger. The BKartA also has the power to order the divestment or the disposal of certain assets where a merger has already been completed.

The BKartA has used the power to order the dissolution of a concentration and ordered two Swiss-based companies to undo their merger (*Sulzer/Kelmix*). This was the first ever divestment order from the BKartA in relation to a foreign-to-foreign merger (however, the decision was successfully appealed by the parties on other grounds). According to the Higher Regional Court of Düsseldorf, public international law is not in conflict with a prohibition of a foreign-to-foreign merger if the merger produces effects on the German territory. However, in the case of an already completed foreign-to-foreign merger, it remains unclear how the BKartA would in practice be able to enforce such a prohibition order if the parties refused to undo their merger.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The relevant provisions expressly provide for imposing conditions and obligations and accepting structural undertakings in second-phase clearance decisions. In addition, remedies (such as a restructuring of the transaction or divestment undertakings) are also possible prior to the clearance decision. Behavioural undertakings that do not affect the structure of the market are rarely accepted as sufficient to address competition concerns unless they have similar effects (divestment of slots, access to infrastructure, etc).

Undertakings subjecting the parties to the transaction to permanent behavioural control by the BKartA are explicitly prohibited by the Act against Restraints of Competition of 1958 (GWB). This has been confirmed once more by the BKartA in *Remondis/DSD*. However, albeit rare in practice, behavioural remedies are possible under German law, if they are effective and do not lead to a permanent control of the undertaking's behaviour by the BKartA.

The BKartA has published guidance (available in English) on acceptable remedies explaining which conditions they must meet to enable the BKartA to clear the transaction with conditions and obligations.

The BKartA has also published model texts for the different types of remedies and a trustee mandate on its website. These templates are similar to the models used by the European Commission, but considerably shorter.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The BKartA can accept remedies if they effectively solve the competition problem and provided they do not involve a permanent monitoring of the parties' behaviour by the BKartA. Consequently, a broad range of undertakings is possible as long as the undertaking effectively remedies the competition concerns raised.

In general, all kinds of structural undertakings are accepted by the BKartA, although in practice most are divestment undertakings.

Non-structural remedies have also been accepted in some cases (see, for example, the acquisition of the cable network operator Kabel Baden-Württemberg by Liberty Global Europe Holding, where remedies included the granting of early termination rights to large customers and the waiving of certain exclusivity clauses).

Divestitures can only be made to a suitable purchaser approved by the BKartA. The BKartA will nowadays normally ask for an 'upfront buyer', meaning that the parties agree not to implement the transaction until the buyer has been approved (suspensive condition). An upfront buyer will be required in circumstances where there is risk as to the viability of the business to be divested, finding a suitable purchaser, or where the remedy concerns a substantial part of the concentration. The sale must be completed within a specified time limit. 'Fix-it-first' solutions (ie, sale of the divestiture business before the clearance decision is issued) remain relatively rare. In exceptional circumstances, the BKartA can also agree to a resolutory condition (ie, implementation of merger before suitable buyer is accepted and divestment business is sold, but clearance lapses if no suitable buyer is found).

Any divestment remedy must be accompanied by a proposal to safeguard the business in the interim. Normally, the parties need to appoint a monitoring trustee to oversee compliance with the preservation measures. A 'divestiture trustee' will be required to handle the disposal of the business if the parent companies do not find an acceptable purchaser within the disposal deadline.

Unlike the EUMR, the GWB does not provide for the possibility of commitments in the first phase and nor is there a deadline in the second phase for the submission of commitments. However, it is advisable to discuss commitments with the BKartA as soon as the BKartA's competition concerns become clear.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As for all mergers that it reviews, the BKartA may require remedies in relation to foreign-to-foreign mergers before issuing a clearance decision. As in domestic transactions, parties to a foreign-to-foreign merger have been required to divest parts of their business around the world. Other remedies have also been imposed on parties to a foreign-to-foreign merger.

The BKartA liaises closely with other competition authorities investigating a merger, in particular with regard to remedies, provided the parties supply a waiver allowing the BKartA to exchange the necessary confidential information with the other competition authorities.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision of the BKartA does not automatically cover arrangements that are related and necessary to the implementation of the concentration insofar as these arrangements may restrict competition between the parties. They may, however, be reviewed outside the merger control process under the restrictive practices provisions of the GWB or article 101 of the Treaty on the Functioning of the European Union. This does not mean that such arrangements are automatically unlawful and void. As a basic rule, ancillary arrangements are exempted from the restrictive practices provisions if they are necessary and indispensable to the successful implementation of the concentration and EU law and practice are taken into account. In particular, ancillary restrictions in the context of newly formed joint ventures and moderate non-compete obligations on the seller may be accepted.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

During the initial investigation period of one month, but even more so during the second-phase in-depth investigation, the Bundeskartellamt (Federal Cartel Office – BKartA) often contacts customers, competitors or other market participants for market information, and their reactions have a substantial influence. However, the BKartA will dismiss information or arguments brought by third parties if it is not competition-related or if it does not bring any new elements.

A third party may also, upon application, formally participate in merger control proceedings before the BKartA as an intervening party if its interests are materially affected by the notified transaction. Therefore, competitors, customers and suppliers usually qualify as intervening parties and have been admitted in many second-phase proceedings as interveners. No private action may be brought parallel to the merger control proceedings of the BKartA, as merger control in Germany is a purely administrative matter.

Third parties admitted as intervening parties have the right to access the file, the right to be heard and the right to challenge second-phase decisions to the extent they are affected by the decision. First-phase clearance decisions are not subject to appeal (this was reiterated by the Higher Regional Court of Düsseldorf in a judgment dated 4 November 2020).

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The BKartA publishes a list of notified transactions with very limited case information on its website. If the parties would like to keep the transaction confidential during an initial period, they normally have to limit themselves to informal pre-notification discussions with the BKartA and the submission of a draft notification. The fact that a formal merger notification has been made in a particular case can only be kept confidential by the BKartA in very exceptional cases upon request. If such a request is made and the BKartA needs to undertake further investigations, it usually does not accept the notification as triggering the waiting periods. However, the BKartA will only postpone publication in extremely rare cases.

In addition, the BKartA also publishes a list of all ongoing second-phase investigations.

Information on important merger decisions is published in the form of press releases on the internet and in the biennial competition report of the BKartA. A non-confidential version of all second-phase decisions is also available on the BKartA's website, along with summary reports of selected cases (some of which are also available in English).

The BKartA is under a statutory obligation to guarantee confidentiality and the disclosure of any business secrets by staff of the BKartA would constitute a criminal offence. Consequently, business secrets contained in a merger notification or in a response to an information request issued by the BKartA will be kept confidential by the BKartA if they are identified as such by the notifying party, and indeed amount to business secrets.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The BKartA cooperates closely with other competition authorities within and outside the European Union, both on a formal and informal basis, where appropriate. However, the transmission of business secrets provided by the merging parties or by third parties is only permitted if the parties that have submitted the information give their consent, if the information is used for the same subject matter for which it was collected and if the receiving authority protects the confidentiality of the information. Regular cooperation exists in particular with the European Commission on jurisdictional issues. The BKartA has also a track record of cooperating with the US Federal Trade Commission (see the press release regarding the proposed concentration between Harry's Inc and Edgewell Personal Care Company, in which the BKartA mentions close cooperation with the US Federal Trade Commission and Department of Justice), and on policy matters, within the International Competition Network and the OECD. There is also a merger working group within the European Union with members from the European Commission and all EU national competition authorities and observers from the EFTA countries. Further details on cooperation between national competition authorities in the European Union can be found in the Merger Working Group's Best Practices (2011).

The European Commission and the national competition authorities of the member states exchange basic case information about notified transactions. Notification of a transaction in one EU member state can, therefore, trigger questions from other national competition authorities.

It is to be expected that worldwide regulatory cooperation might increase even further in the coming years, particularly with regard to digital markets. One sign of this can be found in the publication, in April 2021, by the BKartA, the UK's Competition and Markets Authority and the Australian Competition and Consumer Commission, of a joint statement on merger control. While the joint statement merely reflects the common understanding of all three authorities that consistent merger enforcement is key to preserving competition and diversity, it confirms the three authorities' agreement on the principles of effective and proactive merger control and alignment on advocacy and approach.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

All second-phase decisions of the Bundeskartellamt (Federal Cartel Office – BKartA) are subject to full judicial review by the Higher Regional Court of Düsseldorf, and its judgments are subject to review by the Federal Court of Justice only on a point of law.

There are, however, admissibility criteria for such an appeal, as recalled by the Higher Regional Court of Düsseldorf in its judgment declaring inadmissible an appeal against the prohibition decision *Miba/Zollern* (judgment of 26 August 2020). In that case, the appeal was declared inadmissible as the concentration (prohibited by the BKartA) had in the meantime been authorised by the Ministry of Economics.

In its decision of 25 September 2007 regarding the *Springer/ProSiebenSat.1* case, the Federal Court of Justice acknowledged the right to a declaratory judgment on the BKartA's merger prohibition decisions, even in cases where the parties have abandoned the merger. Judicial review must be granted when the parties have 'a particular interest' in such review, either to clarify the factual basis of the BKartA's decision or to obtain legal certainty on a point of law (eg, if a similar acquisition may be attempted in the future). The Higher Regional Court of Düsseldorf, in the aforementioned *Miba/Zollern* judgment, reiterated the strict conditions on when such a request for a declaratory judgment is admissible.

Judicial review of second-phase clearance decisions is also available to third parties admitted, at the BKartA's discretion, as intervening parties (as well as, in some circumstances, third parties who applied for this status but were refused on the grounds of procedural efficiency) to the extent that they can show that their competitive interests are directly and individually affected by the decision.

However, third parties admitted as intervening parties in the initial merger control procedure do not automatically have the right to appeal the BKartA's decisions. As stated above, they still have to demonstrate how the decision directly and individually affects their competitive interests.

In proceedings brought by third parties against a clearance decision, the Higher Regional Court of Düsseldorf may order interim measures preventing the parties from consummating the transaction. The court will do so if, based on a preliminary assessment, it has 'serious doubts as to the legality of the appealed clearance decision'. In contrast to the normal court proceedings, the appellant further has to show that its rights are infringed by the clearance decision. Thus, the requirements for getting an interim order are more demanding than for lodging an appeal.

Ministerial authorisation decisions overruling a prohibition order of the BKartA are also subject to full judicial review by the Higher Regional Court of Düsseldorf.

For the first time in the BKartA's existence, one regional court (LG Köln) had to decide on the German state's liability in connection with a merger that was declared by higher courts to have been unlawfully blocked by the BKartA. The court recognised the responsibility of the state but decided that no damages should be paid by the state, as the conditions for fault were not fulfilled. The judgment was upheld by the Higher Regional Court of Düsseldorf in 2014.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An appeal against a decision of the BKartA has to be filed with the BKartA within one month of service of the decision. In cases of an application for ministerial authorisation, the period for a subsequent appeal begins upon issue of the order by the Federal Minister for Economic Affairs and Energy.

Proceedings before the Higher Regional Court of Düsseldorf will typically last 12 to 36 months until judgment. The judgment of the Higher Regional Court can then be appealed within one month. Following this, a review process before the Federal Court of Justice will normally take another one to three years.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The BKartA has continued to be very active in merger control over the past year. Out of around 1,200 notifications made to the BKartA in 2020 (200 less than in 2019, which might be owing to covid-19 related economic uncertainties), seven (as at end of 2020) led to in-depth second-phase investigations. In 2020, no transaction was prohibited by the BKartA (this was the case for four transactions in 2019). Two cases were cleared subject to conditions in 2020 (as of end of 2020).

In recent years, in contrast to earlier periods, there are no particular sectoral trends, with Phase 2 cases, notification withdrawals or prohibitions happening in relation to a diverse array of sectors. It is to be expected, however, that cases in relation to petrol stations, hospitals, used packaging waste disposal and recycling, retail, wholesale sanitary equipment, airlines, telecommunications and mobile communications, which are sectors well known to the BKartA and often characterised by a high level of concentration, will be candidates for in-depth merger control scrutiny. This also holds true in relation to food retail, a sector that is before the BKartA again due to numerous concentrations relating to the disposal by Metro of its Real supermarket chains to numerous buyers (several second-phase merger control investigations in recent months relate to this and, in March 2021, the BKartA only partly cleared Edeka's plans to acquire up to 72 Real stores, since 21 stores could not be acquired because of competition concerns). The BKartA also has a very sophisticated approach with regard to platform businesses, particularly in digital industries.

Another noteworthy case of the last year relates to the acquisition by German slaughterhouse company Tonnies of the work contracts of one of its sub-contractors, confirming that purely asset acquisitions fall within the scope of German merger control (see press release dated 27 August 2020, *Tonnies/Lazar*). Similarly, *Carglass/ATU* is an example of a transaction viewed, for one part, as a concentration (entry of the acquiring party into the target's contracts) (with interesting developments on when an asset deal can be viewed as a concentration), and, for the other part, as a non-concentrative cooperation.

The increase of the merger control notification thresholds resulting from the last reform of the GWB is expected to further reduce the number of notifiable concentrations (by possibly up to 40 per cent). This will free up capacity for the BKartA to concentrate on the most important cases and sectors. The new power obtained by the BKartA to impose on particular companies an obligation to notify a high number of concentrations seeks the same objective (it is currently expected that such orders might be imposed on companies active in the waste disposal and digital sectors).

Reform proposals

35 Are there current proposals to change the legislation?

The 10th reform of the Act against Restraints of Competition of 1958 (GWB) entered into force on 19 January 2021. No concrete plans for a next reform have been made yet.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Although the previous reform of the Act against Restraints of Competition of 1958 (GWB) was very recent (it entered into force in 2017), a far-reaching reform of the GWB entered into force on 19 January 2021. The reform of the law concerns multiple areas of competition law (with a focus on dominance, and adopting new rules applicable to companies with paramount market power).

As regards merger control, the following main changes are as follows:

- There has been an increase of thresholds from €25 million to €50 million (this German turnover threshold needs to be met by one undertaking concerned locally) and from €5 million to €17.5 million (this German turnover threshold needs to be met by another undertaking concerned locally). This will reduce the number of notifiable concentrations (possibly by more than 40 per cent). This change responds to the Bundeskartellamt (BKartA)'s plea to free up its resources to concentrate on cases that are more likely to have problematic competition effects in Germany.
- The deletion of the rule according to which notification is not required if one of the undertakings concerned by the concentration is an independent company (ie, does not belong to a group of companies) with a worldwide turnover of less than €10 million.
- Increase of the de minimis market clause from €15 million to €20 million. However, this threshold will be calculated by adding up the value of all markets where there are competition concerns (eg, before, one could benefit from the de minimis exemption if competition concerns related to two markets that each had a value of €14.9 million; now this would not be possible anymore since the total value of those two markets would be €29.8 million, that is, above the €20 million threshold).

- There has been an update of specific turnover rules for press sector; when calculating the turnover, the multiplication factor is reduced from eight to four.
- Post-completion notices have been abolished. However, the obligation to subsequently notify will be maintained for cases where a concentration, which was subject to the notification requirement, was not notified and is thus in violation of section 39, subsection 1, sentence 1 of the GWB.
- Turnover will be calculated using internationally recognised accounting standards (eg, IFRS) for those undertakings that exclusively use those standards in their regular accounting (for the others, German accounting rules still apply);
- The temporary (but conditional) exemption of the hospital sector from merger control has been extended until 31 December 2027.
- Standard Phase 2 duration has been extended from four to five months.

Another significant element of the reform is that the BKartA is given the right to impose on a specific company the obligation to notify any concentration in one or several specific economic sectors, if certain turnover thresholds are reached (and other conditions are met) and if there are reasons to believe that future concentrations involving that company may reduce the level of competition in Germany.

Together, these changes embody the overall objective of enabling the BKartA to review the transactions that have the most potential to significantly impact competition. This will also be facilitated by the raising of thresholds, which frees up resources which up to now have been used to review a large volume of smaller or less relevant transactions.

Greece

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is Law No. 3959/2011 on the Protection of Free Competition (the Competition Law).

The Competition Law is enforced by an eight-member Competition Commission (the Commission), an independent authority with administrative and economic autonomy supervised by the Minister of Development and Investments, with a five-year term of office.

The Directorate General of Competition (DG) is headed by a general director appointed by the Commission for a four-year term of office and consists of approximately 100 members.

The National Telecommunications and Post Committee enforces the law regarding concentrations and antitrust cases in the electronic communications sector, according to Law No. 4727/2020, as in force.

Concentrations and antitrust cases in the media sector (TV, radio, newspapers and periodicals) are governed in principle by Law No. 3592/2007 (the Media Law), as in force, and by the Competition Law. These laws are enforced by the Commission.

Scope of legislation

2 | What kinds of mergers are caught?

The Competition Law applies to concentrations in general. The term 'concentration' includes any kind of merger or acquisition between two or more previously independent undertakings (article 5.2 of the Law). A concentration is also deemed to arise where one or more persons already controlling at least one undertaking, or one or more undertakings, acquire direct or indirect control over the whole or parts of one or more undertakings.

3 | What types of joint ventures are caught?

All full-function joint ventures shall constitute a concentration and shall be examined under merger control rules. However, the cooperative aspects of the joint venture shall be examined under article 1(1) and (3) of the Competition Law. In making this appraisal, the Commission shall take into account: whether the parent undertakings retain a significant portion of activities in the same market as the joint venture or in an upstream, downstream or closely related market; and whether it is likely that the joint venture eliminates competition in a substantial part of the relevant market.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

According to the Competition Law, control shall be constituted by rights, contracts or other means that, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the activities of an undertaking, in particular by ownership or usufruct over all or part of the assets of an undertaking, and rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking. Control is acquired by the person or persons who (or undertakings that) are holders of the rights or entitled to rights under the contracts concerned, or while not being holders of such rights or entitled to such rights under such contracts, have the power to exercise the rights deriving therefrom.

In a 2019 decision, the Commission stated that control may be acquired by natural persons if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking. In that case, the natural person who acquired the shares of the target company (the son) did not fulfil these requirements, so the Commission examined whether the requirements were met by the other notifying natural person (the father) on the grounds that the formal holder of a controlling interest may differ from the person or undertaking, having, in fact, the real power to exercise the rights resulting from this interest. The Commission concluded that control over the target would be, in essence, exercised by the father and that the undertakings concerned were the target undertaking and the father, with the turnover of the undertakings controlled by him being included in the calculation of his turnover.

The acquisition of control may be in the form of sole or joint control. Sole control can be acquired on a de jure or a de facto basis. In the former case, sole control is normally acquired where an undertaking acquires a majority of the voting rights of a company. In the case of a minority shareholding, sole control may occur in situations where specific rights are attached to this shareholding. Sole control on a de facto basis may exist, among others, when a minority shareholder is likely to achieve a majority in the shareholders' meeting, given that the remaining shares are widely dispersed to a large number of shareholders and this shareholder has a stable majority of votes in the meetings, as the other shareholders are not present or represented. The Commission will assess whether, following the concentration, the party acquiring control will be able to determine the strategic commercial decisions of the target undertaking.

Joint control exists when the shareholders must reach agreement on major strategic decisions concerning the controlled undertaking. The Commission has consistently held that joint control exists in the case of equality in voting rights or in the appointment of decision-making bodies. Furthermore, it has held that the acquisition of minority interests may be caught by the Competition Law if, in combination with other factors, it may confer joint control to the holding party, that is, when this minority shareholder can block actions that determine the strategic commercial behaviour of the undertaking. As such, the Commission considers decisions on investments, business plans, determination of budget, or the appointment of management. Such veto rights may be included in a shareholders' agreement or in the company's statutes. Finally, joint control exists, according to the Commission, when the minority shareholdings together provide the means for controlling the target undertaking. This can be the result of either an agreement by which they undertake to act in the same way or can occur on a de facto basis, when, for example, strong interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

In a 2016 decision, the Commission dealt with the acquisition of exclusive control over 14 regional airports in Greece. This was achieved through the conclusion of concession agreements between Fraport AG and the Hellenic Republic Asset Development Fund whereby Fraport was assigned with the financing, upgrade, maintenance, management and operation of the airports for a period of 40 years. This period was considered sufficiently long to lead to a lasting change in control of the undertaking concerned.

Regarding the acquisition of control of a part of an undertaking, the Commission looks separately at each category of assets acquired and examines whether, despite the fact that they may have been acquired by different legal acts, they constitute a single unitary transaction. Furthermore, it considers the acquisition of control over assets as a concentration if those assets constitute a business to which a turnover can be attributed. It has found that this occurs in cases where the assets include, for example, installations, stock, goodwill, operation licence, intangible assets and are combined with a transfer of personnel. In the same context, in a 2013 decision, it has considered as part of an acquired business, apart from the tangible (eg, inventory) and intangible (eg, goodwill) assets transferred, the right of the acquiring undertaking to use the premises where the target business was carried out by virtue of a lease agreement of a 12-year duration concluded with the owner of the premises.

In a 2018 case in the media sector, the Commission has found that the acquisition by an undertaking in a public auction of five trademarks under which a corresponding number of newspapers had been previously published and that had been given as security to the lending banks by the owning company constituted a concentration, as these newspapers, when in circulation, generated a turnover. The acquiring undertaking, which re-launched the circulation of the newspapers under the acquired brands, received (small) fines for late notification and early implementation of the transaction on the grounds that it should have been aware that such acquisition was a concentration and should have suspended implementation until the Commission had issued its decision.

In a 2020 decision, the Commission dealt with a concentration as a result of which the notifying parties claimed that a joint control on a de facto basis would be established between the three minority shareholders and original founders of the undertaking on the one hand and the entering investor shareholder who had the higher minority stake on the other. The Commission held that, in the absence of strong common interests, economic or family links among the original founders the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion by any of the various combinations possible among the minority shareholders, it cannot be assumed that the minority shareholders or a certain group thereof will jointly control the undertaking. In the case at hand, the entering investor shareholder was the only one that could veto the strategic decisions of the undertaking, while none of the other shareholders had such a decisive influence; therefore, it would acquire a negative sole control.

Minorities and other interests less than control are not caught by Competition Law.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration is subject to a pre-merger notification if the parties have a combined aggregate worldwide turnover of at least €150 million and each of at least two participating undertakings has an aggregate turnover exceeding €15 million in Greece. In concentrations in the media sector, the thresholds are €50 million and €5 million, respectively.

In a 2020 decision involving the acquisition of joint control in a pre-existing undertaking by an undertaking and a natural person, each one to hold 45 per cent in the joint venture, the Commission held that the undertakings concerned were each of the undertakings acquiring joint control and the pre-existing acquired undertaking. In that case, the natural person was participating in other joint ventures with third parties. For the allocation of the turnover of these joint ventures to the natural person, the Commission allocated to it the turnover of the joint venture on a per capita basis according to the number of undertakings exercising joint control.

In the case of an acquisition of parts of one or more undertakings, irrespective of whether these parts have a legal personality or not, only the turnover related to the target assets shall be taken into account with regard to the seller.

Regarding credit institutions and other financial institutions and insurance undertakings, article 10(3) of the Competition Law includes specific provisions regarding calculations of turnover.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory without exception.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes, if the thresholds are met, according to article 6. Several foreign-to-foreign mergers have been notified where the parties had sales in the Greek market, even in the absence of a local company or assets. The basis for the application of the Competition Law to such mergers is article 46 thereof, under which the Law is also applicable to concentrations taking place outside Greece, even if participating undertakings are not established in Greece, where they have actual or potential effects on competition in the Greek market.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Regarding competition matters relating to special sectors of the economy under the umbrella of a regulatory authority, such as the telecommunications sector, which is supervised by the National Telecommunications and Post Committee (NTPC), the Commission will deal with markets falling within its competence, while referring others to the NTPC. This was demonstrated in a 2018 decision of the Commission, which approved the acquisition of sole control by Vodafone Hellas over Cyta Hellas regarding the markets of acquisition of TV content, including the right to retransmit other TV channels and to offer pay TV services. In contrast, the examination of the offering of combined or bundled landline telephony, broadband access to internet, pay TV and mobile telephony were referred to the NTPC.

Legislation relating to special sectors, such as banking, insurance, investment services, telecommunications, media, energy, etc, provide for special notifications or approvals, not related to antitrust issues, in cases of acquisitions of major holdings. In addition, there exist special reporting requirements when a major holding in a company listed in the Athens Stock Exchange is acquired or disposed of. These should be examined on a case-by-case basis.

Legislation aiming to attract investments includes the Greek Development Bank Law 4608/2019, the Greek Development Law 4399/2016 and the Law on Strategic and Private Investments 4146/2013, as in force. Tax incentives on transformation of companies are provided by a number of laws, such as Law 4601/2019, Law 4172/2013, Law 2166/1993 and Law 1297/1972, as in force.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A pre-merger filing should be submitted within 30 calendar days of the conclusion of a binding agreement, the announcement of a public bid or the acquisition of a controlling interest. Filing before any of the above events, in principle, shall not trigger the timetable for clearance.

In the case of wilful failure to notify a concentration as above, the Competition Commission (the Commission) imposes a fine of at least €30,000 up to 10 per cent of the aggregate turnover of the undertaking under obligation to notify. In the majority of cases, the fines for late notification do not exceed double the minimum fine amount, although there have been some exceptions.

Failure to notify constitutes a criminal offence for the undertaking's lawful representative, punishable with a penalty from €15,000 to €150,000.

10 Which parties are responsible for filing and are filing fees required?

In the case of a merger agreement, the concentration must be notified by all parties involved, whereas in cases of acquisition of sole control by the party acquiring control and in cases of acquisition of joint control, notification must be made by all the undertakings participating in the agreement.

The filing fee for a pre-merger filing amounts to €1,100.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In cases of concentrations subject to pre-merger control, the implementation of the transaction is prohibited until the Commission issues a decision:

- approving the transaction under article 8(3) within 30 days from the notification of the transaction (Phase I decision);
- approving the transaction after an in-depth investigation (with or without conditions) within 90 days from the initiation of Phase II proceedings, according to article 8(4), (5), (6) and (8) (Phase II decision);
- approving the transaction before a 90-day term following initiation of Phase II proceedings has expired without the issuance of a prohibitive decision (deemed clearance) according to article 8(6); and
- prohibiting the transaction within 90 days from the initiation of Phase II proceedings according to article 8(6).

In a 2014 case, the Commission dealt with an acquisition of joint control, approved back in 2012, in the form of veto rights awarded to the 49 per cent shareholder by virtue of a shareholders' agreement and examined whether the concentration had been implemented before the issuance of its approving decision while it should have been suspended. According to the facts, on the same day that the shareholders' agreement was signed and even before the submission of the notification to the Commission, the shareholders' meeting of the target company had in fact elected a new board of directors consisting of directors appointed by both parties in conformity with the shareholders' agreement. From the evidence submitted to it, the Commission found that although the board had been elected by the shareholders' meeting and had convened at a meeting to constitute itself into a corporate body before the issuance of the Commission's approving decision, it had not thereafter exercised any of its powers. In fact, a month after its election, the shareholders' meeting of the target company revoked its decision electing such board with retroactive effect since its election. The Commission thus concluded that the joint control had not been actually implemented and refrained from the imposition of fines for early implementation of the concentration to the shareholders of the target company.

The issue of suspension of the implementation of a transaction came up in a 2018 decision dealing with the acquisition of sole control. In that case, the parties had notified to the Commission their non-binding memorandum of understanding providing for the sale of 100 per cent of the shares of the target company by the seller to the acquiring undertaking. A few days later, they signed and submitted to the Commission the sale and purchase agreement according to which the seller sold and delivered the shares to the acquiring undertaking, the latter paid to the seller a big portion of the purchase price and the board members of the target company had handed their written resignations to the acquiring company. That agreement did not contain a provision that the sale would be conditional on the approval of the transaction by the Commission; however, a similar clause was contained in the notified memorandum of understanding. The Commission cleared the transaction with commitments. Until the issuance of that decision, the acquiring undertaking had not exercised its rights as the new shareholder of the target company and the resignation of the board members had not been become effective. So, until that day, the target was still being managed by the previous shareholder (ie, the seller). On the basis of these facts, the Commission found that there has not been an early implementation of the transaction, especially because there was no evidence that the parties had intended to conceal the change of control and avoid the substantive examination of the transaction. However, there was a dissenting minority, including the president of the Commission.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing before clearance attracts a fine of at least €30,000 and up to 10 per cent of the aggregate turnover of the undertaking under obligation to notify, according to article 9. In the majority of cases, the fines for early closing do not exceed double the minimum fine amount, although there have been exceptions.

Closing before the Commission's decision constitutes a criminal offence for the undertaking's lawful representative, punishable with a fine from €15,000 to €150,000.

The Commission may adopt appropriate provisional measures to restore or maintain conditions of effective competition if the concentration has closed before a clearance decision or in breach of the remedies imposed by the Commission's clearance decision.

Early implementation may only be allowed following a special derogation by the Commission. Derogations may be granted to prevent serious damage to one or more of the undertakings concerned or to a third party. A derogation may be requested or granted at any time (before notification or after the transaction) and revoked by the Commission in the circumstances provided in the law, for example, if it was based on inaccurate or misleading information. The Commission may, in granting a derogation, impose conditions and obligations on the parties to ensure effective competition and prevent situations that could obstruct the enforcement of an eventual blocking decision. The Commission regards derogations as an exceptional measure and grants them with great caution, in particular where the participating undertakings face serious financial problems. The Commission has granted a derogation to a major Greek bank that intended to take over from a bank under liquidation all its current account contracts with its customers. The Commission held that the immediate implementation of the succession was crucial not only for the customers of the failed bank, so that they could have immediate access to their bank accounts, but also to safeguard the reputation of the Greek banking system.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The Commission would impose sanctions in cases involving closing before clearance in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

'Hold-separate' arrangements have, to date, not been accepted by the Commission as it considers that a concentration at the level of the parent undertakings outside Greece gives the possibility to the acquiring undertaking to implement its business and pricing policy to the seller's customers in Greece, thus acquiring control of the target's local market share.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

In the case of public bids or acquisitions of controlling interest on the stock exchange, implementation is allowed provided the transaction has been duly notified to the Commission and the acquirer does not exercise the voting rights of the acquired securities, or does so only to secure the full value of the investment and on the basis of a derogation decision issued by the Commission. In a derogation issued in this context, the Commission allowed the exercise of the voting rights of the acquired shares to elect a new board of directors, provided this board would not proceed to management acts that would substantially modify the assets or liabilities of the company until the issuance of the clearance decision by the Commission.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Pre-merger filing is onerous. A specific form exists similar to the Form CO, as well as a short form filed when the notifying party considers that the concentration does not raise serious doubts. As a general rule, the short form may be used for the purpose of notifying concentrations, where one of the following conditions is met:

- none of the parties to the concentration are engaged in business activities in the same relevant product and geographical 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 relevant product and geographical market (horizontal relationships), provided that their combined market share is less than 15 per cent; or one or more of the parties to the concentration are engaged in business activities in a product market that is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), and provided that none of their individual or combined market shares at either level is 25 per cent or more; or
- a party is to acquire sole control of an undertaking over which it already has joint control.

The Commission may require a full-form notification where it appears either that the conditions for using the short form are not met, or, exceptionally, where they are met, the Commission determines, nonetheless, that a full-form notification is necessary for an adequate investigation of possible competition concerns.

Notifications should be submitted in four copies in the Greek language, with supporting documents as well as by email. In practice, if these are in English, no Greek translation will be required, except for the concentration agreement itself. This document, or at least its principal provisions, should be translated into Greek. The submitting attorney should produce a power of attorney granting him or her all necessary powers to act before the Commission and also to act as attorney for service.

In a case where wrong or missing information is provided, the law provides for a fine of €15,000 with a maximum level of 1 per cent of the turnover.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Upon receipt of notification, a rapporteur is appointed from the members of the Commission who shall be assisted by a team of employees of the Directorate General of Competition. An investigation shall commence involving contacting third parties, such as competitors or customers, with the purpose of defining the relevant and the affected markets and the competitive conditions therein. Letters may also be addressed to notifying parties with additional requests for information, which should be replied to within at least five days of receipt. The rapporteur should issue its recommendation to the Commission, also made available to the notifying parties, whether to clear the transaction or not. The parties, following the issuance of the recommendation, have access to the non-confidential information of the Commission's file on the case. Third parties do not have access to the file.

A summons is addressed by the Secretariat to the parties for a hearing before the Commission. At the hearing, the parties may present their arguments and examine witnesses. Thereafter, they may also submit written pleadings.

18 What is the statutory timetable for clearance? Can it be speeded up?

There is a two-stage procedure for pre-merger filings.

If the concentration does not raise serious doubts concerning potential restrictive effects on competition, the Commission should issue a clearance decision within one month of notification (Phase I decision).

If the concentration raises serious doubts, the president of the Commission must issue a decision within one month of notification initiating a full investigation of the notified transaction. The participating undertakings should be immediately informed about this decision. The case is introduced before the Commission within 45 days. From that date, the undertakings may within 20 days at the latest propose commitments. In exceptional cases, the Commission may accept commitments even after the expiry of the 20-day term, in which case the term for the issuance of a decision under article 8(6) is extended from 90 to 105 days. Where the Commission finds that the concentration substantially restricts competition in the relevant market, or that, in the case of a joint venture, the criteria laid down by article 1(3) are not fulfilled, it shall issue a decision prohibiting the concentration. Such decision must be issued within 90 days of the initiation of Phase II. If the Commission finds that the concentration does not substantially restrict competition or if it approves the same with conditions, it shall issue an approving decision. If the 90-day term expires without the issuance of a prohibitive decision, the concentration is deemed as approved, with the Commission thereafter issuing a merely confirmatory decision (Phase II decision).

This timetable cannot be speeded up. They can be extended, inter alia, when the notifying undertakings consent, according to article 8(11).

If the participating undertakings do not furnish any required information within the set deadline, the term for the issuance of the decision is suspended and recommences as soon as such information is furnished. In its decisions, the Commission mentions the date of the notification, the date of its request for information and the date of submission thereof by the notifying party.

The Commission issues its decisions within the above terms.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The test for clearance is that a concentration must not significantly restrict competition in the Greek market, in particular by way of creating or reinforcing a dominant position. Criteria taken into account include actual and potential competition, barriers to entry, the economic strength of participating undertakings, the supply and demand trends relating to the products or services involved, the structure of the market and the bargaining power of suppliers or customers.

In a 2017 decision, the Competition Commission (the Commission) dealt with a conglomerate merger where an undertaking active in cold meat and cheese products was acquired by an undertaking producing sweet and salted snacks and chocolate products. The Commission cleared the merger on the grounds that it was unlikely that the acquiring company, although it had a significant share in its market, would proceed to combined sales because:

- these were not complementary products;
- supermarkets had alternatives sources of supply of cold meat and cheese products given the existence of strong competitors of the acquired company in that market;
- competitors in the crude meat market could deploy effective counter-strategies to react to any attempt of foreclosure; and
- private label products played an important role in that market.

Regarding horizontal mergers, the Commission has consistently assessed to what extent these mergers might significantly impede effective competition, in particular by creating or strengthening a dominant position, in one of two ways:

- by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects); or
- by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, would significantly coordinate and raise prices or otherwise harm effective competition (coordinated effects).

In the Media Law, dominance is defined by way of reference to a scale of market shares that will be acquired as a result of the concentration. These market shares vary depending on whether the party acquiring control is active in one or more media of the same type or of different types. The wider the spread in the various media, the lower is the market share conferring dominance. These shares vary from 25 per cent to 35 per cent.

20 | Is there a special substantive test for joint ventures?

In addition to examining whether the joint venture will significantly restrict competition, the Commission will assess possible 'cooperative' effects.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Single or joint market dominance is the basic concern of the authorities during their investigation of a concentration. They have also examined unilateral, coordinated, vertical and conglomerate effects.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

In recent years, the Commission has shown that it also takes into account the effects on the national economy when examining a merger. For example, in relation to the banking sector, the Commission has repeatedly stressed the need to support concentrations therein, as these sectors account for a considerable percentage of gross national income and concentrations would lead to the formation of more competitive and modernised groups with increased economic and productive strength, which would offer employment to a wide range of professions.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are taken into account by the Commission to the extent that they enhance the degree of competition in the market in favour of consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the authorities find that a concentration significantly restricts competition, then a prohibitive decision shall be issued.

If a concentration has been implemented in breach of the Competition Law or in breach of a prohibitive decision, the Competition Commission (the Commission) may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or disposal of all the shares or assets acquired, so as to restore the situation prevailing before the implementation of the concentration. Divestment has to date been ordered only once, in a transaction between Greek companies. The Commission may also order any other appropriate measure for the dissolution of the merger.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Commission may clear the transaction subject to conditions so as to render the concentration compatible with the substantive test for clearance or to ensure compliance by the parties with the amendments to the terms to the concentration agreed by them. A fine for non-compliance may be threatened by the Commission, which may not exceed 10 per cent of the aggregate turnover of the undertakings. By virtue of a subsequent decision verifying that the conditions have been breached, the Commission may declare that the fine has been forfeited.

In a 2011 decision involving the ice cream sector, the Commission analysed in great depth the non-coordinated and coordinated effects of the transaction and cleared it following an undertaking by the acquiring undertaking that the exclusivity clause, obliging the point of sales to use freezers only for the ice cream of the suppliers providing them, would be deleted from the respective agreements. In another 2011 case in the milk sector, the Commission cleared the transaction after a commitment by the acquiring company to divest a business of the target and to appoint a trustee to implement such divestiture.

In a 2017 decision, the Commission, following Phase II proceedings, cleared the acquisition by the second-largest supermarket chain in Greece of another supermarket chain, in a stage of pre-bankruptcy proceedings, with an equal share, which would make the acquiring undertaking the largest chain in Greece, leaving the previous number one chain in second place with a difference of approximately 5 to 10 per cent in terms of market share. The acquiring undertaking had proposed the following commitments, which were accepted by the Commission:

- It would continue its cooperation with the suppliers used both by itself and the acquired chain whose sales to the new entity emerging from the merger would represent at least 22 per cent of their total sales, for a period of three years; the same commitment was taken regarding local suppliers of the acquired entity. This commitment would cease to apply in certain defined cases, including when the product supplied became obsolete, when there were issues of safety and consumer protection imposing the interruption of the cooperation, when the quality of the product deteriorated or when there was an unreasonable increase in its price.
- The acquiring company and the new entity undertook to sell 22 shops in defined locations so as to address the concerns that high shares would emerge for the new entity post-merger in these geographic areas. Such sale should be effected within a term of nine months.

On that same transaction, the Commission issued a new decision in 2018 accepting a request by the acquiring party to modify the commitments on the grounds that the circumstances had changed. More specifically, out of the 22 stores, only eight had been sold and despite continuous efforts, there was no interest from potential buyers for the remaining 14. The Commission re-evaluated the market shares in the local markets concerned and found that although before its initial decision in 2017 the share of the acquiring undertaking would exceed 50 per cent, this was no longer the case as in the meantime new undertakings had entered the market and competition had increased. The Commission thus decided to lift the commitment of sale regarding the 12 stores and imposed a commitment on the undertaking to not operate the other two stores as supermarkets for a term of three years.

In a 2019 decision, the Commission cleared a transaction subject to three years of behavioural remedies. In that case, the vertical dimension of the notified concentration posed competition concerns owing to the dominant, if not monopolistic position, of the acquired company in the market of recycling of aluminium waste. The acquiring undertaking was a big producer and processor of primary cast aluminium. According to the Commission, there was a risk that access to the recycling service would be offered by the new entity as a tied service with the purchase of primary cast aluminium from the acquiring company. The agreed remedies provided that the offer of recycling services to the customers of the acquired company would not be dependent on the purchase of primary cast aluminium from the acquiring company and vice versa, that the acquired company would continue to offer its recycling services to its existing and creditworthy customers and that the customers of both the acquiring and acquired companies would not be bound by an obligation to exclusively obtain primary cast aluminium and recycling services from them.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

To date, only one decision imposing divestment as a condition for clearance has been issued. In that case, to entirely remove the horizontal overlap between the parties to the concentration and enable access of competitors in the chocolate milk market and given that it was not possible to separate the business activity of the chocolate milk from that of white milk, the Commission concluded that the acquiring party should sell a leading trademark of chocolate milk of the acquired party to an appropriate buyer. To ensure the viability and competitiveness of the divested asset, the acquiring party further committed, subject to the buyer's approval, to provide to the buyer access to its distribution network for chocolate milk and to have the new entity enter into a toll manufacturing agreement to produce chocolate milk for the buyer at market prices, for a transitional period of two years following completion of the divestiture.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Commission has, to date, never imposed remedies in a foreign-to-foreign merger.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision covers restrictions directly related and necessary for the implementation of the concentration. The Commission usually examines these restrictions separately and clears them on the basis of principles similar to those of the European Commission's Notice on ancillary restrictions.

In a 2020 decision, the Commission dealt with a concentration involving the acquisition of a part of an undertaking, following which the undertaking that sold part of its business would become a shareholder in the acquiring company. The non-competition clause prevented the shareholder to compete as long as it remained a shareholder and for two years after it had ceased being a shareholder. The Commission held that non-competition clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that end. Based on this, it held that the clause aimed to eliminate any competitive pressures that the shareholder could exercise on the acquiring company for a term that was unreasonably long. It also found that an obligation to impose a non-competition clause to a third party was equally not necessary. Therefore, both restrictions were found not to be ancillary restraints directly related and necessary to the concentration.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Third parties are given the opportunity under the Competition Law to play an important role in the application of Greek merger control rules. The Directorate General of Competition may address questions to third parties, such as competitors or customers. These should be replied to within five days and the Competition Law provides for fines for those who do not comply. The Competition Commission (the Commission) may invite any third party to the hearing before it, if it decides that its participation will contribute to the examination of the case. In addition, any third party, natural or legal person may intervene in the proceedings by submitting written pleadings at least five days before the hearing.

Although the Competition Law does not explicitly give third parties the right to complain in cases of infringement of merger control rules, there is no obstacle to the investigation of a non-notified transaction given the Commission's wide powers to commence on its own initiative investigations with the purpose of establishing whether merger control rules have been infringed.

Third parties demonstrating a legitimate interest may file an appeal against the decisions of the Commission before the Administrative Appeal Court of Athens.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Commission has fixed the form and content of the public announcement of the concentrations subject to pre-merger control by the notifying party in the daily press. This announcement should take place immediately after notification. This announcement is also uploaded to the Commission's website so that any interested party may submit observations or information on the notified concentration.

The decisions of the Commission are published in the Government Gazette. Commercial information, including business secrets, are protected from disclosure under article 28 of the Regulation of Operation and Administration of the Competition Commission.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Under the Competition Law, the Commission assists the European Commission in investigations carried out on the basis of EU provisions. Decisions of antitrust authorities of other member states play a crucial role in the Commission's assessment of the concentration. The Commission keeps records of concentrations subject to multiple filings in the context of the Network of European Competition Authorities (ECAs) and cooperates with ECAs regarding merger control.

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JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the Competition Commission (the Commission) are subject to appeal before the Administrative Appeal Court of Athens. This appeal does not automatically suspend the enforcement of the contested decision, but a petition to this effect may be submitted to the Appeal Court, which may grant a suspension of the whole or part of the appealed decision, provided serious reasons exist. If the appealed decision imposes a fine, the Appeal Court may suspend only up to 80 per cent of the fine.

A recourse for judicial review of the Appeal Court's decision may be filed before the supreme administrative court, the Council of State, on points of law and procedure.

The Commission seems to recognise the possibility for third parties to request by way of a petition to the Commission the revocation of a decision it has issued approving a concentration, if this decision has been based on inaccurate or misleading information. In such case, the Commission may issue a new decision. However, this possibility is only available if the applicant can invoke a specific damage that it will suffer as a result of the approved concentration and a causal link between such damage and the issued decision.

Time frame

33 What is the usual time frame for appeal or judicial review?

The time frame for an appeal before the Appeal Court is 60 days from the decision being served to the parties concerned. The term for recourse before the Council of State is 60 days from the Appeal Court's decision being served. It may take more than a year for the Appeal Court to deliver its decision and even longer for the Council of State.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Competition Commission (the Commission) has, to date, never prohibited a foreign-to-foreign merger, but has imposed fines for failure to notify and for early closing.

Given the increased concentration occurring in the supermarket sector, the Commission had the opportunity in 2014–2015 to deal with a number of transactions in this sector that were approved at Phase I.

Reform proposals

35 | Are there current proposals to change the legislation?

In January 2020, a legislative drafting committee was constituted and assigned the task of reforming the Competition Law.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Following changes in the composition of the Competition Commission in the last quarter of 2019, its current members are I Lianos (the president); K Benetatou (the vice president); P Fotis, I Stefatos, M Ioannidou and M Rantou (the rapporteurs); S Karkalakos and I Petroglou (ordinary members); and M Polemis and A Adamakou (substitute members).

Greenland

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The main legislation on Greenlandic merger control is contained in the Greenlandic Competition Act (Act of the Greenlandic Parliament No. 1 of 15 May 2014), which is modelled on Danish competition law (and thereby EU competition law) and entered into force on 1 July 2014. The main difference from the Danish Competition Act is the notification thresholds, which are significantly lower as well as the 'situated' criterion. The location requirement entered into force on 1 January 2021 (Act of the Greenlandic Parliament No. 8 of 19 November 2019). This chapter reflects the provisions of the Competition Act and the law preparatory documents accompanying the bill, but at the time of writing, the situation remains that no decisions have been adopted and there is accordingly no administrative practice.

For merger control, the provisions of the Greenland Competition Act are accompanied by executive order No. 3 of 10 March 2016 on the Notification of Mergers, and executive order No. 13 of 23 July 2015 on the Calculation of Turnover.

The legislation can be accessed in Danish or Greenlandic using the Greenlandic government's legislation website.

The Competition Tribunal is the principal enforcer of competition law in Greenland. It consists of a chair and six members appointed by the Greenlandic parliament. The chair and three of the members must be independent of commercial and consumer interests while, of the remaining three members, one is nominated by a commercial interest organisation, one by a consumer organisation, and one is nominated by the joint committee, which represents the interests of municipalities in Greenland.

The day-to-day administration of the Competition Act is handled by the Consumer and Competition Authority, which serves as the secretariat of the Competition Tribunal.

Scope of legislation

2 | What kinds of mergers are caught?

The provisions of merger control apply to concentrations. A concentration will be deemed to arise where either:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

3 | What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a concentration.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Greenlandic regulation resembles Danish legislation (which is consistent with EU law), entailing the following definition of control: control shall be constituted by rights, contracts or any other means that, either separately or jointly, confer the possibility of exercising decisive influence over an undertaking.

In cases where outright legal control is not acquired, rights attached to shares or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues may be considered. In the case of the acquisition of minority shareholdings, it is most likely that the Greenlandic Consumer and Competition Authority will assess the situation by looking at the strength of voting rights and other factors. Such considerations may lead to the conclusion that the possibility of exercising control as defined exists. It will most likely not matter whether control has actually been exercised. The European Commission's practice may be expected to serve as guidance.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions apply to concentrations where the combined global aggregate turnover of all the undertakings concerned is more than 100 million kroner, the global aggregate turnover of each of at least two of the undertakings concerned is more than 50 million kroner, and at least one of the participating undertakings is situated in Greenland.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of merger notifications in Greenland is mandatory if the turnover thresholds are met.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers satisfying the turnover thresholds are subject to Greenlandic merger control even where no actual effects in the Greenland market can be shown, as long as one of the participating enterprises is situated in Greenland.

The preparatory works of the Greenlandic Competition Act do not define exactly what is required for an enterprise to be 'situated' in Greenland, and the Competition Authority has currently not prepared any guidelines on this matter. However, to our current knowledge, this requirement would be fulfilled in circumstances where one of the merging companies has a business registration number in Greenland and is thus registered there, or when it has a branch, or the like, located in Greenland. However, other scenarios may also fulfil the requirement. By way of example, the generation of local turnover might under certain circumstances be indicative, although it remains to be seen.

Furthermore, the preparatory works state that the bill is intended to ensure control of mergers between undertakings 'sourcing commodities in Greenland for export'. It is further stated that the effect of such mergers may be significant, especially for the development of markets 'for sourcing of fish and seafood in Greenland, including the price that fishermen receive for their catches'.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Not at present.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations falling within the thresholds must be notified to the Greenlandic Consumer and Competition Authority after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest; and in any event before implementation. A specific deadline can be expected in future executive orders.

Fines may be imposed for failure to notify (and unlawful implementation). However, up until now, there have not been any cases before the Consumer and Competition Authority, where such fines have been imposed.

10 Which parties are responsible for filing and are filing fees required?

In principle, all the parties involved in a concentration are responsible for filing. In practice, however, the filing of acquisitions can be expected to be made by the acquiring party. The fee amounts to 50,000 kroner for simplified notifications and 0.015 per cent of the parties' turnover for non-simplified notifications. However, the filing fee is capped at a maximum of 1.5 million kroner. Fees have to be paid at the same time as the filing of the notification.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A concentration that is notifiable to the Consumer and Competition Authority must not be put into effect before it has been approved by the Competition Tribunal or the Council's time limits have expired.

This creates waiting periods of 40 working days (Phase I) or additionally 90 working days (Phase II) after the expiry of the first waiting period. The waiting period can be extended by up to 20 additional working days.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Fines may be imposed for (failure to notify and) unlawful implementation. Fines are calculated on the basis of the severity of the unlawful action, the duration thereof as well as the undertaking's turnover. Moreover, where clearance is subsequently denied or made conditional, the transaction will have to be annulled or otherwise reopened and modified. The Competition Tribunal has not yet issued decisions in this relation.

The Competition Tribunal has since 1 January 2021 been given the authority to impose administrative fine notices. However, the Competition Tribunal has not yet imposed any such administrative fine notices.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In principle, the same sanctions are applicable to foreign-to-foreign mergers as to other mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are still no decisions or administrative practice from the Competition Tribunal in these cases.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filing under the Competition Act requires the use of a specific form known as Annex 1. The form requires the provision of information about the parties, the markets, customers, suppliers and competitors, and is only a little less detailed than the Form CO used under the EU Merger Regulation. For straightforward cases that are unlikely to raise competition concerns, a simplified 'short-form' filing using a form known as Annex 2 is also possible. This form is similar in structure to Annex 1 but requires less information to be submitted. Both forms require the lodging of a non-confidential version, which is intended to be used for market testing. The forms are similar to the applicable Danish forms.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Pre-notification consultations with the Greenlandic Consumer and Competition Authority may and should take place.

After receiving a non-simplified notification, the Competition Tribunal must declare whether the notification is complete. When the notification is complete, the Competition Tribunal may approve a concentration before the expiry of the initial investigation (Phase I). The Competition Tribunal cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if there are serious doubts regarding the concentration's compatibility with the Competition Act.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance is the same whether the merger is filed under the simplified procedure or the full notification procedure.

The Competition Tribunal must make its decision on the substance within 40 working days (Phase I) from the receipt of a complete notification. It will decide to either approve the concentration or initiate further proceedings. In the latter case, the Competition Tribunal must make a final decision within 90 working days (Phase II) after the expiry of the original 40 working days. These time limits may be extended with up to 20 days if the undertakings propose new or revised commitments at a later stage (ie, fewer than 20 days remaining of the original deadline). The deadline is only extended with as many days required to provide 20 days for the assessment of the new or revised commitments. The deadline can also be extended with up to 20 days on request by the parties or with the parties' consent.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test to be applied by the Competition Tribunal is whether the concentration significantly impedes effective competition (SIEC), in particular as a result of the creation or strengthening of a dominant position. Unless this is the case, the concentration must be approved.

The substantive test for clearance of concentrations that have as their object or effect the coordination of the competitive behaviour of undertakings is similar to that set out in the EU Merger Regulation. Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of the Competition Act, which are the domestic equivalents of article 101(1) and (3) TFEU. This test applies in addition to the SIEC test.

20 | Is there a special substantive test for joint ventures?

The substantive test for clearance of concentrations that have as their object or effect the coordination of the competitive behaviour of undertakings is similar to that set out in the EU Merger Regulation. Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of the Competition Act, which are the domestic equivalents of article 101(1) and (3) TFEU. This test applies in addition to the SIEC test.

In the case of full-function joint ventures, which may also have the object or effect of coordinating the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions of the Competition Act applying to anticompetitive agreements (similar to article 101(1) of the Treaty on the Functioning of the European Union.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

There are still no decisions or administrative practice from the Competition Tribunal.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the review process.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment. However, section 1 of the Competition Act states that the purpose of the Competition Act is to promote 'efficient resource allocation' and, consequently, it can be argued that efficiency should be considered. In practical terms, an efficiency argument can be raised if available and will be considered in the assessment of the case. However, in raising the efficiency defence the undertakings concerned might risk the competition authorities interpreting the argument as an indication of increased dominance, as the efficiency gained will make competition even more difficult for competitors that do not benefit from similar efficiencies. Therefore, the efficiency defence should be applied with due caution.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The transaction may be approved, approved with conditions, or prohibited. Commitments may be offered to eliminate competition concerns. The Competition Tribunal has the power and duty to impose conditions; therefore, it may not, according to the principle of proportionality, prohibit the transaction if it can design suitable remedies. The parties to the merger might therefore be in the position of deciding whether to proceed with the transaction on the basis of remedies accepted by the Competition Tribunal.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the competition authorities assess that the concentration cannot be approved without conditions, the undertakings concerned will enter into a dialogue or negotiation with the competition authorities to agree on suitable commitments. The commitments agreed with the competition authorities will be formulated as conditions in the approval of the concentration. Such conditions can be appealed separately after approval of the concentration, even though they are agreed upon during the negotiations with the competition authorities. The Competition Tribunal may attach conditions including divestment orders or behavioural remedies for clearance of a concentration and may also issue orders to ensure that the parties fulfil these.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Notifying parties are not required to identify ancillary restrictions. It is therefore up to the parties to assess whether there are ancillary restrictions that need to be evaluated by the Consumer and Competition Authority.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Consumer and Competition Authority can be expected to conduct market tests.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Act on public access to documents in public files does not apply to merger cases, and information will generally be treated as confidential information. Section 24 of the Competition Act provides which information is considered to be confidential.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Consumer and Competition Authority cooperates with the other Nordic countries, (ie, Denmark, the Faroe Islands, Iceland, Sweden and Norway).

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The decisions of the Competition Tribunal are not subject to administrative appeal. The decisions of the Competition Tribunal can be brought before the court in Greenland.

Time frame

33 What is the usual time frame for appeal or judicial review?

The time frame for an appeal before the court in Greenland can be expected to be around six to nine months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

There have been no decisions or administrative practice from the Competition Tribunal to shed light on this question.

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Reform proposals

35 Are there current proposals to change the legislation?

Most recently, amendments to the Greenlandic Competition Act were made, which resulted in a revised Competition Act entering into force on 1 January 2021. In the field of merger control, these changes have had an impact on the merger control thresholds by changing the threshold to a global aggregate turnover, rather than a national aggregate turnover, and by adding a requirement that at least one of the participating undertakings is situated in Greenland. The amendments entered into force on 1 January 2021, and it is expected that more mergers than before will be subject to the notification requirement in Greenland, as a consequence of amendments to the Competition Act.

Currently, there are no proposals nor plans envisaged for further amendments to the legislation.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

With effect from 1 January 2021, the parliament of Greenland adopted a change to the merger control thresholds in Greenland. Under the previous rules, a local turnover threshold applied. This has, however, been amended and replaced by a global turnover threshold, with an additional requirement that at least one of the participating undertakings is situated in Greenland.

The Act also makes the existing whistleblowing arrangement a statutory requirement and ensures, as a statutory requirement, full anonymity for the whistle-blower, so that their identity cannot be disclosed through petitions for access to documents. Moreover, the Act introduces the possibility of issuing administrative fine notices.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Hong Kong Special Administrative Region (Hong Kong) is administratively and legally separate from the People's Republic of China. As such, Hong Kong has its own system of law.

The Hong Kong Competition Ordinance (Cap 619) (the Competition Ordinance), which came into full force on 14 December 2015, is the first ever economy-wide, cross-sector competition law in Hong Kong. While the Competition Ordinance focuses on two key behavioural prohibitions on anticompetitive business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, it also incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule). The Merger Rule provides that an undertaking must not, directly or indirectly, carry out a 'merger' that has, or is likely to have, the effect of substantially lessening competition in Hong Kong.

The Competition Commission (the Commission) and the Communications Authority (CA) have concurrent jurisdiction in enforcing the Merger Rule. The Commission and the CA have jointly issued a guideline setting out how they intend to interpret and give effect to the Merger Rule. A dedicated Competition Tribunal (the Tribunal) has jurisdiction to hear and determine applications made by the Commission or the CA to unwind a completed merger or to prohibit a proposed merger.

Unless specified otherwise, where a matter relates to conduct falling within the Commission's and the CA's concurrent jurisdiction, references are made to the 'competition authority', which shall be read as including both the Commission and the CA. In practice, and as stipulated under the terms of a memorandum of understanding between the Commission and the CA, the CA will typically take the lead in relation to matters relating to the Merger Rule, given that the merger control regime in Hong Kong only applies to the telecommunications sector.

Scope of legislation

2 | What kinds of mergers are caught?

The merger control regime only applies to 'mergers' involving a carrier licence within the meaning of the Telecommunications Ordinance (Cap 106). Such a carrier licence essentially relates to network operators that establish and maintain wired or wireless transmission facilities that carry 'communications' between locations that are separated by public streets or unleased land. This includes the local and external fixed network operators and mobile network operators.

There are no financial thresholds to trigger the Merger Rule. Instead, the issue is whether a merger has taken or is to take place. A 'merger' takes place if:

- two or more previously independent undertakings cease to be independent of each other;
- one or more persons or undertakings acquire direct or indirect control of the whole or part of one or more other undertakings. In this regard, the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger; or
- an acquisition by one undertaking of the whole or a part of the assets of another undertaking such that the acquirer is in a position to replace or substantially replace the acquired undertaking in the business or part of the business concerned in which the acquired undertaking was engaged immediately before the acquisition.

In each case above, the Merger Rule applies either where the acquirer or target holds a telecommunications carrier licence, or where the acquirer or target directly or indirectly controls an undertaking that holds a telecommunications carrier licence.

3 | What types of joint ventures are caught?

The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity constitutes a merger within the meaning of the Merger Rule. In accordance with a guideline jointly issued by the Competition Commission and the Communications Authority setting out how they intend to interpret and give effect to the Merger Rule, performing all the functions of an autonomous economic entity means that a joint venture must operate on a market and perform the functions normally carried out by an undertaking operating on that market; this is not the case if it only takes over one specific function within the parent companies' business activities without access to or presence on the market.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

A merger takes place if one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings. 'Control' is acquired by any person if that person becomes a holder of the rights or contracts or is capable of exercising decisive influence with regard to the composition, voting or decisions of any governing body of an undertaking or the activities of the undertaking by ownership of the assets of the undertaking. 'Decisive influence' refers to the power to determine or veto decisions relating to the strategic commercial behaviour of an undertaking. 'Control' may, therefore, be established on a legal or de facto basis such that minority and other interests that amount to less than legal control may be caught. However, no specific percentage threshold for 'control' is stated in either the Competition Ordinance or the related guidelines.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are no financial thresholds under the Competition Ordinance; instead, the question is whether a merger has taken or is to take place.

The competition authority has nevertheless identified two indicative 'safe harbours' according to which mergers are unlikely to substantially lessen competition:

- four-firm concentration ratio: where the post-merger combined market share of the four (or fewer) largest firms (CR4) in the relevant market is less than 75 per cent, and the merged firm has a market share of less than 40 per cent; or where the CR4 is 75 per cent or more, and the combined market share of the merged entity is less than 15 per cent of the relevant market; and
- Herfindahl-Hirschman Index (HHI): where the post-merger HHI is less than 1,000 in the relevant market; or where the post-merger HHI is between 1,000 and 1,800, and the merger produces an increase in the HHI of less than 100 in the relevant market; or where the post-merger HHI is more than 1,800, and the merger produces an increase in the HHI of less than 50.

However, the competition authority has expressly stated that meeting one or both of the safe harbour thresholds does not necessarily mean that the merger does not give rise to competition concerns and that it may still commence an investigation in 'appropriate circumstances'.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is voluntary in general, but parties are encouraged to contact the competition authority at an early stage to discuss a proposed merger that involves a telecommunications carrier licence.

However, where a party is required to make a mandatory general offer (MGO) under the Hong Kong Code on Takeovers and Mergers and Share Repurchases (the Takeovers Code) that would result in a 'change' in relation to a carrier licensee, the Takeovers Code requires that the MGO offeror obtains prior formal consent from the Communications Authority in relation to the 'change' to the carrier licensee before it triggers an obligation to make an MGO.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Merger Rule applies to foreign mergers if the transaction (indirectly) involves a telecommunications carrier licence under the Telecommunications Ordinance.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Generally speaking, there are no economy-wide restrictions relating to foreign investment in Hong Kong. Sector-specific limits on foreign investment apply in the television and sound broadcasting sectors.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing, as the merger control regime is generally voluntary. As a result, there are no specified sanctions for not filing except where prior formal consent from the Communications Authority is required for a 'change' to the carrier licensee. In these circumstances, failure to obtain consent may result in disciplinary action under the Hong Kong Code on Takeovers and Mergers and Share Repurchases. Sanctions include issuance of a public apology, public censure, and requirements on the company involved, licensed representatives and registered institutions not to act or implement the merger or acquisition.

10 Which parties are responsible for filing and are filing fees required?

'Merging parties' can submit a voluntary notification to the competition authority seeking 'informal advice' on a confidential basis (the Informal Advice Route). The informal advice is not binding on the competition authority, but it provides a preliminary view as to whether the proposed merger is likely to raise competition concerns.

Parties to a merger may also apply to the competition authority for a formal decision as to whether the merger is excluded from the application of the Merger Rule on the basis that the economic efficiencies of the merger outweigh the adverse effects caused by any lessening of competition, or the statutory exemptions apply (the Decision Route) (statutory exemptions cover statutory bodies to which the Merger Rule does not apply pursuant to section 3 of the Competition Ordinance or specified persons; and persons engaged in specified activities to which the Merger Rule does not apply as determined by the Chief Executive in Council by means of a regulation made pursuant to section 5 of the Competition Ordinance).

A fee of HK$500,000 will be charged for an application to the competition authority for a decision; in the case of the Communications Authority (CA), the amount of the fee will be equal to the costs and expenses incurred by the CA (but capped at HK$500,000).

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is no suspensory obligation.

In terms of timetable for clearance, no indicative timetable is provided by the competition authority in relation to the Informal Advice Route or the Decision Route. The competition authority has stated that it will endeavour to process applications in an efficient and timely manner, but that timing will depend on the complexities of the case and the resources available to the competition authority. In practice, from submission of all required information, 'no issues' cases have been approved within one month and complex cases have taken up to six months to be approved.

In addition, the competition authority may commence an investigation of a merger within 30 days of the day on which the competition authority first became aware, or ought to have become aware, that a merger has taken place. If the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Competition Tribunal for an order within six months (this can be extended if the Competition Tribunal considers it reasonable) of the day on which the merger was completed or the competition authority became aware of the merger (whichever is the later).

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As noted above, there is generally no requirement to seek approval before closing such that there are no specified sanctions for closing before clearance.

However, where the implementation of a proposed transaction would result in a requirement that the offeror make an MGO pursuant to the Hong Kong Code on Takeovers and Mergers and Share Repurchases, it is a requirement that the offeror obtain prior formal consent from the Communications Authority for a 'change' to the carrier licensee. Failure to do so may result in disciplinary action under the Takeovers Code. Sanctions include issuance of a public apology, public censure, and requirements on the company involved, licensed representatives and registered institutions not to act or implement the merger or acquisition.

In addition, the competition authority may commence an investigation of an anticipated or completed merger and can seek various orders from the Competition Tribunal including orders to unwind the transaction or orders to divest certain assets. In certain circumstances, the competition authority can also apply to the Competition Tribunal for interim measures for the purpose of 'preventing pre-emptive action', which may prejudice the hearing of the application by the Competition Tribunal. Interim measures would include measures akin to hold-separate orders or standstill obligations.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There is generally no requirement to seek approval before closing and there are no specified sanctions for not filing, except where prior formal consent from the Communications Authority is required for a 'change' to the carrier licensee or implement the merger on acquisition.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Not applicable. The Hong Kong merger control regime is voluntary and non-suspensory.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

Yes. Where a party is required to make a mandatory general offer (MGO) under the Hong Kong Code on Takeovers and Mergers and Share Repurchases (the Takeovers Code) that would result in a 'change' in relation to a carrier licensee, the Takeovers Code requires that the MGO offeror obtains prior formal consent from the Communications Authority in relation to the 'change' to the carrier licensee before it triggers an obligation to make an MGO. Failure to do so may result in disciplinary action under the Takeovers Code. Sanctions include the issuance of a public apology, public censure, and requirements on the company involved, licensed representatives and registered institutions not to act or implement the merger or acquisition.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

A prescribed form (Form M) sets out the information required for an application for a decision to exclude a merger or proposed merger from the application of the Merger Rule. Information to be provided includes the parties' general corporate information and business activities, description of the transaction, proposed market definition, market shares, detailed competition analysis and grounds for exclusion. The application should also include supporting documents such as a declaration of completeness and accuracy, copies of transaction documents and internal documents.

There is no prescribed form for a voluntary notification for informal advice, but a guideline jointly issued by the Competition Commission and the Communications Authority setting out how they intend to interpret and give effect to the Merger Rule indicates that applicants should provide some evidence that either the heads of agreement, term sheet or sale and purchase agreement are in place and that, when submitting the voluntary notification, reference may be made to the type of information listed in Form M.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The competition authority may conduct an investigation into any conduct that, upon reasonable suspicion, may constitute a contravention of the Merger Rule.

In terms of timetable for clearance, no indicative timetable is provided by the competition authority in relation to the Informal Advice Route or the Decision Route. The competition authority has stated that it will endeavour to process applications in an efficient and timely manner, but that timing will depend on the complexities of the case and the resources available to the competition authority. In practice, from submission of all required information, 'no issues' cases have been approved within one month and complex cases have taken up to six months to be approved.

In addition, the competition authority may commence an investigation of a merger within 30 days of the day on which the competition authority first became aware, or ought to have become aware, that a merger has taken place. If the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Competition Tribunal for an order within six months (this can be extended if the Competition Tribunal considers it reasonable) of the day on which the merger was completed or the competition authority became aware of the merger (whichever is the later).

Generally, the competition authority will have the power to obtain relevant documents and information and to require any person by written notice to attend an interview before the competition authority during an investigation. The competition authority may also conduct market inquiries that could include consulting with interested third parties. If, following its investigation, the competition authority considers that there is no reasonable cause to believe that the merger or anticipated merger contravenes the Merger Rule, the competition authority will take no further action. In the alternative, the competition authority can apply to the Competition Tribunal for an order.

18 | What is the statutory timetable for clearance? Can it be speeded up?

No indicative timetable is provided by the competition authority in relation to the Informal Advice Route or the Decision Route. The competition authority has stated that it will endeavour to process applications in an efficient and timely manner, but that timing will depend on the complexities of the case and the resources available to the competition authority. In practice, from submission of all required information, 'no issues' cases have been approved within one month and complex cases have taken up to six months to be approved.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test to be applied for the Merger Rule is whether the merger has, or is likely to have, the effect of substantially lessening competition in Hong Kong. A guideline jointly issued by the Competition Commission and the Communications Authority setting out how they intend to interpret and give effect to the Merger Rule explains that the competition authority will generally interpret a substantial lessening of competition by reference to whether the merger is likely to encourage one or more firms to raise prices, reduce output, limit innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives. The lessening of competition must be 'substantial'. Limited effects on the competitive process such as day-to-day injury to individual competitors will not be considered 'substantial' if the competitive process within the relevant market remains strong.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The 'theories of harm' that the competition authority will likely investigate are set out in a guideline jointly issued by the Competition Commission and the Communications Authority setting out how they intend to interpret and give effect to the Merger Rule (the Guideline) and include both non-coordinated effects and coordinated effects. The factors that may be taken into consideration by the competition authority include:

- the extent of competition from competitors outside Hong Kong;
- whether the acquired undertaking has failed or is likely to fail in the near future;
- the extent to which substitutes are available or likely to be available in the market;
- the existence and height of any barriers to entry into the market;
- whether the merger would result in the removal of an effective and vigorous competitor;
- the degree of countervailing power in the market; and
- the nature and extent of change and innovation in the market.

The Guideline further sets out additional factors that the competition authority may consider when assessing a vertical merger. These include whether:

- there is market power at one or more of the functional levels involved in the merger;
- there are incentives to leverage that market power into the upstream or downstream market with the purpose of lessening or foreclosing competition in that market (ie, where the merged firm operates in a competitive upstream or downstream market);
- the market power is likely to be leveraged (eg, where raising rivals' costs in downstream markets through discriminatory access pricing would be profitable and would lessen competition); and
- the effect is likely to substantially lessen competition in the market.

The competition authority will usually employ a 'with-and-without' test when assessing the transaction, which involves assessing the level of competition that is likely to exist in a market both with and without the merger.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Chief Executive in Council may, by order published in the Gazette, exempt a specified merger or proposed merger from the application of the Merger Rule if he or she is satisfied that there are exceptional and compelling reasons of public policy to do so. There is little guidance on what constitutes exceptional and compelling reasons of public policy.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Merger Rule does not apply to a merger if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong. The undertaking claiming the benefit of such exclusion will bear the burden of proof. The undertaking must show that the outweighing economic efficiency gains occur as a direct result of the merger.

A guideline jointly issued by the Competition Commission and the Communications Authority setting out how they intend to interpret and give effect to the Merger Rule sets out three general types of efficiencies:

- productive efficiencies, which are achieved where a firm produces the goods and services that it offers to consumers at the lowest cost;
- allocative efficiencies, which are achieved where resources in the economy are allocated to their highest-valued uses (ie, those that provide the greatest benefit relative to costs); and
- dynamic efficiencies, which are achieved through an ongoing process of introducing new technologies and products in response to changes in consumer preferences and production techniques.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Voluntary application to the competition authority for decision

Where parties have submitted an application under the Decision Route, the competition authority, after considering the representations made by those who are likely to be affected by the decision, may make a decision as to whether or not the merger or proposed merger is excluded from the application of the Merger Rule, or make a decision that includes conditions or limitations subject to which the merger or proposed merger is to have effect including, in the case of a proposed merger, specifying a date by which the proposed merger must be completed.

Review of anticipated mergers by the competition authority

Where the competition authority, after conducting an investigation, has concluded that the merger will not contravene the Merger Rule, then the investigation will be closed and the competition authority will take no further action. If, however, the competition authority has reasonable cause to believe that anticipated mergers will likely contravene the Merger Rule if carried into effect, it may initiate proceedings at the Competition Tribunal. If the Competition Tribunal considers that the merger is likely to contravene the Merger Rule, it may make an order to ensure that there will be no such contravention, including ordering the person against whom the order is directed not to proceed with the merger or a part of the merger, or prohibiting the person against whom the order is directed from doing anything that will result in a merger. If the Competition Tribunal is not satisfied that a merger would likely contravene the Merger Rule, it may make a declaration to that effect. If the application is made to the Competition Tribunal but it has not yet been finally determined, the Competition Tribunal may make interim orders for the purpose of 'preventing pre-emptive action'.

Review of completed mergers by the competition authority

Similar to anticipated mergers, the competition authority may apply to the Competition Tribunal for an order if it has reasonable cause to believe that a merger will likely contravene the Merger Rule. Insofar as the Competition Tribunal is satisfied that a merger contravenes the Merger Rule, it may make any order it considers appropriate for the purpose of bringing the contravention to an end, which may include an order providing for divestiture of any business or any undertaking or association of undertakings, or an order prohibiting or restricting the acquisition by any person of the whole or part of another person's business or the doing of anything that will or may result in a merger.

In each of the above scenarios, it is possible for the parties to propose suitable remedies to close down any competition authority investigation or Competition Tribunal proceedings.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible for the parties to the merger to propose suitable remedies to meet the concerns of the competition authority in return for the competition authority's agreement not to commence an investigation, not bring proceedings in the Competition Tribunal, or to terminate any investigation or proceedings that have commenced. As a general rule, the competition authority prefers structural remedies, as such remedies do not generally require ongoing monitoring activity.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The procedural requirements for the acceptance, withdrawal of acceptance, variation and release of commitments are provided in Schedule 2 of the Competition Ordinance. Before accepting a commitment, the competition authority must give at least 15 days' notice of the proposed commitment to those that are considered likely to be affected by the merger and the proposed commitment and consider any representations that are made to the competition authority. Any commitment accepted by the competition authority will be made public in the register of commitments.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The competition authority does not distinguish between domestic mergers and foreign-to-foreign mergers.

Under the old regime (repealed) under the Telecommunications Ordinance, the Communications Authority approved in 2014 HKT Limited's acquisition of CSL New World Mobility Limited subject to remedies. The remedies to address the concern in the downstream retail mobile telecommunications service market were: HKT and CSL to dispose of a specified amount of 3G spectrum, not to participate in any 3G auction in Hong Kong for a period of five years, and make known any plan of closure of any base station sites for a period of five years. The remedies to address the concern in the upstream wholesale access service market were: HKT and CSL to continue providing wholesale network access to mobile virtual network operators based on existing agreements for a period of three years, and HKT to continue giving effect to its network capacity sharing agreement with a mobile network operator that was relying on such network capacity to provide its own retail mobile telecommunications services.

Although *HKT/CSL* was a domestic transaction, the agreed remedies illustrate the types of remedies the competition authority could also seek in foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A merger transaction can involve the acceptance of restrictions that go beyond the merger agreement itself, for example, non-compete covenants, licences for intellectual property or purchase and supply agreements.

Where the restrictions are directly related and necessary to the implementation of the merger agreement, they will be treated as ancillary restrictions and will be assessed as part of the merger transaction under the Merger Rule. However, where the restrictions are not directly related and necessary, they will be assessed under the behavioural provisions under the Competition Ordinance relating to the prohibition against entering into anticompetitive agreements and the prohibition against abuse of a substantial degree of market power.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Under the Decision Route, the competition authority must publish a notice and allow 30 days for representations to be submitted and considered.

The authority may also, as part of an investigation into a proposed merger or completed merger, seek input from relevant third parties, conduct market inquiries that could include consulting competitors of the merging parties, suppliers, customers, industry associations and consumer groups and consider their views insofar as they are relevant, and carry out independent research, for example, to help assess the degree of competition in the relevant market.

Before accepting a commitment, the competition authority must give at least 15 days' notice to those likely to be affected by the merger and the proposed commitment and consider any representations that are made to the competition authority.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The competition authority is under a duty to establish and maintain adequate procedural safeguards to prevent the unauthorised disclosure of confidential information (which is a broadly defined term in the Competition Ordinance and encompasses commercial information and business secrets). It is an offence when a specified person (which is a defined term in the Competition Ordinance and includes the competition authority and its members, employees or agents) is in breach of his or her duty to preserve the confidentiality of any confidential information. Disclosure is only allowed with lawful authority; for instance, when the required consent is sought or if the information has already been lawfully disclosed to the public on an earlier occasion. In the case of disclosure with lawful authority, a specified person must, before disclosing any such information, give notice to the person who provided the information and to any person who is likely to be affected by the disclosure and consider any representations that are made about the proposed disclosure. The Competition Ordinance also imposes an obligation on a third party (not being a specified person) not to disclose confidential information.

Where a person or applicant provides information to the competition authority and is seeking confidential treatment, the information must be specifically identified and the reason for confidentiality must be provided. Parties are also asked to submit both confidential and non-confidential versions of documents when appropriate.

Specifically in relation to complaints, the competition authority will generally investigate in private to protect the interests of those involved and will not make disclosures except where appropriate (eg, to carry out the investigation).

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

There is no express provision in the Competition Ordinance providing for cooperation with antitrust authorities in other jurisdictions. The Competition Commission (the Commission) did, however, become a member of the International Competition Network (ICN) in 2013. It has since been an active member of the ICN and is engaged in the work of various ICN Working Groups. In 2018, it was appointed co-chair of the Advocacy Working Group with a view to promoting a competition culture through non-enforcement means. The Commission has also formally entered into memorandums of understanding with antitrust authorities in other jurisdictions. For example, in 2016 it signed a memorandum of understanding with the Canadian Competition Commission with the purpose of enhancing cooperation, coordination and information sharing between the two agencies, and in December 2020, it signed a memorandum of understanding with the Philippines Competition Commission to strengthen cooperation between the two agencies.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

An application may be made by any person or undertaking concerned to the Competition Tribunal for a review of the competition authority's decision. An application can only be made with the leave of the Competition Tribunal. Leave can only be granted if the Competition Tribunal is satisfied that either the review has a reasonable prospect of success, or it is in the interests of justice to hear the review. Before or after the determination of an application for review, the Competition Tribunal may, either of its own motion or on application, refer any question of law arising in the review to the Court of Appeal for determination by way of case stated.

An appeal lies as of right to the Court of Appeal against any decision, determination or order of the Competition Tribunal made under the Competition Ordinance with a few exceptions. The Court of Appeal has jurisdiction to hear and determine an appeal and may:

- confirm, set aside or vary the decision, determination or order of the Competition Tribunal;
- where the decision, determination or order is set aside, substitute any other decision, determination or order it considers appropriate; or
- remit the matter in question to the Competition Tribunal for reconsideration in the light of the decision of the Court of Appeal.

An appeal does not lie to the Court of Appeal against any interlocutory decision, determination or order of the Competition Tribunal unless leave to appeal has been granted by the Court of Appeal or the Competition Tribunal.

Time frame

33 What is the usual time frame for appeal or judicial review?

An application for the review of a decision of the competition authority must be made within 30 days of the day on which the determination was made. The Competition Tribunal may extend the time if it is satisfied that there is a good reason for doing so and no injustice would be caused as a result of the extension.

An application for a judicial review must be made within three months of the day on which the determination was made.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since the entry into force of the Competition Ordinance on 14 December 2015, the Communications Authority (CA) has reviewed several merger cases relating to the telecommunications sector: the indirect acquisition of New World Telecommunications by Hong Kong Broadband Network, the indirect acquisition of Wharf T&T (now WTT) by private investment firms MBK Partners and TPG, and the indirect acquisition of Hutchison Global Communications by I Squared Capital. The CA decided not to commence formal investigations into any of these acquisitions. More recently, the CA reviewed Hong Kong Broadband Network's proposed acquisition of WTT. Following a public consultation on the original commitments offered by the parties, the CA conditionally cleared the transaction subject to revised commitments. The transaction reduced the major operators in the relevant market from four to three. The CA expressed concerns about the difficulties of competing fixed network operators in accessing the telecommunications network within certain buildings already served by the merging parties. The revised commitments facilitate access to the telecommunications system and enable competing operators to provide fixed telecommunications services in those buildings. The CA was also concerned about the risk that downstream rivals who have entered into wholesale agreements with the merging parties might become captive customers of the merged entity during a transitional period and therefore be less able to compete with the merged entity. To allow sufficient time for downstream rivals to switch service providers if necessary, the revised commitments extended the period during which the merged entity must continue to provide fixed telecommunication services on existing or no less favourable terms to wholesale customers from two years to three years. The parties have agreed to submit written reports on compliance with these revised commitments to the CA every six months until the expiry of the revised commitments.

Reform proposals

35 | Are there current proposals to change the legislation?

It is clearly unusual for a merger control regime to apply to one sector only and there have been calls from some quarters for the scope of the regime to be extended to cover the rest of the economy in Hong Kong. The government has undertaken to review the Competition Ordinance a few years after it came into effect. In this context, the Competition Commission has indicated that it would advocate for certain aspects of the Competition Ordinance to be revised, including the introduction of a cross-sector merger control regime. The acquisition of Hong Kong Express by Cathay Pacific, which was completed in July 2019 and was not reviewable under the Merger Rule, triggered a fresh wave of concerns over the lack of a cross-sector merger control regime. However, it remains to be seen whether the Merger Rule will be broadened in the future and in what time frame.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In response to the challenges presented by the covid-19 outbreak, the Competition Commission issued a statement in March 2020 regarding its approach in applying the Competition Ordinance during the outbreak. The statement does not directly address mergers and instead focuses on temporary cooperative measures between businesses, but it affirms that the Competition Ordinance continues to apply in full during the outbreak.

Depending on the development of the outbreak, it is possible that merger review timelines could be impacted in practice, in particular where extensive market inquiries are required.

Hungary

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The most important legislative act is Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act). The other major source of law is Act CL of 2016 on the General Public Administration Procedures, which (together with the special rules in the Competition Act) sets out the basic procedural rules for administrative proceedings (including merger review). The rules of the judicial review of merger control decisions are defined by Act I of 2017 on the Code of Administrative Litigation.

Hungarian merger control rules are enforced by the Hungarian Competition Authority (GVH), an autonomous public administrative authority that reports directly and only to Parliament. The Competition Council is the independent decision-making body of the GVH.

Notices and communications by the GVH are also significant sources of merger control rules. GVH updated the notices applicable to merger review in 2018, including the notice clarifying the rules related to the initiation of merger control proceedings and the notice on imposing conditions and obligations for clearance.

Scope of legislation

2 | What kinds of mergers are caught?

The following transactions are caught by the Hungarian merger rules:

- acquisition of sole or joint control over the whole or a part of previously independent undertakings;
- merger of two or more previously independent undertakings; and
- creation of a full-function joint venture.

3 | What types of joint ventures are caught?

Similar to the European Union, full-function joint ventures are subject to merger control review.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is defined as:

- acquisition of over 50 per cent of voting rights in the target;
- the power to appoint, elect or dismiss the majority of the executive officers of the target; and
- the ability to exert decisive influence over the decisions of the target (either by the virtue of contractual arrangements or de facto).

Minority and other interests less than control do not trigger the obligation to report the merger to the GVH.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The parties are obliged to report a merger to the GVH if:

- the combined Hungarian net turnover of all parties (ie, the acquirer or acquirers and the target) exceeds 15 billion forints; and
- the individual Hungarian net turnover of each of at least two parties exceeds 1 billion forints.

Turnover of subsidiaries jointly controlled by one of the parties and a third party must be allocated on a per capita basis according to the number of entities exercising joint control. For the purposes of the second limb of the test (ie, the 1 billion forints threshold), consecutive transactions by the same parties within two years preceding the date of the transaction must be taken into account, provided that such transactions were not subject to prior merger control notification. Intra-group revenues and the turnover of the seller's group must be excluded.

Specific rules apply to the calculation of thresholds for mergers including insurance companies, credit institutions, financial enterprises or investment companies, which are largely in line with those set out in the European Union's Jurisdictional Notice.

The GVH may also decide to investigate mergers that fall below filing thresholds – within six months following their implementation – if it is not obvious that the concentration does not significantly reduce competition in the relevant market; and the combined net group turnover of all parties exceeded 5 billion forints in the previous financial year.

Mergers that meet the EU merger control filing thresholds will be assessed by the Commission in line with the 'one-stop shop' principle.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory in the case of mergers that reach the jurisdictional thresholds.

A special 'public interest exemption' exists under the Hungarian competition regime, which permits the government to qualify a merger as 'strategic' and exempt it from the merger control filing requirement. The government can do so if the merger carries national strategic interests, such as it is needed to protect workplaces or to assure security of supply.

Another exception is temporary (less than one year) acquisition of control by an insurance, investment or financial institution, if such acquisition is made with a view to resell, and the exercise of control during the interim period does not exceed what is absolutely necessary.

A special covid-19 exemption was enacted in 2020: the GVH does not need to be notified of a merger if the merger is a result of financing provided by venture capital or private equity funds directly or indirectly owned by the state in the frame of the government's funding programme to help undertakings hit by the economic consequences of covid-19.

Filing is voluntary in the case of mergers that do not reach the jurisdictional thresholds but may be subject to the GVH's investigation. However, in that case, sanctions cannot be applied for closing before clearance.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes, foreign-to-foreign mergers are subject to Hungarian merger control review if they meet the local merger control filing thresholds.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

From 1 January 2019, a foreign direct investment (FDI) screening by the Minister of Interior applies to all foreign direct investments made in certain protected sectors and industries that are important to the national security of Hungary under Act LVII of 2018. Further, as of 26 May 2020, an additional FDI screening by the Minister of Innovation and Technology was introduced in the wake of the covid-19 pandemic, which applies to strategic companies in Hungary. The latter procedure is governed by subtitle 85 of Act LVIII of 2020, and is in force until 31 December 2021 (as elongated by Government Decree 189/2021).

There are special sectors where the approval of other authorities is necessary in addition to merger review by the GVH. For instance, approval is needed from the National Bank of Hungary for the merger of financial institutions. Also, the approval of the Hungarian Energy and Public Utility Regulatory Authority is required for the merger of electricity and natural gas utility companies operating under licences issued by the same authority. The approval of the Media Council is required for certain transactions involving media companies; if such approval is not obtained prior to the merger notification, the GVH suspends its merger review proceeding until the position statement of the Media Council is obtained. These approvals, however, with the exception of that of the Media Council, have no binding effect on the proceedings of the GVH and the GVH may conclude the merger review proceeding independently from the results of the investigations of these authorities.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no deadline for filing, but the merger cannot be implemented prior to clearance by the Hungarian Competition Authority (GVH).

There are no specific sanctions for not filing per se, but sanctions apply for closing before clearance.

10 Which parties are responsible for filing and are filing fees required?

Typically, the acquirer, but in the case of a merger or joint venture, each of the parties are responsible for filing.

Fast-track review fees amount to 1 million forints. If further investigation is required and a Phase I review is opened an additional 3 million forints must be paid, and in the case a Phase II review is also opened, an additional 12 million forints must be paid.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Non-problematic concentrations can be cleared in a fast-track proceeding. The waiting period of the fast-track review is eight days and there have been cases where clearance was granted overnight. Fast-track review is available for non-problematic mergers and it is recommended that the parties engage in pre-notification discussions and submit a final and complete filing form in the course of such discussions for review and comments by the GVH.

If the investigation enters into Phase I, the waiting period is 30 days, while Phase II lasts an additional three months. The GVH may extend its review by a maximum of 20 days in Phase I, and two months in Phase II. The clock also stops until information requests are complied with. If the GVH fails to issue its decision within the applicable waiting period, its approval is deemed to be granted.

The implementation of the transaction has to be suspended prior to acknowledgement or clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The GVH may impose daily fines for closing before clearance. Fines can range between 50,000 and 200,000 forints per day for each day starting from the date of signing (or other triggering event, as specified) until the initiation of GVH's merger review process.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, sanctions also apply to foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The acquirer may apply for a GVH permission to exercise control prior to clearance. Such request must be made in a reasoned submission and can be granted in exceptional cases only, in particular if control is required to maintain the value of the target's business.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Since the introduction of fast-track proceedings into the Hungarian merger regime, the merger filing became considerably shorter. Currently, it consists of five main chapters, is 20 pages long and only requires information on the transaction, the parties and the relevant markets. If the merger cannot be cleared in a fast-track proceeding and further investigation is required, the GVH will issue targeted requests for information regarding the relevant markets and the competitive effects of the transaction.

The transaction agreement (SPA) and the annual financial reports of the parties shall be annexed to the filing form, together with proof of payment of the filing fee.

The filing form may be downloaded from the GVH website and is available in both Hungarian and English, but must be submitted in Hungarian. Supporting documents drawn up in English may be submitted in the original language, but the GVH may require the submission of a Hungarian summary or a Hungarian translation. If the documents are drawn up in languages other than English, the Hungarian translation of the parts of the documents relevant to support the data and information provided in the notification form must also be attached.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Pre-notification

The first (informal) step in the notification process is the confidential pre-notification discussions with the GVH.

Notification stage

In straightforward, non-problematic cases the GVH closes the procedure and acknowledges the transaction within eight days of receipt of the notification by the issuance of an administrative certificate (fast-track procedure). If this is not the case, the GVH opens the investigation phase.

Investigation stage

In the case of transactions that require more thorough investigation, the procedure of the GVH is divided into two stages: an investigation stage by the case handlers and the decision-making stage by the Competition Council. The investigation stage is completed when the case handlers submit their investigation report to the Competition Council summarising their main findings in the case.

Decision-making stage

Formal decision-making is made by the Competition Council based on the investigation report and their own review and assessment.

Phase I and Phase II

After obtaining the agreement of the Competition Council, the case handlers will open a Phase II investigation in complex cases. In Phase II, extra time is added to the notification timetable both to the investigation (case handlers) and the decision-making (Competition Council) stage.

18 What is the statutory timetable for clearance? Can it be speeded up?

It is advisable to engage in pre-notification discussions with the GVH as these discussions can help to accelerate the GVH's decision-making (by reducing the risk and scope of information requests) and can result in obtaining clearance in a fast-track procedure. Pre-notification discussions are confidential and typically last approximately two weeks. The GVH recommends that parties request the initiation of pre-notification discussions at least two weeks before they intend to report the merger. In 2020, 94 per cent of fast-track applicants engaged in pre-notification discussions.

In straightforward cases where the absence of competition concerns is clear, the GVH acknowledges the transaction by the issuance of an administrative certificate within eight days of the date the merger was reported. The administrative certificate is normally less than a page long and only contains a brief description of the transaction. The Phase I waiting period is 30 days, while Phase II lasts an additional three months. The GVH may extend its review by a maximum of 20 days in Phase I, and two months in Phase II. The clock stops until information requests are complied with. If the GVH fails to issue its decision within the applicable waiting period, its approval is deemed to be granted.

In 2020, the average review times by GVH were:

- four days, for fast-track reviews;
- 17 days for Phase I reviews; and
- 71 days for Phase II reviews.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The Hungarian Competition Authority (GVH) uses the significant impediment to effective competition (SIEC) test for its assessment of mergers and will clear transactions that do not result in a SIEC, particularly by creating or intensifying a dominant position on the relevant market.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The GVH assesses unilateral and coordinated effects in horizontal, vertical and conglomerate mergers including portfolio effects, by weighing pro- and anticompetitive aspects, in particular:

- structure and characteristics of the relevant markets;
- actual and potential competitive pressure;
- presumed competitive effects;
- sourcing and sale opportunities;
- costs, risks and conditions of market entry and exit;
- market position and business strategy of the parties; and
- effects on suppliers and other partners.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The GVH's assessment centres around competitive aspects and it is not expected that the GVH would consider non-competition issues in its review. The only exception is mergers involving media companies, where the GVH must consider the view of the Media Council that focuses its review on maintaining media pluralism.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The GVH takes into account economic efficiencies. In practice, efficiencies are expected to be specific to the transaction and to bring along quantifiable consumer benefit (the sooner the benefits are predicted to arise, the larger weight they carry in the assessment).

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Hungarian Competition Authority (GVH) may prohibit transactions or impose structural or behavioural remedies.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. If a transaction's projected anticompetitive effects can be prevented by imposing structural or behavioural remedies, the GVH can clear the merger subject to appropriate remedies. Usually, the GVH prefers structural remedies because of their ease of monitoring.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Timing and conditions are imposed on a case-by-case basis. However, all remedies must comply with some basic requirements: they must be capable of removing competition concerns, must be proposed by the parties, and be exact, consistent and verifiable. Commitments are normally subject to market testing and the GVH also holds hearings to discuss proposed remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of any truly foreign-to-foreign mergers (where the parties have no Hungarian subsidiaries, manufacturing facilities or other presence) where the GVH imposed remedies on the parties.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

By virtue of law, all ancillary restraints necessary for the implementation of a concentration are covered by the GVH's clearance decision. However, this does not mean that all restrictions labelled in an SPA as 'ancillary' would be automatically approved by the GVH when issuing its merger clearance decision. Instead, the GVH's practice is not to assess the conformity of ancillary restraints with the relevant requirements during its merger review and its clearance decisions are silent on the issue. It is, therefore, the parties' responsibility to self-assess such restraints (prior to filing) and the GVH retains the right to open an independent investigation to assess any ancillary restraint even after the merger is cleared and closed.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Yes, customers and competitors can have their voice heard in the merger review process. The Hungarian Competition Authority (GVH) can send information requests to any group of third parties whose views are relevant to the assessment of the merger. In complex cases, the GVH conducts an in-depth market testing exercise involving competitors, consumers and other parties affected by the transaction. In addition, third parties can also (at their own initiative) submit comments on an ongoing procedure.

Anyone can submit a complaint to the GVH when suspecting the breach of competition rules, including merger-related infringements, such as closing without clearance or gun jumping. Complainants' status slightly defers based on whether they used the GVH's complaint form when submitting their complaint, as complainants using the official form have more procedural rights than those submitting an 'informal' complaint. The GVH must decide within two months from receipt of a formal complaint (which may be extended with two additional months) whether to open an investigation based on information revealed during its review of the complaint. After the complaint review process is closed, complainants can access and review the GVH file. In the case of an informal complaint, the GVH has more flexibility, as it has no obligation to formally decide on whether to open an investigation based on an informal complaint.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

First, after submission of the merger control filing form, the GVH publishes on its website a brief overview of the transaction containing basic information on the contemplated transaction, except if the concentration is accepted for confidential treatment, in which case no publication is made until the concentration is implemented. This summary is copied from a section of the filing form, so the parties can influence the level of detail that goes into it. Second, third parties can request access to merger files, but as a general rule access is only granted after the final and non-appealable conclusion of the merger case. Prior to that, access to merger files is only possible if the third party can demonstrate that such access is necessary to enforce a statutory right or to meet an obligation arising from law or from an administrative decision. In any event, third parties may only have access to non-confidential versions of the relevant documents. Third, the GVH may hold hearings in any competition case (including mergers). The default rule is that such hearings are public, unless the GVH decides to hold a closed hearing because of the need to discuss sensitive information. Finally, the GVH's final decision is published on the GVH's website. All sensitive and confidential information is removed from the public version of the GVH decision prior to publication on its website.

The GVH is very attentive to protecting commercially sensitive or private data throughout the process.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The GVH is a member of the European Competition Network that consists of the national competition authorities of EU member states and the European Commission. It is also a member of the European Association of Competition Authorities, which consists of national competition authorities of the member states of the EU and the EFTA (except for Switzerland), as well as the European Commission and the EFTA Surveillance Authority. The GVH is also member of the International Competition Network.

There is a lively cooperation between the GVH and the OECD, which (among others) manifests in the OECD-GVH Regional Centre for Competition in Budapest (since 2005). The Centre promotes the development of competition policy in the south-east, east and central European regions.

Finally, the GVH has bilateral cooperation agreements with a number of non-EU competition authorities, including the Chinese, Ukrainian, Moldovan, Albanian, Serbian, Russian and Taiwanese authorities.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The decision of the Hungarian Competition Authority (GVH) is subject to judicial review, which may be launched within 30 days of receipt of the

GVH's decision. The first instance court decision may be subject to appeal to a higher court.

The GVH's decision is rarely challenged successfully. The last time a merger case was remanded and referred back for reconsideration was in 2020.

Time frame

33 What is the usual time frame for appeal or judicial review?

Court review takes approximately two years (including both first and second instance review) on average, but it is not uncommon for the review process to last even longer.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Hungarian Competition Authority (GVH) closed 68 merger control proceedings in 2020. It imposed obligations or conditions in only two cases, meaning the GVH did not identify any competition concerns in 97 per cent of notified mergers. 84 per cent of merger control cases were closed using the fast-track procedure, 13 per cent in Phase I and 3 per cent in Phase II.

Reform proposals

35 Are there current proposals to change the legislation?

In light of the pending reform of the Vertical Agreement Block Exemption Regulation (VBER) (Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices), it is expected that Government Decree No. 205/2011 (X. 7) on the block exemption of vertical agreements will be amended to conform with the revised VBER.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

As of 1 January 2021, the Hungarian Competition Authority (GVH) amended its merger control jurisdictional notice (GVH Notice No. 2/2020 on certain jurisdictional issues relating to merger control proceedings). The most significant changes are:

- The introduction of a new ancillary restraint in connection with the minority owners of start-up companies who are responsible for the innovation essential to the start-up. Such minority owners may undertake a non-compete obligation for a maximum of two years after the termination of minority ownership, provided that a financial investor retains or gains control over the start-up.
- The notice explicitly states that undertakings cannot agree to add non-compete clauses to the employment contracts of key employees in the framework of the transaction (ie, such an obligation may not be accepted as an ancillary restraint).
- An added chapter on the calculation of fines for breaching stand-still obligations and for failing to notify the merger may provide a better understanding of the GVH's approach to sanctions for gun jumping.
- Consequence mergers are now explicitly included among the several forms of transactions treated as single concentrations. A consequence merger is a concentration resulting from a transaction that involves a change of control of another undertaking, from another group of companies that is not affected by the transaction. For example, if a company acquires control over an undertaking with which (prior to the transaction) they owned a joint venture, as a result of the transaction, the control of the joint venture will change from joint to sole control.

Furthermore, the GVH has also amended its Notice No. 7/2017 on the 'immediately apparent' requirement in connection with merger control proceedings, adding new sections regarding the coordinative effect caused by overlaps in the management of the undertakings.

Notice No. 8/2017 on commitments in merger control proceedings also received slight amendments, such as the application of firewalls as a behavioural remedy and the possibility for the GVH to impose remedies regarding the price or quality of the services provided by the undertakings concerned.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Competition law in India is governed by the Competition Act 2002 (the Competition Act) and regulations and guidance notes issued thereunder. Sections 5 and 6 of the Competition Act require the pre-notification of all acquisitions, mergers and amalgamations where the turnover or assets of the parties and groups cross specified thresholds (collectively described as 'combinations') to the Competition Commission of India (CCI), which is responsible for merger review applying the standard of appreciable adverse effect on competition (AAEC).

Scope of legislation

2 | What kinds of mergers are caught?

Section 5 of the Competition Act covers three broad categories of combinations:

- The acquisition by one or more persons of control, shares, voting rights or assets of one or more enterprises where the parties, or the group to which the target will belong post-acquisition, meet specified assets or turnover thresholds (see below). Acquisitions not involving a change of control are caught in this category.
- The acquisition by a person of control over an enterprise where the person acquiring control already has direct or indirect control over another enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods, or in the provision of a similar or identical or substitutable service, where the parties, or the group to which the target will belong after the acquisition, meet specified assets or turnover thresholds (see below).
- Mergers or amalgamations where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger or amalgamation, meets specified assets or turnover thresholds (see below).

To prevent the merger control regime from becoming unduly onerous, Schedule I to the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations 2011 (the Regulations) lists categories of transactions that are 'ordinarily' not likely to cause an AAEC in the relevant market in India and, therefore, are not 'normally' required to be notified to the CCI. These transactions are:

- direct or indirect acquisitions of shares or voting rights entitling the acquirer to hold less than 25 per cent of the shares or voting rights of a target company (including through a shareholders' agreement or articles of association) solely for investment purposes or in the ordinary course of business, provided that this does not lead to the acquisition of control. The acquisition of less than 10 per cent of total shares or voting rights will be treated solely as an investment if the acquirer:
  - is able to exercise only the rights of ordinary shareholders exercisable to the extent of their respective shareholding;
  - does not have, or have a right to have, or intend to have a seat on the board of the target enterprise; and
  - does not intend to participate in the management or affairs of the target enterprise;
- an acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to the acquisition, already holds 25 per cent or more shares or voting rights of the enterprise, but does not hold 50 per cent or more of the shares or voting rights of the enterprise either prior to or after such acquisition. This exemption is not available if the acquisition results in the acquisition of sole or joint control of such enterprise by the acquirer or its group;
- an acquisition of shares or voting rights where the acquirer already holds 50 per cent or more of the shares or voting rights in the target enterprise, except where the transaction results in a transfer from joint control 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 of the target enterprise, except where the assets represent substantial business operations of the target enterprise in a particular location or for a particular product or service, irrespective of whether such assets are organised as a separate legal entity or not;
- intra-group reorganisations. These include:
  - an acquisition of shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group; and
  - a merger or amalgamation of two enterprises where one of the enterprises has more than 50 per cent shares or voting rights of the other enterprise, or a merger or amalgamation of enterprises in which more than 50 per cent shares or voting rights in each of such enterprises are held by enterprises within the same group. This exemption is not available if the transaction results in transfer from joint control to sole control;
- acquisitions 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 or 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. Note that care will need to be taken in case of an acquisition of control through a renunciation of rights;

- an amended or renewed tender offer where a notice has been filed by the party making such an offer;
- an acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI (for instance, in case of a divestiture); and
- an acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stockbroker on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stockbroking.

3 What types of joint ventures are caught?

The formation of a joint venture is not specifically covered by section 5 of the Competition Act, as it only covers the acquisition of an 'enterprise' and mergers and amalgamations of 'enterprises'.

'Enterprise' as defined under the Competition Act effectively refers to a 'going concern' that is already conducting or has previously conducted business. A purely 'greenfield' joint venture is unlikely to be considered as an 'enterprise', and will therefore not fall within the scope of section 5. Moreover, even if it were to be considered as an 'enterprise', in the majority of cases, a truly 'greenfield' joint venture is unlikely to meet the thresholds under the target exemption. By contrast, the establishment or acquisition of a 'brownfield' joint venture (where parents are contributing existing assets or businesses, customers, customer contracts, intellectual property, etc, or conferring control over them) would be notifiable where the jurisdictional thresholds are met, as it involves the acquisition of an enterprise under section 5 of the Competition Act.

There is presently limited guidance from the CCI in relation to the treatment of joint ventures or the criteria it would apply in determining whether a transaction is greenfield or brownfield, or, for that matter, whether it would treat full-function joint ventures differently from non-full-function joint ventures.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The acquisition of 'control' is only one of the events that may trigger a notification. As a starting point, 'control' is defined under section 5(a) of the Competition Act to include 'controlling the affairs or management by: (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise'.

Earlier the CCI, in its substantial decisional practice, had interpreted control to mean the ability to exercise decisive influence over the management or affairs and strategic commercial decisions of a target enterprise, whether such decisive influence was capable of being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding) or contractual covenants. However, the CCI has expanded the scope of 'control' in two of its orders: penalising Telenor (C-2012/10/87) for failing to notify its acquisitions of shareholdings in two companies; and penalising UltraTech Cement (C-2015/02/246) for failing to provide information on the shareholding or control of the promoter family over two companies. In *UltraTech Cement*, the CCI stated that, in defining control, regard had to be given to different levels of control – in ascending order, material influence, de facto control and controlling interest (de jure control) – and not just to special rights. In *Telenor*, the CCI held that Telenor could not have sole control of the two target companies as, in the first target, another shareholder held a 51 per cent shareholding, conferring a controlling interest; and in the second target, even though Telenor held 67.25 per cent shareholding, other shareholders held more than 26 per cent, giving them the ability to block special resolutions (which was considered negative control even under foreign direct investment policy). In these cases, the CCI has moved from the concept of 'decisive influence' based on special or veto rights towards a more expansive definition of 'control', to include 'material influence'.

Such an interpretation includes negative control by minority shareholders. In contrast to 'investor protection' rights, having the ability to veto (or cause a deadlock in respect of) strategic commercial decisions could be sufficient to confer at least joint control, the acquisition of which would require notification to the CCI. Such strategic commercial decisions have included decisions on annual business plans, budgets, recruitment and remuneration of senior management, and opening of new lines of business.

Because of the expansive interpretation given to 'control', and the absence of clear guidance from the CCI on which specific rights will be considered as pure minority protection rights, the distinction between genuine minority protection rights and negative control has become blurred. As a result, many pure financial investments and private equity transactions are susceptible to review by the CCI.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The jurisdictional thresholds under the Competition Act are as follows:

- parties test:
  - the parties have combined assets in India of 20 billion rupees or combined turnover in India of 60 billion rupees; or
  - the parties have combined worldwide assets of US$1 billion, including combined assets in India of 10 billion rupees or a combined worldwide turnover of US$3 billion, including a combined turnover in India of 30 billion rupees; and
- group test:
  - the group has assets in India of 80 billion rupees or a turnover in India of 240 billion rupees; or
  - the group has worldwide assets of US$4 billion, including assets in India of 10 billion rupees, or a worldwide turnover of US$12 billion, including a turnover in India of 30 billion rupees.

For the purposes of calculating the jurisdictional thresholds, the government of India has exempted, in the public interest, groups that exercise less than 50 per cent of the voting rights in the other enterprise.

The government of India, through a notification dated 27 March 2017, revised the de minimis target-based filing exemption to apply to all forms of transactions (ie, acquisitions, mergers and amalgamations), for a period of five years until 28 March 2022. Transactions where the assets being acquired, taken control of, merged or amalgamated are not more than 3.5 billion rupees in India or where the turnover is not more than 10 billion rupees in India are exempted from the CCI notification requirement (Target Exemption). The 2017 notification contains an explanation in relation to assessing the jurisdictional thresholds.

The CCI has also updated its frequently asked questions section on its website to give guidance on the calculation of jurisdictional thresholds.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the jurisdictional thresholds are met and no exemptions are available, the combination must be notified to the CCI. Where a proposed combination consists of a number of interconnected steps or transactions, even where one or more of these steps or transactions would, on a standalone basis, have been exempt from filing, all such transactions must be filed as a composite whole and must not be completed pending the CCI's review.

In August 2019, the CCI introduced a 'green channel' filing route that covers combinations where the parties have no horizontal overlap, no vertical relationships and no complementary businesses. Such combinations are, subject to certain conditions and safeguards, deemed to be approved by the CCI upon filing.

In addition to the Schedule I exemptions and the Target Exemption, the government of India has also exempted banking companies from the merger notification requirement when a notification of moratorium has been issued in respect of such companies. A notification of moratorium is ordinarily issued to 'failing' banks that are financially and operationally weak and are on the brink of insolvency. In August 2017, the government of India exempted Regional Rural Banks and nationalised banks from the application of the provisions of sections 5 and 6 of the Competition Act for a period of five years and 10 years, respectively. In November 2017, the government of India exempted central public sector enterprises along with their subsidiaries operating in the oil and gas sectors from the application of the provisions of sections 5 and 6 of the Act for a period of five years.

Section 6(4) of the Competition Act provides that acquisitions, share subscription 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, do not need to be pre-notified to the CCI. However, in such cases, the body concerned will need to notify the CCI of the acquisition within seven calendar days of completion of the transaction. To date, there have been only four decisions published by the CCI under this provision.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Until the end of March 2014, the Regulations provided an exemption for transactions between parties outside India provided there was insignificant local nexus and effects on markets in India. The CCI interpreted the exemption narrowly, rendering it virtually redundant. To remove uncertainty in this regard, the CCI withdrew the exemption, so that foreign-to-foreign transactions satisfying the standard assets and turnover thresholds under the Competition Act, and not covered by any of the other exemptions, will have to be notified even if there is no local nexus and effects on markets in India. However, the absence of a local nexus and effects should expedite the review and clearance process by the CCI.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are currently no other special rules under the Competition Act governing merger control review for foreign investment or specific sectors such as telecoms, pharmaceuticals, the media, oil and natural gas.

In addition, there are non-competition regulatory approvals, which may be required, depending on the sector in which the investment is being made. Notably, following an amendment to the recently introduced Insolvency and Bankruptcy Code 2016, it has been made clear that where a transaction covered by the corporate insolvency resolution process (CIRP) has to be notified to the CCI, approval by the CCI is required before a resolution plan is approved by the committee of creditors (although a recent judgement by the National Company Law Appellate Tribunal has indicated that this amendment was 'directory and not mandatory'). The CIRP is limited to 180 days, which may be extended up to a further 90 days in certain cases. To meet this tight deadline, a bidder would be advised to notify a transaction to the CCI as early as possible.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

In a welcome move to ease doing business in India, the government in June 2017 removed the requirement on parties to notify combinations to the Competition Commission of India (CCI) within 30 calendar days of the relevant trigger event. While notifiable transactions still require approval from the CCI prior to closing and remain subject to penalties for gun jumping, the elimination of the filing deadline has removed timing pressures on the filing parties. It should be noted that the parties may have pre-filing consultations (PFC) with CCI staff or case team members on substantive and procedural matters, and this frequently helps parties decide whether they need to notify and, if so, how they should proceed. The CCI has published a PFC Guidance Note setting out the framework for such consultations.

Previously, while the CCI actively penalised parties for belated filings, it also penalised parties for failing to notify transactions. In *SCM Soilfert* (C-2014/05/175), the CCI fined the acquirer 20 million rupees for consummating strategic open market purchases in the target enterprise without prior approval from the CCI. The CCI imposed a penalty of 50 million rupees on *Piramal Enterprises* (C-2015/02/249) for failing to notify previously closed interconnected steps of a transaction. The Competition Appellate Tribunal upheld both penalties and the Supreme Court of India upheld the penalty imposed in the *SCM Soilfert* case.

Although the penalties imposed by the CCI in recent years have only been nominal (for example, *ReNew* (C-2017/11/536); *Telenor* (C-2012/10/87) and *Intellect Design* (C-2015/12/348)), the CCI has been vigilant in pursuing defaulters. Accordingly, parties are increasingly using the pre-notification consultation process before formally submitting the filing or deciding on not submitting a filing.

10 Which parties are responsible for filing and are filing fees required?

In the case of an acquisition, the acquirer and, in the case of a merger, both the parties jointly, are responsible for filing. Generally, the notice is filed in the (short) Form I; however, where there is a horizontal overlap of more than 15 per cent or a vertical overlap of more than 25 per cent, it is recommended that the notice is filed in the (long) Form II. A green channel filing is required to be made in a Form I.

The filing fee for Form I is 2 million rupees and for Form II 6.5 million rupees. The acquirer, in case of an acquisition, or the parties to a merger or amalgamation in case of a merger or an amalgamation, shall pay the filing fees. In the case of a joint notification, the fees are payable jointly or severally.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The merger control regime in India is suspensory and transactions subject to merger control review by the CCI cannot be consummated until merger clearance has been obtained, or a review period of 210 calendar days has passed, whichever is earlier. The suspensory effect extends to both exempt steps of interconnected transactions as well as to the closing of global transactions (even if the Indian leg has not been consummated) pending the CCI's approval.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the parties fail to notify a notifiable combination prior to closing, the CCI has the power to impose a penalty of up to 1 per cent of the total turnover or value of assets, whichever is higher, of the proposed combination. The CCI has used these powers regularly in cases where late filings have been made though, given the trigger exemption, such proceedings are unlikely to continue. The amount of penalty levied by the CCI has been as high as 50 million rupees. Recently, however, the CCI has imposed more nominal penalties in cases of delayed, voluntary filings. In cases where parties had consummated part of the combination prior to approval by way of pre-payment of consideration, the CCI imposed a penalty of 500,000 rupees (*Hindustan Colas* (C-2015/08/299)) and a penalty of 1 million rupees (*Chhatwal Group Trust* (C-2018/01/544)). In another case, where a loan had been advanced to the seller that could be adjusted against the consideration payable for the proposed acquisition before the CCI approval, a penalty of 1 million rupees was imposed (*Adani Transmission* (C-2015/01/547)).

A penalty of 500,000 rupees was imposed in *Cairnhill CIPF* (C-2015/05/276), where the CCI held the filing to be late because the wrong agreement or document was considered as the trigger by the parties. Interestingly, in *PSPIB and Grupo Isolux Corsan* (C-2015/10/330), which involved a dissolution of a joint venture, the CCI decided not to impose any penalty for a belated filing, given the unique structure of the combination, and the lack of finality of key terms, which were to be determined by third parties. More recently, the CCI found that even a contractual clause in the acquisition agreement amounted to the consummation of a part of the acquisition (*Bharti Airtel* (C-2017/10/531)). It is not clear what the offending clause covered since material parts of the order were redacted. However, the CCI considered that the arrangement disincentivised the target from competing with the acquirer, affected the business activities in the ordinary course of the target and could not be considered as inherent and proportionate to the objective of preserving the business valuation.

The power to impose a penalty also extends to the consummation of any part of the proposed transaction prior to obtaining CCI clearance. In *Etihad Airways/Jet Airways* (C-2013/05/122), the CCI penalised Etihad Airways 10 million rupees for completing one leg of the composite transaction notified for clearance. Parties, therefore, need to be conscious that they are not deliberately or inadvertently taking steps to give effect to parts of the transaction or aligning their commercial behaviour or completing any leg of a notified transaction until approval for the entire transaction has been received. In *LT Foods* (C-2016/04/387), the CCI made it clear that any coordination between parties before approval – such as handing over inventory, making introductions to suppliers and restrictions on promotional selling – was prohibited, and accordingly imposed a 'nominal' penalty of 500,000 rupees.

In May 2018, the CCI penalised telecommunications companies for failing to notify acquisitions of telecommunication spectrum (*Bharti Airtel* (C-2017/05/509); *Bharti Airtel and Bharti Hexagon* (C-2017/06/516); and *Reliance Jio Infocomm* (C-2017/06/516)). Notably, the CCI held that guidelines issued by the sectoral regulators setting caps on market shares and spectrum holdings did not replace the competition mandate of the CCI; spectrum constituted an asset, the acquisition of which amounted to a combination under the Competition Act; and the exemption for the acquisition of assets made solely as an investment or in the ordinary course of business did not apply. In line with the trend of imposing 'nominal' penalty, the acquirer in each case was required to pay 500,000 rupees for gun jumping.

Most recently, in January 2020, the CCI penalised *CPPIB* (C-2017/11/536) in relation to its failure to disclose an interconnected transaction as part of the transaction notified to the CCI. Even though the transaction documents did not capture any such interconnectedness between the two transactions, the CCI relied on press releases of the parties to establish that CPPIB was aware of the interconnected transaction and thus should have disclosed or notified it. CPPIB was required to pay 5 million rupees for gun jumping and non-disclosure.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, sanctions are applied in cases involving closing before clearance in foreign-to-foreign mergers. In *Titan International Inc/Titan Europe PLC* (C-2013/02/109), the parties sought to justify a lengthy delay in filing on the grounds that the transaction was foreign-to-foreign, they were not aware of the filing requirement, the delay was unintentional and there was no bad faith. However, the CCI pointed to a 147-day delay and the fact that the combination had been completed by the time the filing had been made. The CCI could have imposed a maximum penalty of 1.45 billion rupees. However, since the transaction was a foreign-to-foreign acquisition, the parties were based outside India and, notwithstanding the delay, they had voluntarily filed the notification, the CCI accepted these as mitigating factors and imposed a lower penalty of 10 million rupees. In *Etihad Airways/Jet Airways*, the CCI imposed a penalty of 10 million rupees on Etihad Airways for completing one limb of the notified transaction before receiving clearance. In *Baxter/Baxalta* (C-2015/07/297), the CCI imposed a penalty of 10 million rupees on the parties for closing the global limb of the transaction before receiving clearance in India.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is currently no precedent in India in relation to this issue and the CCI has not given any guidance. However, the Competition Act is worded in a manner where it may be arguable that hold-separate arrangements might be legitimate in India. If the CCI initiates proceedings against the parties for failure to notify before closing a global transaction, the parties will have to satisfy the CCI that the assets that relate to India have been kept separate until such time as the clearance from the authority is received and there is no appreciable adverse effect on competition (AAEC) in India. This approach, however, is untested and the CCI might take a different approach.

What is clear, however, is that the actual combination must not be given effect to until CCI approval is received. In *Baxter/Baxalta*, the parties gave effect to a global agreement; however, the transfer of the Indian operations was subject to local implementation agreements. The CCI held that the global transaction was the notification trigger and could not be given effect to (even if, in practice, the transfer of the local entities required separate agreements).

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

At present, there are no special merger control rules under the Competition Act applicable to public takeover bids.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Both Form I and Form II require extensive information – far more than that required by the equivalent notifications under the EU Merger Regulation or the US Hart-Scott-Rodino Act. The CCI has also recently modified the existing Form I, making it generally more onerous. The filing process is complex, and the parties need to prepare filings with the utmost care and well in advance, including detailed overlaps analysis and related information for the narrowest possible market definitions. The documentation to be filed include the trigger document, financial statements of the parties, market data (market share, market size to the extent possible and based on independent third-party data sources and sales) and competitive assessment of the relevant market. A lack of complete information has resulted in the CCI invalidating the notification forms, requiring the parties to file afresh and also resetting the review clock. Further, a penalty of not less than 500,000 rupees, which may extend to 10 million rupees, may be imposed for making a false statement or omitting a material particular in the notification form.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The investigation into combinations by the CCI is in two phases.

Phase I

The CCI is required to form its prima facie opinion on whether the combination is likely to cause or has caused an AAEC within the relevant market in India within 30 working days of receipt of the notice. However, if the CCI reaches out to third parties or statutory authorities during Phase I, this time period may be extended by up to 15 working days. Further, where modifications are offered in Phase I itself, the time period is further extended by 15 calendar days. The clock will also stop if a formal request for information is made and restart only when the CCI has received a satisfactory response to all its queries. If the CCI is satisfied that the combination does not cause nor is likely to cause an AAEC or that its concerns can be addressed through remedies or modifications offered by the parties, it will clear the transaction at the end of Phase I.

Phase II

If the CCI forms a prima facie opinion that a combination is likely to cause, or has caused, an AAEC within the relevant market in India, it shall issue a show cause notice to the parties asking for an explanation as to why an investigation into the combination should not be conducted. The parties are given 30 calendar days to reply to this notice. After the reply has been filed by the parties, the CCI may either direct the Director General to conduct a detailed investigation or do so on its own and this heralds the formal beginning of Phase II. The parties shall also be directed to publish details of the combination in four leading daily newspapers (including at least two business newspapers), the parties' websites and the CCI's website within 10 days of the CCI's decision to investigate further. Until the date of writing, the CCI has never directed the Director General to conduct a detailed investigation into a combination and all Phase II inquiries have been conducted by the combinations division of the CCI.

The objective of this publication is to invite comments from the public in relation to the proposed combination. Once the comments are received by the CCI, it may request further information or seek clarifications from the parties. At this stage, the CCI may invite any person or member of the public, affected or likely to be affected by the combination, to file their written objections before the CCI within 15 working days from the date on which the details of the combination are published. Thereafter, within 15 working days from the expiry of the period mentioned above, the CCI may call for additional information from the parties to the combination to be furnished by the parties within a further 15 days. Following the submission of the information and clarifications by the parties, the CCI will proceed to review the transaction and arrive at its final determination, including proposing remedies to the parties, where it is of the view that the transaction will cause or be likely to cause an AAEC.

After receipt of all the information, the CCI will pass orders either approving or prohibiting or suggesting modifications to the combination.

18 What is the statutory timetable for clearance? Can it be speeded up?

The CCI has up to 210 calendar days from the date of notification to approve or prohibit a notified combination. The 30-working-day periods for the parties to submit amendments to proposed modifications, and for them to accept the CCI's original modifications if the modifications are not accepted, are excluded from this 210-day time period. Further, the CCI follows a practice of excluding any time extensions sought by parties for responding to the CCI's additional requests for information from the 210-day time period (although the Competition Act and the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations 2011 are silent on this aspect).

There are no provisions to speed up the review timetable, and parties who wish to gain early clearance should comply with all information requests expeditiously. In practice, CCI clearance can take anywhere between 60 and 90 days even for no-issues transactions. Transactions with substantial overlaps can take significantly longer. For example, both in the case of *Agrium/PotashCorp* (C-2016/10/443) and *Holcim/Lafarge* (C-2014/07/190), the conditional clearance decisions were adopted nearly at the end of the entire 210-day review period. The CCI in *Dow/Dupont* (C-2016/05/400) and *Bayer/Monsanto* (C-2017/08/523) took over 500 days (including all-time 'exclusions') to clear and approve the transaction subject to modifications.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test for assessing a combination is whether the combination will cause or be likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India.

To determine whether a combination will have or be likely to have an AAEC, the Competition Commission of India (CCI) must have due regard to all or any of the following factors stated in section 20(4) of the Competition Act:

- the actual and potential level of competition through imports in the market;
- the extent of barriers to entry in the market;
- level of combination in the market;
- degree of countervailing power in the market;
- the likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- the extent of effective competition likely to sustain in a market;
- the extent to which substitutes are available or are likely to be available in the market;

- market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- the likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- nature and extent of vertical integration in the market;
- possibility of a failing business;
- nature and extent of innovation;
- relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an AAEC; and
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures, and nothing has to date emerged from decided cases.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

There is no clear guidance from the CCI on the theories of harm that they will investigate. However, on the basis of the CCI's jurisprudence, the CCI has considered both unilateral effects and coordinated effects as appropriate theories of harm in a number of cases. More recently, the CCI has also started assessing portfolio effects in detail as a theory of harm.

To date, the CCI has been focused on combined market shares, concentration in the market and the presence of strong competitors post-transaction in approving transactions.

The CCI has considered the impact of a proposed combination on innovation and has required divestments that allow a new entrant to compete in the market. In addition, in *Agrium/PotashCorp*, the CCI arrived at the view that the combination might cause coordinated effects in the market for supply of potash in India and required a divestment of minority shareholdings in competing enterprises. The CCI recently cleared the global *ZF/WABCO* transaction subject to ZF divesting its stake in an Indian joint venture, which was competing with WABCO in the Indian market.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the review process. In *Walmart/Flipkart* (C-2018/05/571), a number of market players and pressure groups voiced criticisms of Flipkart's business practices. However, the CCI found that the majority of these concerns were unconnected to the transaction and many had nothing to do with competition law.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Section 20(4) of the Competition Act prescribes various factors that may be considered by the CCI while examining a transaction, including various efficiency-related factors. The efficiency-related factors include:

- nature and extent of innovation created as a result of the transaction;
- relative advantage, by way of contribution to the economic development by any transaction causing or being likely to cause an AAEC; and
- assessing whether the benefits outweigh the adverse impact of the transaction.

In its limited decisional practice to date, the CCI has not cleared any transaction that was likely to or caused an AAEC, solely on the grounds that efficiencies outweighed competition concerns. The CCI has taken the prima facie view that a transaction may cause an AAEC on approximately 11 occasions, which were cleared on account of modifications and divestments, and not on account of efficiencies. Some guidance can be drawn from the CCI's clearance decision adopted in *Etihad Airways/Jet Airways*, *Holcim/Lafarge* and *PVR/DT* (C-2015/07/288), where the CCI has indicated that the efficiencies (where claimed by the parties) should be merger specific, verifiable, quantifiable and outweigh competition concerns.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the Competition Commission of India (CCI) believes the transaction will cause or is likely to cause an appreciable adverse effect on competition (AAEC) in India, the transaction will be treated as void, and all actions taken in pursuit of the void transaction shall also be void. No transaction has yet been blocked by the CCI. The CCI also has the power to unwind a transaction, though this has not happened to date. The CCI also has the power to reduce the scope of ancillary restrictions such as non-compete provisions and can also order divestiture of assets. There is no express limitation on the types of remedies that the CCI can accept to address AAEC concerns.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues.

Initially, the remedies considered by the CCI were largely in the context of non-compete obligations in the pharmaceutical sector. Since then, the CCI has considered far more significant remedies, both behavioural and structural, while clearing transactions. For example, in a proposed transaction related to establishing a joint venture in relation to an aviation fuel farm facility, the CCI accepted, among other matters, commitments in relation to third-party access rights as a remedy for clearing the transaction. The CCI has also accepted firewalls and information exchange protocols as remedies (for example, *Northern TK /Fortis* (C-2018/09/601) and *Tata/GMR* (C-2019/07/676)). The CCI cleared *Schneider/L&T* (C-2018/07/586) in Phase II on the basis of a bouquet of innovative and transaction-specific behavioural remedies (including white-labelling, expansion freezes, export commitments and capacity allocation). In *Hyundai/Kia* (C-2019/09/682), the CCI accepted remedies in relation to the acquisition by these automobile manufacturers of small shareholdings in ride-sharing company Ola; the parties agreed that the strategic collaboration with Ola would be on a non-exclusive basis and that the algorithm or programme of the Ola marketplace would not give preference to *Hyundai/Kia* cars or discriminate against drivers of other cars. Recently, in *Outotec OYJ/Metso OYJ* (C-2020/03/735), the CCI's concerns were addressed by voluntary remedies under which Metso would effectively transfer its India business through an exclusive and irrevocable licence of the technology for use in India only. This was the first time that the CCI accepted the transfer of rights for a technology (for a specified duration) as a remedy to address competition concerns. Separately, in a first for a remedy in a private equity deal, the CCI accepted modifications where the investor had an existing investment in an entity competing with the target in the market (*Canary and Link/Intas,* C-2020/04/741). The remedies related to the investor removing their director on the board of the competing portfolio investment; restriction on the use of information relating to the portfolio entities; and the investor exercising limited veto rights in the competing portfolio investment.

Structural remedies have been imposed in *Holcim/Lafarge* and *Sun/Ranbaxy* (C-2014/05/170). In *PVR/DT*, the CCI relied on structural remedies and required the freezing of divestitures and expansion as a precondition to clearing these transactions in the field of cinema multiplexes. The CCI did not accept behavioural remedies in the form of price caps, as it considered such remedies to be ineffective to address the identified AAEC concerns and difficult to monitor. The CCI has required significant India-specific remedies in *Dow/DuPont*, *FMC/Dupont* (C-2017/06/519), *Bayer/Monsanto*, *ChemChina/Syngenta* (C-2016/08/424) and *Linde/Praxair* (C-2018/01/545) in order to approve these transactions. The CCI has also gone as far as requiring divestment of minority shareholdings in companies in India (*Bayer/Monsanto* and *ZF/WABCO*) and outside India (*Agrium/PotashCorp*).

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

During Phase I, the CCI will carry out a review of the proposed combination within a 30-working-day period. However, if the CCI reaches out to third parties during Phase I, this time period is extended by up to 15 working days. In practice, the process may take more than 30 to 45 working days, as the clock can be stopped for various reasons, including the time taken to respond to information requests. At the end of this, the CCI may arrive at the opinion that the proposed combination is not likely to have an AAEC, in which case it will approve the combination. During this phase, the parties themselves may offer modifications that, if accepted by the CCI, will be treated as conditions in the clearance order. Where modifications are offered by the parties, the time period for the CCI to come to a prima facie view is extended by another 15 days.

Alternatively, the CCI may reach a prima facie opinion that the combination is likely to cause an AAEC. Unless the parties can, in response to a show cause notice, persuade the CCI otherwise, the Phase II investigation will start. With a recent amendment to the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations 2011, the CCI now allows the parties to offer modifications (remedies) in response to a show cause notice, before the start of a detailed Phase II investigation.

Once the Phase II investigation commences, as a formal matter it is for the CCI to initiate the remedies process by proposing modifications to the transaction, although it will in practice allow the parties to set the ball rolling informally. The Competition Act provides in some detail the Phase II process for agreeing to modifications. Where the CCI proposes modifications to the proposed combination, the parties to the combination may carry out modifications within the specified period, or submit amendments to the modifications to the CCI within 30 working days. If the parties' proposed amendments are rejected, the parties have 30 working days to accept original modifications proposed by the CCI. If the parties fail to accept the original modifications or to implement them, the combination will be prohibited. It is relevant to note that in the *Dow/Dupont* and *Bayer/Monsanto* transactions, the CCI took over 500 days (including all-time exclusions) to conditionally approve the transactions, subject to modifications.

Therefore, the CCI's review period can end with a prohibition decision, an unconditional approval or an approval conditional on behavioural or structural remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CCI is yet to require remedies in foreign-to-foreign transactions, and none have been offered to date.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The CCI requires parties to file all ancillary arrangements along with the notification form. Approval for the combination thus also covers the ancillary restrictions.

Specifically in relation to non-compete arrangements, the CCI had issued a Guidance Note on Non-Compete Restrictions (Guidance Note) which set out what the CCI believed to be the acceptable scope of non-compete arrangements (including in relation to duration, geographic scope and product scope). Non-compete clauses that did not fall within the Guidance Note, were not deemed to be anticompetitive, and parties were required to self-assess such clauses to ensure compliance with sections 3 and 4 of the Competition Act (respectively addressing anticompetitive agreements and abuse of dominant position).

In November 2020, the CCI removed the requirement to provide information on non-compete obligations in the short Form I (used for notifying a majority of notifiable combinations), and on 31 December 2020, the CCI withdrew its Guidance Note. The CCI stated that such removal would provide parties with greater flexibility in determining non-compete restrictions and reduce the information burden in notifications. However, the withdrawal of the Guidance Note has reduced certainty and increased the self-assessment burden on parties who are filing a notification with the CCI.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Third parties do not have a right to be involved in Phase I proceedings; however, the Competition Commission of India (CCI) can reach out to third parties and those third parties may make representations to the CCI during Phase I. If the CCI forms a prima facie opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, after considering the response of the parties to the combination or receipt of the report from the Director General, whichever is later, direct the parties to the combination to publish details of the combination in daily newspapers. The CCI may then ask any person or member of the public affected or likely to be affected by the combination to file objections in writing within 15 working days of the date on which the details of the combination were published. The person filing objections is required to substantiate his or her claim that he or she is adversely affected or is likely to be affected by the combination by producing supporting documents. Third parties can only present their opinions in writing to the CCI and there is no provision for an oral hearing before the CCI.

The CCI is free to contact customers, competitors and suppliers of the parties to the combination during the course of the investigation and has done so informally even during the Phase I review period. In complex transactions with significant overlaps, the CCI is increasingly relying on these powers and has reached out to competitors and customers, as well as sectoral experts, to gather information as well as verify the information and claims made by the notifying parties. The CCI has also increased international cooperation, especially in its review of global, multi-jurisdictional transactions.

In August 2018, in *Walmart/Flipkart*, the CCI approved the acquisition of majority stake in Flipkart by Walmart. Notably, a number of market players and pressure groups voiced criticisms of Flipkart's business practices. The CCI found that a majority of these concerns were unconnected to the transaction and many had nothing to do with competition law. However, the CCI took note of concerns of deep discounting and preferential treatment to select retailers in online marketplaces, but held that these were not specific to the notified transaction. As the purpose of merger review was to consider the effects of combinations, such conduct was not subject to the merger review process.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Parties are required to submit a 1000-word summary of the transaction (not containing any confidential information), which is uploaded on the CCI website as soon as parties file their notification form with the CCI.

The CCI allows requests for confidentiality by parties, when these requests are specifically made in writing along with the notification form, or along with any other information submitted to the CCI. The CCI requires that the parties submit detailed reasons and justifications in support of their confidentiality claims. The CCI has required such reasons to be provided in an affidavit. Once accepted, the CCI will not publish information on which the parties have requested confidentiality without first obtaining the permission of the parties. As a general matter of practice, the CCI grants confidentiality for three years.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CCI has signed memoranda of understanding (MOUs) with various competition authorities, including with the Federal Antimonopoly Service of Russia, the US Federal Trade Commission and the Department of Justice, the Canadian Competition Bureau, the European Commission, the Australian Competition and Consumer Commission and the Administrative Council for Economic Defense of Brazil to enhance cooperation between the authorities. The CCI is in the process of signing similar MOUs with other key jurisdictions.

The MOUs, which are very general in nature, are intended to increase cooperation and communication between the competition authorities. The CCI has stated that it has reached out to other competition authorities during the review process in a number of cases. It regularly seeks waivers from parties to share information with other authorities in large global transactions.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Any person aggrieved by an order of the Competition Commission of India (CCI) approving or prohibiting a transaction may appeal to the National Company Law Appellate Tribunal (NCLAT) within 60 days. Appeals previously lay before the Competition Appellate Tribunal (COMPAT), which was dissolved in May 2017. Orders of the NCLAT (and of the COMPAT) can be further appealed to the Supreme Court of India.

In 2013, a 'concerned citizen' appealed the *Etihad Airways/Jet Airways* decision before the COMPAT in *Jitender Bhargava v Competition Commission of India & Ors* (Appeal No. 44 of 2013). The appeal was dismissed as the appellant did not have locus standi to appeal the CCI's decision as he was not a 'person aggrieved' as required by the Competition Act.

In 2014, Thomas Cook appealed the CCI's decision in *Thomas Cook/Sterling Holidays* (Appeal No. 48 of 2014), and the COMPAT set aside the 10 million rupees penalty imposed by the CCI for a delayed filing. The CCI appealed this decision to the Supreme Court of India, which upheld the CCI's decision and restored the penalty on Thomas Cook in its recent order. The penalty of 20 million rupees imposed on the acquirer in *SCM Soilfert* for consummating strategic open market purchases in the target enterprise without prior approval from the CCI was upheld in appeal both in the COMPAT and the Supreme Court.

In 2016, *Dalmia Cements* appealed the CCI's supplementary order passed in *Holcim/Lafarge* on the grounds that the CCI did not have the power to pass such an order under the Competition Act. The COMPAT granted interim relief to Dalmia Cements, staying the operation of the CCI's supplementary order; however, Dalmia Cements withdrew its appeal prior to the COMPAT finally deciding the case.

In *Agrium/PotashCorp*, upon rejection of the counterproposal made by the parties to divest shareholdings in two entities as opposed to three entities that were proposed by the CCI to remedy coordinated effects in the market, the parties filed an appeal before the NCLAT. In the first ever appeal against a CCI modification proposal, the NCLAT provided six weeks' time to the parties and the CCI to arrive at a consensus and resolve the matter. Subsequently, the parties submitted a new proposal, which was accepted by the CCI; this was approved by the NCLAT, which accordingly disposed of the appeal.

In August 2018, the Confederation of All India Traders, a trader's collective, filed an appeal before the NCLAT, challenging the approval order passed by the CCI in *Walmart/Flipkart* on the grounds that the CCI failed to look into the anticompetitive effects arising out of the combination. The NCLAT dismissed the appeal stating that the appellant could not make any prima facie case.

Recently, the NCLAT for the first time, set aside a CCI decision to impose a penalty (on Eli Lily) for not notifying a transaction that was covered under the Target Exemption (the CCI had wrongly held that the thresholds of the Target Exemption did not apply to the business being acquired, but rather to the target's parent).

The NCLAT has also dismissed a long-pending appeal by Piyush Joshi against the *Shell/BG* acquisition (Competition Appeal No. 32 of 2017) by holding that the appeal was not maintainable, and 'intimation' given by the CCI to him did not fall under section 53A(a) of the Competition Act.

Time frame

33 What is the usual time frame for appeal or judicial review?

Section 53B(5) of the Competition Act provides that appeals before the NCLAT shall be dealt with expeditiously and the NCLAT shall endeavour to dispose of appeals within six months. Appeals of merger decisions have generally been completed within this period.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since the merger control provisions came into force in June 2011, the Competition Commission of India (CCI) has cleared almost all notifications in the Phase I review period. Public orders have been published in *Sun/Ranbaxy*, *Holcim/Lafarge*, *PVR/DT*, *Dow/DuPont*, *Bayer/Monsanto*, *Agrium/PotashCorp*, *Linde/Praxair*, *Schneider/L&T*, which were all approved subject to remedies after a Phase II review. Show cause notices were issued in *Mumbai International Airport* (C-2014/0/164), *Nippon Yusen Kabushiki* (C-2016/11/459), *ChemChina/Syngenta*, *ZF/WABCO* and *Outotec OYJ/ Metso OYJ*; however, these transactions were cleared before Phase II was initiated. To date, there have been no prohibition decisions.

In the last year, the CCI unconditionally approved *Alstom/Bombardier* (C-2020/07/759), *Facebook/Jio* (C-2020/06/747), Google/*Jio* (020/09/775), *Reliance Retail/Future* (C-2020/09/771), *Adani Ports/Krishanapatnam Port* (C-2020/02/726) and *API/Medlife* (C-2020/08/763) whereas, it approved *Outotec OYJ/ Metso OYJ* and *Canary/Intas* subject to voluntary remedies in Phase I.

Recently, the CCI appears to have paid particular attention to the technology, retail and e-commerce sectors in its merger review process.

Reform proposals

35 | Are there current proposals to change the legislation?

On 20 February 2020, the Ministry of Corporate Affairs published the Draft Competition (Amendment) Bill, seeking public comments. The proposed changes reflect recommendations made by the Competition Law Review Committee in its July 2019 Report. The bill has yet to be presented to the Indian parliament and some further delay may be expected given the effects of the covid-19 outbreak.

A number of proposed amendments may result in more transactions being subject to CCI review. It is proposed to allow the central government to introduce deal value, market share or other notifiability criteria. This may result in strategic high-value transactions, especially in digital markets, becoming subject to merger review.

The Draft Bill also affirms the CCI's shifting stance on the issue of control. Having started with a test of 'decisive influence', the CCI has moved to the test of 'material influence', which is now sought to be codified.

Other amendments reflect the desire to reduce the burden of doing business in India. It is proposed to allow the central government to specify combinations deemed to be approved on submission of notice in a given format (the CCI has already introduced a 'green channel' route to speed clearance of certain non-problematic transactions). It is also proposed that the central government may specify criteria for exempting transactions in the public interest.

Another amendment dilutes the obligation not to implement a merger before CCI clearance (the standstill obligation) in the case of open offers or acquisitions through a series of transactions on a regulated stock exchange.

Finally, in an attempt to speed up the review process, it is proposed that the current overall 210-day review period be reduced to 150 calendar days.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The sectors under scrutiny in 2020 included pharmaceuticals, e-commerce, retail, digital and energy sectors. The Competition Commission of India (CCI) is increasingly reviewing private equity and institutional investor acquisitions.

There have been increases in the filings under the 'green channel' route where notifiable combinations are, subject to certain conditions and safeguards, deemed to be approved on notification where the parties have no horizontal overlaps, no vertical relationships and no complementary businesses.

There has been a proposal to allow the central government to introduce deal value, market share or other notifiability criteria. This may result in strategic high-value transactions, especially in digital markets, becoming subject to merger review. The proposed amendment also affirms the CCI's shifting stance on the interpretation of 'control'. Having started with a test of 'decisive influence', the CCI has moved to the test of 'material influence', which is now sought to be codified.

It is likely that this year will see the passing of the Competition (Amendment) Bill, which will introduce a raft of changes to the Competition Act.

The CCI has also consulted on the dilution of standstill obligations in the case of share acquisitions pursuant to a public bid or on a stock exchange. Under proposed amendments, those acquisitions would not be regarded as gun jumping, provided the notification was made 'without delay' after the acquisition and the acquirer did not exercise any right attached to the shares or influence the target enterprise in any manner, until CCI approval is received.

The CCI has continued to take a pragmatic approach to remedies in merger cases. In clearing the *Outotec OYJ/Metso OYJ* transaction, the CCI accepted for the first time the transfer of rights for a technology (for a specified duration) as a remedy to address competition concerns. More importantly, in a first for a remedy in a private equity deal, the CCI accepted modifications where the investor had existing investment in an entity competing with the target in the pharmaceuticals market (*Canary and Link/Intas*). The remedies related to the investor removing their director on the board of the competing portfolio investment; restriction on the use of information relating to the portfolio entities; and the investor exercising limited veto rights in the competing portfolio investment.

The focus on private equity transactions is likely to increase. In December 2020, the chair of the CCI announced that the CCI would conduct a market study on private equity investment in India. The study would focus on cases where investors held minority interests in several firms in the same sector. It would look at the shareholding rights given to investors and consider the extent to which they would amount to 'passive' shareholder protection rights or would give investors the ability to influence the decisions of the firms and impact competition.

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At the time of writing, India is grappling with the second deadly wave of the covid-19 pandemic. The CCI has risen to the challenge and has remained as open for business as it can in the circumstances. Where CCI personnel cannot travel to the office, they work from home. There are limits to external engagement and physical face-to-face hearings or meetings have not been possible during the lengthy period of lockdown. The CCI continues to accept notices of combinations electronically and parties to a proposed combination may avail of pre-filing consultation through videoconference.

Indonesia

Chandrawati Dewi, Gustaaf Reerink and Bilal Anwari

ABNR

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control in Indonesia is governed by:

- Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unhealthy Business Competition, as amended by the Job Creation Law (the Indonesian Competition Law);
- Law No. 11 of 2020 on Job Creation (the Job Creation Law);
- Government Regulation No. 57/2010 on Mergers, Consolidation and Acquisition of Shares that may result in Monopolistic or Unfair Business Competition Practices (GR 57/2010);
- Government Regulation No. 44/2021 on the Implementation of the Prohibition of Monopolistic and Unhealthy Business Competition Practices (GR 44/2021);
- Indonesian Competition Commission (KPPU) Regulation No. 4/2012 on Guidelines for the Imposition of Penalties for Late Notification of a Merger, Consolidation of a Company or an Acquisition of Shares in a Company (the Guidelines on Penalties for Late Notification);
- KPPU Regulation No. 3/2019 on the Assessment of Mergers or Consolidations of Undertakings or Acquisitions of Shares in a Company that may result in Monopolistic Practices or Unhealthy Competition (the Merger Regulation); and
- KPPU Guidelines on the Assessment of Mergers, Consolidations, or Acquisitions issued on 6 October 2020 (the Merger Guidelines).

The following KPPU regulations are also relevant:

- KPPU Regulation No. 3/2009 on Guidelines for the Interpretation of Relevant Markets (the Guidelines on Relevant Markets);
- KPPU Regulation No. 1/2020 on Electronic Case Handling;
- KPPU Regulation No. 3/2020 on the Relaxation of Legal Enforcement against Monopolistic Practices and Unhealthy Business Competition and the Monitoring of the Implementation of Co-operatives in the Framework of Supporting the National Recovery Programme; and
- KPPU Regulation No. 2 of 2021 on Guidelines for Enforcement of Penalties of Violation of Monopolies and Unfair Competition (the Guidelines on Penalties).

The KPPU enforces the above merger control legislation.

Scope of legislation

2 | What kinds of mergers are caught?

The following mergers are caught:

- Mergers, defined as the legal act of one or more undertakings merging with another undertaking resulting in assets and liabilities being transferred by operation of law to one undertaking and the legal status of the other to cease by operation of law.
- Consolidation, defined as the legal act of two undertakings or more to consolidate by establishing a new undertaking that obtains the assets and liabilities from the consolidating undertaking by operation of law, with the legal status of the consolidating undertakings ceasing by operation of law.
- Acquisition, defined as the legal act of an undertaking acquiring shares or assets of another undertaking resulting in a change of control of the undertaking or assets of the undertaking. It is generally assumed that a change of control could also involve a change from sole to joint control.

The concepts 'merger', 'consolidation' and 'acquisition', should be interpreted broadly, meaning any type of concentration of control over undertakings that were previously independent into one undertaking or one group of undertakings, or a change of control from one undertaking to another undertaking that results in a concentration of control or market concentration.

A share acquisition may be carried out through a direct purchase from the existing shareholder, the capital market, or via subscription of new shares by capital injection. It goes beyond the conventional understanding of the term by encompassing legal instruments conceptually similar to shares, which enable their owners to control and receive benefit from such ownership (eg, a participating interest commonly acquired in the oil and gas industry). An acquisition of shares with no, or limited, voting rights (preferred stock) is exempt from notification as no change of control results.

A transfer of assets (tangible or intangible) is tantamount to an acquisition of shares and, accordingly, should be notified to the Indonesian Competition Commission (KPPU), if:

- a transfer of their management control or physical control; or
- an increase in the ability of the acquirer to control a relevant market;

The following asset transfers are exempt:

1. A non-bank asset transfer transaction valued at < 250 billion rupiah (approximately US$17.9 million).
2. A bank asset transfer transaction valued at < 2.5 trillion rupiah (approximately US$179 million).
3. The transfer of assets is carried out in the ordinary course of business. This depends on the business profile of the acquiring party and the purpose of the acquisition. Transactions in the ordinary course of business are:
   - transfers of assets that are finished goods from one undertaking to another for resale to consumers by an undertaking that is active in the retail sector (eg, the sale of consumer goods by retailers); and
   - transfers of assets that are supplies to be used within three months in the production process (eg, the purchase by an undertaking of raw materials and basic components from various sources for production).

4 Transfers of assets specifically in the property sector that meet one of the following criteria:
   - space for use by the buyer; or
   - social facilities or facilities proposed for general use.
5 Assets not intended for business use by the acquirer (eg, land for corporate social responsibility or not-for-profit activities, or to comply with statutory requirements).

The transferred asset value in (1) and (2) above is as cited in the latest financial statements or as calculated at the sale or purchase or other legal asset transfer. The highest of these should be the basis for calculation of the threshold. If the transferred assets are privately owned, the asset value would be based on the value as referred to in the seller's tax filing.

An undertaking is defined as any individual or business entity, either as a legal or non-legal entity, established and domiciled or carrying out activities within the Republic of Indonesia, either individually or jointly, by virtue of an agreement, in carrying out various business activities in the economic field.

If the transaction is carried out between affiliates, the transaction is exempt. A company is an affiliate of another if: (1) it either directly or indirectly controls or is controlled by that company, (2) both it and the other company, directly or indirectly, are controlled by the same parent company, or (3) there is a 'main principal shareholder' relationship with the counterparty. The principal shareholder should be a controlling shareholder. Affiliation means a relationship of control.

3 What types of joint ventures are caught?

Joint ventures are, in principle, caught by Indonesian merger control legislation, unless they are a greenfield joint venture. For the avoidance of doubt, mergers, consolidations or acquisitions carried out by a joint venture after its establishment are still caught, provided that the other criteria are met.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

There is control if the acquiring party holds more than 50 per cent of the shares or voting rights or holds 50 per cent of the shares or voting rights or less but the ability to influence or direct the company's policy or management, or both.

Whether the acquiring party has the ability to influence or direct the undertaking's policy or management is to be determined case by case. Case law shows that an acquiring party may, for instance, have control because it has certain veto rights and a right to nominate the majority of directors, including the president director, or even if it has more expertise than the other shareholder in the business in which the target is engaged.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The jurisdictional thresholds for notification are:
- combined worldwide value of assets exceeds 2.5 trillion rupiah (approximately US$179 million) or if all undertakings involved in the transaction are active in the banking sector, 20 trillion rupiah (approximately US$1.429 billion); or
- combined sales value exceeds 5 trillion rupiah (approximately US$358 million) in Indonesia.

Undertakings that do not need to notify a transaction because the above thresholds are not met, are not immune to Indonesian Competition Commission (KPPU) investigation.

Of relevance to the calculation are worldwide assets or sales in Indonesia of the acquirer, and all undertakings (ie, including the target) that following the merger, consolidation or acquisition directly or indirectly control or are controlled by the undertaking that carries out a merger, consolidation or acquisition of shares or assets. This includes the ultimate beneficial owner, which is the highest controller of a group of business entities that is not controlled by any other business entity.

The jurisdictional thresholds would also be met if only one party involved in the transaction meets the threshold.

'Target' will include the target and its subsidiaries, and the seller is not taken into account. However, if the transaction results in a change from single to joint control, the worldwide assets or sales in Indonesia, or both, of the existing shareholder and its affiliates are also relevant (unless the target is a joint venture within the meaning discussed below).

The asset and sales value are calculated based on the latest consolidated audited financial report of the ultimate beneficial owner or, if no consolidated financial report is available, the financial reports of the ultimate beneficial owner and each of its subsidiaries. Sales value includes sales of products produced domestically and imported products. Exported products should be excluded from the calculation.

If the asset or sales value of a party involved in the merger, consolidation or acquisition has decreased by 30 per cent or more in an accounting year as compared to the year before, the value is calculated on the basis of the average in the past three years, or if the decrease occurred in under three years, the average in the past two years.

If the transaction involves a joint venture, the ultimate controlling entity for the calculation of the asset and sales value is the joint venture itself, so the calculation should be based on financial statements of the joint venture as well as of the target and its subsidiaries (if any). The asset and sales value of other affiliates of the joint venture (eg, the controlling entities, sister companies) may be ignored for the calculation of the threshold.

According to the KPPU, the joint venture referred to above should form an independent business unit, independent from each of the shareholders that have formed the joint venture. The joint venture should have its own financial statements, separated from each of the undertakings that have formed it.

The KPPU does not seem to require that the shareholding of parent companies in the joint venture is equal (ie, 50:50), or that they have exactly the same rights over the governance of the joint venture; but rather that both parent companies are given rights over strategic decisions (including veto rights) that would confer on them joint control over the joint venture.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

A post-merger filing is mandatory if all criteria are met. Parties involved in the transaction may carry out a voluntary pre-merger filing. However, even if parties carry out a voluntary pre-merger filing, the post-merger filing will still be mandatory. No exceptions exist.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers may have to be notified if they have nexus and an impact on the Indonesian market.

A transaction has nexus if at least one party engaged in the transaction carries out business activities in or sales to Indonesia.

In addition, the transaction should have an impact on the Indonesian market. According to the Merger Guidelines, this 'includes' the situation where one party that carries out the merger, consolidation or acquisition has business activities in Indonesia and the other party does not, but has a sister company that carries out business activities in or has sales to Indonesia. The Indonesian Competition Commission (KPPU) has confirmed that this is just one example. Other transactions with an impact would be if two parties involved in the transaction have sales. In other words, transactions that create a concentration in Indonesia (ie, with at least two parties involved in the transaction having business or sales in Indonesia) would, in principle, need to be filed in Indonesia

Based on the Single Economic Entity doctrine, a party as mentioned above can form part of a business group with (1) the surviving undertaking in a merger or the undertaking that carries out the consolidation or acquisition, (2) the undertaking that carries out the consolidation or (3) the undertaking that carries out the acquisition or the undertaking that is being acquired. Other parties involved in the transaction relevant to establish nexus are the seller that becomes a joint controller or target, and any of its affiliates

'Business activities in Indonesia' can be broadly interpreted and include direct and indirect (portfolio) equity investment in an Indonesian limited liability company (PT), investment in financial instruments other than shares, such as loans or assets, contractual rights, participation in a unit or trust, no matter whether directly or indirectly, or opening of a representative office.

Whether a company has 'sales in Indonesia' is not always easy to determine. Note that parallel sales could also trigger a notification requirement.

Although a transaction is believed not to have impact on the Indonesian market if just one party has business or sales in Indonesia (single nexus), in principle this transaction does need to be notified to the KPPU, so the KPPU can assess the impact of the transaction on the Indonesian market comprehensively.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Indonesia has a general foreign investment regime as set out in Law No. 25/2007 on Investment, as amended by the Job Creation Law (the Investment Law), and implementing legislation, including Presidential Regulation No. 10/2021 on Investment Sectors as amended by Presidential Regulation No. 49/2021 (the 2021 Investment List).

Under the Investment Law, all business fields are open to foreign investment, unless declared otherwise. Foreign investment must be carried out through a foreign investment company in the form of a limited liability company under Indonesian Law (PT PMA), and domiciled within the territory of the state of the Republic of Indonesia, unless provided otherwise by the law. Foreign investors who make investment through a PT PMA should:

- subscribe to shares at the time the PT PMA is established;
- purchase shares; or
- invest through another method in accordance with laws and regulations.

The 2021 Investment List indicates:

- 37 business fields are subject to specific requirements, which may be classified as (1) open to foreign direct investment (FDI) but subject to a maximum foreign shareholding limit; (2) open to FDI but subject to special approval from the relevant ministry; (3) 100 per cent reserved for domestic investors; and (4) certain business fields that are limited, supervised or regulated by a separate regulation on supervision and control of alcohol beverages;
- six business fields are completely prohibited to FDI under the Job Creation Law (narcotics, gambling and casinos, harvesting of fish listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, utilisation or harvesting of coral, chemical weapons and chemicals that might damage the ozone layer);
- 60 business fields are reserved for cooperatives (co-ops) and small and medium-sized enterprises (SMEs); and
- 46 business fields are open to FDI if in partnership with co-ops and SMEs.

Several sectoral laws (eg, in banking, non-banking financial services (venture capital, multi-finance, securities companies), insurance, mining, oil and gas and shipping) introduce foreign investment rules and restrictions. It goes beyond the scope of this overview to discuss these sectoral laws in detail.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A transaction that meets the relevant criteria should in principle be filed within 30 business days as of the date that the transaction become legally effective. This is the most cautious and safest approach that could be taken by an undertaking. Owing to the covid-19 pandemic, the Indonesian Competition Commission (KPPU) has granted a grace period of an additional 30 business days, giving 60 business days in total, for transactions that were notified to the KPPU after the 30 business day deadline and became effective (1) on or after 9 November 2020 or (2) on or before 8 November 2020 and have not yet reached the Commission Hearing stage.

'Business days' excludes Saturdays and Sundays, official national holidays and joint leave.

If the target is an Indonesian limited liability company, a transaction becomes legally effective on:

- (for a merger), the date of approval of the Minister of Law and Human Rights (MoLHR) of the amendment of the articles of association;
- (for a consolidation), the date of approval of the MoLHR of the deed of establishment;
- (for an acquisition of shares), the date of notification of the MoLHR; and
- (for an acquisition of assets), the date of the asset transfer.

A transaction involving a target that is a public company becomes legally effective on the date of the public disclosure letter of the transaction submitted to the Financial Services Authority (OJK), or the last date of payment of shares or other equity securities in the exercise of a rights issuance, merger, consolidation or acquisition carried out by a public company in connection with a public company or a private company in connection with a public company.

The legal effectiveness of foreign-to-foreign transactions is to be determined based on the closing date in the agreement between the parties or approval by the authorities in the jurisdiction in which the transaction is taking place.

If a transaction has more than one date on which the transaction is becoming legally effective, the last date will apply.

For late notification, the KPPU can impose a base penalty of 1 billion rupiah (approximately US$71,000), plus a certain amount calculated based on:

- a negative impact caused by the violation;

- the duration of violation;
- mitigating factors;
- aggravating factors; and
- the ability of the undertaking to pay.

The final calculation of fines is subject to the following limits:
- up to 50 per cent of the net profits earned by the undertaking in the relevant market, during the period of violation; or
- up to 10 per cent of the total sales in the relevant market, during the period of the violation.

In determining the limits above, the KPPU considers data availability and financial ability of the undertaking.

The KPPU may decide whether the penalty should adopt the first or second alternative above, as well as the maximum percentage of net profits, or a less amount, depending on the circumstances of the case.

The KPPU has so far imposed penalties for late notification in at least 45 cases, 29 of which occurred in the past two years, showing an increase in enforcement activity. To the best of our knowledge, three cases related to foreign-to-foreign transactions.

The penalties imposed recently ranged between 1 billion rupiah (approximately US$71,000) and 10.33 billion rupiah (approximately US$738,000) per transaction and 20.66 billion rupiah (approximately US$1.476 million) in total for the same company that acquired three different entities owing to a delay of 1,220 days. The highest penalty for a single transaction (ie, 12.6 billion rupiah, approximately US$900,000) was imposed in October 2019 for a delay of 240 days. However, these penalties were imposed when there was still a maximum penalty of 24 billion rupiah (approximately US$1.785 million), which existed before the enactment of the Job Creation Law.

10 Which parties are responsible for filing and are filing fees required?

The following parties are responsible for a notification filing:
- for a merger: the surviving undertaking of the merger;
- for a consolidation: the undertaking resulting from the consolidation;
- for an acquisition of shares: the undertaking that acquires the shares; and
- for an acquisition of assets: the undertaking that acquires the assets.

Currently, no filing fees are required. However, we understand that the KPPU is considering the introduction of filing fees in the near future.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As Indonesia has a post-merger system, there are no waiting periods and implementation of the transaction does not have to be suspended prior to clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As Indonesia has a post-merger system, there are no possible sanctions involved in closing or integrating the activities of the merging businesses before clearance.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Not applicable.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Not applicable.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No special merger control rules are applicable to public takeover bids.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

A high level of detail is required. A filing document consists of a notification form and supporting documentation.

Even if the parties to a transaction have no overlapping market share, the Indonesian Competition Commission (KPPU) still expects the notifying party to provide information on the products, customers, and suppliers of the parties involved in the transaction. Also, the KPPU, in principle, expects to see relevant corporate documents and financial reports of the parties and their affiliates.

The notifying party will need to grant power of attorney (notarised and consularised if signed abroad) to legal representatives preparing the filing for the KPPU.

The notifying party will also need to submit a business plan containing an industry analysis, management strategy for the next three to five years, an impact analysis (of transactions, market share, markets affected or the benefits of the transaction) and a summary of the transaction. The business plan especially the transaction impact analysis, should be prepared by an economist.

The KPPU can ask parties to submit supplementary documents in addition to the above.

Any foreign language documents, in principle, need to be translated into Bahasa Indonesia. A translated summary of each submitted document is permissible.

Incomplete notifications will not be accepted, and the KPPU will not issue a receipt of submission. If the submission is late, the KPPU may initiate a formal investigation and may impose penalties for the delay.

Further, if inaccurate or misleading data is suspected to have been submitted, the KPPU may carry out its own assessment using its own data.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Informal and anonymised consultations are common, and may be advisable before notifying a merger, but none of these will be binding on the Indonesian Competition Commission (KPPU).

A party may choose to engage in voluntary, pre-merger consultation. This procedure is similar to the notification procedure. The KPPU's assessment carried out in the framework of a consultation will be valid for two years and if there are no substantial changes to the transaction information provided. A consultation will not exempt the party from the obligation to submit a notification after the transaction has become effective.

Upon submission of a consultation or notification, the KPPU will have 60 business days to review it and seek clarification, if necessary, from the notifying party.

If the KPPU is of the opinion that the transaction does not meet the thresholds, is a transaction between affiliates, does not result in a change of control, concerns the formation of a greenfield joint venture, an exempted transfer of assets, or is carried out to implement prevailing laws and regulations, the KPPU will issue a Statement of No Notification Required in respect of the transaction.

After the 60 business days, the KPPU has a further 90 business days to carry out its initial assessment and, if maybe a comprehensive assessment, and issue its opinion.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Upon submission of the notification, the KPPU has 150 business days to issue its opinion. In practice, the KPPU may need more time to issue its opinion.

However, under the Merger Guidelines, the procedure can now be speeded up if the KPPU concludes that a notification is suited to a simplified assessment, as a transaction not expected to create competition issues.

The simplified assessment will take into account the following characteristics of the transaction:

- no involvement of the parties in overlapping business activities;
- no engagement in vertically integrated business activities;
- should overlapping business activities exist, they have a limited joint market share;
- should vertically integrated business activities exist, they each has the Herfindahl Hirschman-Index (HHI) below the required threshold;
- the transaction does not have potential for tying or bundling, or a network effect;
- the notification is submitted within 30 business days of commencement of the transaction; or
- the transaction involves an acquisition resulting in an undertaking that gains sole control (from joint control with another undertaking hitherto).

A simplified assessment may be carried out either by the KPPU or at the request of the notifying party.

If the KPPU approves a simplified assessment request, it should issue its opinion on the transaction within 14 business days.

If, following preliminary notification, the KPPU concludes that a notification is not required, it will issue a statement within 60 business days that the transaction is not notifiable.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Indonesian Competition Commission (KPPU) applies the Herfindahl-Hirschman Index (HHI), or concentration ratio (CRn). Only if HHI were between 1,500 and 2,500 and Delta HHI above 250 or HHI were above 2,500 and Delta HHI above 150 would the KPPU carry out a comprehensive assessment and look at other aspects, as discussed below.

If the market concentration test is positive, the KPPU will consider entry barriers. In doing so it will, for instance, look at: the ease for new players to enter the market; strength of new players; time needed to enter market; switching costs; homogeneity of products; and brand loyalty.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

'Theories of harm' that the Indonesian Competition Commission (KPPU) will investigate are potential unilateral or coordinated effects, and market foreclosure.

If a transaction results in a conglomerate, the KPPU will also assess potential of tying or bundling effects, or both.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Indonesian Competition Commission (KPPU) will assess a transaction more positively if it could prevent a party from bankruptcy. A decrease in market players through bankruptcy would be viewed as more harmful than one of market players as a result of the transaction.

The KPPU may also take into account other non-competition issues when carrying out a review:

- policy to augment the competitiveness and strength of national industry;
- technology and innovation development;
- protection of small and medium-sized enterprises;
- impact on the labour force; and
- implementation of relevant laws or regulations.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Indonesian Competition Commission (KPPU) will assess a transaction more positively if it has potential efficiency effects, benefiting customers. Efficiency gains are balanced against the anticompetitive effects of a transaction. The KPPU will prioritise healthy competition over efficiency.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Indonesian Competition Commission (KPPU) cannot prohibit or otherwise interfere with a transaction within the framework of merger control. However, the KPPU may initiate a formal investigation into a cartel or abuse of dominance rules under the Indonesian Competition Law.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

When the Indonesian Competition Commission (KPPU) has concerns about a transaction, the parties are able to negotiate structural remedies (ie, divestiture) or behavioural remedies, for example:

- access to intellectual property rights related to essential facilities; or
- elimination of competition barriers, for example:
  - exclusive contracts;
  - consumer switching cost;
  - tie-in or bundling; or
  - supply or purchase barriers.

The KPPU may require an undertaking to provide information on price, production, costs and other data to ensure that the undertaking applies a justifiable price strategy.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

As Indonesia adopts a post-merger notification regime, a transaction will already be legally effective by the time remedies are imposed. The Indonesian Competition Commission (KPPU) will state the timing for remedy compliance. Where KPPU has imposed behavioural remedies, it required compliance for three years.

If the undertaking does not respond or refuses to accept conditional approval that imposes remedies, the KPPU can initiate an investigation into violation of the Indonesian Competition Law that may lead to the imposition of penalties as described above.

To the best of our knowledge, the KPPU has never imposed such penalties and sanctions as a result of a party's failure to comply with its remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To the best of our knowledge, the Indonesian Competition Commission (KPPU) has so far only agreed to or imposed behavioural, not structural remedies. The KPPU has so far imposed behavioural remedies in at least five cases, usually consisting of reporting requirements. The KPPU has never imposed behavioural or structural remedies in foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Merger Control Regulation is silent on the circumstances in which the clearance decision will cover related arrangements (ancillary restrictions). We are also not aware of any precedent in which the KPPU addressed related arrangements.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Suppliers and competitors, industry associations, or government agencies may be involved in the review process.

The notifying party is requested to provide contact details of third parties, and the Indonesian Competition Commission (KPPU) may invite them to be interviewed and hear their opinion about the impact of the transaction.

There is no formal procedure for these third parties to submit a complaint on the transaction as part of the merger review process. However, any party may file a complaint to the KPPU based on alleged violation of article 28 or other relevant provisions of the Indonesian Competition Law if they suffer losses as a result of the transaction. This case will be examined and adjudicated separately by the KPPU in the framework of a formal investigation.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The notification and the description of the transaction are publicised by the Indonesian Competition Commission (KPPU) on its website.

There is always a delay in the publication of such information, but normally, this will appear on the KPPU's website before the KPPU issues its opinion. The notifying party would have an opportunity to review and redact confidential commercial information in the opinion.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Indonesian Competition Commission (KPPU) cooperates with competition authorities in other jurisdictions. This cooperation is on general policy matters and the sharing of generic information with other jurisdictions. The KPPU is under a legal obligation to respect the confidentiality of information.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Parties cannot file an objection against an Indonesian Competition Commission (KPPU) opinion on merger control. There is also no other access to judicial review. It is possible, but rare, for parties that have been imposed with a penalty for late notification to file an objection to the KPPU's decision.

Time frame

33 What is the usual time frame for appeal or judicial review?

In the past, it would take more than three months to obtain a District Court decision. However, the authority to review competition law cases was recently transferred from the District Court to the Commercial Court. We cannot estimate the time frame for appeal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Unlike in other jurisdictions, a merger notification in Indonesia does not result in the Indonesian Competition Commission (KPPU) issuing a formal decision to permit or prohibit a transaction between the parties. Instead, the KPPU will render a non-binding opinion, which can be:

- no allegation of monopolistic practice or unfair business competition;
- an allegation of monopolistic practice or unfair business competition with conditional approval; or
- an allegation of monopolistic practice or unfair business competition.

In most cases, the KPPU issues a 'no allegation of monopolistic practice or unfair business competition' opinion. If the KPPU issues a conditional approval, the undertaking must accept behavioural or structural remedies. The authority has, so far, imposed behavioural remedies (reporting requirements) at least five times, none related to foreign-to-foreign transactions.

Reform proposals

35 | Are there current proposals to change the legislation?

The Indonesian legislature plans to enact a competition bill that will replace the current Indonesian Competition Law.

The bill was originally planned to be enacted this year but, due to the covid-19 emergency, the Parliament decided early in July to stop the deliberations. It is unclear when the deliberations will continue.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Issuance of merger guidelines

Key developments of the past year were the introduction of the Merger Regulation and the Merger Guidelines. These pieces of legislation have resulted in significant changes to Indonesia's merger control system, in particular because of the introduction of a notification obligation for certain asset acquisitions and new criteria to assess the need to notify foreign-to-foreign transactions.

New guidelines on calculation of penalties

GR 44/2021, which implements the Job Creation Law, enacted into law in October 2020, introduces profit or turnover-based penalties, which means that penalties for late notification can be multiples of the maximum fine of 25 billion rupiah (approximately US$1,785,000), which existed before enactment of the Job Creation Law. Recently, the Indonesian Competition Commission (KPPU) also issued KPPU Regulation No. 2 of 2021 on Guidelines for Enforcement of Penalties of Violation of Monopolies and Unfair Competition (the Guidelines on Penalties) as implementing regulation of GR 44/2021.

Transition from district court to commercial court

Prior to enactment of the Job Creation Law, a District Court handling an appeal against a decision issued by the KPPU had to render its decision within 30 days. This provision was removed by the Job Creation Law. GR 44/2021 provides that the Commercial Court must examine an appeal within three to 12 months.

Bank guarantee

If an undertaking decides to file an objection or cassation against the KPPU's decision, the relevant undertaking is required to provide a bank guarantee within 14 business days as of receipt of the decision. The bank guarantee is a maximum 20 per cent of the fine imposed.

In addition to the above, the KPPU has also become more active in imposing penalties against undertakings that failed to notify a transaction within the 30-business-day deadline: since the beginning of 2021, it imposed penalties in nine cases, two of which were related to foreign-to-foreign transactions. These developments have had an immediate effect on the practice of merger control in Indonesia, with more undertakings notifying transactions, including foreign-to-foreign transactions, to the KPPU.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Ireland's merger control regime has its legal basis in Part 3 of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017.

The Competition and Consumer Protection Commission (CCPC) is primarily responsible for the enforcement of the Irish merger control regime. The CCPC shares responsibility for the review of media mergers with the Minister for Communications, Climate Action and Environment. The Irish courts have jurisdiction to adjudicate on any allegation of breaches of the Act and on any appeal against a merger decision.

Scope of legislation

2 | What kinds of mergers are caught?

The Irish merger control regime applies to 'any merger or acquisition', which is defined by section 16(1) of the Act as including transactions where:

- two or more undertakings, previously independent of one another, merge;
- one or more individuals who already control one or more undertakings, or one or more undertakings, acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the acquisition of part of an undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business to which a turnover can be attributed, and for the purposes of this paragraph, 'assets' includes goodwill.

The concept of 'undertakings involved in the merger or acquisition' is broadly equivalent to the concept of 'undertakings concerned' under Council Regulation (EC) No. 139/2004 (EUMR).

Mergers and acquisitions (mergers) that meet the turnover thresholds set out in section 18(1) of the Act are subject to mandatory notification to the CCPC. Where these requirements are not met, mergers may still be notified to the CCPC on a voluntary basis under section 18(3) of the Act.

There are different thresholds that apply to media mergers under the Act.

3 | What types of joint ventures are caught?

Only full-function joint ventures (ie, those that perform, on a lasting basis, all the functions of an autonomous economic entity) constitute a merger for the purposes of the Irish merger control regime. The relevant definition is included in section 16(4) of the Act.

The CCPC adopts an approach mostly consistent with the European Commission in identifying whether joint ventures are subject to Irish merger control law. Where a joint venture does not qualify as full-function, the CCPC may assess it under section 4 of the Act, which is based on article 101 of the Treaty on the Functioning of the European Union. Typically, the CCPC will have regard to the European Commission's Guidelines on Horizontal Cooperation Agreements and the Guidelines on Vertical Restraints when undertaking such an assessment.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Irish merger control regime does not regulate the acquisition of interests other than those conferring 'control' over an undertaking or part of an undertaking.

The definition of control that applies under the Act is based on the concept of 'decisive influence', derived from the EUMR.

The following non-exhaustive list of the circumstances that can give rise to control is included in section 16(2) of the Act:

- ownership of, or the right to use all or part of, the assets of an undertaking; and
- rights or contracts that enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Irish merger control regime is mandatory where, for the most recent financial year:

- the aggregate turnover in the state of the undertakings involved is not less than €60 million; and
- the turnover in the state of each of two or more of the undertakings involved is not less than €10 million.

These revised thresholds came into effect on 1 January 2019. References to 'the state' are references to Ireland, excluding Northern Ireland.

There are different thresholds that apply to 'media mergers' under the Act.

The CCPC can also investigate mergers falling below the turnover thresholds under sections 4 and 5 of the Act (ie, where it believes, respectively, either that the merger could have as its object or effect the prevention, restriction or distortion of competition, or involves the creation or strengthening of a dominant position). In practice, the CCPC will contact parties to a merger falling below the turnover thresholds, where that merger raises potential competition concerns, and request that they notify the merger on a voluntary basis under section 18(3) of the Act. For example, through its market surveillance the CCPC became aware in February 2017 that Mediawatch Limited (trading as Kantar Media), a wholly owned subsidiary of WPP plc, was to acquire sole control of Newsaccess Limited. Notwithstanding the fact that the proposed merger fell below the turnover thresholds that trigger mandatory notification, the CCPC undertook a preliminary assessment, which found that the merger would result in Kantar Media removing its closest and most substantial competitor from the market. The CCPC therefore informed the parties that they should make a voluntary notification of the merger. The parties did so and the CCPC eventually cleared the merger with binding commitments.

The CCPC has stated in its published guidance that if, having been contacted by the CCPC, parties to a non-notifiable merger that raises competition concerns inform the CCPC that they do not intend to notify, the CCPC will carry out a preliminary inquiry to determine whether to open an investigation under section 4 or 5 of the Act. The CCPC may then seek an undertaking from the parties not to implement the merger or, where necessary, may seek an injunction to restrain implementation of the merger. Where a non-notifiable merger raising competition concerns is implemented, the CCPC will conduct an investigation and in appropriate cases invoke the Irish Court's equitable jurisdiction to restore the status quo, which may result in the merger being reversed. Such an eventuality has not occurred to date.

The CCPC has not issued detailed guidance on its approach to the calculation of turnover but tends to follow the principles set out in the Commission Consolidated Jurisdictional Notice under the EUMR on the Control of Concentrations between Undertakings 2008 (the Commission Jurisdictional Notice).

One exception is the CCPC's approach to geographic allocation of turnover. A guidance note by the CCPC provides that 'turnover in the state' means sales made or services supplied to customers within the state. The CCPC follows this approach even in cases involving financial institutions where the Commission Jurisdictional Notice would suggest that turnover should instead be allocated on a 'branch basis'.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for mergers that meet the turnover thresholds. No exceptions exist.

Section 18(3) of the Act provides for voluntary notification of a merger that does not meet the jurisdictional thresholds.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Any merger that involves undertakings meeting the turnover thresholds in the state as set out in the Act must be notified to the CCPC.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are currently no special rules that apply to foreign investment. Legislation establishing the new Irish regime, the Investment Screening Bill, was expected to be adopted as early as the end of the first half of 2021, after a heads of bill were approved by the government in July 2020. However, this has been delayed until the end of 2021 or beyond.

Special rules apply where two or more undertakings carry on a media business in the state or one or more of the undertakings involved carry on a media business in the state and one or more undertakings carry on a media business elsewhere.

The definition of 'carrying on a media business in the state' requires undertakings involved to have either a physical presence in the state and make sales to customers located in the state, or to have made sales in the state of at least €2 million in the most recent financial year.

The term 'media business' is broad and includes newspaper publishing, radio and TV broadcasting and production of news and current affairs programming, including online news sources and broadcasting.

Where a merger qualifies as a media merger, the substantive test is 'whether the result of the media merger will not be contrary to the public interest in protecting the plurality of the media in the state' and this includes a review of 'diversity of ownership and diversity of content'.

Undertakings involved are required to make two notifications of a media merger. One notification is sent to the CCPC, which determines whether the merger is likely to give rise to a substantial lessening of competition (SLC). A separate notification is sent to the Minister for Communications, Climate Action and Environment. This is in a prescribed form, last updated in 2015. A fee is payable for each notification.

The Minister will commence a separate review of the media merger 10 days after the CCPC determination is made (ie, consecutively). If the media merger does not raise concerns, it will usually be cleared within 30 working days of the commencement of the Minister's review. However, if the Minister is concerned that the media merger may be contrary to the public interest in protecting plurality of the media, the Broadcasting Authority of Ireland (BAI) will carry out a 'Phase II' examination. The BAI has 80 working days to prepare a report to the Minister, which includes recommending whether the merger should be put into effect (with or without conditions). An advisory panel may be set up to assist the BAI in its review. The Minister will make the decision of whether to approve (with or without conditions) or prohibit the merger, taking into account the BAI report and, if applicable, the views of the advisory panel. The Minister must take this decision within 20 working days of receipt of the BAI report.

To date, there has been only one Phase II examination of a media merger, the acquisition of seven regional newspapers (part of Celtic Media Group) by Independent News & Media (INM). This examination was not completed, as the merger was terminated by mutual consent of the parties.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A filing must be submitted to the CCPC prior to the implementation of the merger, and may be made so long as the undertakings involved demonstrate a good faith intention to conclude an agreement. This approach is in line with the European Commission's practice under Council Regulation (EC) No. 139/2004.

Under sections 18(9) and 18(10) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017, failure to notify a merger that meets the turnover thresholds is a criminal offence punishable by fines of up to €250,000, plus €25,000 per day for a continued breach. The CCPC cannot impose administrative fines but must refer the matter to the Director for Public Prosecutions to initiate either summary prosecution or prosecution on indictment.

Liability attaches to the undertaking required to make the notification, or the person in control of that undertaking. Section 18(11) of the Act provides that the 'person in control' of an undertaking is:

- in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention;

- in the case of a partnership, each partner who knowingly and wilfully authorises or permits the contravention; or
- in the case of any other form of undertaking, any individual in control of that undertaking who knowingly and wilfully authorises or permits the contravention.

Following a Competition and Consumer Protection Commission (CCPC) investigation, on 8 April 2019, Armalou Holdings Limited (Armalou) pleaded guilty in the Dublin Metropolitan District Court to a breach of section 18. Armalou pleaded guilty to six charges arising from its failure to notify the CCPC of its acquisition of Lillis-O'Donnell Motor Company Limited in December 2015. Subsequently, on 10 May 2019, Airfield Villas Limited (formerly known as Lillis-O'Donnell Holdings Limited), also pleaded guilty to six charges arising out of its failure to notify the CCPC of the same transaction. This was Ireland's first criminal prosecution involving 'gun-jumping'. In both cases, the District Court decided to apply the Probation Act 1907 on condition that each company made a charitable donation of €2,000 and pay a contribution of €2,070 towards the Director of Public Prosecutions legal costs and the CCPC's witness expenses.

10 Which parties are responsible for filing and are filing fees required?

Each 'undertaking involved' in the merger must submit a merger filing. In practice, joint filings are submitted and the purchaser tends to lead on drafting the filing. A filing fee of €8,000 (for each filing) currently applies.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A Phase I clearance determination must be issued by the CCPC within 30 working days of the 'appropriate date', which means the date on which a full and complete filing by the merging parties is made, unless either the CCPC has used its power to 'stop and restart the clock' by issuing a formal requirement for information (RFI), which has the effect of resetting the clock and it only restarts when the RFI is complied with, or where the parties and the CCPC are negotiating remedies, in which case the Phase I period is extended to 45 working days. The CCPC also issues 'informal' requests for information that do not stop and restart the clock.

A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date. If the CCPC issues a formal RFI in the first 30 working days of the Phase II period, this has the effect of stopping and restarting the clock in the same way as at Phase I. If the parties and the CCPC are negotiating remedies, the Phase II period is extended to 135 working days.

Media mergers are subject to the waiting periods for notification.

A suspensory obligation is included in the Act. Section 19(1) of the Act imposes a prohibition on the merging parties putting a merger that has been notified (both mandatory and voluntary) into effect prior to the issue of a clearance determination.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Section 19(1) of the Act prohibits the putting into effect of a notifiable merger until the CCPC has reached a determination that it may be put into effect.

In M/16/013 *INM/Greer*, INM completed the acquisition of assets of Greer Publications prior to notification in breach of section 19(1) of the Act. The CCPC accepted the notification on the basis that INM would not, prior to receiving CCPC clearance, combine or change the structure of the target assets, integrate any retailing or advertising functions of the target assets into INM, cross-sell advertising space between INM and the target assets or share commercially sensitive information between INM and the target assets. The CCPC subsequently cleared the merger.

Section 19(2) of the Act provides that a notifiable merger that is notified to the CCPC, but put into effect prior to a clearance determination, is void. The Act does not state whether a merger that is completed prior to clearance is rendered void for all time, or merely until such time as the CCPC issues a clearance determination. The CCPC has previously expressed the view that a notifiable merger completed without notification remains void until the date of a clearance determination (M/04/003 *Radio 2000/Newstalk* 106).

Completing after notification but prior to clearance (ie, where clearance is ultimately given) is not a criminal offence.

While the CCPC has permitted the parties to submit a late notification of a completed merger, it has released statements that parties have breached the Act by closing before clearance. For example, in M/10/043 *Stena/DFDS*, the merging parties completed the merger prior to notification and the CCPC issued a press release stating that the parties had infringed section 19(1) of the Act, and therefore that the implementation of the acquisition was void under section 19(2).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same legal rules apply to all cases involving closing before clearance, regardless of whether or not the transaction is a foreign-to-foreign merger.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No formal guidance has been published by the CCPC on whether structures such as 'hold-separate' undertakings might enable parties to avoid a legal breach of the suspensory obligation under section 19(1) of the Act. In general, we would expect the CCPC to follow the same approach as the Commission with regard to its approach to carve-outs or close-arounds.

Where such mechanisms have been used in Ireland, the CCPC has publicly criticised the merging parties for doing so. In M/12/031 *Top Snacks/KP Snacks*, the CCPC stated in its determination that the Act does not permit partial implementation of a merger or acquisition even where a 'framework agreement' or other kind of hold-separate arrangement is put in place with regard to certain parts of the business within the state. The CCPC might be less likely to initiate court proceedings for breach of section 19(1) or section 19(2) in cases where the Irish businesses of the merging parties were being held separate pending the grant of clearance by the CCPC. In M/16/013 *INM/Greer*, the CCPC accepted the notification of the merger after completion on assurances from INM that it would not, prior to receiving the CCPC's determination, integrate the relevant target assets into its business. Parties should seek legal advice on a case-by-case basis and consider engaging with the CCPC in pre-notification discussions.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Section 18(1A) of the Act provides that, where the turnover thresholds are met, the making of a public bid may be notified by any of the undertakings involved to the CCPC once one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There is a standard form for notifying the CCPC. All parts of the notification form must be completed, unless a conditional approval has been granted by the CCPC in pre-notification discussions. For example, where there is no overlap between the parties' activities, it is usual practice to request an exemption from completing some or all of section 4 of the form, which requires a description of the conditions of competition in relation to all markets where there is a horizontal or a vertical overlap.

No market share threshold applies for the identification of overlaps.

The form requests details of the proposed merger, the parties involved, the overlapping products or services, any ancillary restraints and copies of any non-privileged competition assessments of the merger. The Act requires 'full details' of the proposed merger to be notified to the CCPC.

In terms of media mergers, a notification form and guidelines have been issued by the Department of Communications, Climate Action and Environment. The content required in the merger notification form includes a description of the proposed merger, and significant details on the undertakings involved. Market share details (both pre and post-merger) are required for each media business of the undertakings involved, in terms of readership, listenership, viewership and page impression hits. The undertakings involved must submit detail on compliance with industry codes of practice, relevant regulatory bodies and applicable legislation. Detail is also required on grievance procedures for employees, and employment tribunal proceedings involving employees. The notification form states that an undertaking's record in respect of industrial relations and Labour Court rulings may be examined as part of the assessment.

The undertakings involved must provide information on the 'editorial ethos' of each media business, including data on editorial control, editorial structure and positions taken regarding political endorsements and issues of debate or controversy. A breakdown of content for each media business is also required as well as details of any future plans of the undertakings; for example, whether the undertakings to be acquired will continue as separate enterprises (eg, a newspaper and a radio station) and whether there will be changes to editorial and key content-producing staff.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Pre-notification

- Request conditional approval not to complete the entire notification form (where no overlaps); and
- meeting or conference call to discuss the proposed merger (for difficult cases, expedited cases or requests only).

Phase I

- Submit filing to the CCPC (one hard copy only is required plus an electronic copy of the merger notification form in Word format);
- publication of notice on the CCPC's website within seven days recording fact of filing and parties' names with a call for submissions or comments from third parties (generally a 10-day period);
- possibility of a formal requirement for information that stops and, when complied with to CCPC's satisfaction, restarts the Phase I timetable;
- possibility of an informal request for information that does not impact on the Phase I timetable;
- discussion of remedy proposals from the parties (if applicable), which extends the Phase I period to 45 working days;
- notice to parties of determination (clearance, conditional clearance or Phase II; with press release for noteworthy mergers);
- merging parties may request redactions from the public version of the determination; and
- publication of Phase I determination within 60 working days of date of adoption.

Phase II (if applicable)

- Communication from the CCPC setting out its decision to move to Phase II giving limited details;
- call for submissions or comments from third parties;
- possibility of a formal requirement or informal request for information;
- the CCPC may commission a market survey or economic analysis from consultants;
- meeting between the parties and the CCPC (optional);
- early determination approving the merger can be issued within 40 working days of the beginning of Phase II (rather than 120 working days from notification; this is the usual Phase II outcome) or if the investigation is to progress, the CCPC sends the parties an assessment setting out its concerns about the merger;
- oral hearing (if requested within five working days of receipt of the CCPC's assessment);
- access to the CCPC's file;
- discussion of remedy proposals from the parties (no later than 15 working days after receipt of the CCPC's assessment);
- market testing of remedy proposals of parties (depending on circumstances and at the discretion of the CCPC);
- notice to parties of determination (clearance, conditional clearance or blocking) and press release;
- merging parties may request redactions from the public version of the determination; and
- publication of Phase II determination within 60 working days of date of adoption.

18 What is the statutory timetable for clearance? Can it be speeded up?

The CCPC has a period of 30 working days in which to decide whether to grant a Phase I clearance, and a period of 120 working days in which to decide whether to grant a Phase II clearance.

The Act does not provide for an accelerated investigation and there is no guidance issued by the CCPC on this point. However, in practice, merging parties can request an accelerated investigation and the CCPC has issued expedited clearance decisions in cases not raising competition concerns. For example, M/12/029 *Endless/VION* was cleared in 11 days, and in cases that involved strict insolvency procedure timetables, such as M/09/002 *HMV Ireland/Zavvi*, the clearance determination was issued in nine days. More recently, in M/16/053 *Anchorage Capital/Eircom*, the CCPC cleared that 'no issues' merger in 11 days.

The CCPC can reduce the normal period of 10 days allowed for public comment after publication of notice of a merger notification on its website in individual cases, if circumstances so require. For example, in M/12/048 *Endless/Imtech Suir*, the notification period was reduced from 10 days to five days where Imtech Suir's parent company had been declared insolvent and consequently Imtech Suir was in financial jeopardy and unlikely to operate as a going concern. In that case, the CCPC issued a clearance determination in six days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Section 20(1)(c) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017 provides that the substantive test for assessment of competition issues is 'whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the state' (the SLC test). The Competition and Consumer Protection Commission (CCPC) interprets the SLC test in terms of consumer welfare, which depends on a range of variables. In particular the CCPC will assess whether a merger would be likely to result in a reduction in choice or a price rise for consumers. This is a similar test to that applied by other jurisdictions, such as the UK's Competition and Markets Authority (CMA).

A merger that would otherwise give rise to an SLC may nonetheless be cleared by the CCPC where the failing firm or failing division test is met (as set out in Chapter 9 of the CCPC's Guidelines for Merger Analysis) and therefore the relevant counterfactual is not the prevailing conditions of competition. For example, in M/15/026 *Baxter Healthcare/Fannin Compounding*, the CCPC identified competition concerns related to the reduction in competition for the commercial supply of compounded chemotherapy medicines to hospitals in the state. However, the parties submitted that Fannin Compounding was a 'failing division' of Fannin Limited and that the assets involved would exit the market if the merger was prohibited. The CCPC investigated this argument and engaged Grant Thornton to independently examine financial information pertaining to Fannin Compounding. The CCPC ultimately cleared the merger. It found that the most likely outcome absent the merger would be that Fannin Compounding would close and its assets would exit the market. Thus, the competitive structure of the relevant market would deteriorate to at least the same extent in the absence of the proposed acquisition.

20 | Is there a special substantive test for joint ventures?

No. Joint ventures that are notifiable under section 16(4) of the Act must satisfy the same SLC test.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The CCPC's October 2014 Guidelines on Merger Analysis states that the CCPC will examine unilateral, coordinated, conglomerate and vertical effects (including the loss of actual 'or potential' competition). Like the European Commission, the CCPC in practice tends to focus on the risk of horizontal unilateral effects, although coordinated effects and vertical mergers are occasionally examined.

For example, in M/17/005 *Vhi Investments/Vhi Swiftcare Clinics*, the CCPC investigated potential vertical concerns arising from the acquisition by VHI Healthcare (the state's largest health insurer) of the remaining 50 per cent interest in each of two 'Swiftcare' clinics offering primary care services in Dublin and one clinic in Cork. Specifically, the CCPC investigated an input foreclosure theory of harm whereby VHI could potentially exclude other competing insurers from offering their policyholders access to these clinics. However, the CCPC determined that the clinics formed a small part of the overall primary care market (which included GP clinics and hospitals in those areas) and therefore the merger would not lead to input foreclosure.

Separately, in M/17/035 *Dawn Meats/Dunbia* the CCPC investigated whether the merger could give rise to an increased risk of coordinated effects and undertook econometric analysis to test this point, though it ultimately did not identify any concerns.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Aside from media mergers, non-competition issues are not relevant under the Act. However, the CCPC does sometimes consider wider welfare factors. For example, in M/17/035 *Dawn Meats/Dunbia*, the CCPC investigated whether the merger would give Dawn Meats the ability and incentive to lower the prices it pays to farmers for live cattle for slaughter in the state. The CCPC did not find evidence to support this potential concern.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The CCPC's October 2014 Guidelines on Merger Analysis state that it will consider efficiency arguments, but the burden of proof is on the parties to demonstrate that the claimed efficiency gains are as a direct result of the merger.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Upon the completion of a Phase II investigation, the Competition and Consumer Protection Commission (CCPC) may clear a merger subject to conditions or block a merger outright if the CCPC forms the opinion that the merger would lead to a substantial lessening of competition in markets for goods or services in the state.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Section 20(1)(b) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017 provides that the CCPC may enter into discussions with the merging parties with a view to identifying measures that would ameliorate any negative competitive effects of the merger. These discussions can have as their outcome divestment undertakings or behavioural remedies. Section 20(3) of the Act provides that the negotiation of remedies or commitments may be commenced at any stage of a Phase I or Phase II investigation.

The CCPC has previously accepted both divestment undertakings and behavioural remedies as conditions to clearance determinations.

For example, in M/16/008 *PandaGreen/GreenStar*, CCPC clearance was obtained where PandaGreen made divestment undertakings in relation to Greenstar's domestic waste collection businesses in Fingal and Dun Laoghaire-Rathdown. In M/14/026 *Valeo/Wardell/Robert Roberts*, the acquirer undertook to divest the YR brand of brown sauce to address the CCPC's concern that the acquirer's large post-merger market share in the market for the supply of brown sauce to the retail sector would incentivise it to increase prices to retailers, with insufficient competitive constraint from competitors or countervailing buyer power. Divestment undertakings were also accepted in M/15/020 *Topaz/Esso*, where Phase II clearance was subject to divestment commitments relating to Esso's interest in a fuel terminal at Dublin Port and certain fuel retail sites. This interest was subsequently divested to

Applegreen during the course of 2017, with a binding commitment that Applegreen would import and supply refined fuel products, including aviation fuel (Jet A1), through the JFT.

In M/17/012 *Kantar Media/Newsaccess*, Kantar agreed to divest fixed assets and release a number of contracted customers from their fixed-term contracts. Finally, in M/17/027 *Dalata/Clarion Liffey Valley/Clayton Cardiff Lane*, the CCPC took the somewhat unusual step of requiring Dalata to commit to voluntarily notify the CCPC any time it begins operating a hotel in the state on behalf of a third party, where this would not otherwise be notifiable to the CCPC or EU Commission or give rise to potential competition concerns.

In M/18/36 *Enva/Rilta*, Enva agreed to divest property and fixed assets to ameliorate concerns identified by the CCPC in the waste-processing market as a result of its Phase II investigation. Enva also agreed to certain access proposals relating to the processing of waste lubricant oil and hazardous contaminated soil.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There is a 45-working-day statutory period for the issue of a conditional clearance at Phase I.

In practice, the Phase I deadlines tend not to allow merging parties sufficient time to design and obtain approval for any 'complex' remedies.

The Phase II timetable allows the merging parties more time to satisfy the CCPC that their remedies proposal effectively resolves any identified 'theories of harm' or competition law concern. The CCPC may 'market test' a remedies proposal during both Phase I and Phase II investigations.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CCPC has not required remedies or commitments in foreign-to-foreign mergers, to date.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A merger clearance determination by the CCPC covers not only the notified merger but any arrangements constituting restrictions that are directly related and necessary to the implementation of the merger, and that have been described by the merging parties to the CCPC in the notification form.

In practice, the CCPC tends to follow the principles included in the European Commission's Notice on Ancillary Restraints in this regard.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Section 20(1)(a) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017 provides that, within seven days of receipt of a merger notification, the Competition and Consumer Protection Commission (CCPC) must publish a request for comments from third parties (including customers and competitors). Generally, a 10-working-day period is allowed for the submission of third-party comments during Phase I, and a 15-working-day period is allowed for the submission of third-party comments during Phase II (this 10-working-day period may be reduced depending on the facts of the merger).

In practice, the CCPC will often proactively seek submissions from competitors and customers during both Phase I and Phase II investigations.

Section 20(1)(b) of the Act provides that the CCPC may enter into discussions with third parties (including customers and competitors), with a view to identifying remedies.

The CCPC will consider all third-party submissions and, at its discretion, may meet with interested competitors and customers during the review process.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CCPC publishes on its website notices of all mergers notified to it, written determinations and any press releases by the CCPC on particular cases.

Notifying parties can identify commercially sensitive information that they believe should remain confidential when submitting a notification. Notifying parties are also afforded the opportunity to submit comments on the deletion of confidential information from the public version of the CCPC's determination.

In the event that the CCPC seeks to include information provided by a third party in its determination, that third party will also be offered the opportunity to protect confidential information. Similar provisions apply in access to the file in Phase II.

The CCPC tends to accept all reasonable requests to maintain confidentiality in its written determinations.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Section 23 of the 2014 Act permits the CCPC to enter into arrangements with other competition authorities in other countries for the exchange of information and the mutual provision of assistance.

The CCPC maintains regular contact with competition authorities in other jurisdictions, including in particular the UK CMA and the European Commission regarding, respectively, cases that are subject to parallel reviews in the United Kingdom and Ireland and EU cases that may impact on Ireland. For example, in 2018, the CCPC closely followed the European Commission's investigations into a number of proposed mergers that it considered to be of significant interest to Ireland, including the following:

- M.8306 *Qualcomm/NXP Semiconductors*;
- M.8677 *Siemens/Alstom*;
- M.8736 *Toohil Telecom/Eircom*;
- M.8792 *T-Mobile NL/Tele2 NL*;
- M.8084 *Bayer/Monsanto*;
- M.8882 *Kennedy Wilson/AXA JV*; and
- M.8900 *Wieland Werke/Aurubis & Schwermetall*.

Finally, the CCPC is an active member of the European Competition Network, the International Competition Network and the OECD Competition Committee.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Merging parties may appeal a determination of the CCPC prohibiting a merger or imposing conditions on a point of fact or law to the Irish High Court. There is a possibility for merging parties or the CCPC to make a subsequent appeal of a High Court decision, but only on a point of law. The Competition Acts 2002 to 2017 as amended by the Competition (Amendment) Act 2017 provides no right of appeal in respect of a determination to clear a merger and third parties are not given a right of appeal.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An appeal to the High Court must be lodged within 40 working days of the CCPC's published determination, or, in the case of a media merger, within 40 working days of the Minister for Communications informing the relevant party of his or her determination. The High Court will issue a decision within two months, if this is practicable.

To date, the only successful appeal to the High Court from a determination of the CCPC blocking a merger was in September 2008, when Kerry Group successfully appealed the determination of the CCPC blocking its proposed acquisition of Breeo. The CCPC lodged an appeal to the Supreme Court in respect of the High Court judgment but decided in April 2016 not to proceed with the appeal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, the Competition and Consumer Protection Commission (CCPC) received a total of 41 merger notifications, representing just a 13 per cent decrease of notified mergers from 2019, despite the significant economic turmoil. The most prominent sectors for 2020 were information and communications and healthcare, both of which saw an increase in merger notifications from the previous year, while there was a sharp drop in notifications in the real estate, manufacturing and auto sectors.

The CCPC issued 43 determinations (or clearance decisions) during the year, 32 of which related to notifications made in 2020, with the remaining 11 relating to notifications carried over from 2019. Fifteen investigations involved an extended Phase 1 review, of which 13 were cleared unconditionally and two were subject to a Phase 2 investigation *(Link/Pepper*, *ESB/Coillte* (joint venture). Formal commitments to secure clearance were obtained in just one case in 202: *CVC Funds/Celtic Rugby DAC* (involving a behavioural commitment by the acquirer to voluntarily notify the CCPC if it acquires control over the commercial activities of the Six Nations competition without meeting the CCPC's mandatory notification thresholds). The parties to the latter merger met this commitment by notifying *CVC/Six Nations Rugby* to the CCPC on 17 May 2021. Separately, the CCPC also oversaw the implementation of divestment remedies in two other cases, namely *Berendsen/Kings Laundry* and *Enva/Rilta*.

The average time frame for Phase 1 clearance (excluding extended reviews) in 2020 was 23 working days (as compared with the statutory 30 working day period). The timelines varied from 10 to 29 working days (noting the introduction of the CCPC's simplified procedure). Notably, the 2020 average also marked a reduction of around two business days from the 2019 average.

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The CCPC reviewed four media mergers, clearing three of these (*Reach/ISL*, *Greencastle/Maximum Media*, *Rocketsports/BenchWarmers*) within the initial Phase 1 review period and subjecting one (*DMG/JPIMedia*) to an extended Phase 1 review, which it ultimately cleared unconditionally.

Reform proposals

35 | Are there current proposals to change the legislation?

The Department for Enterprise, Trade and Employment is currently finalising draft legislation for the possible introduction of a new foreign investment or FDI screening regime, as mandated by the EU Investment Screening Regulation (Regulation (EU) 2019/452) that became operational in October 2020 and established an information sharing and cooperation framework across EU member state authorities. The legislation establishing the new Irish regime, the Investment Screening Bill, was expected to be adopted as early as the end of the first half of 2021, after a heads of bill were approved by the government in July 2020. However, this has been delayed until the end of 2021 or beyond. Although the exact scope of the new FDI regime and whether it will give rise to additional mandatory notification requirements in certain instances remains as yet unclear until the draft legislation is published, the CCPC is likely to have a role in administering the initial review under the new FDI regime, alongside the general merger control and media merger regimes.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 18 March 2020, in light of the ongoing covid-19 pandemic, the Competition and Consumer Protection Commission (CCPC) announced temporary measures to assist it in complying with binding statutory deadlines and to ensure business continuity in the review of notified mergers and notifications. These temporary measures included allowing for notifying parties to file all notification forms and supporting documents (including material contained in annexes and appendices to the notification form) in electronic format by email to the CCPC. The

CCPC is also accepting request-for-information responses (involving large internal document disclosures) electronically for the first time. The electronic filing of notifications does not appear to have impacted negatively on the CCPC's merger review function, given that there was just a 13 per cent decrease of notified mergers from 2019 in 2020 despite the economic turmoil caused by the covid-19 pandemic. As a result, these temporary measures could be continued as standard practice even after covid-19 restrictions are eventually lifted.

Following its introduction in July 2020, the CCPC's new simplified procedure for transactions presenting no substantive issues was fully embraced by parties and the CCPC alike, which is set to continue into 2021. The new simplified procedure has proved particularly attractive for non-strategic or pre-'bolt on' M&A and private equity deals in the Irish market and the CCPC's latest statistics based on the six clearances from July to December 2020 demonstrate that parties can secure clearance for such 'no issues' deals in less than three weeks.

Italy

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Law No. 287 of 10 October 1990 (the Law) (in particular, articles 5 to 7 and 16 to 19) contains the rules on antitrust control of concentrations and joint ventures. Presidential Decree No. 217 of 30 April 1998 (the Regulation) contains procedural and enforcement rules. The Law is enforced by an independent body, the Italian Antitrust Authority (IAA) in Rome. There are also specific merger control regimes for utilities and other sectors.

Scope of legislation

2 | What kinds of mergers are caught?

The Law applies to concentrations. A concentration occurs where:

- two or more undertakings merge;
- an undertaking or a person already controlling an undertaking acquires sole or joint control over the whole or parts of another undertaking; or
- two or more undertakings form a concentrative joint venture through the establishment of a new company.

3 | What types of joint ventures are caught?

The wording of the Law does not contain a clear definition of 'concentrative' and 'cooperative' joint ventures.

Generally, the incorporation of a jointly controlled undertaking or the acquisition of joint control over a previously existing undertaking will give rise to a 'concentrative joint venture' (caught by the Italian merger control regime) provided that:

- the joint venture is a full-function joint venture; and
- the joint venture's main object or effect is not the coordination of the competitive behaviour of the parent companies.

This second part of the test is what differentiates the assessment of joint ventures in Italy with respect to the current EU merger law. This difference from the current EU merger control regime has been increasingly believed to be just theoretical, but recent cases have shown that this is not the case.

To assess whether a joint venture is concentrative or cooperative, the 1994 European Commission Notice on the distinction between cooperative and concentrative joint ventures must be kept under consideration. Accordingly, full-function joint ventures are treated as 'cooperative' and appraised under the rules on agreements between undertakings (and not under the merger control rules) if, after the transaction, both parents will remain actual or potential competitors in the same geographical and product market as the joint venture, or in a market that is upstream or downstream or neighbouring with respect to that of the joint venture, if certain conditions are met. Full-function joint ventures that are not 'cooperative' (concentrative joint ventures) will be treated as concentrations.

Concentrative joint ventures must, therefore, be notified to the IAA for appraisal under the merger rules and procedures described in this chapter.

'Cooperative joint ventures', in turn, are subject to the rules on restrictive practices. Article 2 of the Law, like article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements and concerted practices between undertakings that have as their object or effect a substantial restriction of competition in the national market or in a substantial part thereof. Under the Law, such agreements may be individually authorised, for a limited period of time, on grounds similar to those provided for under article 101(3) of the TFEU. Articles 4 and 13 allow undertakings to notify an agreement to the IAA for negative clearance or individual exemption. Following the entry into force of EU Regulation 1/2003, which mandates national competition authorities to apply articles 101 and 102 of the TFEU whenever the national competition laws are applied to cases where there is an 'interstate trade effect', the IAA has indicated that it will no longer accept filings for negative clearances or individual exemptions, even in the case of cooperative joint ventures, if they may affect interstate trade.

To obtain a negative clearance or an individual exemption for purely 'Italian' cooperative joint ventures (ie, where there is no interstate trade effect), the parties must file a request using a special form. Within 120 days of notification, the IAA must either declare that the cooperative joint venture does not infringe article 2 (negative clearance) or decide to initiate proceedings. The IAA, when initiating these types of proceedings, normally indicates a non-mandatory deadline of 120 days within which it will make a final decision.

At the end of proceedings, the IAA will issue a decision stating whether the joint venture infringes article 2 and if so, rule on the request for an individual authorisation.

Notification of cooperative joint ventures is not mandatory. However, if a joint venture may infringe article 2, the IAA may start an investigation on its own initiative or following a third-party complaint.

There is also the risk of claims by any party (including third parties) who has an interest in a declaration of nullity of the cooperative joint venture or in damages.

In its proposal to reform the antitrust legislation sent to the Italian government on March 2021, the IAA proposes to align Italian merger control with the EUMR, thereby requiring notification in relation to all full-function joint ventures (irrespective of coordination risks between the parents).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Article 7 of the Law contains a very broad definition of control for the purposes of merger control. First, the provision expressly refers to the definition of 'controlled companies' in the Italian Civil Code, namely:

- companies in which another company has the ability to control, directly or indirectly, including through fiduciary companies, the majority of votes at the shareholders' meeting;
- companies in which another company has, directly or indirectly, including through fiduciary companies, sufficient voting rights to exercise a dominant influence in its shareholders' meetings; and
- companies that are under the dominant influence of another company by virtue of contractual links.

Second, the concept of control also includes any legal or factual situation whereby one party can exercise (including jointly with another party) a decisive influence over an undertaking. Relevant factual or legal elements include ownership or other rights over the assets or part of the assets of the undertaking, and any rights, contracts or other legal relationships that confer a decisive influence in determining the composition, resolutions or decisions of the corporate bodies of an undertaking.

As a result (and also in light of the express general obligation contained in the Law to interpret its provisions in accordance with the relevant EU principles as developed by the EU institutions), the definition of control for merger control purposes under Italian law is very broad and substantially corresponds to the definition of control applicable under EU merger law. The Law may thus apply to the acquisition of minority shareholdings (provided that this is sufficient to confer joint or sole control over the acquired company - see below) and concentrative joint ventures. More precisely, consistently with relevant European Commission practice:

- a minority interest confers joint control over the acquired undertaking if, by virtue of the provisions of a shareholders' agreement or through other contractual or de facto mechanisms, the holder of the minority interest can exercise veto powers over certain 'strategic' decisions of the acquired company; and
- a minority interest can be sufficient to confer even sole control over an undertaking, given other factors, the most important of which is that the remaining shareholding is dispersed among a large number of shareholders.

Given the substantive approach to the notion of control, board or management representation that grants one minority shareholder a veto over strategic decisions, would be considered in assessing whether this minority shareholder holds joint or even sole control, and this irrespective of the actual shareholding held. Even merely contractual arrangements could give rise to a situation of control by a non-shareholder.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Law that provides two cumulative turnover thresholds was modified in August 2017, when the Italian parliament approved a law that decreased the first threshold (ie, the combined turnover of all undertakings concerned) from €499 million to €492 million, and – most importantly – introduced a twofold change of the second threshold by, on one hand, reducing from €50 million to €30 million the amount of the relevant turnover and, on the other, referring to the Italian turnover of each of at least two undertakings involved (and not, as it was under the old regime, only to the Italian turnover of the target). The thresholds are updated each year to reflect adjustments in the GDP deflator index, and the new figures are published in the IAA's Bulletin and on its website. The last change was in March 2021 and the test applicable since then requires that:

- the Italian turnover of all undertakings involved is higher than €511 million; and
- the Italian turnover of each of at least two undertakings involved is higher than €31 million.

Turnover is defined as the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year.

In the case of banks and 'financial institutions' (ie, firms active in securities investment, asset management, consumer credit or leasing), the turnover used for the purpose of calculating the thresholds is equal to the value of one-tenth of their total assets, excluding memorandum accounts, and, in the case of insurance companies, the value of premiums collected. As a matter of practice, with regard to the turnover of credit and other financial institutions, the IAA, therefore, still follows the guidance contained in the old 1994 European Commission Notice on the calculation of turnover.

The Law will not apply to any transaction caught by the provisions of the EU Merger Regulation (EUMR), with the exception of referrals, as provided for in the EUMR (as set out in the European Union chapter).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Pre-merger filing is mandatory.

There are, however, a few exceptions according to which an acquisition or merger is not considered a 'concentration' within the meaning of the Law and thus does not have to be notified. These are:

- acquisitions of shares by banks or other financial institutions, solely for resale, in undertakings being incorporated or in relation to capital increases, as long as the acquiring institutions do not exercise any voting rights attached to the shares acquired and sell them on within 24 months of the original acquisition (financial exception); and
- acquisitions of, or mergers with, companies that do not carry out any economic activity and do not have any direct or indirect control over another undertaking, nor hold licences, permits, concessions, or any other rights that would allow them to engage in business activities, nor have direct or indirect control over another undertaking holding any of those rights.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Concentrations between foreign companies must be notified to the IAA whenever, by virtue of their sales in Italy, the parties satisfy the cumulative turnover thresholds. The presence of assets or subsidiaries in Italy is not a relevant factor for the purpose of determining the existence of a notification obligation. The rules of the Law therefore also apply to foreign-to-foreign mergers. The cumulative nature of the two turnover thresholds means that the jurisdictional nexus between a foreign-to-foreign deal and Italy is satisfied every time the merger turnover thresholds are met. A 2017 change in the Law further reinforced the local nexus requiring that at least two of the undertakings concerned generate material turnover in Italy for a transaction to be reportable.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Special powers apply to a wide range of M&A transactions relating to assets in specific industries. These 'golden powers' (so called as they replace the former 'golden share' provisions) impose mandatory filing obligations on the parties involved in any deal where key strategic assets and undertakings are being transferred and grant the government – not the IAA – far-reaching powers to impose vetoes and restrictions on such deals. Failure to comply with the new rules gives rise to heavy sanctions (see, for example, the approximately €74 million fine issued by the Office of the Prime Minister against Telecom Italia for failing to file about its acquisition of control by Vivendi – this fine is currently suspended). At the end of 2019 and in 2020, the government amended the 'golden power' rules in various occasions, materially broadening the scope of review (further detailed at the beginning of 2021), including, in addition to original national defence and security:

- energy, communications and transportation;
- 5G networks;
- critical infrastructures, whether physical or virtual, including water, health, media, data processing or storage, aerospace, electoral or financial infrastructure and sensitive facilities;
- critical technologies, including artificial intelligence and robotics;
- the supply of critical inputs, including energy or raw materials;
- food security;
- access to sensitive information; and
- freedom and pluralism of the media.

This broadening was done in response to the covid-19 emergency and, following EU Commission guidelines issued on 25 March 2020 on the protection of European strategic assets and technologies, the Italian government issued Law Decree No. 23 of 2020 (the Decree), containing special measures for the protection of Italian assets. The Decree, converted with amendments into Law No. 40, dated 5 June, as further amended by Law Decree No. 56, dated 30 April 2021, expands the strategic sectors governed by the 'golden power' law on the review of foreign investments in Italian assets with new obligations until December 2021.

In addition, there are specific provisions applicable to special sectors, as outlined below:

- With regard to the cinema exhibition services, acquisitions leading to the creation of a market share of more than 25 per cent in one of the main Italian cities must be notified to the IAA.
- In the case of mergers involving banks, the IAA has to take a decision within 60 days of the submission date. The IAA will assess whether the concentration gives rise to any antitrust concerns, and the Bank of Italy, in line with its financial supervisory role, will assess the transaction under prudential rules in a parallel proceeding also lasting 60 days. In 2007, the Bank of Italy and the IAA signed a protocol agreement setting up procedural guidelines for the exchange of information in relation to concentrations with effects on banking markets.
- Mergers in the insurance sector are subject to the Law. However, the Institute for the Supervision of Insurance, the relevant authority for insurance companies, which in 2013 become a division of the Bank of Italy, must be asked for a non-binding opinion before the IAA takes any measures.

Legislation prohibits 'interlocking directorates' in the banking, insurance and financial services sectors, making it illegal for individuals to sit on the board of more than one corporate body in competing undertakings in any of these sectors. Because the merger notification form requires the merging parties to fill in a section on interlocking directorates, merger control in the above-mentioned sectors can also be used as a means for spotting potential infringements of this law.

With regard to telecommunications, the 1997 Telecoms Law requires that before issuing a decision on any merger (or agreement) in the telecoms, broadcasting and media sector, the IAA must require a non-binding opinion from the Italian Communications Authority (AGCOM). Further, a resolution (last updated in 2016) of the AGCOM provides that any concentration (as defined under the Law) involving undertakings active in the media sector and that meets the relevant alternative turnover thresholds, equal to €482 million for all undertakings concerned and €48 million for the target company, is subject to a mandatory notification to the AGCOM, which could block or impose conditions on the transaction if it is likely to threaten pluralism in the relevant area. This obligation is in addition to the possible parallel filing to the European Commission or the IAA.

Finally, when undertakings entrusted with the operation of services of general economic interest, or operating under a statutory monopoly, wish to operate in markets outside the scope of their current activity, they must do so through a separate company (corporate unbundling). The incorporation of such new companies, or the acquisition of a controlling interest in existing companies operating in new markets, is subject to a prior filing to the IAA irrespective of any associated turnover and there are penalties of up to €51,645 for failure to notify. The IAA has published a notice regarding the formalities applicable. In particular, the notice specifies the situations in which notification is required, and the minimum information required. Since the introduction of this specific filing obligation in 2001, the IAA has prosecuted undertakings for failure to comply with this obligation 28 times, with fines ranging between €1,000 and €50,000.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A concentration must be notified prior to its implementation, that is, before the purchaser has acquired the ability to exercise a decisive influence over the behaviour of the target undertaking.

The earliest a notification can be submitted is as soon as the parties have agreed on the essential terms of the transaction, which would allow the Italian Antitrust Authority (IAA) to conduct a thorough appraisal. In general, the IAA prefers to be notified of a binding agreement; however, in exceptional cases, a filing has been accepted even before signing the final agreement, provided that the parties could assure the IAA that the main terms and conditions of the transaction – and in particular the aspects that are relevant for an antitrust analysis – would not change. While the IAA has generally adopted a strict approach to this issue, rejecting filings not supported by a binding agreement, its practice varies from one sectoral unit of the IAA to another, and it is advisable to discuss this with officials from the competent unit if necessary.

Fines for failure to notify may amount to up to 1 per cent of the worldwide turnover of the notifying party or parties in the last fiscal year. The IAA has informally indicated that it will adopt a zero-tolerance approach against those that disregard merger filing obligations. In 2016, the IAA opened two different proceedings concerning the banking sector, one against Banca di Credito Cooperativo di Roma and one against Banca per lo Sviluppo della Cooperazione di Credito for their failure to notify their acquisition of sole control, respectively, over Banca Padovana Credito Cooperativo in Liquidazione Coatta Amministrativa and Banca Romagna Cooperativa. The IAA closed both proceedings, imposing on the two banking institutions a €5,000 fine. In February 2021, the IAA initiated proceedings for failure to notify against Doreca SpA and

Abruzzo Distribuzione Srl. The transaction concerned the set up of AD Beverage SpA, a full-function joint venture, by the contribution by the parent companies of two businesses under 10-year lease agreements with effect from June 2020. In May 2021, the IAA issued a modest fine to the parties, stressing in particular that the transaction did not generate any competitive concerns and that only 10 months had passed.

10 Which parties are responsible for filing and are filing fees required?

In the case of acquisition of sole control, the acquirer must make the notification. In the case of a merger or acquisition of joint control, each party that merges or acquires joint control is obliged to notify. The parties may, however, file jointly using the same form by appointing a common representative.

No filing fees apply.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As a general rule, implementation of the transaction does not have to be suspended after filing but prior to clearance (although, as a matter of practice, in most cases the parties to a concentrative transaction make clearance by the IAA a contractual condition of closing). The IAA, when opening second-phase proceedings, may, however, order, with a formal decision in such regard, the parties not to implement the transaction until it concludes its Phase II review. However, this must be justified on the grounds that the transaction raises serious competition concerns. Since 1990, this has occurred only three times (the most recent case was *Unipol/Fondiaria* in 2012).

In any event, even if this order is issued, a public takeover offer may be completed during such a suspension period provided that the purchaser does not exercise voting rights at the acquired company's shareholders' meetings until the transaction has been cleared.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Implementing a transaction subsequent to notification but prior to clearance does not give rise to any infringement under the law and so no sanction is applied. Nevertheless, this course of action involves the risk that where a transaction raises serious competition problems, the IAA will decide not to authorise it or to authorise it subject to remedies. Thus, if a transaction is closed prior to clearance, the antitrust risk (ie, the risk of a prohibition or conditional approval decision) will be largely borne by the acquirer only, unless otherwise provided by specific contractual arrangements.

While the absence of a standstill obligation attenuates the risk of 'jumping the gun' in the pre-clearance phase in this regard, undertakings must remain wary that any interactions between them prior to clearance and completion of the deal remain subject to review by the IAA under article 2 of Law No. 287 of 10 October 1990 (the Law), the Italian equivalent of article 101 TFEU, as well as under the latter.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There are no sanctions for closing before clearance, provided completion occurs after a complete notification has been submitted.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

As indicated, a transaction, including a foreign-to-foreign deal, could be closed before clearance.

Thus, implementation of a foreign-to-foreign concentration, as well as concentrations involving national undertakings, can occur after having filed (and even before clearance), except where the IAA has issued a specific suspension order to the contrary when opening Phase II proceedings.

In relation to cases where the IAA has issued a specific suspension order, be it a foreign-to-foreign deal or not, while in principle acceptable, the actual feasibility of a local 'hold-separate' arrangement will ultimately depend on the geographic dimension of the relevant markets and how such arrangement would affect the potential restrictive effects of the proposed concentration.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

A national public takeover bid that may give rise, if completed, to a notifiable concentration must be submitted to the IAA at the same time it is filed with the Italian financial regulator (CONSOB). In the case of a national public bid (ie, public takeover subject to Italian capital market regulations), the term relating to the first-phase assessment period is reduced to 15 days. Where the IAA, having opened a second-phase investigation, issues a suspension order preventing the parties from closing, a public bid may nevertheless be completed provided that the purchaser does not exercise voting rights at the acquired company's shareholders' meetings until the transaction has been cleared. Non-national public takeover bids are subject to the provisions applicable to ordinary concentrations.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Parties may still notify a transaction by completing a form, two copies of which need to be submitted to the IAA along with the relevant attachments. However, the IAA promotes electronic filing by CD-ROM and it is also possible to file by certified email.

Completing the form can be time-consuming. The information required includes details of the parties, description and details of the transaction, and information about the markets affected by the concentration. Additional detailed information on the relevant market must be provided whenever:

- more than one party is active on a relevant market and, after the concentration, they will hold a combined market share of not less than 15 per cent;
- after the transaction, one party will hold a market share of not less than 25 per cent when at least another party is present in an upstream or downstream market; or
- the target undertaking holds a market share of more than 25 per cent even if the other undertakings concerned are not active in the same market or in upstream or downstream markets.

As a matter of practice, the IAA tends to require full filings even where the market share thresholds indicated above are not met. Accordingly, the undertakings concerned should be prepared to supply the IAA with extensive market information in any event.

A considerable amount of documentation must be provided, including all documents concerning the transaction (ie, the execution copies plus the relevant signatory pages and related attachments), balance sheets and annual reports of the companies involved relating to the three financial years preceding the transaction. A power of attorney for the representative signing the filing must also be enclosed (with no particular formalities required). In practice, it is very difficult to file a complete notification in less than two weeks (in particular because the active cooperation of the notifying party or parties and of the target is required). The notification must be submitted in Italian, while as a matter of practice the IAA accepts attached documents (ie, transaction documents) in the original language (if in English, French or Spanish, while a translation may be required in relation to other languages). The notifying party should indicate in its notification which information constitutes business secrets to be treated as strictly confidential (and the reasons for its confidentiality). Fines of up to €25,823 for failure or refusal to provide information and up to €51,645 for supplying false information may be imposed, but only in the case of Phase II proceedings. More broadly, depending on the relevance of the missing or false information to be provided, any such conduct could potentially amount to a criminal offence (although this remains a remote scenario).

The IAA operates a voluntary pre-notification practice. In those cases, at least 15 days before the relevant formal filing, the parties may file with the IAA a briefing paper describing the essential terms of the transaction and the market or markets potentially involved. The parties and the IAA may then meet informally to discuss possible competitive effects of the transaction and the scope of the information to be provided in the actual filing.

Moreover, the IAA publishes a 'notice of merger submission' on its website (subject to the parties' consent). The notice contains a summary description of the transaction and of the affected economic sectors. Third parties are then entitled to submit their observations within five days of the publication.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The IAA has wide-ranging powers, which only apply, however, if second-phase proceedings are opened. It can gather all relevant information, order the production of documents, order inspections and make copies of corporate documents. Even during the first phase, it cannot be ruled out that the IAA may want to informally contact competitors, clients or suppliers to ask for comments or to verify whether the information submitted is true. In some cases, the officials may contact the parties directly to ask for clarifications or explanations of the transaction. The parties may make submissions in writing and may apply to be heard at hearings. Fines of up to €25,823 for failure or refusal to provide information and up to €51,645 for supplying false information may be imposed, but only in the case of Phase II proceedings.

18 | What is the statutory timetable for clearance? Can it be speeded up?

A first-stage investigation takes 30 calendar days (15 for national public bids), after which the IAA may:

- clear the transaction if it does not raise serious doubts as to its compatibility with the Law; or
- open second-phase proceedings if serious doubts concerning the compatibility of the transaction with the Law arise.

Usually, the IAA does not issue a first-phase decision much earlier than 30 days from receipt of notification. This is because of various factors such as the amount of the information that the officials must consider, the internal procedural rules of the IAA and its considerable workload. However, in the least problematic cases the issuing of a decision before the expiry of the 30-day period cannot be ruled out.

If the IAA considers that the parties have not provided complete information, it may formally require such information to be submitted, and this interrupts the running of the 30-day period. This term will run afresh from the moment the IAA considers that the information is complete. It is not uncommon for the IAA to interrupt the 30-day review period through such information requests. However, as a matter of practice, the IAA's officials will normally seek to obtain the relevant information from the parties in an informal way (ie, over the phone), though this is typically done by setting very short deadlines (normally, two to three days, sometimes even less). In principle, only when these deadlines are not complied with does the IAA issue a formal letter interrupting the 30-day first-phase period. The new procedure entailing an informal pre-notification meeting operated by the IAA has been introduced, in part, to avoid these interruptions. During such a meeting, the IAA would generally make clear to the parties all the information that it needs to assess the competitive effects of the transaction, so that the parties will be able to provide a complete filing. Second-phase proceedings must be closed within 45 calendar days (unless the undertakings have failed to provide information available to them, in which case the term can be extended for a further 30 calendar days, although this extension can be made just once).

Accordingly, provided that the 30-day first-phase period is not interrupted, the overall duration of proceedings can run up to 105 calendar days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A concentration is prohibited whenever it creates or strengthens a dominant position as a result of which competition is eliminated or substantially reduced in the Italian market. Despite this being in line with the pre-2004 EUMR substantive test, in practice the criteria for evaluating a merger are largely in line with the new EUMR test, and include market shares, the choice suppliers and users have, access to sources of supply or market outlets, the structure of the relevant markets, the existence of any barriers to entry, and supply and demand trends. The Italian Antitrust Authority (IAA) in fact interprets the test broadly, thus effectively applying a test close to that of the current EUMR.

The IAA's approach has not been affected by the global economic crisis and, although in some cases the IAA has considered the current trends and companies' corporate restructuring in some markets as background elements of the transaction (for instance *Stato Federale della Baviera/BayernLB Holding*, a concentration related to a bank nationalisation in Germany and the *Quaestio capital management/Banca popolare di Vicenza* (2016) and *Quaestio capital management/Veneto banca* (2016), both concerning the banking sector, and *Ferrovie dello stato italiane/Ferrovie del sud est* (2016), concerning the rail transport sector), it does not appear that this has been a key element in its merger assessment. The IAA has, however, been prepared to accelerate the procedure in such cases. The IAA has not used the failing-firm defence or any similar 'failing firm' theory over the past few years. Notably, in *Emmelibri/Effe 2005 Gruppo Feltrinelli/Newco* (2014), the notifying parties while putting forward defensive arguments highlighting that absent the merger, EFFE 2005 would have ceased its distribution activities, explicitly excluded any failing firm defence. In 2012, the IAA issued a temporary suspension order to prevent the implementation of the proposed acquisition of Fondiaria Sai, the second-largest insurer in Italy, by Unipol, also one of the key players in the Italian insurance market, despite the rationale of the transaction being that of rescuing the target company's group from financial difficulties. The transaction was eventually cleared subject to structural remedies.

The IAA has delivered on its stated goal of bringing its enforcement more in line with European 'best practices' by grounding its decisions increasingly on sophisticated substantive economic analysis and in recent retail cases it made use of various economic tools such as the diversion ratio and the gross upwards pricing pressure indicator (GUPPI) in *Fratelli Arena/Rami di Azienda di SMA* (2019), *BDC Italia-CONAD/Auchan* (2020), and *Diperdì/Rami di azienda di SMA e Società Generale di Distribuzione* (2020).

Finally, on 23 March 2021, the IAA published proposals for reform of the antitrust legislation. Inter alia, these include the proposal to replace the current substantive test for the evaluation of concentrations (based on the creation or strengthening of a dominant position) with the EU SIEC (significant impediment of effective competition) test.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for concentrative full-function joint ventures, which are exclusively appraised under the broad 'dominance' test that applies to other concentrations. Cooperative joint ventures (and under Italian law this concept also includes full-function joint ventures where both parents remain in the same market of the joint venture) are not treated as concentrations and are assessed under the restrictive practices test. In January 2017, in the *Lottomatica/Admiral Entertainment/Newco* case the IAA, despite a referral back by the EU Commission, closed the proceedings considering that the notified joint venture had no structural nature and hence it did not amount to a concentration. In particular, it concerned the creation of a Newco (70 per cent by Lottomatica and 30 per cent by Admiral Entertainment – part of the Novomatic group) that would have been active in the gambling market (in the AWP and VLT machines segment). The parent companies would have remained active both in the gambling market at retail level and in the upstream market for the production and marketing of AWP and VLT software. Further, the transaction included a non-compete agreement between Lottomatica and Novomatic with regard to the Newco for the acquisition of gaming halls. Taking into account all these elements, the IAA considered that the transaction did not concern any transfer of business, but rather could lead to substantial cooperative effects, and therefore it opened proceedings under article 101 TFEU (the IAA closed the proceedings in May 2017, as the parties withdrew the transaction).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The IAA is required to follow European Commission case law and practice, including that on collective dominance in merger cases. Even before the 2004 EU reform, the IAA was ready to apply the theory of coordinated effects to block a merger (eg, the 2002 *Granarolo/Centrale del Latte di Vicenza* case). The IAA has so far never applied the pure 'unilateral effects' theory of harm, now possible under the EUMR, when the transaction does not involve or lead to a situation of dominance, and some authors believe that this would not be possible under Law No. 287 of 10 October 1990. In *Ardagh Glass/FiPar Finanziaria di partecipazioni Industriali* (2011), the transaction involved horizontal effects in the glass and metal packaging sector. While, depending on the relevant market definition, the transaction could be seen as a three-to-two deal, the IAA cleared it without conditions essentially in consideration of the likelihood of entry and the role of potential competition. In its assessment, the IAA carried out an in-depth economic analysis, taking into consideration a number of elements, such as the structure of the markets and the fact that the merged entity would have faced strong competitive pressure from other potential players. The IAA cleared the merger in Phase I, noting that the creation of a single or collective dominant position was unlikely. The most recent case blocked by the IAA was the 2013 *Italgas-Aceagas/Isotina Reti Gas* case. In particular, the IAA blocked the proposed change of control of Italian gas distributor Isotina Reti Gas also because no other competing undertakings active in other areas in Italy would have an interest in participating in tenders for the award of gas distribution services where the parties were already present. This case was upheld by the Council of State in January 2015, overturning the first instance decision that had quashed it.

The IAA's enforcement history also includes challenges to vertical mergers on the basis of their expected foreclosing effects; challenges to conglomerate mergers in relation to the related potential portfolio effects that they might generate; and the strengthening of a joint-dominance situation based on multi-markets contacts of the undertakings concerned.

Unilateral effects were considered a serious concern in the *Arnoldo Mondadori editore/RCS Libri* case (March 2016), involving two of the main operators in the book publishing and book retail sectors. The dominant position that would have been gained by Mondadori in four distinct markets and corresponding sub-segments could have resulted in entry barriers in the market for the acquisition of authors' rights. Also, the concentration would have likely resulted in the systematic refusal by the merged entity to provide book catalogues to other distributors, thus having an anticompetitive impact on both the upstream and downstream markets. Ultimately, the IAA cleared with conditions the acquisition of RCS Libri by Mondadori.

On the other hand, in *Edenred Italia/Ristochef* (2011), the IAA initiated a Phase II investigation as it was initially concerned by significant horizontal aspects, as the concentration could have strengthened the dominant position of the leading player in the luncheon vouchers market. The IAA eventually authorised the transaction without imposing conditions, as it concluded that, despite the large market share imputable to the combined entity post-merger, the operation did not produce significant anticompetitive effects on any of the relevant markets in light of factors such as the bidding nature of the relevant market and the absence of barriers to entry. By contrast, in March 2017 the IAA closed with commitments the *Gruppo Editoriale l'Espresso/Italiana editrice* case, concerning a transaction in the book publishing sector. According to the IAA, the transaction was likely to create or strengthen a dominant position in the advertising market for daily newspapers in the provinces of Turin and Genoa. In fact, the IAA noted that in the local area of Turin, the estimated combined market share post-merger would have been 90 to 95 per cent, while in the province of Genoa, the transaction would have led to a de facto monopoly. In this context, the IAA was concerned that third parties would have not been able to exercise any competitive pressure on the merged entity and the entry of new competitors was considered unlikely. The IAA accepted behavioural commitments consisting in the granting to third parties of licence agreements for advertising activities on the *Repubblica* newspaper both for Turin and Genoa local editions. In particular, the IAA considered the duration of these agreements (five years) sufficient to let third parties enter in the relevant market and exercise effective competition. The IAA took into account both horizontal and conglomerate effects in the 2016 *Reti Televisive Italiane/Gruppo Finelco* case, concerning a concentration in the radio broadcasting sector. In addition to the dominant position that the merged entity could have gained in the radio advertising market, the IAA also considered the dominant position already held by Reti Televisive Italiane in the free-TV advertising market. The IAA was concerned about the incentives that the merged entity would have had to foreclose in the sale of advertising space in both the radio and video advertising markets. Therefore, the acquisition was cleared with conditions. In particular, the IAA prohibited the merged entity from renewing any concession contracts through which the combined entity would have marketed the advertising space of two other radio broadcasters; in addition, the IAA required video and radio advertisings to be managed by two separate undertakings; lastly, the IAA imposed a four-year prohibition on acquiring new radio broadcasters and concluding new advertising concession contracts with other radio broadcasters.

The IAA is also interested in the 'harm to innovation' and 'common ownership' theories of harm to which the EU Commission has recently been paying attention; with regard to the former, when, in November 2018, the IAA authorised the *Luxottica Group/Barberini* merger upon commitments (ie, the merged entity would enter into supply agreements with all interested market operators), the imposed remedies were among other things based on IAA's concerns of reduction of ability to innovate by competitors. Lastly, also in its recent big data sector inquiry (see below), the IAA has displayed its interest in exploring the relationship between competitive harm and harm to consumer welfare.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

In principle, as a matter of law, a prohibited concentration may, exceptionally, be authorised by the IAA for reasons connected with the general interests of the national economy. However, the applicability of this 'general interest exception' requires the prior issuance by the Italian government of the necessary guidance criteria, something that has not occurred yet and is unlikely to happen in the near future. Something arguably similar occurred in 2008 in respect of an acquisition by Alitalia (in a situation of distress), but the clearance was then adopted by the IAA pursuant to specifically adopted (and time-limited) legislation.

Moreover, even in ordinary merger procedures, notwithstanding clearance by the IAA, the President of the Council of Ministers may prohibit, for essential reasons of national economy, an acquisition of an Italian company by a foreign company if, in the country of origin of the buyer, Italian companies are subject to discrimination, in particular in relation to their ability to acquire local companies. This provision is intended to ensure reciprocity, but it has never been used to date.

Having said so as a matter of law, it is clear that social considerations may have some influence over the review of certain mergers, although the IAA has always tried to distance itself from any situation that could not be fully explained on purely technical grounds.

Finally, in the banking sector, the IAA may approve a concentration, following a proposal from the Bank of Italy, even if this leads to the creation or strengthening of a dominant position, on financial stability grounds. Even if this power was not resorted to, in the *Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen* merger, this transaction was unconditionally cleared in May 2018 after a Phase II investigation (despite the sometimes very high market shares (above 60 per cent or even 70 per cent in the local retail catchment areas)), commitments having originally been deemed necessary. Clearance was given taking into consideration the functional and structural peculiarities of the banks and the fact that these were cooperative banks also supporting local economies, which had to change their corporate nature pursuant to new sector legislation.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Thus far the IAA has made it clear, albeit informally, that efficiencies are not autonomously considered in the context of merger assessment. In light of the enhanced role of merger efficiencies under EU law and taking into account the economic approach to merger analysis adopted and developed throughout the years by the IAA, it is possible that the treatment of efficiencies will in the future also have some, although limited, direct relevance under Italian law. In a case concerning newspapers and periodicals distribution (*M-DIS – Servizi Stampa Liguria – Società di Edizione e Pubblicazioni/GE-DIS*, 2013), the IAA conducted an analysis of the horizontal and vertical effects of the merger and assessed the efficiency claims raised by the parties. Also in the *SEL-Società elettrica altoatesina/Azienda energetica case* (2015) concerning the creation of a joint venture active in the markets for gas and electricity distribution, the IAA assessed the efficiency claims raised by the parties (in particular in terms of production and distribution costs savings, which would have been ultimately transferred to consumers), but concluded that these efficiencies were not specifically attributable to the transaction and ultimately authorised the transaction subject to conditions. The same assessment was made in the *2i Rete Gas/Nedgia* case (2018), also regarding the market for gas distribution, where the IAA concluded that the efficiencies claimed by the parties could not considered as merger specific. Most recently, the expected efficiencies deriving from the concentration (avoidance of certain organisational duplications) were deemed suitable to have a positive impact on consumers, which helped with the unconditional clearance (in May 2018) of the *Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen* banks merger.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Italian Antitrust Authority (IAA) may block a transaction or clear it subject to conditions (offered by the notifying party) or measures (imposed by the IAA), or both. If a prohibited transaction has already been implemented, the IAA may order all measures, including divestment, that are necessary to restore the parties to their pre-merger positions. Should the parties implement the transaction despite a negative decision or fail to comply with the relevant conditions, the IAA may also impose fines of between 1 per cent and 10 per cent of the turnover of the businesses party to the transaction. This principle has been confirmed by the Supreme Administrative Court, which specified that the sanction for failure to comply with an IAA decision shall apply not only where the transaction was subject to an outright prohibition but also when the transaction is cleared subject to conditions and those conditions have not been complied with (*Edizione Holding/Autostrade*). Fines have been imposed in a number of cases, mostly in the maritime transport sector. In the *CIN/Ramo di azienda di Tirrenia di navigazione* case at the end of 2013, the IAA imposed fines of €500,000 and €271,000 for failure to comply with the conditions imposed in its conditional clearance decision adopted in June 2012. Later (April 2016), the IAA sanctioned Moby €374,000 as it did not respect clearance conditions for the merger with Toremar, which had been authorised in 2011. In 2020, the IAA opened two proceedings (*C12231B - BPER Banca/Unipol Banca* and *C12247C - BDC Italia-Conad/Auchan*) to verify alleged failure to comply with conditions imposed in its 2019 conditional clearance decisions.

In light of market changes and of corporate and legislative changes, in July 2016 the IAA resolved to remove certain measures previously imposed in the *Unicredit/Capitalia* case (2007), concerning the banking and insurance sectors, as such measures (consisting, among others, in eliminating certain commissions for cash withdrawals and avoid entering in any partnership with Generali insurance group) were no longer justified. Further, in July 2016 and later on in January 2017, the IAA resolved to amend the measures imposed in the *Enrico Preziosi-Artsana/Newco-Bimbo Store* case (2015), concerning the manufacturing and distribution of toys and other products for babies and children (healthcare, nursing, etc). In 2017, the IAA also resolved to amend one of the measures imposed in the *Gruppo Editoriale/l'Espresso* case concerning the book publishing sector.

In 2011 and 2013, the IAA blocked two mergers in the energy sector (*Compagnia Valdostana delle acque/Deval and Vallenergie* and *Italgas-Acegas/Isontina Reti Gas*) owing to the presence of barriers to entry and absence of potential competition.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

During both stages of the proceedings, the IAA may indicate to the notifying parties those elements of the proposed transaction that are likely to distort competition and ask the parties to eliminate or modify them as a condition for clearance. Negotiations are often carried out between the IAA and the parties, during which the IAA may ask for, or the parties propose, structural undertakings such as the sale or divestment of a part of their business or the transfer of a trademark, or behavioural undertakings aimed at maintaining an effective degree of competition on the market. Divestitures in Phase I do not technically amount to commitments (which are only available in Phase II under Italian law) and the IAA is more inclined to go to Phase II if the transaction calls for significant remedies. They are therefore not binding and in the case of violation, the IAA may only consider that the factual scenario on which it based its clearance decision has changed and, accordingly, that the transaction that was cleared was different from the one actually implemented. The IAA cannot impose fines for their violation. This means that Phase I commitments have been very rare and must be clear-cut for the IAA to take them into consideration.

In a vast range of cases, commitments involve the adoption of structural remedies proposed by the merging parties. However, recent decisions also show a significant degree of flexibility (particularly if compared to the EU Commission) towards behavioural (rather than structural) remedies (at least, as far as vertical or foreclosure issues are concerned), with the IAA accepting partly or solely behavioural remedies, such as in *Emmeeffe Libri/Centro Libri* (2020), and *F2I SGR/Persidera* (2019); or at the very least pairing behavioural remedies to structural ones, such as in *2i Rete Gas/Infrastrutture Distribuzione Gas* (2021). In the *Emmeeffe Libri/Centro Libri* concentration, the IAA authorised the acquisition of sole control over independent book wholesaler Centro Libri by part of Emmeeffe, a book wholesaler and marketing and commercial services provider, jointly controlled by editorial groups Messaggerie and Feltrinelli, on the condition that Emmeeffe implemented a number of behavioural remedies, including not worsening both existing and future contractual conditions established with independent bookstores and editors for a certain time. Likewise, in *F2i SGR/Persidera*, investment management company F2i sought control of Persidera, active in the construction, maintenance and management of TV broadcasting facilities. At the time, F2i also held 40 per cent of TV, radio, and mobile services and facilities management company EI Towers. The IAA authorised the acquisition but imposed obligations to provide access to EI Towers' services and infrastructures at equitable and fair conditions, as well as measures related to the independence between the original and the acquired business units. In the *Ascopiave/Rami di Azienda di ACEGASAPSAMGA* (2019) operation, whereby multi-utility company Ascopiave acquired gas distribution business units of incumbent concessionaire ACEGASAPSAMGA, the IAA used a number of behavioural remedies to safeguard the ability of a potential future entrant on the market to challenge Ascopiave's incumbent position, including the commitment to allow a potential future entrant to pay in instalments – as opposed to a lump sum – the fees due to the exiting incumbent (so-called residual industrial value), as well as the obligation for Ascopiave, when eventually releasing the concession, to retain workers exceeding the potential future entrant's requirements, so that the latter should not have to shoulder the financial burden thereof. In *2i Rete Gas/Infrastrutture Distribuzione Gas*, the transaction consisted in the acquisition by 2i Rete Gas of all the share capital of Infrastrutture Gas. As a condition of clearance, the IAA requested the divestment of part of the gas redelivery points of one of the parties, at an established price. Only in the event of failure to obtain such a price would a series of behavioural measures need to be implemented.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

As for the substantive conditions, the IAA relies upon the principles laid down by the European Commission in its 2008 Commitments Notice. Remedies may be offered in both stages of the proceedings. There are no particular rules as to their timing. However, although usually not expressly mentioned in the official merger clearance decisions or subsequent decisions, the financial crisis most likely played an important role in the extensions granted by the IAA to merging Italian banks to implement some of the measures attached to the clearances – namely the divestment of a number of local branches, which might be greatly affected by the lack of liquidity, the current restructuring that most banking groups are going through, or both.

The IAA has indicated that behavioural remedies are the exception, in consideration of the difficulties associated with monitoring compliance (particularly, in relation to the 2000, 2002 and 2004 *Edizione Holding/Autostrade* cases). Nonetheless, along with structural measures the IAA has also continued to accept behavioural remedies.

Given the short Phase II timeline that the IAA must follow (45 calendar days that can be extended only once for an additional 30 days), there is not a specific timing for proposing remedies, which thus should be discussed very early in Phase II. In a March 2021 proposal to the government, the IAA proposes to double the Phase II review period, which if implemented would bring the ordinary Phase II period to 90 calendar days, that could be further extended for another 30 calendar days if the IAA requires further information that is available to the parties. In relation to certain sectors (insurance and telecoms) an additional 30-day period will have to be added to allow for the mandatory, but non binding, opinion of the relevant regulatory agency.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In *Solvay Sodi*, which involved a foreign-to-foreign merger in the field of sodium carbonate, the IAA accepted a commitment by Sodi to dispose of a relevant part of the company's production in favour of a competitor established in Turkey and a commitment not to start anti-dumping action against imports in Europe by US competitors. The transaction was approved subject to these undertakings.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

As a rule, the IAA (unlike the European Commission) evaluates ancillary restrictions expressly together with the assessment of the related concentration. Their analysis takes into account the proportionality principle as well as the principles set out in the 2005 EU Notice on Ancillary Restrictions. As a rule, the IAA (unlike the European Commission) evaluates ancillary restrictions expressly together with the assessment of the related concentration. Their analysis takes into account the proportionality principle as well as the principles set out in the 2005 EU Notice on Ancillary Restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

In Phase I, the Italian Antitrust Authority (IAA) – with the express consent of the parties involved in the notified transaction – informs the public of the filing of a transaction through a notice on its website. Any interested party, including customers and competitors, may then submit observations on the notified concentration within five business days of the publication of the notice on the website. Since the introduction of such 'notice of merger', the disclosure that a notification has been submitted has had the effect of further increasing the numbers of third-party interventions during Phase I.

Decisions whereby the IAA opens Phase II proceedings are published in the Bulletin of the IAA and posted on its website, inter alia, for the purpose of enabling customers or competitors to intervene in the process through oral or written submissions. In many cases, customers and clients are contacted directly by the IAA, either informally or formally, by way of a request for information during the 'market test' phase. Experience shows that these contacts can influence the final decision of the IAA to a significant extent.

Third parties may lodge a complaint against a competitor that has not notified a concentration. Third parties must also be granted access to documentation under laws relating to the transparency of conduct that apply to public bodies. As recently stated by the Council of State (the Supreme Administrative Court deciding on second and last instance appeals against decisions of the IAA) third parties providing evidence that they have been harmed by a decision are entitled to bring an action for annulment of the decision before the relevant administrative courts.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The IAA now posts on its website a notice on the filing of any merger, inviting third parties to submit their observations. Further, decisions by which the IAA opens Phase II proceedings or closes proceedings are publicised in the IAA Bulletin and posted on its website. Normally there are three weeks between the time a decision is taken and its actual publication (this period is reduced to approximately one week or less in relation to decisions by which the IAA opens a Phase II merger investigation).

The legal framework for disclosure and access to file is contained in the Regulation. All parties having an existing, direct and immediate interest in the merger proceedings may request access to the file. Access is not granted to documents containing business secrets. The IAA officials are bound by professional secrecy obligations.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The IAA is strongly in favour of full cooperation with the European Commission and the creation of a network with other national competition authorities for the joint examination of transnational cases. In practice, in merger cases, informal contacts between the European Commission and the IAA are frequent, especially in cases where, although the EUMR applies, there is a substantial impact in Italy. One of the units within the IAA is specifically dedicated to the relationship with the Commission and the other national competition authorities (NCAs) in the context of the European Competition Network. Finally, the IAA is an active member of the International Competition Network, one goal of which is to promote international cooperation among NCAs.

In 2010, the record shows only one referral under article 22 of the EUMR, which eventually became case COMP/5959 *SCJ/Sara Lee*, and one request for referral made by the IAA under article 9 (the Commission concluded, however, that there was no need for the matter to be examined by the IAA – Case COMP/5960 *Crédit Agricole/Cassa di Risparmio della Spezia/Agences Intesa Sanpaolo*). No referral from the IAA to the European Commission appears to have been made under article 22 in recent years. But there have been four voluntary referrals back to the IAA under article 4(4) EUMR (in the *Lottomatica/AdmiralEntertainment/Newco* case, the *Holcim Calcestruzzi-Colabeton/Conferimenti di impianti in Cava di Cusago* case, the *Sonepar Italia/Sacchi* case and the *CVC/La Gardenia/Limoni* case).

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Interested parties may appeal against a decision of the Italian Antitrust Authority (IAA) to the TAR Lazio, which has exclusive jurisdiction in these matters. The TAR Lazio may annul a decision of the IAA only on the grounds of lack of jurisdiction or competence, violation of the law, or abuse or misuse of powers. The discretionary judgment of the IAA is not subject to judicial review except in limited circumstances. Decisions of the TAR Lazio are subject to appeal before the Supreme Administrative Court (Council of State).

Time frame

33 | What is the usual time frame for appeal or judicial review?

Usually each judicial degree takes between one and two years and it is therefore possible to have judicial review completed in three to four years. However, the Supreme Administrative Court may transfer the case back to the IAA.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Italian Antitrust Authority (IAA) reviewed approximately 69 cases in the year 2020 (65 in 2019, 73 in 2018, 57 cases in 2017, 51 cases in 2016, 44 in 2015, 40 in 2014 and 59 cases in 2013). The 2017 change in the second threshold has led to a slight increase and was in fact triggered by the concern expressed by the IAA to the parliament that its merger jurisdiction had been narrowed down too far by an earlier reform.

In 2017, the IAA opened a Phase II investigation in only two cases. In the *Gruppo editoriale l'Espresso/Italiana Editrice* case, concerning the book publishing sector, the IAA's main concerns were the horizontal overlaps, as the merged entity would have had a 90 to 95 per cent market share in the local area of Turin and a de facto monopoly in the local area of Genoa, and the IAA was concerned that third parties would not have been able to exercise competitive pressure on the merged entity and the entry of new competitors was considered unlikely. The IAA accepted behavioural commitments to guarantee the entrance of new alternative operators and competitive pressure in the relevant market. In the *Italcementi/Cementir Italia* case, concerning the cement and ready-mix concrete sector, the IAA's main concerns were that Italcementi would have gained (or reinforced) a dominant position in the market as well as the fact that the transaction could have facilitated coordination among independent cement manufacturers, owing to the reduction of the number of undertakings. Moreover, the IAA also considered vertical effects, as the merged entity would have been also active in the ready-mix concrete sector. The IAA accepted structural commitments (ie, the divestment of some plants) as well as behavioural ones.

In 2018, the IAA pursued several Phase II investigations, particularly in the first months. In the *Profumerie Douglas/La Gardenia Beauty-Limoni* case, triggered by a voluntary referral under article 4(4), the transaction would have resulted in the aggregation of the first and second operators in the market, both being each other's closest competitor. As the combined entity would have gained a market share above 45 per cent in half of the relevant markets considered, and above 60 per cent in the other half, and as the IAA considered that the merged entity would not transfer to consumers any cost saving generated, it was eventually deemed necessary to divest a number of stores to avoid overlaps in excess of 45 per cent in any of the 14 identified micro-markets. In *2I Rete Gas/Nedgia*, regarding the distribution of gas in some regions in the south of Italy, the IAA was concerned that the concentration might lead to a strengthening of a dominant position in tenders for the awarding of the natural gas distribution service, which would have discouraged participation of competitors. In the *Cassa Centrale Raiffeisen Dell'alto Adige/Gruppo Bancario Cooperativo Delle Casse Raiffeisen* case, the IAA's main concerns (which were ultimately abandoned) were the horizontal overlaps in the bank funding market, as the merged entity would have had a 45 to 50 per cent market share in the local area of Bolzano. Finally, in the *NOAH2/Mondial Pet Distribution* case, concerning the distribution of pet products, the IAA found a potential significant impediment to effective competition, as the merged entity would have a market share well above 45 per cent in some local areas, and two divestitures were accordingly required. Later, in November 2018 the *Luxottica Group/Barberini* merger was authorised by the IAA upon commitments, which were mostly grounded on foreclosure concerns because of the integration of the parties' respective frames and lens capabilities.

In March 2019, a Phase II investigation was opened into the acquisition by Sky Italia of R2, the technical platform for the provision of terrestrial digital television services of Mediaset Premium. While this transaction was abandoned – as anticipated – because of the concerns raised by the IAA, the case has been opened following a cooperation agreement between Sky and Mediaset that has already been in place for several months, and which, inter alia, resulted in the parties providing each other access to, and hosting in, the respective satellite and terrestrial digital platforms and channels, particularly after Mediaset's exit from the market of the pay-tv contents of Serie A and Champions League football games (somewhat anticipating the consequences of the deal).

Over the past years, the IAA, while dealing with a wide range of sectors, and especially towards the tail end of the supply chain (eg, retail banking and retail commerce) seems to have overall focused its attention on access to key inputs and facilities and barriers to entry, while paying close attention to the capacity of transacting parties to 'catch' consumers' business through geographical proximity.

With regard to the sectors currently under scrutiny, the energy sector (in particular gas distribution) seems to attract the IAA's attention: after clearing the acquisition of SNAM (which in turn controls the largest operator Italgas), the IAA blocked the *Italgas-Acegas/Isontina Reti Gas* merger. In *Compagnia Valdostana delle acque/Deval - Vallenergie*, the IAA determined that the merger would have created a near monopoly in the market for low-voltage retail energy sales to domestic clients in the Valle D'Aosta region. The merged entity would indeed have achieved a nearly 100 per cent share in terms of the number of points served in the domestic market and a more than 90 per cent share in the non-domestic market for low-voltage connections. A good portion of the IAA's analysis focused on the negative impact of the regional regulations that provided a barrier to entry. During the investigation, the IAA rejected the merging parties' price commitment (ie, to freeze prices in the free market at particularly affordable levels for two years, with a possible extension to four) as the IAA deemed this insufficient to achieve the long-term elimination of the competition issues. In 2015, the IAA cleared with conditions a concentration in the electricity energy sector between Società Elettrica Altoatesina and Azienda Energetica. The IAA was concerned that the merged entity could restrict competition in the future market for a tender for the distribution of natural gas in the local area of Bolzano given the fact that the parties already held control over incumbent operators. The IAA imposed the complete sale of one of the subsidiaries involved in the tender and the divestment of a business, amounting to the 30 per cent share held in the market for the supply of natural gas to small-sized customers. Further, recently the IAA focused also its attention in the publishing and advertising sector: in fact, in 2016 and 2017 the IAA cleared with conditions three such concentrations, namely *Reti Televisive Italiane/Gruppo Finelco*, *Arnoldo Mondadori Editore/RCS Libri* and *Gruppo Editoriale l'Espresso/Italiana Editrice*.

The IAA has confirmed its increasing attention to market dynamics at the local level, and particularly identifying micro-markets through isochrone analysis, and requesting parties' and market data at such geographical level even for non-problematic concentrations. Local 'catchment' areas determined through isochrones were also considered for the banking sector in the *BPER Banca/Unipol Banca* (2019) mergers, ultimately cleared in Phase II, as well as in the supermarket sector in the *Fratelli Arena/Rami di Azienda di SMA* (2019) and the *BDC Italia-CONAD/Auchan* (2020) acquisitions. More specifically, all these cases entailed the transfer of a number of bank branches (in the *BPER* case) or retail sales points (*Fratelli Arena* and *CONAD*). The IAA evaluated the competitive pressure exerted by such retail activities in light of their 'catchment area' for consumers, or driving time (through isochrones) required to reach them, and therefore imposed remedies of divestment of the overlapping branches or sales points presumably on this basis.

Reform proposals

35 | Are there current proposals to change the legislation?

In March 2021, the IAA published proposals to reform Italian antitrust legislation. In relation to the merger control regime, it proposed the following:

- enabling the IAA to request a filing for certain concentrations below the mandatory filing thresholds;
- replacing the current substantive test for the evaluation of concentrations (based on the creation or strengthening of a dominant position) with the EU SIEC (significant impediment of effective competition) test;
- considering joint ventures as concentrations if 'full-function', irrespective of the related risks of coordination between the parent companies;

- looking at revenues for the purpose of the merger control thresholds and for banks; and
- extending the Phase II review period from 45 to 90 calendar days.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Italian Antitrust Authority (IAA) decided four (compared with six during 2019) Phase II cases during 2020, and two more cases in the first months of 2021. Overall, the IAA published 69 merger decisions in 2020 and 28 more in the first few months of 2021.

In July 2020, the IAA authorised with conditions the acquisition of control of Ubi Banca SpA by Intesa Sanpaolo SpA (ISP). It noted that the transaction, consisting of a voluntary all-inclusive public exchange offer made by ISP concerning the share capital of UBI Banca SpA, was likely to result in the establishment or strengthening of ISP's dominant position in some local markets in bank funding, loans to consumer households and loans to household producers and small businesses. For these reasons, in authorising the transaction, the IAA imposed some structural measures on ISP. In particular, ISP had to dispose of over 500 bank branches in the geographical areas where the greatest competition issues were found.

Finally, a new IAA chair (Roberto Rustichelli, a Naples commercial judge) started work in early May 2019; the first year of Mr Rustichelli's tenure shows that, while merger control has not been a priority for the IAA compared to other areas of enforcement (such as consumer protection), the IAA has maintained – and even slightly increased, if adjusted for the number of notified operations – the number of reviewed transactions.

Japan

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Chapter 4 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No. 54 of 1947, as amended) (the Anti-Monopoly Act (the Law)), along with the relevant provisions of the Cabinet Ordinance and Regulations for the Law (the Ordinance and Regulations), prohibits certain forms of transactions, including mergers and acquisitions, and sets out a filing requirement for certain transactions. The thresholds and detailed filing requirements are provided in the Law, together with its Ordinance and Regulations. Criteria for business combinations that would cause substantive restraint to market competition and, therefore, are prohibited are set out in the 2004 Guidelines on the Application of the Anti-Monopoly Act for Reviewing Business Combinations, as amended in June 2011 (the Merger Guidelines).

The Law is enforced by the Fair Trade Commission (FTC). The FTC is an external agency of the Cabinet Office (which is, in principle, equated with other government ministries positioned under the Cabinet), but the Law declares its independence from any external pressure in respect of its operation. The empowered authority under the Law is the FTC, but almost all the implementation procedures are delegated to the General Secretariat except for ultimate high-level decision-making.

Scope of legislation

2 | What kinds of mergers are caught?

Share acquisitions, statutory mergers, statutory demergers, business transfers (ie, transfer of all or a significant part of the business of another company, transfer of all or significant business-related fixed assets of another company, leases of all or significant businesses of another company, delegation of management regarding all or significant businesses of another company, and contractual arrangements to share business profits and losses of another company) and the appointment of interlocking directorships are the categories of transaction regulated by the Law. Those transactions (or personnel arrangements) are prohibited if they cause a substantial restraint of competition.

The Law sets out special rules for companies engaged in banking and insurance. Those companies are prohibited from acquiring more than 5 per cent (for companies engaged in insurance businesses, 10 per cent) of voting rights in another Japanese company except for certain special cases, including when an approval by the FTC is obtained.

Share acquisitions, statutory mergers, statutory demergers and business transfers (transfers of businesses or business-related fixed assets only), if certain thresholds are met, are subject to a prior notification requirement. No filing requirement is imposed in respect of the creation of interlocking directorships.

3 | What types of joint ventures are caught?

There are no specific, separate rules for joint ventures. Typically, the establishment of a joint venture is caught by the filing requirement as are the respective acquisitions of shares in the joint-venture company by the investors exceeding either the 20 or 50 per cent threshold. In contrast with the EU rules, no prima facie exemption is available based on the nature of the joint venture, such as whether it is full-function or whether it is not-for-profit, although those factors may be taken into account in the FTC's substantive review if it takes place.

The FTC normally examines, in the assessment of a joint venture, not only the possible unilateral anticompetitive effect potentially created by the joint venture itself, but also any coordinated anticompetitive effect on the competitive relationship between the parties to the joint venture. According to the Merger Guidelines, when each party transfers the entire business of a certain section or department to the joint venture, thereby creating a clear separation between the businesses of the joint venture and the parent companies, the FTC's examination is primarily limited to the unilateral anticompetitive impact of the joint venture itself. In other cases, the FTC also examines the risk that the parents of the joint venture are colluding with each other via the joint venture.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

In terms of the thresholds for the formal filing requirements, the present Japanese rules take a relatively simple approach. For share acquisitions, the Law provides thresholds defined by percentages (share acquisition to exceed 20 or 50 per cent), without using the concept of 'control' as in some other jurisdictions.

The concept of control is, however, used to define the scope of a group company. Given that the filing thresholds rely on the Japanese turnover on a group company basis, the concept of control plays a significant role. It is provided by the relevant regulation that a parent–subsidiary relationship is recognised when a company has control over another company's business or financial decision-making, taking into account various factors, such as a minimum voting stake of over 40 per cent, board representation and loans.

For the purposes of substantive review, the concept of control is also relevant. The Merger Guidelines provide detailed criteria to decide whether a share acquisition should fall under the scope of the FTC's examinations in respect of the competitive impact, and the criteria are primarily based on the concept of control, although the word 'control' itself is not used. For example, when the share acquisition results in a stake of over 50 per cent in the target company, or when the share acquisition results in an over 20 per cent stake in the target company and the acquirer alone becomes the largest shareholder therein, the share acquisition qualifies for the FTC review (subject to certain exceptions) regardless of whether a formal filing obligation exists.

Also, when the share acquisition results in a stake of over 10 per cent in the target company and the acquirer ranks within the top three shareholders, various factors are considered to determine whether the FTC's substantive review should take place, such as the percentage of the resulting shareholding, the distribution of the stake between shareholders, mutual shareholding between the acquirer and the target, interlocking directorships between them and their business relationships.

There is no concept of 'joint control' unlike in other EU-style jurisdictions. As a result, if a joint venture is owned by two parent companies, each holding 50 per cent, with equal rights in terms of the number of board members or decision-making powers in key strategic issues (ie, deadlock relationship), none of the parents is regarded as having control over the joint venture; therefore, it is understood that the joint venture does not belong to either of the parents' groups for the purpose of merger control reportability. There is some room for case-by-case analysis, and this aspect should be carefully evaluated, but this principle is unique to the Japanese system.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Different thresholds apply depending on the transaction structures as illustrated below. The categorisation is based on structures used in the Companies Act, and, as a result, it is often difficult to decide which category a foreign transaction would fall under. Generally speaking, the FTC tends to take an analytical approach, looking at the exact contractual formats rather than the 'big picture'. For example, a foreign transaction that would be perceived as a transfer of business could be interpreted under Japanese law as a combination of multiple share acquisitions. When the reportability is unclear, it is safest to consult the FTC.

Share acquisition

A company acquiring shares in another company (where both are above a certain size, as described below) must file a notification with the FTC prior to the transaction when all the following thresholds are met:

- the ratio of voting rights held by an acquiring company in an issuing company exceeds either the 20 or 50 per cent threshold;
- the acquiring party as a group has a Japanese turnover of more than ¥20 billion; and
- the target as a group (the target entities and subsidiaries, not including the entities staying with the seller) has a Japanese turnover of more than ¥5 billion.

When calculating the Japanese turnover, in principle, both direct and indirect sales within and into Japan made by the company group during the most recent financial year should be included except intra-group captured sales.

There are separate rules for collective share transfers, which are a form of transaction available under Japanese corporate law that allows more than two companies to create a common holding company. For this form of transaction, when one of the parties as a group has a Japanese turnover of more than ¥20 billion and the other or another party has a Japanese turnover of more than ¥5 billion, the FTC filing is triggered.

Statutory merger or demerger

In respect of statutory mergers, a filing must be made with the FTC when both the following thresholds are met:

- one of the parties as a group has a Japanese turnover of more than ¥20 billion; and
- the other party as a group has a Japanese turnover of more than ¥5 billion.

There are more detailed rules for statutory demergers.

Business asset transfer

Regarding business or business-related fixed-asset transfers, a filing must be made with the FTC when the transferee company as a group has a Japanese turnover of more than ¥20 billion, and the target business or business-related assets satisfies any of the following:

- whole business of another company with a Japanese turnover of more than ¥3 billion;
- key business of another company with a corresponding Japanese turnover of more than ¥3 billion; or
- whole or key part of another company's business-related fixed assets with a corresponding Japanese turnover of more than ¥3 billion.

Substantive test

Even if a transaction does not meet this threshold, it is technically still subject to the FTC's substantive test. When the application of the substantive test is expected, parties are recommended to go through voluntary consultation with the FTC to avoid post-transaction remedy orders. This is not a legally binding rule, and the Law does not stipulate any threshold for parties to consider voluntary consultation. The Merger Guidelines, however, provide useful yardsticks in this respect.

The substantive test catches non-notifiable transactions if the anticompetitive effect is material, in which case the parties are advised to engage in voluntary consultation. In particular, when a transaction is subject to merger control in other jurisdictions (especially the United States and the European Union) and the anticompetitive impact in Japan is expected to be substantial, the FTC tends to obtain the information via intergovernmental channels and sometimes contacts the parties, even in the absence of a filing obligation.

Voluntary filing for large transactions with an impact on the Japanese market

The FTC amended the Procedural Merger Guidelines in December 2019 to encourage parties to a large non-reportable transaction to make a voluntary filing where an impact on the Japanese market is expected. This amendment is designed to capture large technology mergers, but the rule itself is not sector-specific and applies across all industries if the conditions are met.

The amended Guidelines state that for merger proposals that do not require notification, parties are advised to consult the FTC if the total amount of consideration for the acquisition is expected to exceed ¥40 billion, and the merger proposal is likely to have an impact on domestic consumers by satisfying any of the following conditions:

- the target company's business sites and research and development centres are located in Japan;
- the target company conducts sales activities aimed at domestic consumers, such as operating Japanese-language websites or using pamphlets in Japanese; and
- the domestic turnover of the target company exceeds ¥100 million.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory if the relevant conditions are met. Transactions within the same company group are exempted from the filing requirement.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes, foreign-to-foreign mergers must be notified. The same criteria apply to foreign-to-foreign transactions.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes. In respect of foreign shareholdings in Japanese companies, there are some regulated industries where foreign ownership levels are limited by specific sectoral legislation. For example, NTT, a holding company of the dominant national telephone carrier, must be less than 33.3 per cent foreign-owned. In addition, foreign shareholdings must be less than 20 per cent for terrestrial and radio broadcasters and less than 33.3 per cent for domestic airlines.

The Foreign Exchange and Foreign Trade Law applies to foreign direct inward investments to Japan, requiring a party that has made an investment in Japan to make a post-fact filing with the Ministry of Finance through the Bank of Japan within 15 days of the investment in most cases. For certain industries (such as the energy sector), prior filing is required.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no deadline requiring a notification within a certain period of time following a particular transactional event (signing or board resolution, etc), although a notification must be made with the Fair Trade Commission (FTC) 30 days prior to the closing of the transaction. When a notification is submitted, the FTC issues an acceptance notice to confirm the filing date, and the parties are subject to a 30-day waiting period following that date.

If the parties fail to make the required filing or close in breach of the waiting period, a fine of up to ¥2 million may be imposed. However, to our knowledge no such criminal sanctions have ever been imposed, although parties that have failed to file are often requested to file a delayed report with a brief explanatory note setting out the reason for the delay and the measures to be taken to avoid future negligence. The FTC can also apply to the court for annulment of any statutory merger or demerger for which the parties failed to file, but it has never done so.

In 2016, the FTC formally criticised, although with no penalty, a specific two-step structure used in an auction transaction with the aim of expediting the closing timeline by avoiding an initial FTC filing. This two-step structure was also investigated by overseas authorities, including a financial penalty. This case demonstrated the FTC's increasing appetite to intervene more closely in potential gun-jumping attempts.

10 Which parties are responsible for filing and are filing fees required?

In the case of a statutory merger or demerger, both companies intending to effect the merger or demerger are jointly responsible for filing. For a business transfer or business-related fixed-asset transfer and share acquisition, the acquiring company is responsible. The FTC does not charge any filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Where a notification to the FTC is required, the parties cannot close the transaction for 30 days following the filing. When a notification is submitted, the FTC issues an acceptance notice to confirm the filing date. It is possible that the FTC does not accept an initial submission as a sufficient notification, in which case the parties should revise the notification to ensure that all the required information is provided in the notification. To avoid uncertainties, as a practice recommended by the FTC, companies normally submit a draft notification informally to the FTC in advance for the FTC to review even if there is no substantive competition issue.

As in pre-notification consultation in the European Union, the parties can discuss the substantive issues with the FTC before submitting the notification formally, and this process can take several months if there are several rounds of questions and market testing is conducted, before the FTC grants an informal greenlight to submit formally.

As a unique rule of Japanese law that is different from many other jurisdictions, once the 30-day waiting period lapses, the parties can close the transaction legally even if the FTC has not completed its substantive review, although the FTC can reserve the right to take action for a certain period of time by requesting additional material or information before the expiry of the 30-day waiting period.

If the FTC asks one or more of the companies during the waiting period to submit additional material or information, the FTC may still take action even after the expiry of the waiting period, subject to statutory time limitation: any action must be taken prior to the later of 120 days from the date of acceptance of the notification or 90 days from the date of submission of the additional material.

The FTC has the discretion to shorten the 30-day waiting period. In the old regime before the amendments in 2011, the FTC was reluctant to shorten the waiting period except for in very rare cases. However, in the new regime, the FTC is likely to be more generous in agreeing to shorten the waiting period, although there is some uncertainty in respect of whether a shorter period is always available if applied.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There has been no precedent where the FTC challenged gun jumping with a penalty. It is, however, possible under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No. 54 of 1947, as amended) (the Anti-Monopoly Act (the Law)) for the FTC to take measures against transaction parties who have actually or effectively closed the transaction before the required clearance.

In 2016, the FTC formally criticised, although with no penalty, a specific two-step structure used in an auction transaction with the aim of expediting the closing timeline by avoiding an initial FTC filing. Considering the increasing global trend to regulate gun jumping, a similar level of caution as used in the most aggressive jurisdictions, such as the United States and European Union, is also prudent with regard to the FTC.

Criminal penalty

A person who closes a transaction (executing a share transfer or registering a merger or demerger in the relevant company registry) before the expiry of the waiting period is subject to a criminal penalty of up to ¥2 million. As is the case for other criminal penalties under the merger control regime, in practice, the FTC has so far not imposed such sanctions.

Remedies

Apart from the criminal sanctions, the FTC may also order remedies that require the parties to take certain measures to restore competition in the relevant market if the transaction may restrict competition.

Court action for annulment

Further, the FTC may petition the court for annulment of a merger or demerger on the grounds that a transaction requiring a notification has been closed during the 30-day period, and the court may invalidate the transaction. The FTC has, however, never yet done so.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There have been no cases in which a sanction has been imposed against any company, either Japanese or foreign, for closing before clearance. However, the rules allow the FTC to challenge foreign-to-foreign mergers as long as an impact exists and affects the Japanese market. The FTC proactively investigated BHP Billiton, as it was known then, at the time of its merger discussions with Rio Tinto, which indicates the FTC's general policy of not hesitating to investigate foreign transactions.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under the Japanese rules, as long as the 30-day waiting period has lapsed, technically the parties can close a transaction legally without waiting for the FTC's substantive clearance (completion of substantive review). However, even after the expiry of the 30 days, the parties remain exposed to the risk of receiving an FTC remedy order in a case where substantial antitrust concerns are raised by the FTC. Very occasionally, closing before clearance could become an issue in a foreign-to-foreign merger under a pressing schedule that cannot afford even the 30-day waiting period, but because of this risk, most companies choose not to close before clearance. The prohibition of closing itself does not extend beyond the 30 days, but technically, the FTC may petition a court for an interim suspension of the deal.

It is not theoretically precluded that the parties try to agree with the FTC on a 'hold-separate' arrangement, but to our knowledge there is no precedent for such an attempt.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no competition law rules specifically applicable to public takeover bids. There is no clear rule in respect of when a notification can be filed with the FTC in the case of a takeover bid, but the announcement of the takeover bid is likely to become an important milestone for deciding the timing of notification, subject to case-by-case consultation with the FTC. It is generally understood that when a takeover bid requires an FTC notification, the registration statement for a takeover bid to be filed with the Financial Services Agency must disclose the merger filing requirements under the Law, and the offeror can express in the registration statement that failure to obtain the required antitrust clearance may cause the offeror to withdraw from the takeover bid.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

To file a transaction with the FTC, a company must comply with the format prescribed by the FTC (different forms are set out for each transaction category), which can be downloaded from the FTC's website. The filing, including parts of the additional documents to be attached to the form, must be in the Japanese language. As a result, when a foreign company prepares for a notification, sufficient time should be allowed for translation.

Unlike Form CO in the European Union, which has to be prepared in flowing text, the Japanese form simply sets out tables into which the reporting parties insert the relevant information and data. An applicant is not expected to provide its own economic analysis of the market or detailed market data (except for very high-level data) in the filing. The FTC format on its own does not require notifying parties to fully express its own argument to justify the transaction.

The following are the details, among other things, that should be included in the form:

- descriptions of the companies involved, including their affiliated entities and economic importance measured by assets or sales;
- the purpose and background of the transaction;
- information regarding shareholding relationships between the companies involved; and
- high-level market information, including the types of products or services subject to horizontal overlap or vertical relationship between the parties, geographical coverage of those businesses, ranking and market shares of key players.

Additional documents must be provided (different requirements apply depending on the transactional category of share acquisition, statutory merger, demerger and business transfer, respectively), including the latest annual report, balance sheet, a profit and loss statement, articles of incorporation, a copy of the transaction agreement and a record of the shareholders' approval of the transaction.

To supplement the relatively simple notification form for a difficult matter, parties can submit additional information to supplement the notification form in the course of pre-notification consultation with the FTC, as in the European Union, to avoid Phase II, which makes the timetable more unpredictable. The 2011 amendment clarified in the implementation regulations that parties can submit those supplementary documents.

During the review, the FTC requests additional information, and, sometimes, these requests are more demanding than those of other authorities, particularly around supporting evidence in respect of market definitions. In recent years, the FTC has also requested internal documents, although usually on a voluntary basis.

Submission of false information is subject to a criminal penalty of up to ¥2 million, but we are not aware of any cases where the penalty was actually imposed.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Parties can discuss issues with the FTC through pre-notification consultation as in the European Union. Companies are encouraged to use pre-notification consultation to avoid Phase II review by submitting extensive information proactively at this stage if the transaction is potentially problematic.

Once a notification is submitted, if the FTC finds that the filing raises any issues under the Law in Phase I, it is likely to contact the parties informally first. The FTC can also formally request more information by a written request (report request), although such a formal request triggers Phase II review. Further, if the parties fail to respond properly to the FTC's request for information or the FTC otherwise considers that more proactive investigation is necessary, it may commence a formal investigation and has the power to interview relevant parties (eg, suppliers, competitors, employees, executives and customers) and examine related documents.

The FTC often interviews customers of the parties in addition to carrying out document-based assessment. If the parties are manufacturers with substantial production facilities, the FTC may visit those facilities. The interviews and site visits could potentially take place either during Phase II review or, depending on the case, at the pre-notification stage.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Following the submission of a notification, the FTC issues a notice that confirms the date when the FTC officially accepted the notification. The parties are subject to a 30-day waiting period starting from that date (Phase I). If the FTC requires one or more parties to the transaction to submit additional materials or information (report request) before the expiry of the waiting period, Phase II review is triggered. According to a literal reading of the Law, the parties can still complete the transaction upon the expiry of the 30-day period even when the FTC has not completed their substantive review, but once Phase II is triggered, the FTC may take action even after the expiry of the 30-day waiting period prior to the later of 120 days from the date of the FTC's acceptance of the notification or 90 days from the date of submission of the additional materials or information. Thus, the parties are subject to de facto prohibition from closing until a clearance is given.

The FTC issues a written confirmation of its clearance at the end of both Phase I and Phase II.

The FTC often shortens the waiting period in response to the parties' specific request. When Phase II review is triggered, the case is disclosed on the FTC website for third-party comments, and a summary of the FTC's analysis also appears on the website after the completion of the review.

Before the formal timeline starts, usually, in particular in a difficult case, there are informal pre-notification discussions as in the European Union. This process can take several months, especially where the FTC conducts market testing and there are several rounds of questions.

There have been some recent cases where the FTC has requested, on a voluntary basis, parties' internal documents. The requests were not as formal as those seen in the United States and European Union, but this may become a more common practice.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Fair Trade Commission (FTC) reviews individual mergers and acquisitions in light of whether competition in the defined market will be substantially restrained.

Safe harbour

For horizontal transactions, the criteria suggested by the 2004 Guidelines on the Application of the Anti-Monopoly Act for Reviewing Business Combinations, as amended in June 2011 (the Merger Guidelines) are:

- the Herfindahl-Hirschman Index (HHI) after the business combination (post-HHI) is not more than 1,500;
- the post-HHI is over 1,500 and not more than 2,500, and the increase in HHI is not more than 250; or
- the post-HHI is more than 2,500, and the increase of HHI is less than 150.

For vertical and conglomerate transactions, the suggested criteria are:

- the combined market share is not more than 10 per cent in any of the related markets; and
- the post-HHI is not more than 2,500, and the combined market share is not more than 25 per cent in any related market.

These numerical thresholds are not absolute but merely for indicative purposes, and the actual review process is conducted in the light of a number of factual elements, which are listed in the Merger Guidelines. It is also suggested in the Merger Guidelines that if the post-HHI is not more than 2,500 and the combined market share is not more than 35 per cent, the business combination is less likely to be regarded as restraining competition.

Factors to be considered

Different sets of factors apply to assess unilateral conduct and coordinated conduct that are expected as a result of the transaction, but generally speaking, the following are among the factors listed in the Merger Guidelines: market position of the parties and the state of competitors, imports, entry, competitive pressure from related or neighbouring markets, competitive pressure from users, overall business capabilities, efficiency and financial strength of the company parties. 'Failing firm' defence is not something that is regularly used and acknowledged, but while the hurdle is not low, it is worth exploring where the claim is relevant.

2011 amendment of the Merger Guidelines

More detailed rules were included in the Merger Guidelines for the analysis of import pressure, and the possibility of defining 'global market' beyond the national market. This was to more accurately reflect the existing review practice of the FTC, and no significant change to its review policy in substance has been observed so far.

2019 amendment of the Merger Guidelines

The FTC amended the Merger Guidelines to reflect the already existing review practice, including various key considerations for digital mergers, overlaps in research and development activities and foreclosure using big data.

20 | Is there a special substantive test for joint ventures?

There are no specific criteria for joint ventures and, in principle, the FTC's substantive test also applies to joint ventures. The Merger Guidelines, however, include a few general statements regarding anticompetitive behaviour that may arise in joint ventures. For example, it is stated that in assessing the effect of a joint venture on competition, the commercial relationship between the investors in the joint venture should be examined, given that the investors could, without having any direct capital tie-up between them, indirectly create an anticompetitive business combination. In this respect, whether the investors have transferred the business in a given sector to the joint venture entirely or partially is also taken into account. In the case of a partial transfer of business where the investors still retain some interest or activities in the same business sector, the risk of an anticompetitive effect is likely to be higher as compared with a case of complete transfer in a certain sector.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

As a general principle, the Law prohibits and regulates three categories of anticompetitive activities of undertakings: private monopolisation, unreasonable restraint of trade (including cartels) and unfair trade practices. The rationale behind the merger control regulation is primarily to prevent private monopolisation. The Merger Guidelines do not directly address 'theories of harm' per se, and the underlying philosophy for merger control is ultimately governed by the general principle of 'whether a transaction would substantially restrain market competition'. However, it does provide different evaluation yardsticks for different transaction categories identified based on the structure and nature of the transaction. The Merger Guidelines have chapters on horizontal business combinations as well as vertical or conglomerate business combinations, and they also differentiate between the anticompetitive impact of unilateral conduct and that of coordinated conduct.

The FTC is currently considering the need to analyse the role and impact caused by big data possessed by the merger parties in the context of merger review. This follows various discussions held, particularly in the European Union, and will become an additional consideration in Japan, for instance, in mergers involving platform businesses.

Generally speaking, even compared to some other authorities, the FTC appears to be interested in hearing about new technologies and more generally 'innovation' aspects, so it is worth exploring this argument where it is relevant.

The concept of common ownership could be captured by the FTC, considering that the Merger Guidelines indicate that a mere 10 per cent shareholding could be considered as having a potential impact on competition; however, at least currently, we are not aware of any specific initiative by the FTC to pursue this aspect.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The Merger Guidelines do not expressly include non-competition issues to be considered in the review process.

Merger control in the context of specific industries

In certain regulated sectors, non-competition issues may be considered as part of the process of consultation with regulatory authorities. For example, for the purpose of certain telecommunications businesses, the transfer of a business licence as a result of a merger or acquisition is subject to approval by the Ministry of Internal Affairs. Likewise, with regard to air transport, approval from the Ministry of Land, Infrastructure and Transport is mandatory with a view to transferring business licences following a merger or acquisition.

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No. 54 of 1947, as amended) (the Anti-Monopoly Act (the Law)) includes special rules for share acquisitions in the banking and insurance sector, and in examining applications for approvals, the FTC must consult with the Financial Services Agency (FSA). In addition to the Law, the Banking Law and the Law Concerning Insurance Businesses require banks and insurance companies to obtain FSA approval for certain mergers and acquisitions.

Public interest

Public interest per se is not mentioned as a factor in the FTC review process, but especially in the context of regulatory assessment in a specific industry, public interest would be taken into account. This was debated in some expert communities in the context of a recent series of FTC merger reviews involving local banks, where the FTC expressed concerns at potential concentration in the relevant local markets, whereas some interested groups argued the public interest to be recognised in rescuing troubled local banks. To our knowledge, the FTC does not openly acknowledge public interest as a factor in their review.

De minimis market exemption

The 2019 amendment introduced a new paragraph that provides for effective exemption to two-to-one mergers where the relevant market is too small to support multiple players however efficient they may be. This addition to the guidelines appears to be intended to address some specific situations, such as a merger between regional banks within the same small region. However, as the wording itself does not limit the application of the paragraph, its actual scope of application is uncertain.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is listed in the Merger Guidelines as a factor to be considered in the review process. However, the extent to which the improvement of economic efficiency offsets the anticompetitive impact is restricted by the following conditions: the efficiency improvement must be specific to the business combination and not capable of being achieved by other available means; the efficiency improvement must be practically possible; and it must enhance users' welfare. The Merger Guidelines also state that a merger or acquisition would rarely fulfil these three conditions when it generates a monopoly or a situation close to monopoly.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Fair Trade Commission (FTC) can either issue remedy orders to rectify a breach of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No. 54 of 1947, as amended) (the Anti-Monopoly Act (the Law)) or petition a court for annulment of the transaction, although no precedents exist for the latter. For the purposes of the former, the FTC must give prior notice and provide the parties concerned with an opportunity to make submissions. If the FTC issues such an order and the parties are dissatisfied, they may request the FTC to hold a hearing.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The 2004 Guidelines on the Application of the Anti-Monopoly Act for Reviewing Business Combinations, as amended in June 2011 (the Merger Guidelines) clearly state that remedies can relate to the behaviour of the parties, although, in principle, a structural measure, such as divestment, is preferable. The Merger Guidelines list possible remedies, including divestment, such as a partial transfer of business in a given sector, or the termination of a business or capital relationship with other entities, or alternatively long-term supply agreements regarding the product concerned if the former is difficult to achieve. When those primary measures are not viable, the parties are advised to take, as secondary remedies, measures to promote imports or new entry into the relevant market, or to increase the independence of each undertaking (eg, by setting up an information firewall or prohibiting the purchase of raw materials from a communal seller).

Types of remedy that have been ordered in the past include partial disposal of shareholding, abolition of interlocking directorships, partial transfer of business facilities, technology licensing to a competitor, production of certain competitors' products and prohibition of the acquirer's intervention in the target's own business decision-making. Compared to the general tendency, for example in the European Union and United States, to clearly prefer divestiture, it appears that the FTC may be more open to behavioural remedy options. When a behavioural remedy is adopted, JFTC tends to do the monitoring itself rather than requiring an external monitoring trustee.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In terms of procedures to finalise the contents of remedies, the FTC introduced the Commitment System from the beginning of 2019, and the Guidelines clearly state that in the context of finalising merger remedies, the timeline and procedural requirements under the Commitment System will apply. It is not entirely clear from the Guidelines, but the general understanding is that the traditional procedures for merger remedies (ie, with no timeline or specific documents required except for that the parties must give details of the remedy in the final section of a formal filing once the remedy is decided) would technically continue to apply. As at the time of writing, this new mechanism has not been seen in operation in merger contexts, and, as a result, it is unclear how it operates and what the relationship exists between the old rules and the Commitment System.

The following describes the current system.

Conditions

The basic condition applicable to a divestment order or other remedy is that the remedy is able to restore the competition that is likely to be undermined, by limiting the freedom of the merging parties to set market prices and other market conditions. Upon request by the parties, the FTC sometimes subsequently permits the parties to modify or terminate remedies, provided that this would not result in a substantive restraint to competition.

There is no independent format to submit a proposed remedy or to agree on a remedy. When a remedy is agreed between the parties and the FTC during the review, either Phase I or Phase II, after the submission of notification, the parties are requested to submit an amendment of the original notification to reflect the agreed remedy.

Timing

In principle, remedy measures should be implemented before a transaction comes into effect. However, when a remedy is to be implemented only after the transaction enters into force, the deadline to implement the remedy must be specified clearly and appropriately. In particular, in the case of a partial business transfer, ideally, the purchaser should be decided and approval obtained from the FTC before the transaction takes effect, although unlike some other jurisdictions, the requirement to secure upfront buyers and have them approved is not regarded as an established precondition for the FTC's clearance. At present, there is no EU-style established rule or practice of involving trustees.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As long as a substantial restraint to competition in the Japanese market is expected, remedies are required even for foreign-to-foreign transactions. Foreign companies have agreed and implemented remedies in a number of previous transactions reviewed by the FTC. There is no recent precedent where a cease-and-desist remedy order was issued for a foreign-to-foreign transaction, but this does not mean that the FTC is reluctant to order remedies regarding foreign-to-foreign transactions. It is simply because of the common practice, up until now, of arranging remedies on a voluntary basis before a cease-and-desist order is issued. If remedies cannot be agreed by the end of Phase II, a cease-and-desist order may be possible.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is no express guidance in this respect either in the Law or the Merger Guidelines. In general, however, even if the FTC does not request or order remedies or bring court action for annulment regarding a transaction, the FTC can still challenge certain ancillary restrictions between the parties. In that sense, a merger clearance does not protect ancillary restrictions; therefore, ancillary restrictions are still subject to challenges on the basis of other competition rules. It is very likely, however, that the FTC would order the parties to exclude or amend anticompetitive ancillary provisions, if those arrangements are obvious at the time of merger control review. To that extent, it is worth considering putting any ancillary arrangements before the FTC as this may implicitly or explicitly provide a degree of comfort in implementing the arrangement.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Yes. The Fair Trade Commission (FTC) often interviews customers of the parties as well as competitors.

The law also stipulates as a general right that anyone (therefore including customers and competitors) who perceives an infringement of the law may report to the FTC the relevant facts and call for appropriate measures to be taken. It is possible, although at present uncommon, for customers or competitors to make a complaint to the FTC in respect of certain transactions during the course of the review process. In this event, the FTC must then investigate and, even if it decides not to take any measures, it must inform the complainant of its decision.

There has been a precedent where the FTC started to investigate a foreign-to-foreign merger in response to a complaint raised by customers, even though a transaction did not trigger a filing.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Reports filed with the FTC are not made public, although the contents could be partially summarised and disclosed if the transaction, either at Phase I or Phase II, has value as a precedent. In addition, in the rare event that the FTC issues a remedy order, detailed information will be fully disclosed. In 2017, the FTC started to disclose information on all filed cases to include parties' identities, the industry, the structure of the transaction, the clearance date and whether it was short-track.

Website disclosure of Phase II cases

When Phase II is triggered, this fact is published on the FTC website for third-party comments. Further, in the case of a Phase II review, the final analysis and observations are made public as 'major business combinations' as an annual report on the FTC website, which is published every June. The FTC sometimes publishes a case summary upon clearance, if they consider it as a significant review case even where the review was completed in Phase 1. The FTC contacts the parties prior to the publication to ensure that the public disclosure does not include trade secrets or any other commercial information that the parties would not wish to be made public. The parties can request the FTC to limit the information disclosed on the website to omit certain sensitive information. Some cases are disclosed on the website without disclosing the names of the parties involved.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The FTC cooperates very actively with other major jurisdictions on specific cases. It is, therefore, very important that submissions to the FTC are consistent with those made in other jurisdictions, particularly the United States, the European Union and Korea.

Cooperation in individual cases

In 1999, the governments of Japan and the United States concluded an agreement concerning cooperation on anticompetitive activities. Similar agreements were signed in 2003 with the European Union and in 2005 with Canada. The primary purpose of these bilateral frameworks is to promote collaboration between the competition authorities of both parties in terms of information gathering and implementation of each party's antitrust legislation.

Japan has also signed economic partnership agreements with Brunei, Chile, India, Indonesia, Malaysia, Mexico, Peru, the Philippines, Singapore, Thailand and Vietnam, and these contain a chapter on collaboration on antitrust issues. The actual status and development in the implementation of these bilateral instruments is not clear, particularly given the less active enforcement of merger regulations in some countries, but it seems that in respect of large-scale multi-jurisdictional transactions (especially when involving US, EU and Korean authorities), the FTC has extensive exchange of detailed information with other authorities in the course of its merger control review.

Other policy discussions

The FTC has been active in various international forums (the International Competition Network, the Organisation for Economic Co-operation and Development, the Asia-Pacific Economic Cooperation, etc) including general policy discussions and capacity building for developing countries in connection with antitrust legislation.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Under the previous rules, when the Fair Trade Commission (FTC) issued a cease-and-desist order and the parties to the transaction were dissatisfied, they could request the FTC to initiate the procedure for a hearing and file a court challenge if they were dissatisfied with the FTC's decision. Since April 2015, the FTC hearing proceeding has been abolished, and instead, the first-stage appeal of the FTC's cease-and-desist order will be made to the Tokyo District Court. There are various discussions among practitioners in respect of how this system should be used in practice.

Time frame

33 | What is the usual time frame for appeal or judicial review?

A legal action to challenge the decision of the FTC must be filed within 30 days of the date on which the decision became effective. According to a report by the FTC, the Tokyo High Court has rendered its decision within one year in recent cases.

The time limit for filing an appeal with the Tokyo District Court is subject to the general rules under which the plaintiff must file an appeal within six months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The latest publicly available data is for fiscal year 2020 (1 April 2020 to 31 March 2021). In this period, a total of 266 filings were made.

The number of notified transactions decreased by 14 per cent compared with fiscal year 2019.

Of the 266 cases filed during this fiscal year, 258 were cleared in Phase I (97 per cent) and one case was reviewed in Phase II (0.3 per cent).

Reform proposals

35 | Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There were two cases in the digital sector (*Z Holding/LINE*, *Google/Fitbit*) in 2020, where the amended guideline clauses directly or indirectly came into play to analyse digital businesses. Both cases were cleared with conditions, but the FTC's close scrutiny demonstrated their strong interest in this sector.

Kenya

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In Kenya, merger control is regulated by the Competition Act No. 12 of 2010 as amended by the Competition (Amendment) Act No. 49 of 2016 (the Act) together with all subsidiary legislation and rules created thereunder. The Act is enforced by the Competition Authority of Kenya (Authority) and is headed by a Director-General who is vetted by the National Assembly.

Scope of legislation

2 | What kinds of mergers are caught?

The Act defines a merger as an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover. The Act also provides a non-exhaustive list of how a merger may be achieved, including:

- the purchase or lease of shares, acquisition of an interest or purchase of assets of the other undertaking in question;
- the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;
- the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;
- acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
- in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
- vertical integration;
- exchange of shares between or among undertakings that result in a substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
- amalgamation, takeover or any other combination with the other undertaking.

3 | What types of joint ventures are caught?

The Competition (General) Rules 2019 (the Rules) provide that a joint venture that is not full function does not qualify as a merger. A full-function joint venture is defined as a joint venture that must perform for at least 10 years or more all the functions of an autonomous economic entity.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

A person 'controls' an undertaking under the Act if that person:

- beneficially owns more than half of the issued share capital or business or assets of the undertaking;
- is entitled to a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- can appoint, or veto the appointment of, a majority of the directors of the undertaking;
- is a holding company and the undertaking is a subsidiary of that company as contemplated in the Companies Act;
- in the case of the undertaking being a trust, can control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
- can materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the points above.

Minority interests, board and management representations, contractual arrangements and other interests are captured where a person exercises 'control' as contemplated above. The Consolidated Guidelines on the Substantive Assessment of Mergers (the Consolidated Guidelines), which have no force of law but are a guide on how the Authority assesses mergers, indicate that the Authority will not ordinarily view an acquisition of a minority interest below 20 per cent of the voting securities of an undertaking held only for the purpose of passive investment without exercising influence over the affairs of the undertaking as an exercise of 'control'. When assessing 'control' of a private equity fund, including a venture capital fund, the Rules stipulate that control will be deemed to rest with the general partner.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Rules contain the Merger Threshold Guidelines (the Guidelines) that serve to identify notifiable transactions and transactions that qualify for exclusion.

Notably, Kenya has now introduced a minimum threshold where the following transactions are excluded from notification:

- mergers where the combined turnover or assets (whichever is higher) of the merging parties does not exceed 500 million Kenyan shillings; or
- mergers where the transactions meet the COMESA (the Common Market for Eastern and Southern Africa) Competition Commission Merger Notification threshold and at least two-thirds of the turnover or assets (whichever is higher) is not generated in Kenya.

The Guidelines state that mergers that meet the following thresholds must be notified to the Authority:

- where the undertakings have a minimum combined turnover or assets (whichever is higher) of 1 billion shillings and the turnover or assets (whichever is higher) of the target undertaking is above 500 million Kenyan shillings;
- where the turnover or assets (whichever is higher) of the acquiring undertaking is above 10 billion shillings and the merging parties are in the same market or can be vertically integrated, unless the transaction meets the COMESA Competition Commission Merger Notification Thresholds;
- in the carbon-based mineral sector, if the value of the reserves, the rights and the associated assets to be held as a result of the merger exceed 10 billion Kenyan shillings; and
- where the undertakings operate in the COMESA, their combined turnover or assets (whichever is higher) does not exceed 500 million Kenyan shillings and two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya.

The Guidelines also provide that the following transactions may be considered for exclusion from notification, but only after application to the Authority:

- where the combined turnover or assets (whichever is higher) of the merging parties is between 500 million Kenyan shillings and 1 billion Kenyan shillings; and
- if the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.

Moreover, the Rules also provide that a merger shall not be subject to notification if it is taking place wholly or entirely outside of Kenya and has no local connection.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Under section 42 of the Act, filing is mandatory for all mergers that are not excluded by the Guidelines. Even where a merger is not excluded by the Guidelines, but is eligible for consideration for exclusion, the approval of the Authority is required.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Act has extraterritorial application with respect to the conduct outside Kenya by a citizen of Kenya or a person ordinarily resident in Kenya, or a body corporate incorporated in Kenya or carrying on business within Kenya, or any person in relation to the supply or acquisition of goods or services by that person into or within Kenya, or any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya.

The Guidelines also provide that the following transactions may be considered for exclusion from notification, however, upon application to the Authority:

- where the combined turnover or assets (whichever is higher) of the merging parties is between 500 million Kenyan shillings and 1 billion Kenyan shillings; and
- if the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.

In determining whether it has jurisdiction over a foreign-to-foreign merger, the Authority considers both the merger notification thresholds and other economic and business factors to determine whether a foreign-to-foreign merger has a connection to competition within Kenya or a substantial part of Kenya. In particular, the Authority has identified the following as additional factors that it will consider in making that determination:

- whether an undertaking party to the merger has a significant presence in Kenya, as evidenced by turnover or assets in or into Kenya;
- whether revenue is generated in Kenya by an undertaking party to the merger; or
- whether an undertaking party to the merger acquires direct or indirect control over the strategic commercial affairs of the other undertaking party to the merger and such strategic commercial decisions will have an effect on trade in or into Kenya.

Moreover, with the rollout of the Competition (General) Rules 2019, the merging parties are required to inform the Authority in writing within 14 days of notifying other the regional competition bodies such as COMESA.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act makes no provision restricting or regulating foreign investments into Kenya. However, the insurance, telecommunications, banking and air services industries are subject to sector-specific legislation that limits the extent to which non-Kenyan citizens can own undertakings licensed in Kenya. Moreover, mergers involving those industries must obtain approval from the relevant regulatory authorities concurrently with merger control approval from the Authority.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Competition (Amendment) Act No. 49 of 2016 (the Act) has no deadlines for filing. However, parties to a merger are required to notify the Competition Authority of Kenya (the Authority) and obtain approval before implementing the proposed merger. Anyone who fails to comply with the Act's Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenyan shillings, or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual gross turnover in Kenya of the offending undertakings.

10 Which parties are responsible for filing and are filing fees required?

The acquiring undertaking and the target undertaking in a proposed merger are each required to notify the Authority. Filing fees are payable based on the combined turnover or assets of the merging parties in Kenya. The Act does not prescribe which party is responsible for the payment of filling fees and in practice, the merging parties negotiate and apportion fees between them.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Ordinarily, the Authority acknowledges receipt of a merger application within three days of receipt. Under the Act, the Authority is required to make a determination:

- within 60 days of the date that it receives a merger filing;
- if the Authority has requested for further information, within 60 days of the date of receipt of such further information; or
- if the Authority has convened a hearing conference, within 30 days of the date of conclusion of the conference.

Moreover, if the Authority is of the view that a transaction is complex, it is permitted to extend the determination period by an additional 60 days prior to the expiry of any of the foregoing determination periods, by giving a written notice to the undertakings involved.

Implementation of the merger transaction is prohibited before clearance and therefore in Kenya, its implementation will have to be suspended by the merging parties.

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Implementation of a merger transaction including the integration of activities of the merging businesses (even partly) prior to receiving clearance from the Authority is an offence under the Act. Payment of the full purchase price is deemed to be 'implementation' for purposes of the Act, but payment of a deposit of up to 20 per cent of the purchase price is permitted. A merger that is implemented without complying with the notification and approval requirements of Part IV of the Act does not have legal effect in Kenya and parties cannot enforce any agreement in that regard in any legal proceedings.

Moreover, anyone who fails to comply with the Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenyan shillings, or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual gross turnover in Kenya of the offending undertakings.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, where the foreign-to-foreign merger is caught by the provisions of the Act.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Neither the Act nor the Consolidated Guidelines make any provisions for 'hold-separate/ring-fencing' arrangements being put in place in Kenya to enable foreign-to-foreign mergers to be implemented outside Kenya.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

No, there are no special merger control rules. Where a public takeover is caught by the provisions of the Act, the provisions of the Act must be applied together with the requirements of the Capital Markets Act Chapter 485A, the Capital Markets (Takeover and Mergers) Regulations 2002, the Nairobi Securities Exchange Rules, the Companies Act 2015 and any other relevant sector-specific legislation.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Competition (General) Rules 2019 provide for Form III, the Merger Notification Form (the Notification Form). Undertakings applying for exclusion from the provisions of Part IV of the Act and the Guidelines are required to complete and file Part I (questions 1 to 26) and Part IV of the Notification Form together with the requested documentation.

Mergers that are at or above the prescribed thresholds and where the undertakings do not operate in the same line of business or where no vertical relationship exists between the parties require the undertakings to complete and file Part I and Part IV of the Notification Form together with the requested documentation.

Mergers that are at or above the prescribed thresholds and where the merging parties operate in the same line of business, or where there are vertical relationships between the parties, require the undertakings to complete and file Parts I, II and IV of the Notification Form together with the requested documentation.

Mergers at or above the prescribed thresholds and where the merging parties operate in the same line of business, or where there are vertical relationships existing between the parties; or there is a high likelihood that the combined market share of merging parties falls above 3 per cent in one or more markets or one or more of the parties are dominant in at least one market require the undertakings to complete and file Schedules I, II, III and IV of the Notification Form together with the requested documentation.

The Authority is not restricted to the questions and responses in the Notification Form. Where the information provided by either of the undertakings is not sufficient for the purposes of determining a proposed merger, the Authority may within 30 days of receiving the notification request further information from the undertakings concerned.

Further, the Notification Form provides for all or some of the following documents to be filed together with the duly completed Notification Form (this will depend on which Parts of the Notification Form apply to the merger):

- a signed copy of the sale and purchase agreement;
- duly signed audited financial statements for the last three years;
- the latest annual reports;
- board resolutions and related documents regarding the merger;
- copies of certificates of incorporation or registration certificates and similar documents including other shareholder companies where there is chain ownership;
- breakdown of employees and plans to realise cost savings, efficiencies and plans documenting investment evaluations;
- documents prepared for the Board of Directors of regulatory bodies in relation to the transaction;
- reports, surveys, analysis or other documents assessing the transaction with respect to its impact on competition;
- latest business plans, marketing plans, sales report and strategic plans including for relevant subsidiaries and divisions;
- periodic (such as monthly and quarterly) review of sales and market trends including by consumer category and by different geographic areas for the last three years; and
- pricing schedules including terms of discounts and rebates offered.

It is an offence to supply the Authority with materially incorrect or misleading information that results in a revocation of a merger under section 47 of the Act, and persons found guilty may upon conviction be liable to a fine of 10 million Kenya shillings or imprisonment for a term not exceeding five years, or both.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

After a merger notification form is received at the Authority's offices, the Authority ordinarily acknowledges receipt of the submission in writing and a case officer is assigned to analyse the proposed merger. At first instance, the submission is evaluated to determine:

- its completeness, and where necessary additional information, may be requested, or clarifications sought;
- if the proposed merger is a 'merger' within the meaning of the Act;
- if the Authority has extraterritorial jurisdiction over the proposed merger;
- if the proposed merger meets the thresholds under the Merger Threshold Guidelines to determine if an application for exclusion from the provisions of Part IV of the Act is appropriate; and
- any requests for confidentiality that may have been sought, and if acceptable such confidentiality is granted by a letter early on in the evaluation process.

The case officer together with the Authority's mergers and acquisition division then undertake a complete merger assessment during which time, the Authority may conduct interviews with the merging parties or convene a hearing conference. The mergers and acquisition division then makes its recommendations to the Authority's board for a determination. The board then makes its determination, within the prescribed periods and its decision is communicated to the submitting parties.

18 What is the statutory timetable for clearance? Can it be speeded up?

Ordinarily, the Authority acknowledges receipt of a merger application within three days of receipt. The Authority is required to make a determination:

- within 60 days of the date that it receives a merger filing;
- if the Authority has requested for further information, within 60 days of the date of receipt of such further information; or
- if the Authority has convened a hearing conference, within 30 days of the date of conclusion of the conference.

Moreover, if the Authority is of the view that a transaction is complex, it is permitted to extend the determination period by an additional 60 days prior to the expiry of any of the foregoing determination periods, by giving a written notice to the undertakings involved.

Implementation of the merger transaction is prohibited before clearance and therefore in Kenya, its implementation will have to be suspended by the merging parties.

As a matter of practice, the Authority will in the case of a submission from exclusion of the provisions of Part IV of the Act, communicate its determination within 14 days of receipt of the merger notification form. Where the Authority determines that the proposed transaction is not a 'merger' or where an advisory opinion on a proposed transaction is sought, the Authority communicates its decision to the enquiring party in writing within 10 days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The Competition Authority of Kenya (the Authority) applies both the competitive effects test and the public interest test to any proposed merger transaction. In assessing the former, the Authority seeks to determine whether the proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. In determining the latter, the Authority will assess whether the proposed merger conflicts with government policies.

In applying the competitive effects test and the public interest test, the Authority will among other factors consider the extent to which the proposed merger is likely to:

- prevent or lessen competition or restrict trade or the provision of any service or endanger the continuity of supplies or services;
- result in any undertaking (including a non-party) acquiring or strengthening a dominant position in the market;
- benefit the public;
- affect a particular industrial sector or region;
- affect employment;
- affect the ability of small undertakings to gain access or be competitive in any market;
- affect the ability of national industries to compete in international markets; and
- benefit research and development and have an impact on technical efficiency, increased production, efficient distribution of goods and services or provision of services and access to markets.

Moreover, where a failing firm defence is used, the Authority considers the following:

- the failing undertaking would in the near future be forced to exit the market because of financial problems if not taken over by another undertaking;
- there is no less anticompetitive alternative acquisition other than the proposed merger; and
- in the absence of the proposed merger, the assets of the failing undertaking would inevitably exit the market.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. The tests for clearance apply.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The Consolidated Guidelines indicate that the Authority will investigate all plausible theories of harm that would apply to each merger on a case-by-case basis.

The Authority will investigate market dominance and in so doing will define and identify the market of the goods and services produced by the parties to the proposed merger. It will also assess the unilateral and coordinated effects of the proposed merger where it is investigating a horizontal merger, and the vertical and conglomerate effects where it is assessing a non-vertical merger.

In all instances, the Authority's primary concern will be to ensure that the impact of the merger will not result in the prevention or lessening of competition by allowing the creation or increasing of market power or assisting in its exercise.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The Competition (Amendment) Act No. 49 of 2016 (the Act) requires the Authority to take the interests of the public into consideration when assessing any proposed merger. The Consolidated Guidelines clearly indicate that the public interest test is applied regardless of the outcome of the competition test.

In considering the public interests, the Authority assesses the proposed merger's effect on employment, the ability of small and medium enterprises to gain access to or be competitive in any market; and the ability of national industries to compete in international markets and in a particular industrial sector.

In recent years, employment has been a specific area of focus for the Authority and in its assessment, it has evaluated the track record of the merging undertakings in relation to labour-related issues. Should the Authority determine that the proposed merger may result in job losses, it would require the merging undertakings to provide a justification and evaluate such justification against the countervailing public interest justifying the job losses. It may ultimately grant a conditional approval of the proposed merger and require written undertakings from the merging parties not to pursue redundancies for a prescribed period.

The Authority will also be likely to consider the impact foreign direct investment may have post-merger. Of particular concern is the potential of a foreign entity to move its procurement of goods and services from the local markets to the foreign markets, therefore negatively impacting local suppliers' ability to compete and maintain jobs.

The public interest guidelines under the Act seek to enhance and sustain employment through supporting measures to ensure no substantial job losses occur as a result of mergers and that the effects on employment are mitigated in the short run and salvaging of failing and dormant undertakings.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Consolidated Guidelines indicate that economic efficiencies are an important pillar of the competition test applied by the Authority when reviewing a proposed merger. The extent to which the negative effects of a proposed merger will be compensated for by economic efficiency are evaluated on a case-by-case basis, and it would appear only acceptable where there is no public interest concern.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority of Kenya (the Authority) has the power to prohibit merger transactions or approve merger transactions with conditions.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues. The Authority has the power to set conditions to a proposed merger that it deems anticompetitive or presents public interest concerns.

The Authority may require structural remedies to the proposed merger, which include among others:

- divestment of the whole or part of an undertaking's business;
- the immediate transfer of contractual rights; or
- an amendment to the intellectual property rights of an undertaking.

The Authority may also impose behavioural remedies (where structural remedies are not commercial feasible) that are intended to limit the potential for the merged entity to behave anticompetitively in the post-merger market. The behavioural remedies include, among others:

- the periodic provision of information to the Authority;
- an order requiring the merged entity to supply goods and services to a specific customer segment or geographical region;
- undertakings for the implementation of non-discriminatory pricing and supply or access of goods and services to customers;
- undertakings on price caps;
- restrictions on expansion;
- undertakings on access to critical technology; and
- restrictions on the merged entity not to approach any customers of the sold or divested business.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The stated objective by the Authority is that any remedial package it imposes on a proposed merger (including a requirement for divestiture), is meant to 'restore or maintain competition while allowing for the realisation of merger-specific efficiencies and benefits.

The implementation period for each remedial package is agreed to by the Authority on a case-by-case basis. Moreover, each remedial package agreed to by the Authority (whether structural or behavioural) must include the following elements:

- address the major areas of competition concern;
- have a low level of risk of not being successful;
- be capable of practical implementation and monitoring in Kenya; and
- be capable of resolving the identified areas of concern within a specified, preferably short, time frame.

If the remedial package includes a divestment, the Authority may require the appointment of divestment trustees to ensure the business to be divested is sold off to a suitable purchaser where the merging parties have been unable to offload that business within the agreed divestment period.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Competition (Amendment) Act No. 49 of 2016 (the Act) does not distinguish between local mergers and foreign-to--foreign mergers. The Authority has therefore approved some foreign-to-foreign mergers with conditions to remedy the anticompetitive effects of the merger and ensure compliance with the Act.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Authority will assess a proposed merger as a whole and where behavioural remedies are required, may impose ancillary restrictions. Such restrictions may include:

- restrictions on the merged entity not to approach any customers of the sold or divested business;

- a moratorium on job losses for a specified period;
- restrictions on output;
- restrictions on expansion; and
- restrictions on the merged entity changing existing business models, such as distribution chains for a specified period.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Competition (Amendment) Act No. 49 of 2016 (the Act) permits any person (including a customer or a competitor) who is not a party to a proposed merger to voluntary submit information relating to such proposed merger to the Authority at the application stage. However, once the Authority makes a determination on a proposed merger, only a party to the proposed merger or any other person against whom an order is made by the Authority can appeal to the Competition Tribunal (the Tribunal).

Additionally, subject to any rights of confidentiality granted by the Authority to the merging parties, the Authority as part of its assessment of a merger may consult competitors and customers as well as conduct market testing on the effects of a proposed merger or the effectiveness of a proposed remedial package.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Act permits any person submitting information or documentation to the Authority to make a claim for confidentiality in respect of that information or documentation. The Authority has provided a prescribed form for this purpose. Upon receipt of such a claim, the Authority assesses the request and notifies the claimant of their decision. In circumstances where the Authority refuses to grant confidentiality, any information submitted will be treated as confidential for a period of 14 days.

A submitting party may withdraw any information submitted to the Authority within 14 days if a request to grant confidentiality on that information has been declined. A person aggrieved by the decision of the Authority in a request for confidentiality may appeal to the Competition Tribunal.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Act mandates the Authority to liaise with other regulatory and public bodies in all matters relating to competition and consumer welfare, and as a matter of practice, the Authority cooperates and shares information with antitrust authorities in other jurisdictions. Moreover, the prescribed merger notification forms require merging parties to inform the Authority if a proposed merger will be notified with other antitrust authorities. The Authority and the COMESA Competition Commission entered into a cooperation agreement that formally obliges each party to inform the other of any enforcement activities it becomes aware of that affect the other party's interests.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The Competition (Amendment) Act No. 49 of 2016 (the Act) established the Competition Tribunal (the Tribunal), which is mandated to hear and determine appeals against the decisions of the Authority. The Act requires the Authority and the Tribunal to give written reasons for their decisions. Both the Authority and an aggrieved party can appeal a decision of the Tribunal to the High Court of Kenya, whose decision shall be final.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An aggrieved party should give notice of its intention to appeal a decision to the Tribunal for review within 14 days of notice of the Authority's decision being published in the Kenyan Gazette and submit the substantive appeal 16 days thereafter. The Tribunal shall, within 30 days of receiving that application, give notice of the application in the Kenyan Gazette and invite interested parties to make submissions. If the application is designated by the Tribunal to be fast-tracked, the substantive hearing must be heard within six months of the application being so designated.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Authority has a mandate to enforce compliance with the Competition (Amendment) Act No. 49 of 2016 (the Act) and, in this regard, it regularly undertakes investigations into unauthorised implementations of mergers. In February 2020, the Authority penalised Asante Capital EPZ Limited (Asante) 549,019 Kenyan shillings for implementing a merger with Moringa Entities (Moringa SCA and Moringa Mauritius Africa) without seeking its approval. The Authority has, over the last few years, increasingly become concerned about the effects a proposed merger would have on public interest matters, such as the effects on employment and the competitiveness of SMEs in the Kenyan and international markets, as well as particular industries or sectors. The Authority has been known to give conditional clearances to mitigate these risks including obligations to maintain existing distribution chains or obligations to absorb employees or not to pursue redundancies for a prescribed period.

Reform proposals

35 | Are there current proposals to change the legislation?

There are no proposals to change legislation.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Competition Authority has recently published the Joint Venture Guidelines (JV Guidelines). The JV Guidelines are intended to provide clarity and predictability to stakeholders on the legal and economic analysis that the Authority will adopt when assessing 'full function' and 'greenfield' joint ventures.

In the case of the acquisition of an 84.89 per cent stake by Branch International Limited (a digital lending platform) (the Acquirer) in Century Microfinance Bank Limited (a microfinance bank licensed by the Central Bank of Kenya) (the Target), the Authority decided to review the transaction as a full merger even though the Target's turnover and assets did not exceed 500 million Kenyan shillings on the basis of public interest concern as provided for under Rule 13 of the Competition General Rules 2019.

Of concern to the Authority was the fact that, because of the transaction, the Acquirer would now have access through the Target to list its defaulters with credit reference bureaus (CRBs), a position that is not available to digital lenders. Consequently, defaulting borrowers of the Acquirer would not have been able to access loans with either the Target or the banking sector generally. Moreover, the Competition Authority was also concerned that the transaction would enable the two entities to subject existing loans to new loan terms therefore disadvantaging existing borrowers.

The Authority approved the transaction on condition that:

- the Acquirer and the Target each maintain the terms agreed with the borrowers in respect of all the loans existing on their loan books at the time of the transaction; and
- the Acquirer and the Target each maintain their existing performing and non-performing loans in accordance with their terms up to and until the expiry of such loans so long as such terms are not in contravention of the provisions of the Competition Act No. 12 of 2010.

Based on the above, it is evident that the Authority is conscious of the importance of data in doing business and is also alive to the provisions of the Data Protection Act 2019.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Liechtenstein has been a member of the European Economic Area (EEA) since May 1995. European Union directives are implemented into Liechtenstein's legal system. There is no automatic implementation of EU law, however, as the EEA Joint Committee must state first that a directive is part of the EEA 'acquis'. It is only with a respective resolution of the EEA Joint Committee that the obligation to incorporate arises.

Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation) regulates the control of mergers. The EEA Joint Committee has passed Resolution No. 78/2004 of 8 June 2004 confirming that the EU Merger Regulation is relevant for the EEA (Legal Gazette 2004 No. 234, LR 0.110.034.53).

Liechtenstein has no national merger control or antitrust law. The competition rules of the EEA Agreement (articles 53 to 60), and the EU competition law stated in Annex XIV (Competition) to the EEA Agreement are applicable; in particular the EU Merger Regulation. The provisions of the EU Merger Regulation are directly applicable in Liechtenstein with minor non-material adaptations as set out in Annex XIV to the EEA Agreement.

According to the EU Merger Regulation, mergers that do not meet the turnover thresholds of the EU Merger Regulation fall within the competence of the EU member or the European Free Trade Association (EFTA) states' authorities in charge of merger control.

The Law on Persons and Companies (PGR) of 20 January 1926, in its presently valid version (Legal Gazette 1926, No. 4, LR 216.0), contains provisions on mergers of companies limited by shares (article 352(a) et seq PGR). Article 351 et seq PGR regulate national mergers within Liechtenstein, whereas article 352(a) et seq PGR transpose Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies into Liechtenstein law.

In addition, the Law of 16 September 2009 on employee participation in cross-border mergers of limited liability companies (Legal Gazette 2009, No. 269, LR 216.222.3), in its presently valid version, has been enacted to transpose the Directive into Liechtenstein law. However, these Liechtenstein provisions on mergers of companies limited by shares as well as on employee participation in cross-border mergers do not contain a merger control provision in the sense of a control to prevent anticompetitive consequences. They stipulate a mere legality control of the merger.

The Liechtenstein Office of Justice controls the legality of the cross-border merger with respect to the execution and formation of a new company limited by shares under Liechtenstein law as a result of the merger. Further, it verifies the compliance with the law on the employee participation in a cross-border merger of limited liability companies. Each of the following statements to the questions will contain a brief paragraph answering the question with respect to these national provisions, although strictly requirements imposed by company law are not considered to be part of the competition merger control regime. It needs to be kept in mind that they are only applicable for companies limited by shares.

The Law of 23 May 1996 on the Execution of the Competition Rules in the EEA (Legal Gazette 1996, No. 113, LR 172.013) in its presently valid version has been enacted in Liechtenstein to govern the execution of the competition rules in the EEA.

Pursuant to article 2 of the Law on the Execution of the Competition Rules in the EEA, the Office of Economic Affairs is the Liechtenstein authority with jurisdiction for the implementation of the competition rules in Liechtenstein, unless the jurisdiction of the national courts is provided. The Law foresees the necessary competencies for the Office of Economic Affairs to allow the surveillance authorities' investigations and to assist them.

Hence, as Liechtenstein has no national merger and antitrust laws of its own, the following answers are mainly based on the EU Merger Regulation and Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing the EU Merger Regulation. According to our information, Liechtenstein has had no mergers with an EU or EFTA dimension since the entry into force of the EU Merger Regulation. As a consequence, Liechtenstein has so far had no practice or jurisdiction in this field.

Scope of legislation

2 | What kinds of mergers are caught?

Article 3 of the EU Merger Regulation defines a concentration as the change of control on a lasting basis, resulting from a merger of two or more previously independent undertakings or the acquisition of direct or indirect control of the whole or part of another undertaking.

The concentration needs to have an EU dimension, which is stipulated in article 1 of the EU Merger Regulation. Certain thresholds must be fulfilled.

Mergers of a Liechtenstein company limited by shares with a limited liability company formed in accordance with the law of an EEA member state and having its registered office, central administration or principal place of business with the EU are regulated according to article 352(a) et seq PGR.

3 | What types of joint ventures are caught?

A joint venture is a relevant concentration under the EU Merger Regulation and thus, in Liechtenstein, provided it performs on a lasting basis all the functions of an autonomous economic entity, is also caught. A distinction is made between a full-function joint venture and a non-full-function joint venture.

Joint ventures are not caught under the merger provisions for companies limited by shares in the PGR.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

As the EU Merger Regulation is applicable, control is defined according to article 3 of the EU Merger Regulation. It means in essence the possibility of exercising decisive influence on an undertaking regardless of the means. The ownership or the right to use all or part of the assets of an undertaking, or the rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking are particular examples of the possibility to exercise decisive influence on an undertaking.

Issues of lesser importance than control in the meaning of the exercise of decisive influence on the activity of an undertaking (which is assessed having regard to the considerations of fact or law involved) are not caught. The mere board or management representation, without a majority, regularly will not mean control in the sense of the above.

Control is not defined, nor are minority and other interests less than control caught by the merger provisions for companies limited by shares in the PGR.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration needs to have an EU or EFTA dimension. If the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion and the aggregate EU-wide turnover or EFTA-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover of EFTA-wide turnover within one and the same EU member state or EFTA state, the threshold is met.

Even if the thresholds for a concentration with an EU or EFTA dimension are not met, the provisions of the EU Merger Regulation are nevertheless applicable where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5 billion;
- in each of at least three EU member states or EFTA states, the combined aggregate turnover of all the undertakings concerned is more than €100 million;
- in each of at least three EU member states or EFTA states, including for the purpose of the above point, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and
- the aggregate EU-wide turnover or EFTA-wide turnover of each of at least two of the undertakings concerned is more than €100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover or EFTA-wide turnover within one and the same EU member state or EFTA state.

Further information depends on the competent authority, for example, if the forms differ or the request can be made by the EFTA Surveillance Authority (ESA). We are not aware of circumstances in which transactions falling below these thresholds may be investigated.

So far, no concentrations falling under the EU Merger Regulation have been notified to the ESA. Neither has a case falling below the thresholds of the EU Merger Regulation been referred to the ESA.

The merger provisions of the PGR do not contain jurisdictional thresholds.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notification of concentrations with an EU or EFTA dimension to the Commission is mandatory. However, the notification may already be made if the involved undertakings demonstrate good faith to conclude an agreement or to make a public bid that would result in a concentration with an EU or EFTA dimension (article 4 EU Merger Regulation).

According to article 4, section 4 of the EU Merger Regulation, a concentration may be referred to a certain EU member state or EFTA state if the concentration may significantly affect competition in a distinct market and should, therefore, be examined by that EU member state or EFTA state. If the case is referred by the Commission, no notification is required.

The filing of the merger to the Liechtenstein Office of Justice is mandatory insofar as the merger only becomes effective upon the entry in the Commercial Register (articles 351(h) and 352(h) PGR).

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Pursuant to recital 10 of the EU Merger Regulation, a concentration with an EU or EEA dimension is deemed to exist, regardless of whether the involved undertakings have their seat or their principal fields of activity in the European Union, on the condition they have substantial operations there and exceed the thresholds. Hence, foreign-to-foreign mergers may also fall under the EU Merger Regulation and may need to be notified, if the above prerequisites are met. There is no local effects test. There need to be substantial operations in the EEA; besides this, there is no local nexus test.

Foreign-to-foreign mergers do not have to be notified according to article 352(a) et seq PGR.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In the course of a domestic or cross-border merger, an undertaking for collective investments in transferable securities (UCITS) may amalgamate with one or more other UCITS, irrespective of the legal form of the UCITS and whether the absorbing or transferring UCITS has its registered office in Liechtenstein. The merger of UCITS requires the prior approval of the Liechtenstein Financial Market Authority (FMA), if the transferring UCITS has its registered office in Liechtenstein (article 39 of the Law of 28 June 2011 on Certain Undertakings for Collective Investment in Transferable Securities (Legal Gazette 2011, 295, LR 951.31), in its presently valid version (UCITSG)). The rules on the merger of UCITS apply mutatis mutandis to other structural measures.

The domestic or cross-border merger of an alternative investment fund (AIF) with one or more other AIFs is admissible and requires the approval of the FMA (articles 76 and 78 of the Law of 19 December 2012 on alternative investment fund managers (Legal Gazette 2013, 49, LR 951.32, in its presently valid version (AIFMG)).

On structural measures between UCITS and AIF, the provisions of the UCITSG apply. Regarding structural measures relating to exclusively managed AIF of the same AIF manager, there is a duty to notify the FMA (article 76 paragraph 4 and 5 and article 33 AIFMG). Several Liechtenstein laws state filing requirements in case of the acquisition of significant participation in an undertaking or controlling influence on an undertaking such as the Liechtenstein Banking Law, the Law on Tender Offers, the Law on Financial Conglomerates, the Law on the Disclosure of Important Participations of Quoted Companies, the Law on the Surveillance of Insurance Companies, the Asset Management Law and the Law on Investment Funds.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The EU Merger Regulation does not determine deadlines for filing. However, the notification of the concentration needs to be made before its implementation.

Pursuant to article 14(2) of the EU Merger Regulation, the EFTA Surveillance Authority (ESA) and the European Commission may impose fines, when a concentration is intentionally or negligently not notified prior to its implementation, unless expressly authorised by article 7(2) or by a decision taken pursuant to article 7(3) of the EU Merger Regulation.

The merger plan must be filed with the Liechtenstein Office of Justice at least one month prior to the shareholders' general meeting, which is intended to resolve on the consent. If the merger plan is publicly accessible without cost on the website of each company, it is sufficient to place a notice on the website of the Liechtenstein Office of Justice referring to the companies' websites providing the merger plan and its publication date (article 351(d), sections 1 and 1(a) of the Law on Persons and Companies (PGR)).

10 Which parties are responsible for filing and are filing fees required?

The parties to the merger or those acquiring joint control need to notify the concentration. In all other cases, the notification needs to be effected by the person or undertaking acquiring control (article 4(2) of the EU Merger Regulation).

The company management of the transferring and of the absorbing company must file the merger and its consequences to the Liechtenstein Office of Justice. However, the management of the absorbing company has the right to file the merger for the transferring company (article 351(g), section 1 PGR) as well.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A concentration may not be implemented either before its notification or until it has been declared compatible with the common market unless a derogation has been granted (article 7 of the EU Merger Regulation).

For a cross-border merger of a Liechtenstein company limited by shares, the Liechtenstein Commercial Register, which is a department of the Office of Justice, will verify whether the conditions precedent for a merger have been fulfilled and will issue a pre-confirmation (article 352(e) PGR).

Within six months of the issuance of the pre-confirmation, all involved companies need to file the merger plan as well as a possible agreement with the Liechtenstein Office of Justice, which controls the legality of the cross-border merger with respect to its execution and the formation of a new company limited by shares under Liechtenstein law as a result of the merger. Furthermore, it verifies the compliance with the Law on employee participation in a cross-border merger of limited liability companies (article 352(f) PGR).

The registration of a cross-border merger in the Commercial Registry is only admissible after a legality control according to article 352(f) PGR (article 352(h), section 1 PGR).

The merger only takes effect after it has been entered in the Commercial Register of the absorbing company and it may only be entered in the Commercial Register of the absorbing company after it has been entered for the transferring companies (article 351(h) PGR). The transfer of the assets and liabilities and the dissolution of the transferring companies take effect together with the entry of the merger in the Commercial Register.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The ESA and the European Commission may fine a person or an undertaking for closing before clearance (article 14 of the EU Merger Regulation). The validity of any transaction (in connection with a concentration with an EC/EEA dimension) carried out before its notification or until it has been declared compatible with the common market shall be dependent on a decision of the European Commission or on a respective presumption (article 7, paragraph 4 of the EU Merger Regulation). Moreover, the Commission may take the appropriate measures to ensure that the undertakings concerned dissolve the concentration, or may take interim measures (article 8, paragraphs 4 and 5 of the EU Merger Regulation).

There are no recent cases where sanctions have been imposed.

There are no specific sanctions for closing before clearance for mergers of companies limited by shares in the PGR. Article 351(l) PGR states the liability of the members of the company management of the transferring company in relation to their shareholders for their negligent or wilful behaviour in the course of the preparation and accomplishment of the merger.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions could be applied in cases involving closing before clearance in foreign-to-foreign mergers if they have substantial operations in an EU member state or an EEA state and exceed the thresholds. However, no such case has been reported for Liechtenstein.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No such solutions exist in which it would be acceptable to permit closing before clearance.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Article 7(2) of the EU Merger Regulation determines that a public bid or a series of transactions in securities, by which control is acquired from various sellers, may be implemented on the following conditions:

- the concentration is notified to the European Commission or the ESA without delay; and
- 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 a derogation granted by the European Commission or the ESA.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The special forms provided for in the Annexes of Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing the EU Merger Regulation must be used for a notification of a concentration pursuant to the EU Merger Regulation: Form CO (Annex I) or Short Form CO (Annex II).

Generally, the Short Form CO may be used when a notification is submitted that is unlikely to raise completion concerns. The exact conditions are stipulated in paragraph 1.1, subparagraph 3 of Annex II of EC Regulation No. 802/2004 of 7 April 2004. In all other cases, Form CO must be used.

Section 1 et seq of Annex II of EC Regulation No. 802/2004 states in detail the information that must be provided in the form (eg, description of the concentration, information about the parties, details of the concentration, ownership and control). All required information must be correct and complete. If a notification in any material respect is incomplete, the Commission informs the notifying parties in writing. In such a case the notification shall become effective on the date on which the complete information is received by the Commission (article 5, paragraph 2 Regulation (EC) No. 802/2004). To carry out the duties assigned to it by the EU Merger Regulation, the Commission by simple request or by decision may require the concerned persons to provide all necessary information (article 11, paragraph 1 EU Merger Regulation). The Commission may by decision impose fines to relevant persons (eg, where they intentionally or negligently supply incorrect information in response to a request (article 14, paragraph 1 EU Merger Regulation)).

The Ordinance of 11 February 2003 on the Commercial Register, in its presently valid version (Legal Gazette 2003, No. 66, LR 216.012) determines in articles 69 and 70 the required level of detail for the filing.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Before the notification, the European Commission may be consulted to informally and confidentially confirm the jurisdiction of the European Commission, identify key issues and possible competition concerns and ascertain deadlines.

In Phase I, the European Commission issues a formal clearance decision upon the notification of a concentration if the merger does not raise 'serious doubts as to its compatibility' with the common market.

If the concentration raises 'serious doubts', the European Commission issues a decision to initiate proceedings (ie, to proceed with an in-depth Phase II investigation).

The Phase II decision clears or blocks the merger.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Pursuant to article 10 of the EU Merger Regulation, the European Commission or the ESA must decide within 25 working days and provide clearance in cases that do not raise 'serious doubts as to its compatibility' with the common market. The period begins on the working day following the receipt of the notification. Under certain conditions, the period may be extended by 20 days. In all other cases, an in-depth investigation will follow, which takes 90 days and may even be extended to 105 days.

The concentration is deemed compatible with the common market if the Commission or the ESA have not taken a decision within the given time limits. The time frame for clearance cannot be speeded up.

As Liechtenstein has had no mergers with an EU or EFTA dimension since the entry into force of the EU Merger Regulation, there is no pertinent practice.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

There is no particular substantive test for clearance with respect to Liechtenstein. However, the European Commission or the European Free Trade Association (EFTA) Surveillance Authority (ESA) will apply the considerations stated in article 2 of the EU Merger Regulation.

A concentration may not significantly impede effective competition in the common market or in a substantial part of it. The structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the European Union or EFTA must be taken into consideration. In addition, the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition, must be assessed when deciding whether a concentration is compatible or incompatible with the common market. Moreover, the Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The Commission considers the following three criteria to be especially relevant for the application of a 'failing firm' defence. First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anticompetitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings VIII re Failing Firm (2004/C 31/03)).

This question is not applicable for national or cross-border mergers of companies limited by shares under the Law on Persons and Companies (PGR).

20 | Is there a special substantive test for joint ventures?

There is also no particular substantive test for joint ventures with respect to Liechtenstein. The European Commission or the ESA assesses whether the joint venture significantly impedes effective competition. A joint venture may not result in an appreciable restriction of competition between undertakings that remain independent (recital 27 of the EU Merger Regulation).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The Liechtenstein Office of Economic Affairs does not assess and investigate itself whether a concentration is compatible or incompatible with the common market. It reports potential cases to the ESA. The ESA makes an overall assessment in accordance with article 2, paragraph 1 of the EU Merger Regulation. The ESA (or the Commission) for such an assessment applies several theories of harm (eg, for horizontal mergers it considers whether by such merger there is a reduced competitive pressure and thus an increased ability to raise prices). Furthermore, for vertical mergers, the ESA may examine whether by such merger there is an input foreclosure (ie, a restriction of competitor access to procurement markets) or a customer foreclosure (ie, a restriction of competitor access to sales markets).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

There are no particular non-competition issues with respect to Liechtenstein. However, the European Commission or the ESA will apply the considerations stated in article 2 of the EU Merger Regulation.

Among others, the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition, must be assessed when deciding whether a concentration is compatible or incompatible with the common market.

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Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The European Commission or the ESA will apply the considerations stated in article 2 of the EU Merger Regulation.

Among others, the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition, must be assessed when deciding whether a concentration is compatible or incompatible with the common market.

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REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

At the request of the European Commission, the Liechtenstein Office of Economic Affairs may, according to article 3 of the Law on the Execution of the Competition Rules in the European Economic Area (EEA) and article 12 of the EU Merger Regulation, require information from the involved Liechtenstein undertakings of a concentration, inspect business files or may have the files inspected and verified by an expert. Apart from that, the Liechtenstein Office of Economic Affairs may ask the European Commission and the European Free Trade Association Surveillance Authority to control a merger.

The European Commission may conduct all necessary inspections of undertakings and associations of undertakings. It may impose fines, require the undertakings concerned to dissolve the concentration or, if a restoration is not possible, any other measure appropriate to achieve such restoration as far as possible, take interim measures appropriate to restore or maintain conditions of effective competition (article 8 of the EU Merger Regulation).

The merger only becomes effective after it has been entered in the Commercial Register in the case of national or cross-border mergers of companies limited by shares under the Law on Persons and Companies (PGR). Hence, the Office of Justice may refuse to enter the merger in the Commercial Register if the legal requirements have not been fulfilled.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy competition issues. However, the European Commission usually applies behavioural remedies rather than structural remedies.

A merger only becomes effective after it has been entered in the Commercial Register in the case of national or cross-border mergers of companies limited by shares under the PGR. Hence, the Office of Justice may refuse to enter the merger in the Commercial Register if the legal requirements have not been fulfilled.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The conditions are that a concentration has already been implemented and that a concentration has been declared incompatible with the common market, or that a concentration has been implemented in breach of a condition included in a decision, or in cases where a joint venture constituting a concentration would not fulfil the criteria laid down in article 81(3) of the Treaty on the Functioning of the European Union.

The Liechtenstein Office of Justice controls the legality of the cross-border merger with respect to the execution and formation of a new company limited by shares under Liechtenstein law as a result of a merger. Furthermore, it verifies the compliance with the law on employee participation in a cross-border merger of limited liability companies. It does not assess the effects of a merger on the market. If the legal requirements of articles 351 to 352(k) PGR for the merger with respect to the execution and formation of a new company limited by shares are not met, the entry of the merger to the Commercial Register (and thus the validity of the merger) may be postponed or refused.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The European Commission may impose remedies in foreign-to-foreign mergers if they fall within the application of the EU Merger Regulation as in mergers involving undertakings from EU member states or EEA states.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A decision declaring a concentration compatible is deemed to cover restrictions directly related and necessary to the implementation of the concentration (article 8(2) of the EU Merger Regulation).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The European Commission may hear other natural or legal persons showing sufficient interest (article 18(4) of the EU Merger Regulation). Furthermore, the European Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation (article 11(7) of the EU Merger Regulation).

The Commission must base its decision only on objections on which the parties have been able to submit their observations. The rights of defence must be fully respected in the proceedings (article 18(3) of the EU Merger Regulation).

This question is not applicable for national or cross-border mergers of companies limited by shares under the Law on Persons and Companies (PGR).

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Only general information or surveys that do not contain information relating to particular undertakings or associations of undertakings may be published. Information acquired through the application of the EU Merger Regulation and covered by the obligation of professional secrecy may not be disclosed. All information acquired as a result of the application of the EU Merger Regulation may only be used for the purpose of the relevant request, investigation or hearing (article 17 of the EU Merger Regulation and article 4(b) of the Law on the Execution of the Competition Rules in the EEA).

Decisions of the European Commission are published, but shall have regard to the legitimate interest of undertakings in the protection of their business secrets (article 20(2) of the EU Merger Regulation).

The Liechtenstein Commercial Register, including applications for registration and supporting documents, is public. Against payment of a fee, anyone is entitled to inspect the entries in the Liechtenstein Commercial Register, the supporting documents and other written records on which the entries are based. Hence, the documents provided to the Commercial Register for the registration of the merger may be inspected by anyone (article 953 PGR and article 18 of the Ordinance of 11 February 2003 on the Commercial Register).

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Liechtenstein Office of Economic Affairs and the Liechtenstein EEA Coordination Unit cooperate with the European Commission and the European Free Trade Association Surveillance Authority. As Liechtenstein, as far as we have seen, has not had a case under the EU Merger Regulation so far, there exists no practice with respect to the cooperation between antitrust authorities.

In case of a cross-border merger of a company limited by shares under the PGR, the Office of Justice informs the involved foreign authorities (article 352(h) PGR).

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the European Commission and the European Free Trade Association (EFTA) Surveillance Authority may be reviewed by the European Court of Justice or the EFTA Court (article 16 of the EU Merger Regulation).

Time frame

33 What is the usual time frame for appeal or judicial review?

No general comments can be made as there has been an insufficient number of cases to calculate an average time frame.

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ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The European Commission pursues foreign-to-foreign mergers if they have an EU or EEA dimension and the aggregate turnover of the concerned undertakings exceeds the thresholds given by the EU Merger Regulation.

This question is not applicable for national or cross-border mergers of companies limited by shares under the Law on Persons and Companies.

No current enforcement concerns of the authorities are known with respect to Liechtenstein.

Reform proposals

35 | Are there current proposals to change the legislation?

No, there are no current proposals to change the Liechtenstein legislation.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No updates at this time.

Malaysia

Shanthi Kandiah*

SK Chambers

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Malaysia's general competition legislation, namely the Competition Act 2010, sets out prohibitions on anticompetitive agreements and abuses of dominance, but not merger control. Although mergers are not expressly excluded from the scope of the Competition Act 2010, there is acceptance that the competition regulator, the Malaysia Competition Commission, has no merger control mandate.

There are sector-specific laws and guidelines that regulate the antitrust aspects of mergers in the aviation services sector and the communications and multimedia sectors, enforced by the Malaysian Aviation Commission (MAVCOM), and the Malaysian Communications and Multimedia Commission (MCMC) respectively.

The MAVCOM has competition policy powers under the Malaysian Aviation Commission Act 2015 (MACA). This is presently the only statutory merger control regime in Malaysia.

The MAVCOM has published the following guidelines on mergers:

- Guidelines on Substantive Assessment of Mergers;
- Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger; and
- Guidelines on Aviation Service Market Definition.

For the communications and multimedia sectors, the existing Guideline on Substantial Lessening of Competition issued by the MCMC expressly states that the regulator considers that mergers involving telecommunications and multimedia licensees must be investigated as 'conduct which has the purpose of substantially lessening competition in a communications market' (under section 133 of the Communications and Multimedia Act 1998 (CMA)). On 17 May 2019, the MCMC issued the final versions of the following guidelines:

- Guidelines on Mergers and Acquisitions (the M&A Guidelines); and
- Guidelines on Authorisation of Conduct.

Scope of legislation

2 | What kinds of mergers are caught?

Aviation services sector

The MACA encompasses both horizontal and non-horizontal mergers (vertical and conglomerate). A merger is deemed to occur if:

- two or more enterprises, previously independent of one another, merge;
- one or more persons or other enterprises acquire direct or indirect control of the whole or part of one or more other enterprises;
- as the result of the acquisition by one enterprise (the first enterprise) of the assets (including goodwill), or a substantial part of assets, of another enterprise (the second enterprise) the first enterprise is in a position to replace or substantially replace the second enterprise in the business or in the part concerned of the business in which the enterprise was engaged immediately before the acquisition; or
- a joint venture is created to perform, on a lasting basis, all the functions of an autonomous entity.

Section 48 of the MACA, read together with the Third Schedule, lists excluded commercial activities, agreements and mergers.

Communications and multimedia sectors

The MCMC Guideline on Substantial Lessening of Competition provides that the MCMC regards mergers to be 'conduct' falling within the scope of sections 133 and 139 of the CMA. The definition of M&A under the M&A Guidelines is similar to that set out in the MACA.

The competition regulation regime established by the CMA does not contain any express provisions for merger control and assessment. As such, there is no process nor is there a legal requirement that parties to an M&A should notify the MCMC in respect of such transactions. Despite the lack of clear provisions, the MCMC has said that it will assess mergers affecting the communications and multimedia sector that are voluntarily submitted to it in the manner set out in the M&A Guidelines. The advantage that the procedures established through the M&A Guidelines is that it enables merging parties to:

- obtain the MCMC's view in respect of the competitive effects of an M&A; and
- decide whether to apply to the MCMC for authorisation of an M&A where it is consistent with national interest subject to various undertakings or in a restructured form to avoid breaching the provisions of the CMA.

It is likely that the MCMC is attempting to replicate the informal clearance regime that operates in Australia. There is a natural incentive for merging parties to seek clearance of any anticipated or completed merger, to ensure that mergers are not subject to an unexpected review by the MCMC, thereby providing greater transaction certainty.

The competition provisions under the CMA apply only to licensees. The four (major) individual licence categories under the CMA require licensees to be companies incorporated in Malaysia as a standard licence condition.

3 | What types of joint ventures are caught?

Aviation services sector

The MACA treats full-function joint ventures as mergers. A joint venture constitutes a merger where it is created to perform, on a lasting basis, all the functions of an autonomous economic entity. The Guidelines on Substantive Assessment of Mergers explain that a joint venture performs all the functions of an autonomous economic entity when it 'operates in an aviation service market and performs the functions normally carried out by enterprises in that market'. Factors to determine whether a joint venture is intended to operate on a lasting basis include:

- commitment of resources by the parent enterprises;
- where a joint venture is for a specific period, the period of the joint venture must be long enough to cause a lasting change in the structure of the enterprises concerned or provide for continuation beyond such specified period;
- joint ventures established for a short definite period and to carry out a specific project may be considered as not having an operation on a lasting basis; and
- joint control by the parties to the joint venture where such enterprises are capable of exercising decisive influence with regard to the activities of the joint venture.

Communications and multimedia sectors

The CMA does not define 'joint venture'. However, the the M&A Guidelines describe an approach similar to that in the MACA.

Based on the M&A Guidelines, the MCMC will deem a joint venture to be an M&A when a joint venture is created to perform, on a lasting basis, all the functions of an autonomous economic entity, and involves changes in the shareholding structure of the firm. The MCMC considers a 'lasting basis' to mean the joint venture is intended to, and can, operate for such a length of time that the joint venture involves a lasting change in the structure of the parent company, the structure of the market and competition in the market. Having said that, whether all the functions of an autonomous economic entity on a 'lasting basis' is contextual and will be determined by the MCMC based on circumstances of the M&A being assessed.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The MACA and the Guidelines on Substantive Assessment of Mergers explain that 'control' can exist via:

- ownership of the assets of the enterprise;
- the right to use all or part of the assets of the enterprise; or
- the rights or contracts that enable the exercise of decisive influence regarding the composition, voting or decisions of the enterprise.

Control can be acquired directly or indirectly. Examples of direct control are by becoming holder of the rights or contracts, whereas indirect control may occur through acquisition of the power to exercise rights. Indirect control can be determined by examining links between the acquirer and the enterprise having indirect control such as the source of funding and family relations between the acquiring person or enterprise.

Communications and multimedia sectors

'Control' is not defined or explained under the CMA. The M&A Guidelines explain that control can be achieved through:

- amalgamating with another firm to form a merged entity;
- acquiring the assets of another firm and replacing that firm; or
- through acquiring direct or indirect control over another firm.

The test for control is whether a firm can exercise 'decisive influence' over the activities of another firm by reason of rights, contracts or other means. 'Control' can be obtained through:

- legal control (ie, having more than 50 per cent ownership of all voting rights); or
- de facto control (ie, circumstances that allow one firm to influence another's activities to affect key strategic commercial behaviour).

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Aviation services sector

For notification and assessment of a merger, parties should self-assess whether a merger can give rise to a substantial lessening of competition within any market affecting Malaysia, and whether a merger notification should be made to the MAVCOM. The MAVCOM is more likely to investigate a merger or anticipated merger where:

- the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least 50 million ringgit; or
- the combined worldwide turnover of the merger parties in the financial year preceding the transaction of the merger parties is at least 500 million ringgit.

Communications and multimedia sectors

The MCMC has not prescribed any jurisdictional thresholds but has taken the position that a market share of 40 per cent or more is indicative of dominance.

The Guidelines on Mergers and Acquisitions provide guidance on thresholds for notification and assessment:

Type of merger	Notification threshold
Proposed horizontal merger	At least one of the parties to the merger is a licensee in a dominant position; or if the threshold above is not met, the merger would result in the proposed merged firm obtaining a dominant position. A post-merger market share of the proposed merged entity of 40 per cent or more would be indicative of this.
Completed horizontal merger	The merged entity is a licensee in a dominant position.
Proposed non-horizontal merger	At least one of the parties to the merger is a licensee in a dominant position.
Completed non-horizontal merger	The merged or acquired entity is a licensee in a dominant position.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Aviation services sector

The MACA has a voluntary notification regime.

Communications and multimedia sectors

The regimes for both notification and assessment of a merger, as well as authorisation of conduct, are voluntary.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There are no such special notification requirements for either sector.

Under the MACA, a local effects test is applied (ie, whether a merger transacted or executed outside Malaysia has an effect on competition in any aviation service market in Malaysia).

The CMA applies extraterritorially to licensees or providers of relevant facilities or services in a place within Malaysia.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Aviation services sector

Applicants for an air service licence, air service permit or group handling licence must either be a Malaysian or a company incorporated in Malaysia under direct or indirect control of a Malaysian. It is understood that foreign shareholding is allowed subject to significant local shareholding.

Communications and multimedia sectors

Licences are only offered to Malaysian incorporated companies. In 2011, the Ministry of International Trade and Industry's liberalised foreign shareholding thresholds to 70–100 per cent, depending on licence category. However, the MCMC, as the licensing authority, permits 30–49 per cent foreign shareholding for certain licence categories and higher shareholding requests will be entertained on a case-by-case basis. Import permits are required for importation of communications equipment.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Aviation services sector

Merger parties have the option of notifying both completed and anticipated mergers. For anticipated mergers, notification and application can be made to the Malaysian Aviation Commission (MAVCOM) when:

- merger parties have a bona fide intention to proceed with the anticipated merger;
- details of the anticipated merger are available; and
- the anticipated merger has been, or may be, made public.

For completed mergers, notification can be made at any time, but merger parties are encouraged to do so as soon as possible after the merger is completed. There are no sanctions for failing to file, per se, but the MAVCOM in its final decision can impose a financial penalty if it is satisfied the infringement was intentional or negligent.

Communications and multimedia sectors

For notification and assessment, parties should submit their transactions prior to completion. An application for authorisation of conduct can be made before, during or after submitting an application for assessment pursuant to the Guidelines on Mergers and Acquisitions (the M&A Guidelines).

10 Which parties are responsible for filing and are filing fees required?

Aviation services sector

A party to an anticipated merger or involved in a merger is responsible for filing. The MAVCOM does not presently impose such fees but will do so via regulations in future.

Communications and multimedia sectors

Licensees can apply to the Malaysian Communications and Multimedia Commission (MCMC) for authorisation of conduct and notification and assessment. Under the M&A Guidelines, the MCMC will not accept multiple parallel applications for assessment of a merger. The M&A Guidelines provide that the acquiring party (for a proposed M&A) or the merged entity or entity that has acquired control (for completed mergers) are the appropriate parties.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Aviation services sector

The regime is non-suspensory, but parties proceed at their own commercial risk as the MAVCOM has the power to unwind mergers and impose financial penalties for infringement. The duration for the assessment of an application will be determined on a case-by-case basis.

Communications and multimedia sectors

In theory, the notification and assessment regime under the M&A Guidelines appear to be a non-suspensory regime. Parties can proceed with the M&A without automatic sanctions.

Similarly, where parties apply for authorisation, the regime is non-suspensory as licensees can apply before, during or after submission of an assessment application. There is no requirement to seek authorisation.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There have been no reported cases in which a sanction was imposed for closing or integrating the activities of the merging businesses before clearance. However, the laws do not prevent the relevant regulators (ie, MAVCOM and the MCMC) from applying the following sanctions where applicable:

Aviation services sector

Where an application for an anticipated merger to be considered has been made to the MAVCOM and the anticipated merger is carried into effect before the MAVCOM makes a decision of whether there is an infringement, the MAVCOM may either treat the application as if it were an application for the resulting merger, or refuse to make any decision in respect of such anticipated merger and require any party involved to apply to the MAVCOM for the merger to be considered under the relevant provisions of the MACA as a merger instead.

Where the MAVCOM has commenced, but not completed, an investigation, the MAVCOM may impose interim measures by directing parties to suspend the effect of, or desist from acting in accordance with any agreement, desist from any conduct that is suspected to infringe a prohibition or to do, or refrain from doing, any act (but that shall not require the payment of money).

Communications and multimedia sectors

The MCMC may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market that has, or may have, the effect of substantially lessening competition in any communications market, including requirements that the licensee must not continue with or complete the M&A and must not transfer any licences or spectrum assignments granted pursuant to the CMA to another entity.

The MCMC may seek for an interim or interlocutory injunction in response to any failure by parties to an M&A to comply with the prohibition against conduct that substantially lessens competition in a communications market, or to prevent further integration between the parties to the M&A, or to prevent the merged or acquired entity from trading.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There have been no reported cases in which a sanction has been applied against any company, either local or foreign, for closing before clearance. However, the laws do not prevent the relevant regulators (ie, MAVCOM and MCMC from challenging foreign-to-foreign mergers that substantially lessen competition in their respective markets in Malaysia, where applicable.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The regime in the aviation services as well as the communications and multimedia sectors are non-suspensory and parties can proceed with the M&A before clearance. Having said that, the relevant regulators have the powers to, among other things, direct a person to cease a conduct pursuant to the relevant legislation as well as to impose interim measures and financial penalties for infringement of any prohibited conduct. In this regard, it is not precluded that the parties try to agree with the relevant regulator on a hold-separate arrangement to permit closing before clearance although there has not been any reported precedent on this.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

All persons engaged in any takeover and mergers in Malaysia are subject to the Malaysian Code on Takeovers and Mergers 2016 and Rules on Takeovers, Mergers and Compulsory Acquisitions 2016, which are issued and administered by the Securities Commission Malaysia.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Aviation services sector

The Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger provide that a notification and application shall be made in the form and manner determined by the MAVCOM, supported by the required documents and information. In the Notification and Application form for an anticipated merger or a merger published by the MAVCOM, the information and supporting documents required by MAVCOM consist of, among other things:

- details of the parties to the merger;
- information on the merger including description of the turnover of the merger parties, structure of the merger and change on the ownership structure of the merged entity;
- description of the relevant aviation service market, including the relevant service market, geographic market and temporal market where applicable;
- competitive effects of the merger including unilateral and coordinated effects of the merger, barriers to entry, and countervailing buyer power;
- economic efficiencies (if any) including description of significant economic efficiencies and nature of the economic efficiencies; and
- social benefits (if any) including description of significant social benefits and the nature of the social benefits.

The MAVCOM may refuse to accept incomplete or incorrect applications.

Failing to disclose relevant information, evidence, documents or providing false or misleading information, evidence, documents to the MAVCOM in response to a direction issued by the MAVCOM, is an offence carrying a fine of up to 500,000 ringgit, imprisonment up to three years, or both.

Communications and multimedia sector

For authorisation of conduct, applicants will need to provide MCMC with the information (Form 1) set out in Annexure 2 of the Guidelines on Authorisation of Conduct (the AC Guidelines) and prepare Form 2 as well as the relevant supporting documents as stated in Annexure 3 of the AC Guidelines. The following information, among others, needs to be submitted:

- description of the proposed conduct and any documents detailing terms of such conduct;
- the relevant markets that the conduct is likely to affect;
- market characteristics;
- the time frame for which authorisation is sought and supporting reasons;
- benefits of the conduct from the perspective of the national interest;
- who is likely to benefit from the conduct;
- how are the benefits distributed; and
- how the conduct has been framed to minimise anticompetitive effect.

Failure to provide sufficient information may render the application invalid. If applicants knowingly give false or misleading information, they commit an offence that carries a fine of up to 20,000 ringgit, or imprisonment not exceeding six months, or both.

For notification and assessment, applicants will need to prepare Form 1 and Form 2 as well as the relevant supporting documents, full details of which can be found in Annexures 1 and 2 of the M&A Guidelines. The MCMC will use the information provided to it in Form 1 to undertake Phase 1 of the assessment process, and if the MCMC decides that Phase 2 of assessment is required, an applicant will be required to complete and submit Form 2 to the MCMC. Incomplete applications will be rejected by the MCMC. The MCMC may revoke a notice of no objection to a notification and assessment that was approved, if, among other things, the information provided by a licensee was materially incomplete, false or misleading. The CMA also provides that knowingly giving false information is an offence that carries a fine of up to 20,000 ringgit, or imprisonment not exceeding six months, or both.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Aviation services sector

For notification and assessment, upon receiving a complete application, the MAVCOM will first determine whether the merger or anticipated merger falls within the meaning of section 54 of the MACA. If it does, the MAVCOM will publish a summary of the application for public consultation.

Next, the MAVCOM will proceed with two phases of its assessment – Phase 1 involves evaluating the possible competitive effects through gathering of information. The MAVCOM will then issue a proposed decision and publish it for public consultation. Following this, the MAVCOM will make a final decision of non-infringement or proceed to Phase 2, which involves a more detailed and extensive examination of the effects of the merger or anticipated merger. A proposed decision will be published for public consultation and applicants can make written representations in response to a finding of infringement. The MAVCOM will then consider public feedback and written representations before making its final decision. The duration for the assessment of an application will be determined on a case-by-case basis.

The MAVCOM also has the power to investigate a merger or anticipated merger that raises competition concerns under the MACA. The process of such an investigation is not expressly spelled out.

Communications and multimedia sectors

The assessment for notification is proposed to be broken down into two phases under the M&A Guidelines and is similar to the MAVCOM's approach. The M&A Guidelines also indicate time frames for investigation – Phase 1 should be completed within 30 business days from receipt of a valid Form 1 application, Phase 2 should commence within 10 business days of a valid Form 2 application and is expected to complete within 120 business days. The time frame for an investigation for both Phase 1 and Phase 2 may be completed in less or more time than indicated if the MCMC considers that it is warranted in the circumstances of the M&A being assessed.

If the MCMC reaches the view that it is likely to issue an unfavourable decision, it will issue an applicant with a statement of issues setting out its preliminary findings and the grounds on which it reaches its conclusions. The applicant will be given 30 days to provide the MCMC with submissions in response. The MCMC will then object or not object to the merger and issue the relevant notices having regard to the submissions provided to it.

A similar process and time frames are envisaged for an authorisation application as provided in the AC Guidelines.

These timelines may be extended by the MCMC at its absolute discretion and may be reviewed by the MCMC, taking into account the practical considerations.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Aviation services sector

There is no specific statutory timetable for clearance. The duration for the assessment of an application will be determined on a case-by-case basis, depending on factors such as the complexity of the issues and the timeliness and the completeness of the information provided by the enterprises.

Communications and multimedia sectors

There is no specific statutory timetable for clearance. However, the M&A Guidelines stipulate the time frames for investigation – Phase 1 should be completed within 30 business days from receipt of a valid Form 1 application, Phase 2 should commence within 10 business days of a valid Form 2 application and is expected to complete within 120 business days. The time frame for an investigation for both Phase 1 and Phase 2 may be completed in less or more time than indicated if the MCMC considers that it is warranted in the circumstances of the M&A being assessed.

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A similar process and time frames are envisaged for an authorisation application as provided in the AC Guidelines.

These timelines may be extended by the MCMC at its absolute discretion and may be reviewed by the MCMC, taking into account the practical considerations.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Aviation services sector

Mergers that have resulted or may be expected to result in a substantial lessening of competition in any aviation service market are prohibited.

The 'failing firm' defence is available. This will be considered in the counterfactual analysis where a merger party may claim that, without the merger, it would exit the relevant market and competition would be lost anyway.

Communications and multimedia sectors

Section 133 of the Communications and Multimedia Act 1998 (CMA) prohibits 'any conduct which has the purpose of substantially lessening competition in a communications market'.

The failing firm defence is available where:

- the financial situation of the firm has deteriorated to such an extent that without the M&A, it and its assets would exit the market in the near future;
- there are no serious prospects for restructuring the business; and
- there are no less anticompetitive alternatives to the M&A.

20 | Is there a special substantive test for joint ventures?

Aviation services sector

The Malaysian Aviation Commission Act 2015 (MACA) treats full-function joint ventures as mergers. A joint venture constitutes a merger where it is created to perform, on a lasting basis, all the functions of an autonomous economic entity. The Guidelines on Substantive Assessment of Mergers explain that a joint venture performs all the functions of an autonomous economic entity when it 'operates in an aviation service market and performs the functions normally carried out by enterprises in that market'. Factors to determine whether a joint venture is intended to operate on a lasting basis include:

- commitment of resources by the parent enterprises;
- where a joint venture is for a specific period, the period of the joint venture must be long enough to cause a lasting change in the structure of the enterprises concerned or provide for continuation beyond such specified period;
- joint ventures established for a short definite period and to carry out a specific project may be considered as not having an operation on a lasting basis; and
- joint control by the parties to the joint venture where such enterprises are capable of exercising decisive influence with regard to the activities of the joint venture.

Communications and multimedia sectors

The CMA does not define 'joint venture'. However, the Guidelines on Mergers and Acquisitions (the M&A Guidelines) describes an approach similar to that in the MACA. Based on the M&A Guidelines, the Malaysian Communications and Multimedia Commission (MCMC) will deem a joint venture to be an M&A when a joint venture is created to perform, on a lasting basis, all the functions of an autonomous economic entity, and involves changes in the shareholding structure of the firm. The MCMC considers a 'lasting basis' to mean the joint venture is intended to, and can, operate for such a length of time that the joint venture involves a lasting change in the structure of the parent company, the structure of the market and competition in the market. Having said that whether all the functions of an autonomous economic entity on a 'lasting basis' is contextual and will be determined by the MCMC based on circumstances of the M&A being assessed.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Aviation services sector

Generally, the Malaysian Aviation Commission (MAVCOM) will look at whether a merger or anticipated merger is likely to lead to substantial lessening of competition by way of unilateral and coordinated effects. To determine unilateral effects, the MAVCOM would consider:

- the profitability of any price increase or reduction of supply;
- whether other competing enterprises would increase their capacities or expand their commercial operations in response to any price increase or reduction of supply;
- the existence of any close substitutes of the service provided by the merger parties;
- the ease and likelihood of buyers switching to the services of other competing enterprises; and
- the possibility of new competitors entering the relevant aviation service market.

In assessing coordinated effects, the MAVCOM will consider the structure and characteristics of a relevant aviation service market, any history of coordination in the said market, factors that would indicate the characteristics of a relevant aviation service market such as the level of concentration in the market and the existence and degree of barriers to entry and how those factors would impact the coordinated effects of a merger.

Communications and multimedia sectors

As per the M&A Guidelines, when assessing whether a horizontal merger results in coordinated effects on competition, the MCMC will attempt to establish whether a merger materially increases the likelihood that firms in a market will successfully coordinate their behaviour or strengthen any existing coordination, and will take into account the following conditions:

- the ability of firms to align on the terms of coordination;
- incentives to maintain coordination; and
- weak competitive constraints.

In determining whether unilateral effects of horizontal mergers substantially lessen competition, the MCMC will consider:

- whether the products and services sold by each party to the M&A are close substitutes;
- whether rivals have an incentive and the ability to respond to a price increase;
- the significance the merger parties have to the competitive process; and
- the competitive constraint each of the merger parties exerted on each other prior to the merger.

For non-horizontal mergers, the MCMC also looks at coordinated effects and unilateral effects. For coordinated effects, the same factors for establishing coordinated effects in a horizontal merger will be relevant to non-horizontal mergers. For unilateral effects, the MCMC will take into account foreclosure, barriers to entry and access to commercially sensitive information.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Aviation services sector

A party affected by an infringement decision by the MAVCOM may within 14 days of the date notice of the decision is given, apply to the Minister (of Transport) for the anticipated merger or merger to be exempted from the prohibition on the ground of public interest considerations. This exemption will be confined to matters of public or national security and defence.

Communications and multimedia sectors

Section 140(2) of the CMA states that the MCMC can authorise a conduct if it is satisfied that the authorisation is in the national interest. The MCMC will use the national policy objectives in section 3(2) of the CMA as the basis to decide whether or not the conduct should be authorised.

A cost-benefit analysis is used to examine if a conduct promotes national policy objectives. This analysis is guided by four steps – market definition, market structure analysis, analysis of economic impact, and analysis of benefits from the perspective of national interest. The MCMC can exercise its discretion and vary these steps, if necessary.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Aviation services sector

A merger party may claim that there are significant economic efficiencies arising directly from the merger, including supply-side or demand-side efficiencies. Examples of supply-side efficiencies that may be considered include cost reduction, removal of double marginalisation in vertical mergers, increase in investment, differentiation of aviation services, and increase in capacity and network of aviation services. Examples of demand-side efficiencies include increased network of aviation services available to buyers, price effects of complementary aviation services, and benefits of 'one-stop shopping'.

Communications and multimedia sectors

As part of the process of conducting a cost-benefit analysis in relation to authorisation of conduct to examine if a conduct promotes national policy objectives, detrimental effects of a conduct will be analysed from the perspective of economic efficiency, namely production efficiency, allocative efficiency and dynamic efficiency – examples specified are economies of scale and scope and pooling of resources.

For the notification and assessment regime, efficiencies (including economic efficiencies) will be considered as part of the assessment of whether there is a substantial lessening of competition.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Aviation services sector

If an infringement is found in a merger or an anticipated merger, the Malaysian Aviation Commission (MAVCOM) can take the following actions:

- require the infringement to be ceased immediately;
- specify steps that should be taken by the infringing enterprise in order to bring the infringement to an end;
- impose financial penalties that shall not exceed 10 per cent of worldwide turnover of the infringing enterprise over the period that the infringement occurs; and
- provide any other direction as the MAVCOM deems appropriate.

The Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger provide examples of directions:

- prohibiting an anticipated merger from being carried into effect;
- ordering a merger to be dissolved or modified;
- requiring parties to enter into agreements designed to lessen or prevent the anticompetitive effects arising from a merger or an anticipated merger;
- requiring a merger party to dispose its businesses, assets, shares or rights in a specified manner; and
- providing a performance bond, guarantee or other form of security on such terms and conditions as may be determined by the MAVCOM.

Additionally, the MAVCOM may issue interim measures in the context of an investigation (but not for notification and assessment):

- suspending the effect or desisting from acting in accordance with any agreement suspected of infringing any prohibition;
- desisting from any conduct that is suspected of infringing any prohibition; and
- to do or refrain from doing any act, but that shall not require payment of money.

Communications and multimedia sectors

The Communications and Multimedia Act 1998 (CMA) sets out administrative actions available to the Minister (of Communications and Multimedia) or the Malaysian Communications and Multimedia Commission (MCMC):

- The Minister can modify, vary, revoke, impose further special or additional conditions of an existing individual licence.
- The Minister, on the MCMC's recommendation, can suspend or cancel an individual licence.
- The MCMC can direct a licensee in a dominant position to cease conduct that substantially lessens competition and implement appropriate remedies.

No specific provision for remedies can be found in the CMA. The MCMC has the power to determine the appropriate remedy subject to ministerial direction and the object of the CMA.

In administering the section 133 of the CMA prohibition and failure to comply with the MCMC's directions pursuant to section 139 of the CMA, the MCMC may enforce the following remedies:

- interim or interlocutory injunction against any prohibited conduct; and
- fine up to 500,000 ringgit or imprisonment up to five years or both upon conviction. Offenders would also be liable for a further fine of 1,000 ringgit per day or part of a day during which the offence is continued after conviction.

Under the Guidelines on Mergers and Acquisitions (the M&A Guidelines), the MCMC is also empowered to include the following directions in its notice of objection, including requirements that the licensee:

- must not continue or complete the M&A;
- must not transfer any licences or spectrum assignment granted pursuant to the CMA to another entity for a proposed merger; and
- must not further integrate with another merger party if a merger has completed and involves a licensee in a dominant position and has the effect of substantially lessening competition in a communication market. The MCMC may also prevent the merged entity from trading.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Aviation services sector

A merger party may, voluntarily or upon invitation, propose an undertaking to do or refrain from doing anything, which the MAVCOM has the right to accept or reject. If the MAVCOM accepts, it must close the investigation without finding of infringement or imposition of a penalty. Undertakings can be both structural and behavioural.

Communications and multimedia sectors

In respect of authorisation, the MCMC can require a licensee to submit an undertaking regarding its conduct in any matter relevant to the authorisation. Licensees can subsequently withdraw such undertaking and the authorisation that was granted based on the undertaking provided will be deemed to have never been given.

With respect to the notification regime, it is not clear if the MCMC would be prepared to accept voluntary commitments offered by parties to a merger as part of the informal assessment process without having to go through a formal authorisation clearance pursuant to section 140 of the CMA.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Aviation services sector

The MAVCOM can impose remedies upon finding an infringement by taking into consideration:

- whether the remedial action can restore the competition that would be substantially lessened as a result of a merger or an anticipated merger;
- whether the remedial action would be effective to stop the infringement or to remedy, mitigate or prevent a substantially lessening of competition effect arising from the merger or an anticipated merger; and
- the cost of monitoring the remedial action.

The Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger spell out conditions applicable to the sale of business(es) as a structural remedy:

- such business is required to be capable of being fully separated from the merger party;
- the approval of the purchaser may be required prior to the sale of the business; and
- to consider an enterprise that is willing to pay a commercially reasonable price for a business as an alternative purchaser even if the price is lower than the price that a merger party is willing to pay for the acquisition of that business.

In this regard, the MAVCOM may specify that the sale must be completed within a certain period of time, failing which an independent trustee may be appointed, to monitor the operation of the business pending disposal or to handle the sale at the expense of such merger party.

The MAVCOM may consider behavioural remedies in the following situations:

- divestment of business would be impractical or disproportionate to the nature of the competition concerns; and
- behavioural remedy is necessary to support structural divestment; for example, the MAVCOM may direct a merger party to refrain from approaching former buyers of the divested business for a specified period so as to allow the buyers of the divested business to be a viable and effective competitor.

Communications and multimedia sectors

The MCMC is given the power to request for an undertaking regarding a licensee's conduct in any matter relevant to the authorisation. Undertakings that the MCMC may require with an authorisation of conduct include:

- proceeding with the merger in a substantially restructured form;
- a specific division to be sold off;
- the negative competitive effects of the merger to be addressed in some other form;
- expand or allow fair and reasonable access to vital infrastructure or services to customers or competitors;
- not acquire assets within a specific time period, if doing so would have the effect of strengthening the merged or acquired entity's market power; and

- in the case of a firm acquiring direct or indirect control of another, all dealings between the parties will continue on arm's length basis and measures will be put in place to ensure this remains the case.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

None published.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The powers given to the MAVCOM and the MCMC (in the M&A Guidelines) appear to be wide enough to make decisions covering ancillary restrictions, but the circumstances in which decisions by the MAVCOM and the MCMC would cover ancillary restrictions is unclear.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Aviation services sector

Customers and competitors may be contacted for information gathering under the Phase 1 assessment. The Malaysian Aviation Commission (MAVCOM) will also consider any feedback received in the public consultation stage. It is unclear who would be the parties involved in an investigation where the MAVCOM is not notified.

Any individual or enterprise may make a complaint to the MAVCOM regarding any suspected infringement of Part VII of the Malaysian Aviation Commission Act 2015 in the aviation services. Those who suffer loss or damage as a result of infringement have a right to civil action.

Communications and multimedia sectors

Under the Guidelines on Mergers and Acquisitions (the M&A Guidelines), the Malaysian Communications and Multimedia Commission (MCMC) assessment of competitive effects of an M&A involves public consultation with competitors, customers and even suppliers.

A person can lodge a written complaint regarding any suspected infringement to the MCMC. However, the MCMC may decide whether to give a complainant the opportunity to appear before the MCMC in relation to an investigation. As mentioned above, an interim or interlocutory injunction can be sought by anyone, against any prohibited conduct under the Communications and Multimedia Act 1998.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Aviation services sector

Commercial information is not automatically treated confidentially. Confidentiality is available to claims that the MAVCOM determines to have merits prior to issuance of its proposed decision and a decision in a voluntary regime. There is no mention of confidentiality safeguards in relation to the MAVCOM's public consultations. Hence, it is prudent for a merger party to specify that the information disclosed to the MAVCOM is of a 'commercial and confidential' nature.

Communications and multimedia sector

For authorisation of conduct, the Guidelines on Authorisation of Conduct allow a licensee to provide confidential information in a separate annexure from the application form, clearly marked as 'confidential'. A public inquiry may form part of the investigation process under this route if the conduct in question is of significant interest to consumers or licensees. The MCMC may decide not to publish evidence or material presented to the inquiry or lodged with the MCMC that it considers to be confidential in nature.

As for the notification regime, confidentiality is partially warranted in the M&A Guidelines. An applicant has to redact commercially sensitive or confidential information to be used in the MCMC's consultations with third parties. However, as the assessment process involves a necessary amount of public and third-party consultation, the MCMC does not encourage parties to notify it in respect of a proposed merger unless it has been publicly announced (or is made known to the public generally) and the parties have a bona fide intention to proceed with the merger. Alternatively, where there is a level of confidentiality surrounding the M&A, parties are encouraged to consider an application for confidential assessment instead. However, the application process for confidential assessment is informal and any view taken by the MCMC following a confidential assessment is non-binding and qualified by the need for a full assessment of the M&A once it has been publicly announced.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

None published.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Aviation services sector

Persons affected by the Malaysian Aviation Commission (MAVCOM)'s decisions may apply to the Minister of Transport for a merger or anticipated merger to be exempt from the prohibition on the ground of public interest. Any person or body aggrieved by MAVCOM's decision, which includes any act, omission, refusal, direction or order, may also appeal to the High Court.

Communications and multimedia sectors

An applicant's right to appeal against the Malaysian Communications and Multimedia Commission's (MCMC) decision to the Appeal Tribunal exists under the Communications and Multimedia Act 1998 (CMA). The Guidelines on Mergers and Acquisitions explains that M&A parties may appeal against MCMC's decision. Appeals are not available to third parties nor on the MCMC's determinations that an M&A party is in a dominant position.

A person affected by the decision or other action of the Minister of Communications and Multimedia or the MCMC may apply to the court for a judicial review upon exhausting all other remedies under the CMA.

Time frame

33 What is the usual time frame for appeal or judicial review?

Aviation services sector

Applications for exemption must be made within 14 days of the date of the MAVCOM notice. Appeals to the High Court must be made within three months of the date on which the decision was communicated.

Communications and multimedia sector

There is no time frame prescribed by the CMA for appeal to the Appeal Tribunal at this juncture.

As a general rule according to the Rules of Court 2012, the time period for application for judicial review is three months from the date the grounds of application first arose or when the decision was first communicated to the applicant.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

None that have been made public.

Reform proposals

35 Are there current proposals to change the legislation?

It has been reported that the the Malaysia Competition Commission has initiated the process of seeking legislative amendments to include new provisions on mergers and acquisitions into law and that a merger control regime is expected to be tabled to Parliament by the end of 2021.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

It has been reported that the Malaysia Competition Commission (MyCC) has initiated the process of amending the Competition Act 2010 (CA) to include provisions on mergers and acquisitions. According to the Minister of Domestic Trade and Consumer Affairs, the amendments to the CA would mean that merger and acquisition transactions will require approval from the MyCC and companies that do so without approval may be ordered to demerge and may be fined. The MyCC aims to table the amendments to the CA to Parliament by the end of 2021. The MyCC has also indicated that the amendments to the CA will not be implemented on a retrospective basis, and that the MyCC is in the process of determining the thresholds for merger control. If this amendment to the law is made, Malaysia will be joining the ranks of its counterparts within East Asia in adopting a merger control regime as part of their competition law framework.

In April 2021, reports also surfaced of a proposed merger between two telecommunications companies, Celcom Axiata Bhd and Digi.com Bhd, with the merged company to be known as Celcom Digi Bhd. This merger would fall within the scope of the Communications and Multimedia Act 1998.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The principal legislation governing mergers is the Control of Concentrations Regulations (CCRs). The CCRs have been issued as subsidiary legislation (SL 379.08) under the Competition Act (CA, Chapter 379 of the Laws of Malta), which is the main legislation regulating competition in Malta, together with the relative provisions of EU law.

Merger control is regulated exclusively by the CCRs, with the exception of partial-function joint ventures regulated by the relevant provisions of the CA, including articles 5 and 9 that implement articles 101 and 102 of the Treaty on the Functioning of the European Union.

The relevant regulatory body is the Director General (DG) who heads the Office for Competition, which is a key player in all stages. Concentrations must be notified to the DG, who then has the obligation of conducting the prescribed assessment within the established time frames. The undertakings' concerned and interested third parties may file an application before the Civil Court (Commercial Section) on points of law or fact, and request an appeal from the decision of the DG.

Scope of legislation

2 What kinds of mergers are caught?

The CCRs apply to a 'concentration' defined as follows: the merging of two or more undertakings that were previously independent of each other; or the acquisition by one or more undertakings or the acquisition by one or more persons or undertakings already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more undertakings, whether occurring in Malta or outside Malta when in the preceding financial year the aggregate Maltese turnover of the undertakings concerned exceeded €2.3 million and each of the undertakings concerned had a turnover in Malta equivalent to at least 10 per cent of the combined aggregate turnover of the undertakings concerned.

3 What types of joint ventures are caught?

The CCRs specifically provide that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, namely a 'full-function joint venture', is considered to be a 'concentration'. Accordingly, such joint ventures, or the acquisition of control of joint ventures are also caught by the CCRs and the CA.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined as having the possibility of exercising decisive influence on an undertaking, in particular:

- through ownership or the right to use all or part of the assets of an undertaking; or
- through rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking, provided that even persons or undertakings not holding such rights or entitled to such rights under the contract concerned are deemed to have acquired control if they have the power to exercise the rights deriving therefrom.

Minority and other interests are not specifically mentioned in the legislation, but if they bring about a change in control, there will be a concentration within the meaning of the CCRs.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The CCRs establish a series of thresholds that have to be met for a concentration to be notifiable to the DG. Those thresholds are based on turnover.

In the case of mergers or takeover bids occurring in or outside Malta, in the preceding financial year, the aggregate turnover in Malta of the undertakings concerned exceeded €2.3 million and each of the undertakings concerned had a turnover in Malta equivalent to at least 10 per cent of the combined turnover in Malta of the undertakings concerned. The Office for Competition has always interpreted the 'aggregate turnover' threshold to relate solely to turnover in Malta.

In the case of concentrations consisting of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts that are the subject of the transaction are taken into account with regard to the seller or sellers. Nonetheless, where two or more such transactions take place within a two-year period between the same persons or undertakings, they are treated as one and the same concentration arising on the date of the last transaction.

In the case of credit institutions and other financial institutions, the turnover includes the sum of the following income items, after deductions of value added tax and other taxes directly related to such items, where appropriate, that are received by the institution or its branch in Malta:

- interest income and similar income;
- income from securities;
- income from shares and other variable yield securities;
- income from participating interests;

- income from shares in affiliated undertakings;
- commissions receivable;
- net profit on financial operations; and
- other operating income.

In the case of insurance undertakings, the turnover consists of the value of gross premiums written. This comprises all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including outgoing reinsurance premiums and after deduction of taxes and parafiscal contributions (payments made by the employer to family compensation funds) or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

The aggregate turnover of an undertaking concerned is calculated by adding together the respective turnovers of the following:

1. the undertaking concerned;
2. those undertakings in which the undertaking concerned, directly or indirectly:
   - owns more than half the capital or business assets;
   - has the power to exercise more than half the voting rights;
   - has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings; or
   - has the right to manage the undertakings' affairs;
3. those undertakings that have in the undertaking concerned the rights or powers listed in (2);
4. those undertakings in which an undertaking as referred to in (3) has the rights or powers listed in (2); and
5. those undertakings in which two or more undertakings as referred to in (1) to (4) jointly have the rights or powers listed in (2).

Where undertakings concerned by the concentration jointly have the rights or powers listed in (2) above, in calculating the aggregate turnover of the undertakings concerned, no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in (2) to (5) above, but account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, this turnover being apportioned equally among the undertakings concerned.

The CCRs bestow numerous powers upon the DG to be able to carry out his or her duties and undertake all necessary investigations into undertakings and associations of undertakings. Thus, the DG has the power:

- to examine the books and other business records;
- to take or demand copies of or extracts from the books and business records;
- to ask for oral explanations on the spot; and
- to enter any premises, land and means of transport of undertakings.

The undertakings and associations of undertakings must in turn submit to such investigations, ordered by decision of the DG.

Similar investigative powers are also provided in the Competition Act. In such cases, the DG may request any undertaking or association of undertakings to furnish him or her with any information or document in its possession that he or she may have reason to believe is relevant to the matter under investigation, within such time as in the circumstances of the investigation the DG may consider reasonable. The DG's power is only limited with respect to documents or the disclosure of information subject to the duty of professional secrecy.

The DG only has the power to investigate transactions that meet the turnover thresholds set out in the CCR.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of a notification to the DG is mandatory for all types of concentrations. The CCRs contain a concentration notification form (Form CN) that must be followed in all cases.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Although no specific reference to foreign mergers is made in the relevant laws, it is nonetheless quite clear that foreign-to-foreign mergers are also caught. This, inter alia, emerges from the inclusive definition of 'concentration', which catches mergers and takeovers 'whether these occur within or outside Malta', thereby including foreign-to-foreign mergers. In addition, the definition of concentration requires each of the undertakings concerned to have a turnover in Malta.

The CCRs adopt a local effects test in prohibiting concentrations that might lead to a substantial lessening of competition in the Maltese market or part thereof.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Apart from tax rules, money laundering and the legislation on collective investment schemes, there are no rules or provisions concerning foreign investment or foreign direct investment.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations shall be notified to the Director General (DG) prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest, within 15 working days. For a concentration to be considered as complete, the notification must be carried out in accordance with the rules set out in the CN Form to the Control of Concentrations Regulations (CCRs) and the notification fee specified in the same CN Form must be paid on notification. In default, the DG will declare the notification to be incomplete and hence invalid.

Penalties between €1,000 and €10,000 may be imposed by the Civil Court (Commercial Section) (the Court) for failure to file a notification before implementation.

The Court will impose a penalty of up to 10 per cent of the total turnover of an undertaking or association of undertakings concerned in the preceding business year for putting into effect a concentration before its notification.

To date, the DG has never applied any of these penalties.

10 Which parties are responsible for filing and are filing fees required?

Notification is to be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings. This means that in the case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification; in the case of a public bid to acquire an undertaking, the bidder must complete the notification. However, in the cases where the concentration consists of a merger or the acquisition of joint control, the notification is to be made jointly by the parties to the merger or by those acquiring joint control as the case may be. Each party completing the notification form is responsible for the accuracy of the information that it provides. The notification fee, which was introduced in 2007 by Legal Notice 49 of 2007, must be paid by the notifying party or parties on submission of the duly completed notification form and such fee amounts to €163.06.

It is also relevant to point out that, although pre-notification meetings with the DG are not mandatory, they are recommended. In fact, the Form CN explicitly states that pre-notification meetings are extremely valuable to both the notifying parties and the DG in determining the precise amount of information required in a notification and, in the large majority of cases, will result in a significant reduction of the information required. Accordingly, notifying parties are encouraged to consult the DG regarding the possibility of dispensing with the obligation to provide certain information.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Following the submission of all the required information, the DG has to take a decision regarding the applicability of the CCRs to a concentration within six weeks. Where he or she finds that the notified concentration falls within the scope of the CCRs, the DG will initiate proceedings. In a Phase I proceeding, the law, however, allows the extension of this period to two months in cases where, at any time during the first five weeks, the undertakings concerned submit commitments aimed at modifying the concentration in such a way as to make it compatible with the CCRs. Up until the fifth week, the notifying party may also request a moratorium of three weeks to discuss and present substantially revised commitment proposals. However, it is up to the DG to decide whether to accede to such a request. If, following modifications, the DG finds that the concentration does not infringe the CCRs, the DG shall issue a decision declaring such concentration to be lawful. The decision is also considered to cover restrictions that are directly related and necessary for the concentration's implementation. The DG may also choose to attach conditions and obligations to ensure that the undertakings comply with the commitments they entered into.

Where the DG finds that a concentration raises serious doubts as to its lawfulness in terms of the CCRs and decides to initiate Phase II proceedings, the DG must, except in the case of modifications, issue a decision declaring that the concentration is unlawful within not more than four months from the date on which proceedings were initiated. However, when the undertakings concerned submit commitments with a view to rendering the concentration lawful in terms of the CCRs, following the DG's initiation of the said proceedings and within three months of the initiation of the said proceedings, they may request that this four-month period be suspended for up to one month for proper consideration of such commitments, thereby extending it to a possible five months.

The CCRs also provide for a simplified procedure in cases of concentrations deemed not to raise serious doubts as to their legality in terms of the CCRs. Where the simplified procedure applies to a transaction, the DG must issue a short-form decision to that effect within four weeks of notification. The simplified procedure applies to the following categories of concentrations that are deemed not to raise serious doubts as to their legality in terms of the provisions of the CCRs, unless the DG, in exceptional cases and in view of the economic conditions pertaining to the market and the parties to the concentrations, deems otherwise:

- two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities in the territory of Malta because the turnover of the joint venture or the turnover of the contributed activities, or both, is less than €698,812.02 in the territory of Malta and the total value of assets transferred to the joint venture is less than €698,812.02 in the territory of Malta;
- two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a market that is upstream or downstream of a product market in which any other party to the concentrations is engaged; or
- two or more undertakings merge or one or more undertakings acquire sole or joint control of another undertaking and two or more of the parties to the concentrations are engaged in business activities either in the same product and geographical market and their combined market share is less than 15 per cent or in a product market that is upstream or downstream of a product market in which any other party to the concentration is engaged and their combined market share is less than 25 per cent.

The simplified procedure is available where there is not going to be a substantial lessening of competition.

The implementation of the transaction must be suspended until clearance. The DG shall examine the notification and shall determine within a six-week period whether to proceed with one of the following methods:

- conclude that the concentration notified does not fall within the scope of these regulations and record that finding by means of a decision;
- conclude that the concentration notified, although falling within the scope of these regulations, does not raise serious doubts about its lawfulness in terms of the CCRs and decide not to oppose it; the DG shall declare it to be a lawful concentration and such a declaration shall also cover restrictions directly related and necessary to the implementation of the concentration; or
- initiate proceedings after concluding that the concentration notified falls within the scope of these regulations and raises serious doubts as to its lawfulness in terms of the provisions of these regulations. All proceedings are deemed to be closed by means of a decision, which, subject to certain exceptions, must be taken within not more than four months of the date on which proceedings are initiated.

Where the DG finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts as to its lawfulness, the DG may decide to declare the concentration to be a lawful concentration.

The CCRs state that all the aforementioned time periods shall be suspended in a number of cases where, inter alia, the information given is not provided in full.

Where the DG has not taken a decision within the time limits set in the CCRs, the regulations state that the concentrations shall be deemed to be lawful.

The general rule states that a concentration shall not be put into effect either before its notification or until it has been declared lawful. However, this rule does not apply in cases of a public bid that has been notified to the DG and on the basis of a special derogation granted by the DG, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments. Furthermore, in all cases, the DG may, upon a reasonable request and after having taken into account the effect of a suspension (eg, major financial risks) and the threat of competition, grant a derogation from the obligation to suspend transactions prior to clearance, and this derogation may be subject to conditions and obligations to safeguard effective competition.

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a transaction is carried out before clearance, apart from any penalties that may be levied for this breach, its validity will depend on whether clearance is eventually granted. If the result is that the concentration is allowable under the CCRs, then it is likely that the transactions will be deemed valid.

The CCRs contain special rules regarding securities. The suspension of concentrations rule does not apply to transactions in securities, including those convertible into other securities admitted to trading on a market, which is regulated and supervised by the competent authorities appointed under the law and that operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of the provisions of the CCRs.

A concentration shall not be put into effect either before its notification or until it has been declared lawful pursuant to a decision or on the basis of a presumption according to Regulation 9(7), that is, where the DG has not taken a decision in accordance with the time periods stipulated under the CCRs.

The CCRs also provide for penalties in situations where clearance or derogations from suspension are granted subject to certain conditions or obligations, which are then breached by the undertakings. Accordingly, in respect of persons or undertakings that intentionally or negligently fail to comply with an obligation imposed by decision pursuant to the provisos to Regulations 7(3) (derogation from suspension) or 8(2) (authorisation decision with commitments); put into effect a concentration in breach of the suspension of concentrations rule; or put into effect a concentration declared unlawful in terms of the provisions of the CCRs, the Court will impose a penalty of up to 10 per cent of the total turnover of an undertaking or association of undertakings concerned in the preceding business year.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No specific reference is made to foreign-to-foreign mergers in the relevant laws and the normal provisions are applicable.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Local authorities are empowered to take the necessary remedial action in the case of a foreign-to-foreign merger that is in breach of the CCRs. Naturally such a merger would be acceptable if it has a minimal effect on the Maltese market. 'Hold-separate' arrangements may be used, but, nevertheless, the merger is likely to be caught under the CCRs if, notwithstanding the arrangement, it results in a lessening of competition in the Maltese market.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

A public bid that has been properly notified is not suspended before clearance, provided that the acquirer does not exercise the voting rights attached to the security or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DG in terms of the CCRs.

The CCRs stipulate that the bidder acquiring an undertaking or part thereof must submit the notification. Furthermore, in such cases, Form CN specifically requires:

- a declaration of whether any public offer for the securities of one party by another party has the support of the former's board of directors or other bodies legally representing that party; and
- a copy of the offer document, which, if unavailable at the time of notification, should be submitted as soon as possible and no later than when it is posted to shareholders.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification of concentrations is to be made in accordance with the provisions of the Form CN contained in a schedule attached to the CCRs. This form requires the applicants to supply details about, inter alia:

- the notifying party and all parties to the concentration;
- the nature of the concentration;
- the extent to which the parties are involved in the concentration;
- the economic and financial structure of the concentration;
- the proposed structure of ownership and control;
- the worldwide and Maltese turnover;
- details on product and market descriptions (including structure of supply and demand, market entry and pre-existing agreements in the market) together with all supporting documentation; and
- all ancillary restraints entered into by the parties to the concentration and other involved parties (including the seller and minority shareholders).

Until all the required information is supplied, the notification will be deemed to be incomplete and no time frames shall commence until all the necessary information and details are supplied.

The CCRs list four types of documents to be submitted:

- copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties of a public bid;
- in a public bid, a copy of the offer document; if it is unavailable at the time of notification, it should be submitted as soon as possible and not later than when it is made available to the shareholders;
- copies of the most recent annual reports and accounts of all the parties to the concentration; and
- where at least one affected market is identified: copies of analyses, reports, studies and surveys submitted to or prepared for any members of the board of directors, the supervisory board, or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to competitive conditions, competitors (actual and potential) and market conditions.

Where a party supplies incorrect or misleading information relating to a deal, intentionally or negligently, they may be liable to an administrative fine of not less than €1,000 and not more than €10,000, as imposed by the DG. In addition, the DG may also revoke his or her decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The investigative process can be broadly divided into two separate phases. The first phase commences from notification and lasts until the initial decision is issued, whereby the DG determines whether to start proceedings. The second phase comes into effect when, upon finding that a concentration raises serious doubts as to its lawfulness in terms of the CCRs, the DG initiates proceedings to further investigate and, if need be, induces modification by the applicants of the said concentration to bring it within the parameters of the CCRs.

Within this second phase, undertakings may submit commitments with a view to rendering the concentration lawful and the DG may in turn request the supply of certain additional information as well as order certain investigations to be carried out. At the end of this phase, the DG either declares the concentration to be in breach of the CCRs and therefore prohibits it, or else finds it to be allowable subject to the imposition of certain conditions, restrictions or modifications and issues a decision to that effect.

In the case of concentrations deemed not to raise serious doubts as to their legality in terms of the CCRs and falling within the ambit of the simplified procedure, the DG shall issue a short-form decision to that effect within four weeks from notification.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Although there are no specific exemptions to speed up the process, in practice pre-notification meetings with the DG and consultation on determining the precise amount of information required in a notification, explaining the product market concerned and identifying key issues and possible competition concerns, usually enables the DG to process the CN Form within shorter time frames, although legally he or she is not obliged to do so.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

To determine whether a concentration is deemed to be legal, the Control of Concentrations Regulations (CCRs) require the Director General (DG) to take into account, inter alia, the need to maintain and develop effective competition in the Maltese market, the geographical and product markets and potential competition from other undertakings. The test for product markets stipulates, inter alia, the need to give regard to issues of substitutability, conditions of competition, prices and cross-price elasticity of demand. The geographic market test comprises an analysis of the area in which conditions of competition are sufficiently homogeneous and distinct from neighbouring areas. In this regard, the Maltese market, when distinct from the EU market, is generally considered as one single geographical area.

Other factors taken into account in making an assessment of a notified concentration include:

- whether the business or part of the business of a party to the concentration has failed or is likely to fail (to the best of our knowledge, there have not been any instances where this failing-firm defence has been raised);
- the market position of the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users and their access to supplies or markets;
- any legal or other barriers to entry;
- supply and demand trends for the relevant goods and services;
- the interests of the intermediate and ultimate consumers;
- the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition; and
- the nature and extent of development and innovation in a relevant market.

20 | Is there a special substantive test for joint ventures?

Certain joint ventures fall under the CCRs. In addition to a general substantive test applicable to concentrations in general, in the case of a joint venture the DG should have particular regard as to whether two or more parent companies retain significant activities in the same market as the joint venture or in a market that is neighbouring, downstream or upstream from that of the joint venture, and as to whether the coordination resulting from the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Office for Competition would request all the information as set out in Form CN for the purposes of assessing a concentration. This would include an investigation and determination of:

- its market share thresholds;
- whether there is overlap between the relevant geographic market and relevant product market;
- market power; and
- whether there is an effect on the competition in the Maltese market.

It will also consider whether the benefits derived from the merger outweigh the effects on competition in Malta. However, the company has to prove that these efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services.

The Office for Competition is concerned with mergers that have horizontal effects (where two or more parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 per cent or more) and vertical effects (where one or more of the parties to the concentration are engaged in business activities in a product market that is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market share is 25 per cent or more, regardless of whether there is or is not any existing supplier or customer relationship between the parties to the concentration). Mergers having vertical effects will most probably create barriers to entry in the market or will increase the possibility of parties colluding in the market.

The Office for Competition is also concerned with the following issues:

- supply and demand, including supply and distribution structures, maintenance of service networks and the identity of major suppliers and customers;
- existing cooperative agreements within the market; and
- certain cases of conglomerate mergers, especially where the merger creates or enhances portfolio power.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The CCRs grant the Director General (DG) discretion to hear other persons or undertakings showing a sufficient interest in the concentration. Therefore, apart from representatives of the administrative or managerial bodies of the undertaking concerned, any third parties showing a sufficient interest in the concentration may apply in writing to the DG to make known their views in writing or orally. However, the CCRs are clear on the relevant assessment to be made and non-competition issues are not relevant to the review process.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The CCRs lay down the framework for various economic considerations to be made. In determining whether a concentration is prohibited or not, the DG is obliged to take into account, inter alia, whether the business or part of the business, or a party to the concentration has failed or is likely to fail; and the economic and financial power of the undertakings concerned.

Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration are allowed if the undertakings prove that such efficiency gains cannot be attained otherwise and are verifiable in the form of lower prices, greater innovation and choice or quality of service to consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The merger control legislation in Malta allows the relevant authority to perform the following:

- the imposition of conditions and restrictions upon the applicants when granting clearance, thereby regulating the transactions to be performed;
- revocation of clearance where:
  - the decision is based on information supplied by the undertakings that turns out to be incorrect or obtained by deceit; or
  - the undertakings concerned commit a breach of a commitment attached to the decision;
- the imposition of penalties on the undertakings concerned where such undertakings are in breach of any of the provisions of the Control of Concentrations Regulations (CCRs); and
- a declaration of invalidity of concentrations.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Notifying parties that are informed by the Director General (DG) that the concentration they notified raises serious doubts as to its lawfulness under the CCRs, may, within the prescribed time frames, enter into negotiations with the DG and effect modifications or otherwise submit commitments and restrictions to which the concentration will be subjected in case of clearance. There are no restrictions as such as to the method to be proposed by the notifying parties and the undertakings concerned are given adequate opportunities to remedy the situation by proposing a remedy, which can be structural as well as behavioural, including divestments. Clearance will only be given, however, if the remedies have been agreed to by the DG and the concentration will not lessen effective competition.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

No specific conditions for such remedies are established by law. The conditions would generally be stipulated by the DG and may include a time frame within which divestments or other remedies must be implemented. The DG generally adopts an approach that is similar to that adopted by the European Commission and the European courts.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Although there are foreign-to-foreign mergers that, from time to time, are notified to the Maltese authorities, to date, no occasions have arisen where such mergers were objected to in Malta. Generally, where the Maltese authorities may have had cause to object to any such merger, this would also have been stopped or objected to by authorities within the European Competition Network.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

If the parties to a concentration or other involved parties (including seller and minority shareholders), or both, enter into ancillary restraints that are directly related to and necessary to implement the concentration, these restrictions may be assessed in conjunction with the concentration itself.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Control of Concentrations Regulations (CCRs) place a considerable emphasis on customers and the preservations of their rights. In fact, Form CN requires the provision of details of the five largest independent customers of the parties to the concentration in each affected market. Within this framework, it may be envisaged that the Director General (DG) will consult these customers to determine the effect that the proposed concentration will have upon them. Moreover, the notification is required to be published and upon such publication, any interested third party, including competitors, may come forward and present their objections to the DG.

Furthermore, before taking any second-phase decision, the DG may, if he or she deems it necessary, request information from or hear other persons or undertakings that show sufficient interest in the concentration. A request of information to a third party by the DG, which, in the course of his or her investigations has not been answered, operates to suspend the running of time within which the DG is bound to give a decision, although this shall not extend the maximum allowable time frame for a decision.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Following notification, the proposed concentration is published in a local daily newspaper and in the government gazette, inviting third parties to make submissions. The information given concerns the actual notification, the names of the parties, the nature of the concentration and the economic sectors involved.

The CCRs do, however, oblige the DG, who is bound by professional secrecy, to take account of the legitimate interests of the undertakings concerned in the protection of their confidentiality and business secrets. Furthermore, information acquired by the DG during hearings or following a request made to the parties for an investigation shall be used only for the purposes of that hearing and information requested may not be disclosed.

Finally, decisions taken by the DG are published, but the CCRs once again oblige the DG to have regard for the legitimate interests of undertakings in the protection of their business secrets.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Office for Competition is the designated competition authority under article 35 of EC Regulation 1/2003 and, as such, must cooperate with the European Commission. The Office for Competition is also a member of the European Competition Network, and is often involved in cooperation relating to various matters including investigations, interpretations and liaison with foreign authorities.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Throughout the investigation process preceding the decision, all parties may make new submissions and proposals to remedy any situation that may raise doubts as to the lawfulness of the concentration.

Persons, undertakings or associations of undertakings concerned, or any third party entitled to a hearing in accordance with the Control of Concentrations Regulations (CCRs), may, within 20 days of notification or publication of the decision, file an application before the Civil Court (Commercial Section) (the Court) on points of law or fact, and request an appeal from the decision of the Director General (DG). The appeal application filed does not have the effect of suspending the decision unless the Court, upon a reasonable claim raised by the party concerned in the proceedings, and after considering the submissions of all parties to the proceedings, suspends the decision under such conditions as it may deem fit.

The Court has the power to substitute its discretion for that of the DG, including the power to either confirm, modify or quash in whole or in part, the decision of the DG; where the Court quashes all or part of the decision of the DG, it may refer the matter back to the DG to take a new decision.

There is also a right to appeal on points of law or fact before the Court of Appeal by any party to the proceedings before the court who feels aggrieved by the judgment delivered by that court within 20 days from the date of the judgment of the court.

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Time frame

33 What is the usual time frame for appeal or judicial review?

Persons, undertakings or associations of undertakings concerned, or any third party entitled to a hearing in accordance with the CCRs, may, within 20 days of notification or publication of the decision, file an application before the Court on points of law or fact, and request an appeal from the decision of the DG. The appeal application filed does not have the effect of suspending the decision unless the Court, upon a reasonable claim raised by the party concerned in the proceedings, and after considering the submissions of all parties to the proceedings, suspends the decision under such conditions as it may deem fit.

There is also a right to appeal on points of law or fact before the Court of Appeal by any party to the proceedings before the court who feels aggrieved by the judgment delivered by that court within 20 days from the date of the judgment of the court.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Following 2011 amendments to the Competition Act, the enforcement regime was changed so that the Director General (DG) assumed the power to investigate and sanction behaviour deemed to restrict competition and if necessary impose an 'administrative fine' of 10 per cent of the turnover from the undertaking. However, in May 2016, the Maltese Constitutional Court adopted its judgment in *Federation of Estate Agents v Director General* (Competition) (3 May 2016), which held that certain provisions of the Competition Act breached the right to a fair hearing enshrined in the Constitution and, therefore, legislative amendments were required for the Office to be able to adopt any decisions finding infringements or impose penalties. Accordingly, until the Competition Act was amended, the DG was unable to impose administrative fines if there was a breach of the substantive provisions of the Competition Act.

On 31 May 2019, Act XVI of 2019 entered into force, amending the Competition Act so that the imposition of penalties can resume, but subject to a new enforcement regime. Under the Competition Act as amended, if the Office for Competition, following an investigation, considers that a breach of competition law has occurred, the DG can no longer issue a decision itself. Rather, it must file a sworn application (ie, a statement of claim confirmed on oath) before the Civil Court (Commercial Section) (the Court) against the suspected undertaking or undertakings concerned. The sworn application must contain, among other things, a summary of the facts that led the DG to find a suspected infringement of competition law and a demand to impose a fine (penalty) or other remedy on the undertaking or undertakings concerned for that breach.

As a consequence, under the Control of Concentrations Regulations (CCRs), although the DG may issue a decision in terms of the CCRs, the penalties contemplated under the CCR may only be imposed by the Court.

Reform proposals

35 | Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Office for Competition has taken a more proactive approach in keeping markets under review and intervening on possible transactions, which although not notified, could give rise to a concentration in terms of the Control of Concentrations Regulations.

In the year 2020, the Office for Competition issued 10 decisions, which, unlike in previous years, required a substantive assessment as to their impact in Malta. There have been an increased number of mergers in the gaming sector and the wholesale and retail trade sector.

Mexico

Gabriel Castañeda

Castañeda y Asociados

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The original Federal Economic Competition Law came into force in 1993 (amended in 2006 and 2011), and its implementing regulations governed merger control. Enforcement was the exclusive responsibility of the Federal Competition Commission (FCC). In 2013, the FCC was substituted by a new agency, the Federal Economic Competition Commission (COFECE).

In June 2013, stemming from an unprecedented constitutional reform in the field of telecommunications, two new agencies were created, the aforementioned COFECE and the Federal Institute of Telecommunications (IFT), both autonomous bodies, with legal personality. The IFT is the agency that reviews pre-merger notifications related to the telecommunications and broadcasting industries, and the COFECE reviews the rest of the premerger notifications in the other areas of the economy.

The Federal Economic Competition Law (FECL) was approved in Congress and was published in the Official Gazette on 23 May 2014. The FECL replaces the 1993 Act and came into force on 7 July 2014. The core of the merger analysis was not changed, but the order of the Chapter of Merger Control and its articles was modified. The FECL preserved most of the substantive provisions of the old Act; however, it created a newly designed agency.

COFECE's current Organic Statute was published in July 2020, and IFT's current Organic Statute was in July 2020.

In November 2014, the COFECE issued the FECL's Regulatory Provisions (updated in August 2019), while in January 2015 the IFT issued the FECL's Regulatory Provisions for the Telecommunications and Broadcasting Industries.

COFECE issued an updated version of its Guidelines for merger review in April 2021 and is achieving notable influence, both in merger enforcement and advocacy functions.

Main subjects included in the new Guidelines are:

- the assessment and merger analysis of joint ventures;
- clarification on issues relating to the notification thresholds;
- identification of which party is bound to notify a transaction that involves multiple buyers; and
- for failing firm defence cases, parties must submit reliable information on issues such as the financial deterioration of the firm; that there are no reorganisation alternatives; and the risk of imminent exit from the company and its assets, among other arguments.

Scope of legislation

2 | What kinds of mergers are caught?

Article 61 of the FECL employs a very broad interpretation of 'concentrations', a term that includes mergers, acquisitions of control or any acts by which shares, trusts, equity, partnerships and assets of any kind are concentrated. Straightforward business vehicles that meet monetary thresholds should thus be informally referred to the COFECE before filing. In any case, any merger meeting monetary thresholds defined in article 86 of the FELC must be notified to COFECE or the IFT, regardless of any vehicle used for the merger.

3 | What types of joint ventures are caught?

Under Mexican competition law, joint ventures above jurisdictional thresholds are subject to clearance before they are completed. Assessment of these cases is similar to that of other concentrations.

Although joint ventures are not addressed directly in the statute or regulations, current practice considers such arrangements as concentrations and thus subject to pre-notification rules if and when thresholds are met. Joint ventures are currently subject to rule-of-reason analysis, and where there are substantial horizontal or vertical issues in a particular case, it is therefore strongly advisable to explain and be prepared to substantiate the absence of anticompetitive concerns and efficiencies expected to arise from the joint venture to avoid incurring outright prohibition.

To determine whether a joint venture should be analysed as a concentration, the merger guidelines point out that COFECE will carefully consider, at least, the following elements:

- lifespan of the agreement – the collaboration agreements that fit into the definition of concentrations are those that are designed to be permanent or that involve the long-term integration of activities of the participating companies;
- independence – the degree to which the joint venture will act independently, determining its marketing strategies, pricing policies, distribution, sales and financial decisions, among others, is a sign that the corresponding joint venture should be filed;
- scope – once a joint venture agreement is signed, COFECE will assess if the parties maintain competitive pressure in the markets outside those of the collaboration agreement;
- rivalry – it is also relevant to determine the degree to which competitive rivalry is limited by virtue of the collaboration agreement; and
- although joint ventures can be analysed as concentrations, the forgoing does not exempt them from being investigated where there are signs or evidence of potential illegal conduct, as defined in article 53 of the FELC (horizontal practices).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The FECL does not provide an explicit definition of control. However, the Supreme Court has stated that a firm can exert decisive influence or control over others de jure or de facto. Transactions meeting the broad definition of 'concentration' (merger, acquisition of control or any act) and the monetary thresholds must be notified, regardless of the nature of what is being acquired. However, minority interests, non-controlling or any other ancillary participation should be claimed as of lesser concern (or mitigating factors) in merger review. Transactions that meet the pre-merger notification thresholds, including transactions related to minority or other interests less than control, must be filed before the authority.

Minority and other interests less than control are caught, and COFECE has not formally considered 'non-controlling' interests as of lesser concern. Certain minority acquisitions are not subject to merger control, especially acquisitions by investment funds (less than 10 per cent), provided certain requirements are met.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are three monetary thresholds defined in article 86 of the FECL. It is sufficient to trigger one of the three sections to be bound to notify a transaction.

Section I

The value of the transaction must exceed the threshold of 18 million times the Unit of Measure and Update (UMU), a benchmark common to all legal thresholds, currently about US$80 million, considering an exchange rate of 20 Mexican pesos per US$1. By 'value', COFECE considers the price (or consideration agreed upon) paid by the purchaser, including money, liabilities or some type of exchange of shares or other assets to be paid in Mexico.

Section II

It has two components: the first part refers to the transfer of at least 35 per cent of shares, assets or other form of participation; and the second part is to determine if the agent object of the transaction owns assets or had sales in Mexico, regardless of destination, for more than 18 million times the UMU (about US$80 million).

Section III

It also has two components. The first one refers to the accumulation of assets or stockholders' equity for more than 8.4 million times the UMU (about US$37 million). In case the transaction does not refer to the acquisition of all the shares of the target, the proportional value that is actually acquired is taken into account. With respect to this component, the value of the assets actually accumulated is assessed, and the value considered, refers to the higher figure between the commercial value and the value stated in the financial statements.

With respect to the second part of this section, COFECE considers the sum of assets or annual sales of the parties involved, located or generated in Mexico, separately or jointly, with a value that exceeds 48 million times the UMU (about US$213 million). Assets and sales must be located or generated in Mexico.

Sources of information for notification purposes

For the determination of the value of assets, sales, or income and stockholders equity, the source of information is the financial statements. The required financial statements must be audited, and must be from the immediate past tax year. Exceptionally, in the event of not having audited financial statements, internal financial statements may be submitted, as long as they comply with accepted financial information standards in Mexico or the country of the notifying agent.

The relevant variables to be considered in these financial statements are as outlined below.

Value of assets

For this test, COFECE considers the higher value of the: total value of the assets as stated in the balance sheet; or commercial value of the assets, which may differ from the value stated in the financial statements.

In the case of accumulation of assets consisting of shares, the value of these will be obtained from the seller's financial statements. In cases where that value cannot be obtained, the amount of the assets can be calculated as a proportional amount of the assets of the acquired object.

Value of sales

The FELC refers to annual sales. COFECE may also assess the concept of 'income', which appears in the statement of income of the financial statements.

Concentrations that are below the thresholds provided for in article 86 the FELC may result as questionable and thus become subject to investigation. COFECE and IFT have just one year to investigate mergers that do not meet the monetary thresholds.

COFECE and IFT welcome informal inquiries from parties regarding specific questions as to threshold analysis. Written but non-binding guidance may be requested if parties are clearly identified and proper powers of attorney are submitted with sufficient data to assess the specific problems prompting an inquiry.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The FECL provides for mandatory pre-merger notification only, that is, those mergers or 'concentrations' meeting or exceeding the monetary thresholds prescribed by law. However, parties may voluntarily file a notification even if the transaction does not meet or exceed the thresholds and the agency may process it as a mandatory filing, or parties may ask COFECE for guidance for planning purposes.

The FECL exempts from notification (article 93 of the FECL), among others, the following:

- mergers where the acquirer increases its participation in the acquired party over which the acquirer holds control since its incorporation or starting of operations dates, or when the COFECE has already authorised the acquisition of such control;
- corporate restructures (ie, when all participating parties belong to the same 'control group' with no third party involved);
- transactions involving firms listed on stock exchanges (Mexican or foreign) where the acquirer is allowed to purchase in one or several acts less than 10 per cent of the corresponding stock or title, and said acquirer may not exercise control over or influence the administration or corporate strategy, and may not exercise voting rights for 10 per cent or more of the stock, and may not appoint or remove the target's members of the board, directors or managers; and
- acquisitions of stock, trusts, investments or similar titles by one or more purely speculative investment fund provided that they do not already own assets or participation in any target's competitors.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

It should be expected that all mergers affecting assets or operations of economic agents doing business in Mexico will in principle be subject to pre-merger notification. However, article 86 of the FECL states that thresholds are to be assessed on a national impact basis: 'assets' are understood to include only those located within Mexican territory; and 'sales' are now understood to be only sales originated in Mexico. Only parties with joint or separated assets located in Mexico or sales originated in Mexico of approximately US$213 million or more will have to notify foreign-to-foreign transactions provided that the target (worth about US$37 million or more) is located in Mexico. There is no nexus test.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Mergers in some sectors or areas restricted for purposes of foreign investment also need to be cleared with the relevant authorities. Mergers in telecommunications are heavily regulated and will not be cleared by COFECE, but a specialised sectorial agency (IFT). In any event, compliance with legislation and other administrative filings should be consistently planned to avoid further requests or unwanted delay. COFECE does not prejudge about other authorisations the involved economic agents must obtain from other authorities.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Federal Economic Competition Law (FECL) provides that mergers reaching or exceeding legal thresholds must be notified to the Federal Economic Competition Commission (COFECE) or the Federal Institute of Telecommunications (IFT) before they are carried out. A general recommendation regarding a deal with evident complexity or antitrust concerns would be:

- to consult on complex horizontal mergers with the respective agency before any important information is actually shared between parties;
- to exchange letters of intent or enter into similar agreements, subject to COFECE or IFT approval;
- to refrain from actual transfer of assets or administration; and
- to refrain from publicly announcing completion or closing.

If a special time frame for the deal or special confidential arrangements are needed, it is advisable to approach the agencies to obtain their approval of such arrangements.

Penalties for not filing reportable transactions may be up to 5 per cent of the turnover in Mexico of the parties involved.

10 Which parties are responsible for filing and are filing fees required?

Article 88 of the FECL provides that all participating parties must file, but at the same time accepts that one party may act as a common representative. Parties should be seen to be disclosing the information needed for a proper assessment of the merger. Because each merger may raise different economic and legal issues, according to the specific market circumstances of the case, it is advisable to make sufficient plans before appearing before the respective competition agency so that information that is best suited to the purpose of convincing the authorities can be supplied, thereby avoiding requests that may delay full completion of the deal. In any case, once all the data has been gathered and the briefs or questionnaires have been completed, it is generally advisable to have access to both parties' data and information, except for information that is clearly confidential. The filing fee for a notification is the equivalent to around US$10,000.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Article 87 of the FECL orders parties not to close all reportable transactions until the final resolution is issued. Thus, there are no waiting periods. However, it is possible to sign the merger's contracts establishing a suspensive condition to obtain COFECE's approval.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

While there are no specific sanctions for closing before clearance, article 127, section VII states that penalties for 'illegal transactions' may be up to 8 per cent of parties' involved turnover in Mexico. A non-reported transaction may be deemed an 'illegal transaction'. However, in the following cases, the transactions were cleared, but were sanctioned not because they were illegal, but for failure to notify before closing. For example, in 2020, COFECE imposed two fines for closing before notification: case number CNT-105-2019 (*Santander/UBS Americas*), with a fine of approximately US$100,000; and case CNT-078-2020 (*Coty/Rainbow*), with a fine of approximately US$40,000.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No. Foreign-to-foreign transactions with no effects in Mexico are not bound to be notified. But if the transaction has to be notified and the parties close before clearance, penalties will be triggered therein.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign-to-foreign transactions with no effects in Mexico are not bound to be notified. Foreign-to-foreign transactions with effects in Mexico must be authorised before closing.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filings can be of two basic kinds: the 'general' procedure, with ordinary time frames (60 working days to issue a resolution, with the referred period beginning after all the information requested by COFECE has been received), and a 'fast-track' procedure for simple and evident cases, with a shorter time frame (15 working days to issue a resolution; requirements for the fast-track procedure are listed in article 92 of the FELC). The information that should be submitted is the same for both procedures, but the fast-track procedure requires further detail to prove that it is 'evident' that the merger is not anticompetitive and that the parties are not 'potential competitors', which requires a higher burden of proof. Therefore, parties usually opt to file under the ordinary procedure, which requires the data and information necessary to define the relevant market and to assess market power.

Solid market data and economic reasoning offer the best guarantee of good results and of avoiding misunderstandings of a factual or analytical nature. A balance must be struck between the quantity of data and simplicity of the argument. Most of the time spent before filing should be dedicated to the planning of information gathering so as to avoid delays and minimise the risk of the competition agencies' opposition.

All information must be in Spanish, with proper translations of non-Spanish material.

Depending upon the complexity of the transaction and the extent and quality of the information available, a typical filing may be 10 to 40 pages long (excluding the formal and analytical annexes). It may take anything from one to six weeks to complete the filing in non-complex cases.

Article 89 of the FECL points out the notification brief must include:

- names of the parties involved in the transaction;
- names of legal representatives (and public documents to demonstrate the representation);
- description of the transaction (and relevant transaction documents);
- explanation of the rationale of the transaction;
- incorporation deeds and public by-laws of the parties involved;
- financial statements of the parties;
- description of the parties' stock structure;
- activities of economic agents involved to the transaction, about holding an interest in the capital stock, management or in any activity of companies which may produce or trade similar or related goods or services to or having substantial relationship with the goods and services of the economic agents participating in the concentration;
- parties' and competitors' market share information;
- location of parties' facilities;
- description of products or services manufactured or sold by the parties involved; and
- any other important information.

If the notifying parties fail to submit the information requested in article 89 of the FECL, COFECE may declare the transaction as not filed (section II, article 90 of the FECL). In addition, parties may be fined for up to approximately US$635,000 for submitting false information.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Parties are welcomed by the staff to engage in pre-notification informal conversations. Article 92 of the FECL grants parties the right to request, from the day of filing, that the transaction should be reviewed under a 'fast-track' procedure if the parties can convince COFECE that the proposed transaction evidently may not lessen, harm or impair the competitive process. If the parties are successful, COFECE shall issue a ruling within 15 business days (upon the issuance of an admissibility ruling issued by COFECE stating that no further information is needed for assessing the transaction). The fast-track analysis includes a general principle subject to several conditioning factors: parties must state that the acquirer does not already participate in markets related to the target's relevant market. In practice, fast-track proceedings are rarely used.

Within the 'general' procedure, when the written notification fails to comply with the requirements established in article 89 of the FECL, the authority, within the following 10 business days after the notification has been filed, shall inform the notifying parties that their notification is not complete and will grant an additional 10-business-day period for the parties to submit the missing information or documents. Said period may be extended per request of the notifying party in duly justified cases (the 'basic information request').

Once the notification brief is complete, the competition agency may issue a second request of information and data within 15 business days.

Once the additional information request for information is met, the competition agency has 60 business days to issue a ruling. If the authority fails to issue a ruling, under a 'sunset provision' the filing is deemed approved by default (although this is a most uncommon event). Before the 60-business-day period elapses, the authority may extend this period by up to an additional 40 business days, which would bring the whole filing review period to a total of around 105 business days, depending on when time is counted from in each specific case. In extreme cases, however, the final resolution could take up to 155 business days.

Consider that this timeline does not take into account all possible scenarios. For example, when there is a remedies proposal, the clock stops and resets back to zero. Then the authority may have an additional 60 plus 40 working days period to issue a final resolution.

A hands-on and fully cooperative approach by the parties may shorten the review process. The staff is usually expected to verify key data and information.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance is the same as for the investigation.

In addition, parties may be asked to explain, orally or in writing, some of the data or arguments in the filing (a formal second request for information). The respective competition agency may conduct an investigation to complement information contained in the filing, which may involve requesting data or information from competitors, clients or suppliers. Each agency's enforcement branch then produces a report with a recommendation to be submitted to each authority's seven-member Commissioners' Panel. This panel issues a ruling. Parties may appeal against the ruling before a federal judge strictly on constitutional grounds.

Article 90 of the FECL defines the timeline for clearance since notification to the final resolution.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The main substantive test is whether the transaction will reduce, impair or prevent competition. Theoretically, the pro-competitive effects of the proposed transaction should be weighed against the anticompetitive effects.

The main test is then broken down into three sub-tests:

- acquisition of market power to the extent of being able to determine price levels or restrict output in the relevant market;
- intent to displace or the effect of displacing competitors orientated to obstruct or with the effect of obstructing market entry; and
- intent to facilitate, or the effect of facilitating monopolistic practices by merging parties (rule-of-reason offences or 'abuse of dominant position' such as refusals to deal, exclusivity agreements, resale price maintenance, boycotts, predatory pricing, discrimination, cross-subsidies and other vertical conduct cases, as well as potential incentives to incur in horizontal behaviour).

In May 2015, the Federal Economic Competition Commission (COFECE) issued a Resolution related to the technical criteria for calculating and applying a quantitative index in horizontal merger analysis. According to this Resolution, COFECE uses the Herfindahl-Hirschman Index (HHI), and the proposed 'safe harbours' are:

- the value of the increase of HHI (Δ) is less than 100 points;
- the value of HHI after the transaction is below 2,000 points; and
- the value of HHI after the transaction is between 2,000 and 2,500 points, Δ is located between 100 and 150 points, and the resulting economic agent after the transaction is not one of the four largest economic agents in the relevant market.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Precedents or practice may not be associated with any single theory of harm. Depending on the case at hand, the agencies focus on the analysis of a combination of the following outcomes: market dominance, joint dominance, unilateral effects, coordinated effects and vertical foreclosure. However, no special predominance on any theory may be singled out. However, rulings to condition or block transactions show mostly concerns over high combined market shares, even in the presence of broad geographical market definitions such as, for example, the 'North American Area'.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The 2013 constitutional reform created the new COFECE and the Federal Institute of Telecommunications (IFT) as autonomous bodies. Therefore, when reviewing mergers, non-competition issues should not be relevant for the review process.

However, because COFECE and the IFT are still young agencies, there are no public precedents regarding this particular issue.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Article 55 of the Federal Economic Competition Law formally recognises that the agency must review claimed efficiency gains stemming from the merger (or the conduct) that favourably affect the competition process. These efficiency gains may include the following: the introduction of new products, products on bargain sale, defective or perishable products, cost reductions arising from the creation of new technologies and production methods, integration of assets, increases in the scale of production, the introduction of technological innovation, the combination of productive assets or investments to improve the quality or extend the attributes of goods and services, improvements in quality, and others that do not cause a significant increase in prices or a significant reduction in consumer choice, and others causing such net contributions to consumer welfare that outweigh anticompetitive effects.

However, at the time of writing, no transaction has been cleared under findings based on economic efficiencies. Despite theoretically being accepted by the statute, in practice the agency is rather resistant to admit allegations thereon: in a transaction that was blocked in 2017 by COFECE (*REA*/*Magnekon*), the parties appeared to have submitted a comprehensive study of merger-specific efficiencies with quantitative support. Moreover, alleged efficiencies represented potential reductions in variable costs, which are generally expected to benefit final customers. In addition, the parties submitted alleged evidence of a recent transaction in the same relevant market in which the efficiencies originally estimated in that case were obtained and actually passed through customers. COFECE concluded that many of the claimed efficiencies had positive effects, but decided to rule that the parties failed to prove that those efficiencies would be passed on to consumers. The resolution did not include estimations of potential harm to allow balancing pro-competitive effects against expected anticompetitive effects.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The competition agencies may order divestiture of assets, impose conditions or block the whole transaction outright. the Federal Economic Competition Commission (COFECE) has imposed stringent conditions in several cases.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Article 90, penultimate paragraph, of the Federal Economic Competition Law allows parties to offer undertakings that may remedy potential antitrust concerns during the review process, including divestment of certain assets or behavioural remedies as a condition for clearance. The notifying parties may submit, from the moment the written notification is filed and until one day after the concentration is scheduled for a Board of Commissioners session, draft conditions to avoid impairing, damaging or preventing the competitive process and free market access as a result of the concentration.

Rulings show that the COFECE often addresses or accepts undertakings related to divestment of assets.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The conditions will depend upon the nature and extent of the antitrust concerns at hand; however, COFECE may accept schedules that set up timing and other relevant facts to ensure that parties comply with agreed undertakings. COFECE may appoint a trustee, for example, to oversee specific divestiture procedures. The Commission's Technical Secretariat performs these oversight and compliance functions.

Regarding transactions considered to pose possible risks to the competitive process, COFECE informs the notifying parties about the risks identified (within a 10-day period prior to the case being scheduled for a Board of Commissioners session), to allow the parties to propose conditions or remedies that may correct the aforementioned risks.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no public track record of a special nature, as foreign-to-foreign mergers with no effects in Mexico are not bound to be notified. Since its inception in 2013, COFECE has reviewed 1,032 transactions, 20 of which were subject to remedies, and seven of which were blocked.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is not uncommon for COFECE rulings to include restrictions concerning potential spillover effects over related markets under its powers to prevent anticompetitive conduct. In addition, COFECE may impose remedies to address the effects of anticompetitive restrictions. COFECE has published guidelines regarding ancillary restraints, mostly referred to non-compete covenants.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

In complex cases, the Federal Economic Competition Commission (COFECE) issues requests for information to customers, suppliers, competitors, or other authorities strengthen its analysis (notifying parties do not have access to these responses). Third parties have no legal rights to access a merger file. Filings and submitted documents, as well as third parties' responses of information, are not public.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Notifications and the process of merger review are not public. The only publicity given to any process is the publication of a redacted version of the final decision.

According to article 124 of the Federal Economic Competition Law (FECL), the information and documents obtained directly by the competition agencies during its investigations and inquiries will be considered as reserved information, confidential information or public information, under the terms of article 125 of the FECL.

During the investigation, access to the file is forbidden to third parties, and, in the aftermath of the procedure, only firms with legitimate legal interest may have access to it, with the exception of information classified as confidential.

Public officials will be subject to responsibility of the information they are presented with. When an order of a competent authority compels the presentation of information, the COFECE and the aforementioned authority shall dictate the measures that will be in place to protect the confidentiality in the terms of the FECL.

Article 125 of the FECL states that confidential information will only be considered as such when requested by the economic agent, and proves its confidentiality. That is, the merging parties involved are asked to identify their confidential information and to prove that the standards of confidential information protection are applicable. Under no circumstances will COFECE or the Federal Institute of Telecommunications be compelled to provide confidential information, nor will it be able to publish it. It will have to keep the information safe to this effect.

The public officials of the competition agencies shall abstain from publicly issuing declarations or revealing information related to the files or matters in process at the respective agency and that could cause harm or directly affect the parties involved, until the economic agent subject to investigation has been notified of the final resolution, preserving at all times the obligations that result from this article.

The COFECE has a strong reputation for keeping the confidentiality of all data and documents provided.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Mexico has entered into several international arrangements to coordinate and cooperate in competition enforcement matters, through free trade agreements (FTAs): the USMCA Agreement (NAFTA was signed in 1994, but was repealed and substituted by the USMCA Agreement in July 2020); the Global Agreement with the EU and its member states; the Trans-Pacific Partnership including 11 countries in the Asia-Pacific region, as well as bilateral FTAs with Bolivia, Chile, Costa Rica, Israel, Japan, Nicaragua and Uruguay. In addition, Mexican agencies are part of bilateral cooperation agreements with the agencies of Argentina, Brazil, Chile, Colombia, Ecuador, El Salvador, Honduras, Korea, Nicaragua, Panama, Paraguay, Peru, Russia and Spain. Such arrangements provide the usual positive comity, exchange of non-confidential information, coordination, cooperation and related items.

Waivers are commonly requested in multi-jurisdictional transactions.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

From the creation of the Federal Economic Competition Commission (COFECE) and the Federal Institute of Telecommunications (IFT) as autonomous constitutional bodies, and as stated in article 28 of the Mexican Constitution, actions or omissions of COFECE and IFT may be challenged only through indirect *amparo* (recourse on constitutional grounds) judgment.

The Mexican Federal Constitution states that the resolutions issued by COFECE or IFT may be contested only by the filing of indirect *amparo* and will not be subject to suspension. In cases in which COFECE or IFT impose fines or order the divestiture of assets, shares or brands, among others, those resolutions will be executed until the *amparo* proceeding is resolved. The *amparo* proceeding is conducted by specialised judges and courts in the terms of article 94 of the Constitution. In no case will ordinary or constitutional remedies against proceeding acts be accepted.

The judiciary has set up specialised tribunals of circuit and district courts in areas of economic competition, broadcasting and telecommunications. It is worth noting that the judiciary has reviewed *amparo* lawsuits related to the imposition of conditions, as in file number CNT-021-2015 (*Soriana/Comercial Mexicana*), or blocked transactions, as in file number CNT-025-2019 (*Inmueblemar/Soriana/Planigrupo Latam*).

In addition, the courts have reviewed cases in which COFECE has imposed fines on unreported transactions and have confirmed COFECE's decisions.

Time frame

33 | What is the usual time frame for appeal or judicial review?

For court recourse, parties must file petitions within 15 business days of being notified of the final resolution. A district judge may take several months to issue its ruling. Parties may appeal before a circuit tribunal as a last resort. The appeal may take between one and five years to be ruled upon. The Council of the Federal Judiciary has established new specialised circuit tribunals and district courts in the fields of economic competition, broadcasting and telecommunications.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, the Federal Economic Competition Commission (COFECE) resolved 128 cases. All cases were authorised except one, which was conditional (*Guiding Light Plastics/Profluent Plastic Technologies*).

Current enforcement challenges for both agencies include the implementation of the Federal Law of Economic Competition, the publication of refined technical criteria and predictable rulings, lack of procedural transparency and the effectiveness and incentives of recourse to competition and telecomm courts.

COFECE and the Federal Institute of Telecommunications are currently facing considerable challenges in enforcing competition principles amid wider government efforts to return influence to state-controlled entities in industries such as oil and energy.

Reform proposals

35 Are there current proposals to change the legislation?

No. The current Federal Law on Economic Competition was approved in Congress, published in the Official Gazette on 23 May 2014, and came into force on 7 July 2014.

In June 2013, Congress made amendments to article 28 of the Mexican Constitution concerning telecommunications industries. The amendments include the creation of the Federal Institute of Telecommunications, which is entitled to review competition issues (mergers, acquisitions and monopolistic practices) in telecommunications industries.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Profluent Plastic Technologies/Plastics Technology of Mexico

In this transaction, the parties included a non-compete covenant that the Federal Economic Competition Commission (COFECE) considered excessive, with implications for markets unrelated with the notified operation and, thus, unjustified. After being cautioned of these risks, the parties proposed modifying the overreaching terms of the non-competition clause in such a way that they could be adjusted to the parameters considered appropriate. Consequently, COFECE resolved to condition the authorisation of the concentration to compliance with these conditions.

Uber/Cornershop

Even though the transaction was originally notified to and reviewed by COFECE, the Federal Institute of Telecommunications also considered itself the competent authority to handle this case. Thus, in strict accordance with the Federal Economic Competition Law, COFECE referred the file to the Federal Judiciary Branch to settle the conflict over jurisdiction.

COFECE raised several arguments to support its position regarding jurisdiction. Among these, COFECE argued that digital platforms, such as Uber and Cornershop, do not provide telecommunications services, but only use them as an input to offer their respective services. The Specialised Circuit Court decided to grant COFECE jurisdiction to resolve the concentration between Uber and Cornershop, taking into consideration, among other assumptions, the following:

- the notifying parties are not telecommunications concessionaires, but rather use them for providing their services through a digital platform;
- the services provided are not telecommunications, but logistics and intermediation between users, drivers and delivery people; and
- the notifying parties use the internet as an input, which does not constitute the platforms' service or its source of income.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The new Moroccan merger control rules are set out in Law No. 104-12 of 30 June 2014 (Dahir No. 1-14-116) on free pricing and competition (the Competition Law) and its enforcement decree No. 2-14-652 of 1 December 2014 (the Decree) and in Law No. 20-13 relating to the Competition Council of 30 June 2014 (Dahir No. 1-14-117) and its enforcement Decree No. 2-15-109 of 4 June 2015.

Under the former legal framework (Law No. 06-99 of 5 June 2000 on free pricing and competition and its enforcement Decree No. 2-00-854), the Chief of Government had decision-making power and the Competition Council had a consultative role when the notified concentration was likely to infringe competition. The opinions of the Competition Council mentioned in this article were released by the Competition Council under the former legal framework.

The Competition Law and Law No. 20-13 significantly modify the roles of the merger control authorities:

- the merger control function has been transferred to the Competition Council; and
- the administration, through the Chief of Government or the delegated governmental authority, retains residual powers (in particular, an evocation power on the decisions of the Competition Council for matters of public interest).

The Competition Law had, in principle, entered into force in December 2015, after the issuance of the ministerial order of the Minister of Foreign Affairs and Governance No. 3633 (3 December 2015) referred to the Minimis Rules, but has only been applicable since the appointment of the new president and members of the Competition Council, which occurred at the end of 2018.

When the notified concentration concerns specific sectors, sectoral regulators are consulted by the Competition Council. This includes the National Telecommunications Regulatory Authority (ANRT) for the telecommunications sector; the High Authority for Audiovisual Communication (HACA) for the audiovisual market; the Bank Al-Maghrib for banks; the Financial Market Authority (AMMC) for the capital market; the Supervisory Authority for Insurance and Social Security; and the National Ports Agency (ANP) for ports.

Article 109 of the Competition Law provides that, unless the relationship between the Competition Council and the sectoral regulators is addressed in the constitutive texts of these institutions, the Competition Council will, from a date defined by a future regulation, exercise its jurisdiction on all sectors.

In the specific case of the telecommunications industry, it should be noted that Law No. 24-96 authorises the ANRT to enforce the concentration control provisions in its industry.

Scope of legislation

2 | What kinds of mergers are caught?

According to article 11 of the Competition Law, a concentration occurs where:

- two or more previously independent undertakings merge;
- one or more persons, already controlling at least one undertaking, acquire, directly or indirectly, whether by purchase of securities or assets, by contract or by any other means, control of the whole or parts of one or more undertakings; and
- one or more undertakings acquire, directly or indirectly, whether by purchase of securities or assets, by contract or by any other means, control of the whole or parts of one other or more other undertakings.

The Competition Law also states that the creation of a joint venture performing on a lasting basis all the functions of an economic entity shall constitute a concentration within the meaning of the Moroccan merger control law.

3 | What types of joint ventures are caught?

Joint ventures might fall under the scope of the Competition Law provided that they perform on a lasting basis all the functions of an economic entity (article 11 of the Competition Law), meaning in particular that the sales of the joint venture should not be exclusively intended for its parent companies (see, for example, the decision of the Competition Council No. 77/D/19 of 12 September 2019) and that the joint venture should conduct its activities as an independent economic actor on the market (see, for example, the decision of the Competition Council No. 101/D/19 of 26 December 2019).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law defines control under article 11 as resulting from rights, contracts or any other means that confer, either separately or in combination, having regard to the considerations of fact or law involved, the possibility to exercise a decisive influence on the activity of an undertaking and, notably:

- ownership rights or rights of use over all or parts of the assets of an undertaking; or
- rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

An internal restructuring of a group of companies does not fall within the scope of Moroccan merger control (see, for example, the decision of the Competition Council No. 01/D/19 of 30 January 2019).

Minority interests can be caught (see, for example, the decision of the Competition Council No. 72/D/19 of 24 July 2019 relating to the acquisition by Carlyle Group of 35 per cent of the shares and voting rights of Compañía Española de Petróleos) if they constitute a concentration within the meaning of article 11.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration must be notified to the Competition Council when one of the three following conditions is fulfilled:

- the combined aggregate worldwide pre-tax turnover of all the undertakings or groups of natural or legal persons parties to the concentration is equal to or more than 750 million dirhams;
- the aggregate Moroccan-wide pre-tax turnover of at least two of the undertakings or groups of natural or legal persons concerned by the concentration is equal to or more than 250 million dirhams; or
- the undertakings that are parties to the concentration, or that are the subject of the concentration, or the undertakings that are economically linked to them, have generated altogether, during the previous calendar year, more than 40 per cent of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market.

However, the Competition Council considers that foreign-to-foreign mergers are not subject to notification if the Moroccan market is not concerned or impacted by the transaction.

The Decree provides that different turnover thresholds may be established for certain specific sectors or geographic areas by the Chief of Government or the government authority delegated by the latter for this purpose.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Under article 12 of the Competition Law, the filing is mandatory and the Moroccan legislation does not provide for any exception to this rule.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers have to be notified (1) where they fulfil one of the notification thresholds and (2) when, according to the Competition Council, the Moroccan market is concerned or impacted by the transaction.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Concerning foreign investments, a convertibility regime is set up in favour of foreign investments by the 'Instruction Générale des opérations de change 2020' of the Foreign Exchange Office. Concerning foreign exchange regulations, the convertibility regime guarantees to the foreign investors concerned freedom to carry out their investment operations, as defined by the Instruction, in Morocco, transfer any income from such investments, and transfer back any income resulting from the transfer or liquidation of their investments when the investments have been made in foreign currencies. To proceed with the transfer, the foreign investor must provide the bank in charge of the transfer with some supporting documents. Moreover, the convertibility regime holds that an investor must, within four months of the date of the foreign investment, file a report with the Foreign Exchange Office including all the details and supporting documents of the transaction (investor's identity, business sector, amount, bank certificates, etc) and must also file an annual summary declaration within four months of the end of the calendar year.

Certain sectoral authorities are in charge of the regulation of special sectors:

- telecommunications – ANRT;
- the audiovisual market – HACA;
- banks – Bank Al-Maghrib;
- the capital market – AMMC;
- insurance –the Supervisory Authority for Insurance and Social Security; and
- ports – ANP.

According to Law No. 20-13, the Competition Council shall seek the opinions of the sectoral regulators on competition issues relating to their sectors of activity. Article 8 of Law No. 20-13 provides for a consultation procedure.

Article 109 of the Competition Law provides that, unless the relationship between the Competition Council and the sectoral regulators is addressed in the constitutive texts of these institutions, the Competition Council will, from a date defined by a future regulation, exercise its jurisdiction on all sectors.

In 2019, the Competition Council entered into a cooperation agreement with the Bank Al-Maghrib to specify their collaboration concerning the competitive issues in the banking industry.

In the specific case of the telecommunications industry, Law No. 24-96 and its enforcement decree authorises ANRT to enforce the concentration control provisions in its industry. To the best of our knowledge, this jurisdiction has never been implemented by the ANRT (however, in 2020, the ANRT applied the provisions of the Competition Law prohibiting the abuses of a dominant position to impose on Maroc Telecom a fine of 3.3 billion dirhams).

Moreover, specific turnover thresholds may be established for certain specific sectors or geographic areas by the Chief of Government or the government authority delegated by the latter for this purpose.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The transaction must be notified to the Competition Council before its completion, as soon as the parties concerned are able to present a sufficiently concrete file to allow the investigation of the case and, in particular, when they have entered into an agreement in principle, signed a letter of intent, or as of the announcement of a public offer.

The sanctions for not filing are as follows:

- for legal entities responsible for filing: a fine amounting to a maximum of 5 per cent of the pre-tax turnover made in Morocco during the last fully closed financial year, increased, when applicable, by the turnover made in Morocco during the same period by the acquired company; and
- for natural persons responsible for filing: a fine of a maximum amount of 5 million dirhams.

Moreover, upon failure to file a notification, the Competition Council compels the parties, subject to a daily penalty payment, to notify the operation, unless they revert to the previous state of affairs.

No sanction for not filing has been published yet.

10 | Which parties are responsible for filing and are filing fees required?

This notification obligation is the responsibility of the natural or legal persons who acquire control of all or part of an undertaking or, in the case of a merger or the creation of a joint venture, of all parties concerned, who must then notify jointly.

There are no filing fees.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Competition Council must rule on the transaction within 60 days of receipt of the complete notification file (Phase I). In case of opening of an in-depth investigative phase, the Competition Council has 90 additional days to take its decision (Phase II). These time limits may be extended or suspended.

Under article 12 of the Competition Law, the filing has a suspensive effect. The parties are thus not entitled to implement their concentration plan as long as the Competition Council (or the administration, if it takes on the case) has not authorised the transaction.

Nevertheless, in case of duly motivated need, the parties can ask the Competition Council for an exemption to this suspensive effect, allowing them to actually complete all or part of the transaction without waiting for an authorisation decision of the competition authorities and without prejudice of this decision (article 14, paragraph 2 of the Competition Law; see, for example, the derogation granted by the Competition Council on 31 August 2020 to Delfingen Industries SA Group to acquire sole control of the shares of several Schlemmer companies).

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

According to article 19 of the Competition Law, closing a concentration before clearance may lead to the application of the fines imposed for failure to file a concentration. No sanction for closing before clearance has been published yet.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No specific rules concerning the sanctions to apply in cases involving closing before clearance in foreign-to-foreign mergers are established by the Moroccan competition legislation and the sanctions for closing before clearance should be applicable in these cases.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Moroccan legislation provides no specific solutions permitting closing before clearance in a foreign-to-foreign merger.

In case of duly motivated need, the parties to a foreign-to-foreign merger can, however, ask the Competition Council for an exemption to the suspensive effect to allow them to close the transaction before clearance (article 14, paragraph 2 of the Competition Law; see, for example, the derogation granted by the Competition Council on 31 August 2020 to Delfingen Industries SA Group to acquire sole control of the shares of several Schlemmer companies).

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

No specific merger rules are provided by Morrocan law for public takeover bids.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification file submitted to the Competition Council must contain in particular specific information and documents listed in the Decree as regards:

- the contemplated operation (including a copy of the agreement subject to the notification);
- the undertakings concerned and the groups to which they belong (including, in particular, their annual accounts, a list of their main shareholders, etc);
- a presentation of the relevant product and geographic markets concerned (including the markets shares of the parties); and
- when a market is affected, a detailed presentation of this market and of the firms active in this market.

A market is considered to be affected when:

- one or more undertakings operate on the concerned market and have an aggregated market share reaching 25 per cent or more;
- at least one of the concerned undertakings operates on the concerned market and another of the concerned undertakings operates on the upstream, downstream or associated market, whether or not there exist supplier relations, as long as all the concerned undertakings reach a 25 per cent market share; or
- the operation leads to the eviction of a potential competitor on the market.

In case of wrong or missing information in the notification file, the Competition Council can impose the fines for failure to file a concentration and also withdraw its authorisation decision. Unless the parties revert to the previous state of affairs, they must once again notify the transaction within one month from the withdrawal of the decision.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

No pre-notification contacts are required.

Upon receiving a notification file, the Competition Council must publish a release containing, in particular, a non-confidential summary of the transaction and the time frame in which interested third parties are invited to make observations.

During Phase I, the Competition Council will examine the file and designate a case officer to follow up the file and conduct the investigation.

The case handler organises one or several meetings to discuss the case and check the completeness of the file.

If the Competition Council considers, at the end of Phase I, that serious doubts remain as to the risk of infringing competition (or at the request of the governmental authority in charge of competition), a Phase II investigation is opened to conduct an in-depth analysis of the transaction.

During Phase II, a report is sent to the parties and to the Government Commissioner. This report contains a statement of the facts as well as the elements of information on the basis of which the case officer has based its analysis and the observations of the parties, if any.

Hearings at the Competition Council are not public. Only the concerned parties and the Government Commissioner may attend such hearings. The Competition Council may also hear all persons in a position to contribute information on the case.

At the end of Phase II, a draft of the decision is communicated to the concerned parties who may present their observations within 10 days.

18 What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance is as follows.

Phase I (60 days)

According to article 15 of the Competition Law, the Competition Council must rule on the transaction within 60 days of receipt of the complete notification file.

If commitments are offered by the parties, this 60-day time limit is extended by 20 days.

In case of particular necessity, such as the finalisation of the commitments, the parties may ask the Competition Council to suspend the deadline for a maximum of 20 days.

At the end of Phase I, the Competition Council may either:

- decide that the notified transaction does not fall under the scope of the merger control;
- authorise the operation subject, where applicable, to the effective implementation of the remedies proposed by the notifying parties;
- open an in-depth analysis of the transaction (Phase II) if it finds that serious doubts remain as to the risk of infringing competition; or
- refrain from adopting any of the above decisions.

Within 20 days after having received a copy of the decision or having been informed of it by the Competition Council, the government authority in charge of competition may ask the Council to open a Phase II investigation.

The transaction is deemed to be authorised upon the conclusion of this 20-day time limit.

Phase II (90 days)

According to article 17 of the Competition Law, the Competition Council must determine within 90 days whether the transaction is likely to infringe competition, notably by creating or strengthening a dominant position or a buying power that places suppliers in a position of economic dependency. The Competition Council also assesses whether the contemplated transaction brings a sufficient contribution to economic progress to offset the competition infringements.

If the notifying parties offer commitments to remedy the anticompetitive effects of the contemplated operation less than 30 days before the end of the 90-day deadline, the deadline will then expire 30 days after the reception of the commitments. Moreover, the 90-day deadline may be suspended for up to 30 days at the parties' request in case of particular necessity, notably to finalise their commitments.

The deadline may also be suspended by the Competition Council, in particular when the notifying parties have failed to provide it with the requested information or to inform it of the occurrence of a new material event. The time limit resumes when the cause of the suspension has been addressed.

The Competition Council may, at the end of the Phase II, either:

- authorise the operation subject to, where applicable, the effective implementation of commitments offered by the notifying parties;
- authorise the operation, while requiring the parties to take all appropriate measures to ensure sufficient competition or to comply with instructions destined to provide a sufficient contribution to economic progress to offset the competition infringements; or
- prohibit the concentration and require the parties, when applicable, to take all appropriate measures to re-establish sufficient competition.

Upon receiving a copy of the decision or being informed of it by the Competition Council, the Chief of Government, or the delegated government authority, may within 30 days exert its power and issue a decision on the transaction for reasons of public interest (such as industrial development, competitiveness of the companies within the international context or job creation).

The transaction is deemed to be authorised when this 30-day time limit has expired.

The Moroccan competition legislation does not contain any accelerated procedure.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test for clearance is whether the planned concentration is likely to infringe competition, notably by creating or strengthening a dominant position or a buying power that places suppliers in a position of economic dependency.

During Phase II, the Competition Council also takes into account whether the contemplated concentration brings a sufficient contribution to economic progress to offset the competition infringements.

20 Is there a special substantive test for joint ventures?

The Moroccan legislation does not provide for a special substantive test for joint ventures.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The Competition Council assesses the effects of the concentration on competition and determines whether the transaction would lead to:

- horizontal effects: the Council examines whether the concentration would lead to an overlap of the merging parties' activities and to an addition of their market shares that would create or reinforce a dominant position on the relevant market and allow the merging parties to act independently from their competitors and customers;
- vertical effects: the Competition Council assesses whether the concentration would foreclose the access to the upstream markets;
- conglomerate effects: the Competition Council examines whether the concentration would lead to an expansion and a diversification of the merging parties' product ranges and trademarks that would increase their market power and enable them to impede competition through practices such as tie-in sales or bundled rebates; and
- coordinated effects: the Competition Council assesses whether the merging parties will, after the transaction, be able to coordinate their behaviour on the market and whether the transaction will thus lead to the creation or the strengthening of a collective dominant position.

To carry out this assessment, the Competition Council defines the relevant product or services market and the geographical dimension of these relevant markets and conducts in particular an analysis of the market structure, the market shares of the parties involved and of their actual and potential competitors, the entry barriers, the importations and exportations on the relevant markets, the customers and the suppliers of the parties involved.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

During Phase II, the Competition Law requires the Competition Council to assess whether the operation concerned provides a sufficient contribution to the economic progress to offset the competition infringements.

Thus, the Competition Council conducts not only a competitive assessment, but also an economic assessment of the concentration.

For example, in its Opinion relating to a concentration concerning the SNI and Danone (No. 32/12), the Competition Council had taken into account the fact that Danone's strategy was in line with the goals of a Moroccan environmental programme.

Therefore, the parties involved in the concentration are also asked by the Competition Council about the aim of the transaction and its impact on Moroccan economic situation (the contemplated investments, the anticipated impact of the transaction on the employment situation, the evolution of the range of products or services offered to the consumers, etc).

Non-competition issues are also taken into account when the Chief of Government, or the delegated government authority, exercises its power and issues a decision on the transaction for reasons of public interest (such as industrial development, the competitiveness of the companies within the international context or job creation).

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies should be taken into account in Phase II of the review process, during which the Competition Council has to assess whether the concentration provides a sufficient contribution to economic progress to compensate for its anticompetitive effects.

The efficiencies that are taken into account by the Competition Council are, in particular, the improvement of product quality, product diversification, technical improvement in the relevant sector, price reductions, job creations, increase in exports, and the stimulating effect of the transaction on the competitive environment of the relevant market.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Council may prohibit a transaction at the end of Phase II and, if necessary, require the parties to take all appropriate measures to re-establish sufficient competition.

The Council can also authorise the operation, while requiring the parties to take all appropriate measures to ensure sufficient competition or to comply with instructions destined to provide a sufficient contribution to economic progress to offset the competition infringements.

Similarly, at the end of Phase II, the Chief of Government or the delegated governmental authority may prohibit a transaction after having considered the case.

In addition, according to article 20 of the Competition Law, if an undertaking abuses its dominant position or a state of economic dependency, the Competition Council may enjoin the undertakings concerned to modify, complete or terminate all of the agreements and measures that gave rise to the concentration of economic power that enabled these abuses. The Competition Council can apply these provisions even if these measures have already been subject to the merger control process.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Structural or behavioural remedies can be proposed by the notifying parties or imposed by the Competition Council to remedy or compensate for the adverse effects of the planned concentration on competition.

In 2012, the Competition Council rendered its first opinion regarding commitments (Opinion No. 31/12 relating to a concentration concerning the SNI and Kraft Foods Maroc) where it recommended the Chief of Government authorise the transaction subject to Kraft Foods respecting various behavioural commitments, such as not practising tie-in sales or offering bundled rebates, and complying with the competition code of conduct and compliance programme.

In September 2020, Uber Technologies proposed remedies relating to future prices and price practices in order to answer the competition concerns identified by the Competition Council regarding the contemplated acquisition of the assets of Careem company.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The parties are allowed to propose commitments:

- along with the notification file;
- at any moment before the end of Phase I; or
- during Phase II, as soon as they have been informed of its opening.

When commitments are offered by the parties during Phase I, the 60-day time limit is extended by 20 days and may be suspended for a maximum of 20 days at the parties' request to finalise their commitments.

If commitments are offered by the parties during Phase II less than 30 days before the end of the 90-day deadline, the deadline will expire 30 days after the reception of the commitments. The Phase II deadline may also be suspended for up to 30 days at the parties' request to finalise the commitments.

The Competition Council, at the end of Phase I or Phase II, and the Chief of Government (or the delegated government authority) if it evokes the case, may authorise the operation subject to the effective implementation of commitments by the parties.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To the best of our knowledge, the Competition Council has not yet required remedies in a foreign-to-foreign merger.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

To date, this is uncertain. The Competition Law and the Decree do not address this issue. The decisional practice of the Competition Council will certainly clarify this point in the future and should follow the position of the European Commission.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

After receiving the complete notification file, the Competition Council publishes a press release that contains a non-confidential summary of the transaction and indicates the time frame in which interested third parties are invited to make observations.

In addition, the Competition Council has the faculty to hear any third party in a position to contribute to its information and to conduct a market test.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Upon receipt of a notification file, the Competition Council publishes a press release that indicates:

- the names of the concerned parties;
- the nature of the transaction;
- the concerned economic sectors;
- the time frame in which interested third parties are invited to make observations; and
- a non-confidential summary of the transaction provided by the parties.

When parties communicate documents or information to the Competition Council, they must indicate which elements they consider as business secrets. The General Rapporteur ensures that this information is reserved to the Competition Council and the Government Commissioner and that a non-confidential version of the documents is prepared, if needed.

Except in cases where the communication or the consultation of documents containing business secrets is necessary to the exercise of the rights of defence of a concerned party, the president of the Competition Council may deny to a party the communication or consultation of these documents.

Moreover, the disclosure by one of the undertakings involved of information obtained during the process concerning another party or a third party is punishable by a 10,000 to 100,000 dirham fine.

According to article 13 of the Decree, the merger decisions of the Competition Council and of the government authority in charge of competition are published in the Official Bulletin and are available on their websites.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Since its reactivation in 2008, the Moroccan Competition Council has started to liaise with foreign antitrust authorities and this cooperation has strengthened since 2019.

Indeed, an association between Morocco and the member states of the European Communities was established by the Euro-Mediterranean Agreement in 2000 and a mechanism of cooperation between European and Moroccan competition authorities was put into place by Decision No. 1/2004 of the EU-Morocco Association Council of 19 April 2004 adopting the necessary rules for the implementation of the competition rules. In 2020, the Moroccan Competition Council and the EU announced a partnership aiming at harmonising and converging their respective legislation in competition law matters.

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A bilateral cooperation has also been established with Tunisia and many exchanges have since taken place (training courses, conferences, etc).

Furthermore, the Competition Council has been a member of the International Competition Network (ICN) since April 2010.

The Moroccan Competition Council was also a founding member of the Euro-Mediterranean Competition Forum (EMCF), an informal regional network that was set up in 2012.

The Moroccan Competition Council also entered into a cooperation agreement with the competition authority of China in 2017 and announced in 2019 new exchanges of information and expertise for the years 2019–2020.

In 2019, the Moroccan Competition Council also announced an agreement with the National Commission of Market and Competition of Spain, a strengthening of its bilateral cooperation with the Portuguese Competition Authority and its cooperation with the Chilean National Economic Prosecutor.

In 2020, a memorandum was signed by the Competition Council with the National Competition Authority of the Republic of Turkey to reinforce their bilateral relationships.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Merger decisions of the Competition Council and of the Chief of Government (or the delegated government authority) may be appealed to the administrative chamber of the Moroccan Supreme Court.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Article 46 of the Competition Law provides that an appeal against merger decisions must be lodged by the concerned parties or the Government Commissioner within 30 days of receipt of the merger decision notification.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Competition Council issued 53 merger control decisions in 2019 and appears to have kept the same rhythm in 2020.

Since it became operational again at the end of 2018, the Competition Council has made merger control enforcement one of its priorities and intends to reinforce the means of its instruction services.

Reform proposals

35 | Are there current proposals to change the legislation?

There are no current proposals to change the legislation, as the Competition Law and Law No. 20-13 were adopted in June 2014 and have only been applicable since the appointment of the new president and members of the Competition Council in November and December 2018.

The Competition Council is currently drafting a handbook about investigation procedures.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the Competition Council published its first annual report for 2019, which was the first year of application of the new merger control regime.

More than 80 transactions were notified to the Competition Council in 2019 and 2020.

Most of these cases were authorised at the end of Phase I. However, a Phase II was opened in a few cases, in particular, in 2019 in the merger between Uber and its competitor Careem and in 2020 in the acquisition by Alstom SA Bombardier of sole control of Transportation UK Ltd.

The Competition Council has been operational during the state of public health emergency linked to the covid-19 crisis.

Netherlands

Winfred Knibbeler, Paul van den Berg and Felix Roscam Abbing
Freshfields Bruckhaus Deringer

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The relevant legislation is the Dutch Competition Act of 22 May 1997 (the Act), which entered into force on 1 January 1998. The general rules on administrative procedure, as laid down in the General Act on Administrative Law, cover enforcement of the Act as well as various procedural aspects.

The body in charge of enforcement is the Authority for Consumers and Markets (ACM), which is competent to take decisions pursuant to the Act. On 1 April 2013, the ACM was created through the merger of the Netherlands Consumer Authority, the Netherlands Independent Post and Telecommunication Authority and the Netherlands Competition Authority (NMa). The ACM is authorised to initiate proceedings, to order parties infringing the Act to cease their behaviour and to take administrative measures. The ACM is an independent agency, as was its predecessor in competition enforcement, the NMa, since 2005. The Minister of Economic Affairs remains responsible for competition policy and may give the ACM general policy instructions but may not give instructions in specific cases. The ACM is headed by a board consisting of three members. Martijn Snoep has been chair of the board since 1 September 2018.

Scope of legislation

2 What kinds of mergers are caught?

The Act applies when any of the following operations occur:

- two or more previously independent undertakings merge;
- one or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings; or
- a joint venture (whether concentrative or coordinative) is established that performs, on a lasting basis, all the functions of an autonomous economic entity.

3 What types of joint ventures are caught?

'Full-function' joint ventures (ie, joint ventures that perform, on a lasting basis, all the functions of an autonomous economic entity) are caught by Dutch merger control. Cooperative aspects of joint ventures are not caught by Dutch merger control, but governed by the cartel prohibition contained in article 6 of the Act, which closely resembles article 101 of the Treaty on the Functioning of the European Union.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined as the ability to exercise a decisive influence on the activities of an undertaking on the basis of factual or legal circumstances. The term control does not refer to day-to-day management but to important strategic decisions. Minority shareholdings and other interests that give rise to 'control', for example, as a result of contractual veto rights or if a smaller shareholding allows blocking of important strategic decisions because of qualified majority voting requirements, are also caught. If a company is governed by the rules applicable to statutory two-tier entities (ie, with a separate board of directors and supervisory board), the ACM takes the view that this does not mean that the majority shareholders are not able to have decisive influence within the meaning of the Act.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration falls within the scope of the Act if:

- the aggregate worldwide turnover of the undertakings concerned in the previous calendar year exceeds €150 million; and
- the individual turnover in the Netherlands of each of at least two of the undertakings concerned was at least €30 million in the previous calendar year.

The interpretation of 'undertaking concerned' is similar to that applied under the EU Merger Regulation (EUMR). Where the concentration is implemented through the acquisition of control over parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts that are subject to the transaction will be taken into account in the determination of turnover.

Turnover refers to the net turnover as defined in the Dutch Civil Code. This is the income from the supply of goods and services from the business of the legal person after the deduction of rebates and the like and of tax on turnover. The ACM has indicated that the interpretation of 'tax on turnover' is similar to that applied under the EUMR.

For credit and financial institutions, the general thresholds apply, but the calculation of the turnover differs. The turnover is, in general terms, calculated by taking the sum of interest income and similar income, income from securities, commissions receivable, net profit on financial operations and other operating income, after the deduction of VAT and other taxes directly related to these items.

For insurance companies, the €150 million threshold also applies, but it refers to the value of gross premiums that was received from Dutch residents. With respect to pension funds within the meaning of the Dutch Pension Act, alternative thresholds apply: €500 million combined gross written premium of which at least two undertakings concerned received €100 million from Dutch residents.

Separate thresholds apply in relation to the healthcare sector if at least two of the undertakings concerned have achieved a turnover of €5.5 million from the provision of healthcare in the preceding calendar year. If that is the case, the concentration falls within the scope of the Act provided that:

- the aggregate worldwide turnover of the undertakings concerned in the previous calendar year exceeds €55 million; and
- the individual turnover in the Netherlands of each of at least two of the undertakings concerned was at least €10 million in the previous calendar year.

Concentrations that fall below these thresholds can in principle not be reviewed by the ACM unless the companies infringe other parts of the Act. The Minister of Economic Affairs can, however, temporarily reduce the thresholds for certain categories of undertakings, although this measure does not apply retrospectively. The reduction lasts five years, but can be prolonged.

If there is any doubt about the necessity of a notification, the ACM encourages 'pre-notification' meetings to discuss such jurisdictional difficulties.

Transactions that fall within the scope of the EUMR do not (with limited exceptions provided for in the EUMR, as set out in the European Union chapter) fall under the Act.

A prior mandatory notification to the Dutch Healthcare Authority (NZa) needs to be made if a merger involves a healthcare provider that employs 50 or more persons. The NZa will apply primarily a procedural test, to see whether the parties have taken due account of the interests and opinions of stakeholders. If an NZa notification is required, the transaction cannot be implemented until the NZa has provided clearance (and cannot be implemented until the ACM has also provided clearance if a subsequent ACM notification is needed). In 2017, the NZa, for the first time, imposed a fine of €70,000, for the failure to notify a healthcare merger. The ACM will only accept a notification if the NZa has provided prior clearance. These rules are expected to change. The additional test applied by the NZa will be performed by the ACM after legislative changes have been implemented.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory. The Act prohibits the implementation of concentrations that fall within the scope of the Act before they have been notified to the ACM and a period of four weeks has passed. With regard to the acquisition of shares, the ACM is of the opinion that concentrations are implemented when the shares in question are transferred. The ACM may, at the request of the notifying party, grant a (conditional) exemption to the prohibition to implement the transaction before clearance.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

With respect to the geographical allocation of turnover, the ACM follows the guidance as provided by the European Commission's Consolidated Jurisdictional Notice in attributing turnover to the Netherlands.

If the turnover thresholds are met, foreign-to-foreign mergers must be notified, even if the companies concerned do not have a physical presence in the Netherlands. Joint ventures may also need to be notified, if the parent companies meet the notification thresholds, even if the joint venture is not active in the Netherlands. The substantive test only applies to impediments to competition on the Dutch market or parts thereof.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Netherlands currently has no general public interest or foreign investment screening regimes. However, rules in relation to specific sectors (healthcare, energy and telecommunications) apply.

Legislative proposals introducing a broader national security investment screening regime and a sector-specific screening policy applicable to the defence industry are expected later this year.

Banking and insurance sectors

Concentrations involving companies in the banking and insurance sectors are subject to the merger control provisions of the Act. A protocol has been drawn up between the ACM and the Dutch Central Bank, setting out rules for the exercise of supervisory powers in these sectors in cases requiring urgent action. It describes the cooperation between the ACM and the Dutch Central Bank in concentrations involving the financial sector in which there is extreme urgency (such as a possible insolvency) to ensure that emergency situations are dealt with quickly. This protocol was applied for the first time to the acquisition of Friesland Bank by Rabobank. Friesland Bank was in financial difficulty and could not continue independently. The competition authority and the Dutch Central Bank granted Rabobank permission to acquire Friesland Bank without going through the normal notification process.

Healthcare sector

Under the Dutch Healthcare Market Regulation Act, the Dutch Healthcare Authority (NZa) evaluates concentrations involving healthcare providers with a view to protecting the quality, accessibility and availability of healthcare services and the interests of clients and employees.

This requires a separate filing prior to (a potentially required) notification under the Dutch Competition Act to the Authority for Consumers and Markets (ACM).

A merger control cooperation protocol between the ACM and the NZa specifies that they will keep each other informed in merger cases, how information is exchanged between them and how they can consult each other on, for example, market definition issues. (The ACM has entered into a number of cooperation agreements with other authorities and government departments, including the financial markets supervisor, the authority for personal data and the Dutch gambling authority.)

A pending legislative proposal would transfer the test currently performed by the NZa to the ACM (in addition to the standard merger control test that the ACM already performs). But for now, mergers should be reported to the NZa and then to the ACM.

Energy

The Dutch Electricity Act and Dutch Gas Act prescribe a mandatory notification to the Minister of Economic Affairs for concentrations involving a change of control of generation facilities producing over 250MW of electricity or liquefied natural gas, respectively. When triggered, notifications must be submitted at least four months before closing, but a notification requirement does not have suspensory effect. The public interest concerns involved are public safety, and the continuity and reliability of the generation and supply of energy.

Telecommunications

Under the Dutch Telecommunications Act, the Minister of Economic Affairs is able to review acquisitions of 'predominant control' of a 'telecommunications party' that have a 'relevant influence in the telecommunications sector'.

'Telecommunications party' is broadly defined and includes providers of mobile and fixed telecommunications networks and services, as well as hosting services and data centres. Such transactions should be notified to the Minister of Economic Affairs no less than eight weeks before closing or no later than the launch of a public offer.

The Minister of Economic Affairs has eight weeks (six months in case of in-depth review) to decide whether the acquisition should be prohibited, subject to a stop-the-clock in case further information is needed. The regime does not have suspensory effect. The Minister may prohibit the acquisition where it can reasonably be expected that the acquirer will abuse or cause deliberate outage of the network or the acquirer has such a record that the risk of a negative impact in the quality, quantity, continuity and confidentiality of telecommunications services will occur will be considerably increased.

Although there is no decisional practice yet, the threshold for a prohibition therefore appears high.

National security screening mechanism

The Netherlands is in the process of introducing a national security regime, which will cover national security and critical infrastructure (referring explicitly to goods and services that relate to 'vital processes', 'sensitive technologies' and 'military goods'). Entry into force is expected in 2021.

Under the proposed legislation, foreign investments in Dutch businesses or undertakings that could potentially result in a threat to national security or serious social disruption will be subject to ex ante screening.

The regime will be further set out in implementing regulations. Several sectors and activities mentioned in the draft act would in any event fall within its scope: vital processes; sensitive technologies; and military goods.

The Minister of Economic Affairs has indicated that all investments made after 2 June 2020 will be retroactively reviewable ex officio. At the time of writing, no notification obligation is envisaged for any investments made prior to the regime entering into effect.

Defence

The Minister of Economic Affairs announced that a separate legislative proposal introducing a sector-specific ex ante investment screening mechanism for military and dual-use goods will be proposed later in 2021. Further details have not yet been made public.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Like the EU rules, the Act provides for a two-phase filing procedure: the notification (first phase) and the licence (second phase). The Act does not require that an agreement be signed or that a controlling interest be acquired before notification is possible. A concrete intention to engage in a transaction is sufficient. The Authority for Consumers and Markets (ACM) has to decide whether a licence authorising the transaction is required within four weeks starting the day after the receipt of the notification. If a licence is required, a second-phase examination will be necessary. To initiate the second phase, the parties (or party) concerned must submit a separate application. The ACM must decide on the licence application within 13 weeks.

The implementation of a concentration before the ACM has provided clearance can lead to administrative penalties. If the parties provide incorrect or incomplete information in their notification, the ACM can impose a fine of €900,000 or 1 per cent of the annual worldwide turnover of the company (whichever is higher).

10 Which parties are responsible for filing and are filing fees required?

In case of a merger, the acquiring companies have to notify the transaction. Where a company acquires control of another company, the obligation to notify applies to the acquiring company. With regard to public bids, the bidder has to notify the transaction. The filing fees are €17,450 for the notification and €34,900 for the licence application.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The implementation of a concentration pending the statutory waiting period of four weeks following notification of the proposed concentration is prohibited. There are two exceptions to this rule. The implementation of a public bid is not prohibited if the ACM is notified immediately and the acquirer does not exercise its voting rights. Further, the ACM may in exceptional circumstances (such as risk of irreparable harm) grant a derogation from the prohibition at the request of one of the notifying parties. The ACM quite regularly grants exemptions to the standstill obligation in cases involving a target company in financial distress. If the parties go ahead with implementation of the transaction prior to obtaining clearance, they assume the risk that competition concerns are subsequently identified by the ACM, which may require amendment or even unwinding of the transaction.

If the ACM decides that an application for a licence is required, the concentration will be further suspended for the 13-week period following the application for a licence. Here again, an exemption can be granted upon request to prevent serious damage.

The four-week and 13-week periods will be suspended from the day on which the ACM requires further information from the undertakings involved in the concentration until the day on which such information is provided. The ACM frequently makes use of its power to request additional information. Parties should take possible requests for additional information and following up on those requests into account when planning the timing of the notification and the implementation of a concentration.

The notifying parties have the possibility to submit a reasoned request to suspend the four-week period. The ACM will allow such a suspension if it assists in the assessment of the notification. This voluntary suspension may only be requested once. In addition, the 13-week period can be suspended, at the request of the notifying party or at the initiative of the ACM. In both cases, written assent of all undertakings concerned is required.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The implementation of a concentration before the ACM that has been notified thereof or during the subsequent period of four weeks, or of a concentration for which a licence is required where no licence is granted, may result in a void transaction. In addition, the ACM can impose administrative penalties, such as fines up to a maximum of €900,000 or 10 per cent of the annual turnover of the company (whichever is higher), which can be imposed on each party that is responsible for filing.

The ACM may also make an order, backed by periodic penalty payments, that the undertakings concerned cease or reverse the infringement.

The competition authority has imposed fines for implementing a concentration without having notified and received clearance in several cases, indicating that it is fully prepared to impose tough sanctions for gun-jumping violations. An example is the sale by the Dutch state of shares in Fortis Corporate Insurance to Amlin. Amlin did not notify this transaction before transferring the shares. The competition authority therefore imposed a fine of €1,366,000 on Amlin. In 2012, the Court of Appeal for Trade and Industry ruled that the seller is not responsible for filing the proposed transaction and that therefore the competition authority is not entitled to impose sanctions on the seller. In addition, in 2013, the District Court Rotterdam ruled that the fine imposed on Amlin should be reduced to €130,000 because the method used to calculate the fine led to an arbitrary result. The ACM had imposed the fine in the year after the concentration was implemented, meaning that the turnover of Fortis Corporate Insurance was also taken into account when determining the amount of the fine. Had the authority imposed the fine during the year that the concentration was implemented, the Fortis turnover would have been excluded, resulting in a much lower fine.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The ACM is prepared to impose sanctions for gun-jumping violations. The Dutch competition authority has also shown its willingness to impose sanctions in foreign-to-foreign mergers that have not been notified before implementation. An example concerns the acquisition of Vinnolit and Vintron by Advent. Vinnolit and Vintron were both German undertakings that were acquired by Advent. Because of an incorrect calculation of the turnover of Advent in the Netherlands, the parties had determined that a notification in the Netherlands was not necessary. After implementation, however, Advent noticed its mistake and voluntarily informed the competition authority. The competition authority found that the parties had violated the Act and imposed sanctions on Advent and the sellers.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Specific solutions are not available, but a divestment or other measure before closing, so that the notification thresholds are no longer met, means that clearance is no longer required. In addition, the parties also have the opportunity to request a derogation from the prohibition on implementing an intended concentration before clearance from the ACM.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

The implementation of a public bid is exempt from the prohibition on implementing an intended concentration before clearance provided that the ACM is notified immediately and the acquiring party does not exercise its voting rights.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Standard forms (in Dutch) must be used for both the notification and the licence application (an unofficial English language version is available on the ACM's website). The notification form requests information on the undertakings concerned such as a description of their business activities, a description of the sectors in which they are active, information on the group (if applicable), and a financial outline of the preceding year showing the total turnover and the turnover in the Netherlands. Further, the notification form requests a description of the transaction and supporting documentation (the supporting documents can be submitted in another language, though the ACM may ask for a translation), such as the most recent annual accounts and reports of the undertakings, the most recent documents showing the intent to effectuate the concentration and the granting of powers of attorney by the undertakings concerned to the designated contact person or persons. Parties must also submit market research reports and, if there is an overlap between their activities, information on their major competitors, customers and trade organisations active in the sectors in which the parties' activities overlap. Moreover, parties must indicate whether there are any ancillary restraints and if they wish the ACM to declare whether they fall within article 10 of the Act. If there are markets to be investigated, parties should provide both value and volume-based market share figures. Parties are also asked to indicate whether the concentration has been or will be filed with any other competition authority in the EU and, if so, to provide details.

The ACM has the authority to impose fines of up to €900,000 or 1 per cent of the relevant turnover of the undertaking concerned (whichever is higher), if it has been provided with wrong or misleading information. Such fines are imposed only very rarely. An example is a fine of €468,000 (reduced on appeal to €312,000) for providing incomplete information regarding activities of subsidiaries and for understating market shares. It cannot be excluded that the ACM may follow the recent practice of the European Commission whereby the provision of accurate and complete information is more critically assessed and more sanctions are imposed in this respect.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Cases that do not present substantive competition concerns are typically submitted to the ACM after a brief call to indicate that the filing will be submitted. Cases that do potentially present substantive competition concerns are typically submitted to the ACM after pre-notification discussions. However, pre-notification discussions are optional and parties may choose to immediately make a formal filing even if it raises competition concerns.

Upon receipt of the notification, the ACM must take a decision within four weeks (this period can be suspended, if a reasoned request is submitted by the notifying parties). This period will start running the day after the receipt of the notification provided that it is not a Saturday, Sunday or public holiday. The ACM will publish the fact of notification within a few days, assess the notification and, when necessary, ask the undertakings involved for further information. Information may also be requested from third parties such as customers, suppliers and competitors. Third parties with sufficient interest are allowed to intervene. The parties will be informed of the conclusions of the investigation and requested to indicate the parts of the decision that they consider confidential. The decision is then published. The vast majority of cases are decided within four weeks. Some cases take longer, owing to suspension of this time period resulting from requests for additional information and replies to these.

If the ACM considers that it cannot clear the concentration within the first phase, it will determine that a licence is required. Following receipt of the application for a licence, an in-depth second-phase investigation will commence. The ACM must take a decision within 13 weeks following the application for the licence. It will ask the notifying parties, as well as third parties, for further information and can also commission expert reports. If the assessment reveals competition concerns, the ACM will usually (although it is not obliged to do so) communicate its preliminary assessment in writing to the undertakings concerned and to affected third parties. The undertakings may respond to this document, propose remedies or do both. The ACM is also, in certain circumstances, willing to organise intermediate state of play meetings.

If a notified case fulfils certain requirements, the ACM may issue a summary decision. The ACM has published guidelines on when a case definitely does not fulfil these requirements, and is therefore not a candidate for a short-form decision. It will normally issue a short-form decision if it is clear that Dutch merger control is applicable, that the concentration does not raise any competition concerns and if there are no objections from third parties. The adoption of a short-form decision may speed up the process.

18 What is the statutory timetable for clearance? Can it be speeded up?

The vast majority of cases are cleared through a short-form decision. Those cases, which do not present substantive competition concerns, are usually cleared in three to four weeks from notification. The ACM is willing to provide clearance even faster when the parties can explain the need for doing so. Examples include financial distress of the target company and the need to safeguard business continuity. The ACM's approach to pre-notification meetings is set out in guidelines. Simple cases do not require lengthy pre-notification discussions. Informally announcing the notification a few days in advance is sufficient for cases that do not raise potential concerns.

For more complex cases, if the ACM decides that a licence is required that triggers an in-depth second-phase investigation, a decision will need to be adopted within 13 weeks of the application for the licence. However, the ACM often stops the clock to request further information, which extends the time frame for obtaining a second-phase decision significantly. To illustrate, second-phase investigations in recent years on average lasted more than 280 days in total.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

A licence application will be required where the Authority for Consumers and Markets (ACM) considers that a concentration may significantly impede effective competition (SIEC) in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position. A licence will be granted if the ACM concludes after its second-phase investigation that this will not occur. As this test mirrors the SIEC test in the EU Merger Regulation (EUMR), it will cover all competition issues raised by mergers, including unilateral effects cases.

20 Is there a special substantive test for joint ventures?

Joint ventures performing on a lasting basis all the functions of an autonomous economic entity are dealt with under Dutch merger control, but are subject to the same substantive test as other concentrations.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

Since the 2007 amendment to the Act, the test applied is whether a proposed transaction significantly impedes effective competition in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position. In applying the test, the ACM generally applies the same criteria and theories of harm as used by the European Commission, including the criteria set out in the horizontal and non-horizontal guidelines, and by the European courts.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Only competition issues are relevant in the ACM's review process.

If the ACM refuses to issue a licence authorising an envisaged concentration, the Minister of Economic Affairs may, in response to a request to that effect, decide that a licence will be granted if this is desirable for general interest reasons – either economic or non-economic – that outweigh the expected detriment to competition. This is a separate power of the Minister, not a right to give instructions to the ACM in specific cases.

In 2019, the ACM prohibited the acquisition by PostNL of Sandd as it considered that it would result in a postal delivery monopolist that would be able to increase prices for business mail by 30 to 40 per cent. For the first time, the Minister made use of its power to grant a licence for general interest reasons. The Minister concluded that the benefits of the acquisition to the public would outweigh the detriment to competition as envisaged by the ACM, and granted a licence subject to certain conditions (to prevent the price increases that could result from the transaction). In 2020, that decision by the Minister was overturned by the Rotterdam District Court. An appeal of this judgment is pending.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Dutch competition authority has generally not paid specific attention to economic efficiencies in the review process, in particular because notifying parties have not frequently submitted efficiency claims. Since the alignment of the test with the EUMR in 2007, there is more room for taking efficiencies into account. In 2009, the competition authority considered an efficiency defence in a case concerning the merger of two hospitals in the province of Zeeland. In that case, at first instance, the competition authority had concerns regarding the market power of the combined entity as there appeared to be no real alternatives to these hospitals. After the hospitals submitted an 'efficiency defence' claiming that the merger would lead to consumer benefits, the competition authority stated that the present Act leaves room for the competition authority to take such efficiencies into account. Subsequently, the competition authority concluded that, in that case, the parties' claim was 'unsubstantiated' and could, therefore, not be accepted. The parties thereafter submitted a significant remedy package, which was accepted by the competition authority. The transaction was ultimately cleared. It is believed that the ACM will be as reluctant as the Commission in accepting efficiencies as a justification for clearing a concentration that would otherwise fall foul of competition law. The authority will especially focus on whether it is credible that efficiency gains will be passed on to consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a concentration is implemented despite the standstill obligation, it is null and void and the Authority for Consumers and Markets (ACM) may order it to be reversed within a specified time limit. Contravention of the standstill obligation as well as of several other merger control provisions (eg, supply of incorrect information) may be sanctioned with fines or an order to remedy the infringement, subject to periodic penalty payments on non-compliance with such order, or by a combination of these sanctions.

The administrative fine for refusal to cooperate amounts to €900,000 or a maximum of 1 per cent of the relevant turnover of the undertaking concerned (whichever is higher).

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Since 1 October 2007, the Act has provided the possibility of offering remedies during the notification stage of the investigation. This possibility exists if the competition problem is clear and it is certain that the remedies will remove this problem. The ACM may attach conditions to the decision. The Act provides that if the ACM imposes conditions in the notification stage, the suspension obligation stays in place until the conditions are fulfilled. This reduces the importance of this possibility in practice. It is also possible to make amendments to the original notification, thereby alleviating the concerns of the ACM. If the original notification is amended, the transaction (as notified in the amended notification) may be closed after the decision is adopted.

The ACM may attach conditions to the granting of a licence in the second phase; for example, that changes be made to the intended transaction, or certain aspects of it.

The competition authority's 2007 guidelines on remedies set out both its procedural and substantive policy. They are similar to the approach of the European Commission in that both divestment (ie, structural remedies) and behavioural remedies are possible, though structural remedies are preferred. In relation to some past concentrations involving hospitals, the ACM accepted a behavioural remedy in the form of a price cap to address competition concerns. However, in the more recent *Stichting Albert Schweitzer Ziekenhuis/Stichting Rivas Zorggroep* (2015) case involving hospitals, the ACM indicated that it considered a behavioural remedy in the form of a price cap to be unsuitable. Therefore, it seems unlikely that the ACM will accept a behavioural remedy in the form of a price cap in relation to hospitals in the future, similar to its position with respect to other sectors. The ACM will only accept an amendment of the original notification if a structural remedy is used.

In 2019, the ACM accepted behavioural remedies in relation to the acquisition by Sanoma Learning of Iddink Holding, relating to the distribution of school books and learning materials via digital platforms. Following an appeal by a third party, the District Court of Rotterdam annulled the decision because it was insufficiently motivated and ordered the ACM to further investigate and motivate its decision. Appeals against the judgement are pending.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The remedy guidelines set out the basic conditions for a divestment or other remedy. The guidelines are modelled closely on the European Commission notice on remedies and Commission practice.

The undertakings concerned should take the initiative in proposing adequate remedies, preferably in the pre-notification discussions. Structural remedies are preferred to behavioural remedies and, according to the guidelines, the ACM does not accept behavioural remedies in the notification phase.

Proposals offered by the undertakings concerned must include an adequate and proportional solution to the competition concerns of the ACM. The conditions that the ACM includes in a first-phase decision must remove the identified competition concerns and be implemented before the transaction is closed. Conditions that the ACM includes in a second-phase decision must ensure that the concentration does not significantly impede effective competition. These conditions generally involve divestment of the businesses that give rise to the impediment of competition, or severance of links between the undertakings concerned and these businesses. Where divestments are involved, the purchaser must be independent of the undertakings concerned and should have sufficient expertise and financial resources to guarantee the continuity of the activities of the business. As the divestment is intended to ensure that the market remains competitive, the ACM has the right to approve the prospective purchaser. Where the undertakings concerned are not able to divest the businesses concerned, the ACM may require the appointment of a trustee who will ensure that this process is carried out. The undertakings concerned must ensure that prior to the sale, the activities of the business to be divested remain intact and that their continuity and position on the market are not jeopardised. Where the conditions laid down are aimed at ensuring that a certain business remains independent of the parties involved in the takeover, the undertaking concerned must take measures to guarantee that such independence will continue to exist in the future. The ACM may supervise the divestment process for a limited time (and may require the divestment of the activities concerned). On timing, the guidelines clearly favour discussing remedies in the pre-notification meetings and strongly recommend submission of remedies at least one week prior to the end of the four-week time limit. With remedies in the licence phase, the guidelines state that, as a general practice, the ACM will inform the parties of the competition problems it perceives in its preliminary assessment, typically after eight weeks. This gives parties the opportunity to submit remedies should they not have done so at an earlier stage. At this stage, remedies in the licence phase should be proposed at least three weeks prior to the deadline for the decision.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, we are not aware of any remedy decision that involved foreign-to-foreign mergers. However, parties have amended their filing in response to the competition authority's concerns in at least one concentration involving two foreign-owned undertakings, which sought to take joint control over two Dutch undertakings.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

When submitting a notification, parties can indicate whether there are any ancillary restraints. Parties may ask the ACM to declare that the related arrangements fall within article 10 of the Act, meaning that they are directly related to and necessary for the implementation of the concentration as a result of which the cartel prohibition contained in article 6 of the Act does not apply to the restraint.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Authority for Consumers and Markets (ACM) may request information from customers, suppliers and competitors on the envisaged transaction or relevant markets. Third parties whose interests are directly involved may submit their comments on the proposed transaction to the ACM and are invited to express their view on the preliminary assessment issued by the ACM eight weeks after the application for a licence. In practice, the ACM attaches value to observations made by third parties. This is especially the case in relation to concentrations involving hospitals, where the ACM will attach significant importance to the opinion of health insurers and patients.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

After a notification, and following the filing of an application for a licence, the ACM publishes an announcement in the Official Gazette and on its website, inviting interested parties to submit their views on the proposed transaction. Decisions by the ACM, including a decision that a licence is required and decisions to end procedures, are also made public. Sensitive information (ie, business secrets) is omitted from these publications. Prior to publication, parties are given the opportunity to submit a reasoned request that certain information is to be treated confidentially and removed from public documents. If the ACM disagrees, it will inform the parties in due time, so as to allow them to file for an injunction against publication.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The ACM cooperates formally and informally with foreign competition authorities; for example, as a member of the European Competition Authorities and the International Competition Network and with the Commission, as a member of the European Competition Network. It may inform the relevant competition authorities if it requests information from foreign companies and may provide competition authorities in other jurisdictions with information it has collected. The ACM contacts other competition authorities where a transaction is filed in several jurisdictions and may exchange information or coordinate its proceedings with these authorities. The notification form also requests parties to indicate whether the transaction has been, or will be, notified to other antitrust authorities.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Appeals against decisions by the Authority for Consumers and Markets (ACM) must be lodged with the District Court of Rotterdam (Chamber of Administrative Law). The judgment of the District Court may be further appealed to the Court of Appeal for Trade and Industry in The Hague. Any person whose interests are directly affected may appeal against a decision. The Minister of Economic Affairs may, in response to a request, grant a licence for an envisaged concentration even though the ACM has refused to grant one. Decisions of the Minister are also subject to judicial review.

In 2016, the Court of Appeal for Trade and Industry annulled the ACM's 2012 prohibition decision involving biscuit producers AA ter Beek and Continental Bakeries. Continental Bakers produces private label biscuits while AA ter Beek produces private label biscuits in addition to branded biscuits. According to the ACM, the upstream market for the production of biscuits comprises both private label and branded products, meaning that the combined market share of the parties would be very high. The market definition was based on reasoning by the ACM that, when purchasing biscuits, retailers will take into account pricing for both private label and branded biscuits. The court annulled the decision on the basis that the ACM had not investigated and explained properly why and how the upstream market should cover private label and branded products, as a result of the purchasing behaviour of retailers.

In 2016, the Rotterdam District Court upheld, on appeal by Vodafone, a 2014 ACM clearance decision in relation to the acquisition of sole control by Dutch incumbent telecom operator KPN in Reggefiber, a fibre optics cable operator. KPN already had joint control in Reggefiber, which was cleared in 2008 subject to remedies. The ACM had cleared the change from joint to sole control unconditionally, on the basis of sector-specific regulation that, in its view, prevented competition concerns. The sector-specific regulation, inter alia, requires KPN to put in place Chinese walls, act in a non-discriminatory manner and it imposes maximum prices. The District Court agreed that the sector-specific regulation could be taken into account by the ACM in its prospective analysis when assessing the effects on the concentration. The court accepted that the sector-specific regulation is sufficient to prevent concerns.

In 2017, the Rotterdam District Court dismissed two appeals against ACM clearance decisions. One case related to the clearance decision by the ACM of the acquisition by the Lotto of the Staatsloterij, which was appealed by Stichting Speel Verantwoord and Lottovate. The Rotterdam District Court dismissed the appeal and the case is still pending in the Court of Appeal for Trade and Industry. The other case the Rotterdam District Court dismissed related to the clearance of the acquisition by Brocacef of Mediq, which was appealed by Mosadex. Mosadex subsequently appealed this judgment to the Court of Appeal for Trade and Industry.

In 2019, the Court of Appeal for Trade and Industry dismissed Mosadex's appeal against the clearance decision of ACM in relation to the acquisition by Brocacef of Mediq.

In 2020, the Rotterdam District Court annulled the Ministerial decision to grant a licence to the *PostNL/Sandd* concentration. After the ACM had prohibited the concentration, the Minister of Economic Affairs made use of its power to grant a licence for compelling reasons of general interest. The Rotterdam District Court has now upheld appeals submitted by several interested third parties and annulled the decision for both procedural (interested third parties not having been sufficiently heard) and substantive grounds (predominantly relating to insufficient motivation of the decision).

Time frame

33 What is the usual time frame for appeal or judicial review?

While the time frame for appeal and judicial review will depend on the courts' agendas and workloads, litigation may take up to a year, and perhaps longer. The Court of Appeal for Trade and Industry considers that appeal at the District Court level as well as subsequent appeal to the Court of Appeal for Trade and Industry should each take at most two years, to prevent a violation of the right of a fair trial as contained in the European Convention on Human Rights.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2010, the competition authority imposed fines in three cases for breaching article 34 of the Act (ie, implementing a concentration without having notified and therefore failing to receive clearance prior to closing). In 2001, a fine was imposed in the case of a foreign-to-foreign merger: only German undertakings were involved in the transaction. The competition authority repealed this fine in 2002.

At the beginning of 2020, the Authority for Consumers and Markets (ACM) published its agenda for 2020–2021, which focuses on two main topics: the digital economy and energy markets in transition. As part of its focus on the digital economy, the ACM indicated that it would dedicate more resources to the protection of the 'online consumer'. Although this will predominantly be relevant in the context of fields other than merger control, parties that operate digital platforms or have interaction with online consumers should expect close scrutiny of their mergers.

In addition, in the past year, we have seen an increasing focus by the ACM on sustainability, both relating to merger control and behavioural cases as well as in relation to consumer law cases.

Reform proposals

35 | Are there current proposals to change the legislation?

It is expected that new legislation will enter into effect by which the ACM will take over the test currently performed by the Dutch Healthcare Authority (NZa) in relation to concentrations involving healthcare providers. This test, which will apply in addition to ACM's merger control assessment, consists primarily of a procedural test, to see whether the parties have taken due account of the interests and opinions of stakeholders. The legislative proposal was amended at the beginning of 2020, following input from the NZa and the ACM. It is uncertain when this legislative proposal will be introduced.

In addition, some mostly technical changes to the Dutch Competition Act are expected, although it is unclear when these will be introduced. This includes the removal of an existing legal requirement, in case of conditions attached to a Phase I clearance decision, to observe the conditions prior to being allowed to implement the concentration.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, 89 merger notifications and four licence notifications were submitted to the Authority for Consumers and Markets (ACM) and one merger notification and one licence notification were withdrawn. Out of the 89 merger notifications, 11 related to the healthcare sector. Out of the four licence notifications, one related to the healthcare sector. The ACM issued 87 Phase I clearance decisions, referred three cases to Phase II, issued six licences and did not prohibit any concentration. The vast majority were short-form decisions.

In February 2020, the ACM granted a licence to Koninklijke BAM and Heijmans for their joint venture combining 10 asphalt facilities in the Netherlands. The ACM assessed whether the concentration would result in foreclosure, but considered that there remained sufficient alternatives for customers after the concentration. The ACM also concluded that BAM and Heijmans are dependent on the supply of asphalt to third parties, in view of the overcapacity in the market.

In August 2020, the ACM granted a licence to NCOI for its acquisition of LOI. Both parties offer accredited higher vocational education, accredited intermediate vocational education and non-accredited professional education. In its Phase II investigation, the ACM conducted more research into the definition of the markets (on which it did not have sufficient information during the Phase I investigation). The ACM considered there remained sufficient competitors after the concentration as well as additional residual competitive pressure. The ACM also considered it an important factor that the closest competitor to the parties had been able to substantially increase its market share in recent years.

In October 2020, the ACM granted a licence to Sunweb for its acquisition of Corendon. Sunweb and Corendon are the numbers two and three on the market for package holidays and would become roughly as large as the leader TUI after the concentration. The ACM referred to the importance of smaller operators and potential entrants to the market. The ACM also considered that a large number of consumers also consider unbundled offers when booking their holidays. After the ACM granted the licence for this deal, the purchaser terminated the purchase agreement in October 2020. Corendon commenced interim injunction proceedings to require Sunweb to cooperate in the closing of the transaction. The interim injunction was refused and Sunweb was therefore not forced to cooperate in closing the deal.

At the beginning of 2020, the ACM published its agenda for 2020 to 2021, which focuses on two main topics: the digital economy and energy markets in transition. As part of its focus on the digital economy, the ACM indicated it would dedicate more resources to the protection of online consumers. During 2020, the ACM made various announcements and commenced various investigations and market studies relating to consumer protection law (eg, algorithms, online search result rankings and 'greenwashing' online).

Meanwhile, in the past year, we have seen an increasing focus by the ACM on sustainability, both relating to merger control and behavioural cases as well as in relation to consumer law cases.

New Zealand

Troy Pilkington, Bradley Aburn and Petra Carey
Russell McVeagh

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

New Zealand's merger control legislation is contained in Part 3 of the Commerce Act 1986 (the Act). New Zealand's competition law regulator is the Commerce Commission (NZCC). The NZCC adjudicates on applications for clearance, or authorisation, of mergers and can take enforcement action in the courts. Interested third parties can also enforce the Act directly.

Scope of legislation

2 What kinds of mergers are caught?

The Act prohibits any person (including bodies corporate) from acquiring 'assets of a business' or shares if that would, or would be likely to, substantially lessen competition in a market in New Zealand.

The phrase 'assets of a business' is not defined and, therefore, could include any asset owned by a business. However, this has been interpreted to refer to a collection of assets sufficient to run a business, or business division.

The term 'acquire' includes both legal and beneficial acquisition, including entry into an agreement to acquire assets or shares that is not conditional on clearance.

Partial acquisitions of shares can be caught, and there is no de minimis transaction, asset, or turnover value threshold.

3 What types of joint ventures are caught?

Joint ventures involving an acquisition of assets or shares can be caught by the merger control provisions. Joint ventures that do not involve the acquisition of assets or shares can be caught by the Act's restrictive trade practices prohibitions contained in Part 2 of the Act.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

There is no definition of 'control' in the Act's general merger control regime. Acquisitions of assets or shares, including minority or partial acquisitions, may breach the Act where:

- the acquirer will be able to 'directly or indirectly exert a substantial degree of influence over the activities of the other' (interpreted as 'able to bring real pressure to bear on the decision-making process' of the target); and
- that influence is likely to substantially lessen competition in the market.

The NZCC considers that the ability to exert a substantial degree of influence can arise at any level of shareholding. The NZCC does not provide indicative thresholds in its Mergers and Acquisitions Guidelines given that other factors, such as the spread of shareholding, will be relevant to determining whether an individual shareholder has the necessary degree of influence. Other case-specific factors will also impact this assessment, including an individual shareholder's influence on management or policy.

The NZCC recently investigated the acquisition of 19.99 per cent of the shares in a listed company, and blocked the proposed acquisition of 22.5 per cent of the shares in a listed company (where there was also a cooperation agreement between the parties).

There is an additional process that may be triggered where an overseas person acquires a 'controlling interest' in a New Zealand company.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are no asset or turnover thresholds. The test is simply whether the acquisition of assets or shares will or would be likely to substantially lessen competition in a market in New Zealand.

The NZCC's Mergers and Acquisitions Guidelines (the M&A Guidelines) include post-merger market share 'concentration indicators' that it uses to 'identify those mergers that are less likely to raise competition concerns'. These are:

- where the merged firm's post-merger market share is less than 40 per cent in a non-concentrated market (where the three largest firms have a combined market share of less than 70 per cent); and/or
- where the merged firm's post-merger market share is less than 20 per cent in a concentrated market (where the three largest firms in the market have a combined market share of 70 per cent or more).

The NZCC stresses these are 'only initial guides' and that a 'merger not exceeding these indicators may still substantially lessen competition'. For this reason, the NZCC no longer refers to these indicators as 'safe harbours' as it considered that term indicated a 'degree of safety that did not exist'. Accordingly, market share measures remain insufficient in themselves to establish whether a merger is likely to have the effect of substantially lessening competition.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Merger filings in New Zealand are voluntary. Parties can (but are not obliged to) seek clearance or authorisation of a proposed merger but there is no statutory obligation to. However, if:

- a merger has been implemented or is no longer conditional on NZCC approval, it cannot then be cleared or authorised retrospectively; and
- if parties reach that point without obtaining NZCC approval, the NZCC may choose to open an investigation, and it has a range of enforcement options at its disposal.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The merger control prohibitions in the Act extend to acquisitions outside New Zealand, 'to the extent that the acquisition affects a market in New Zealand'.

Accordingly, an offshore merger involving two or more major suppliers of a product or service to New Zealand, both where there is no New Zealand presence and where there is a New Zealand subsidiary, may be caught by the Act.

However, the practical ability of New Zealand authorities to enforce orders made against offshore companies may limit the recoverability of penalties from foreign firms.

To address such limits regarding acquisitions by Australian businesses, New Zealand has legislation (the Trans-Tasman Proceedings Act 2010) and a mutual enforcement treaty with Australia that effectively removes the bar on the NZCC enforcing penalties against Australian companies and directors.

In respect of acquisitions by businesses from other countries, the NZCC may seek remedies where an 'overseas person' acquires a 'controlling interest' in a New Zealand company through an acquisition outside New Zealand ('controlling interest' defined to be control of the board, or the ability to control greater than 20 per cent of the voting rights, issued shares or dividend entitlements). The NZCC can apply to the High Court, within 12 months of the acquisition, for a declaration that the acquisition will substantially lessen competition in a market in New Zealand. If the High Court makes such a declaration, it may make an order requiring the New Zealand company to cease carrying on business in New Zealand or dispose of shares or assets. Contravention of any such declaration is subject to the same penalties as a breach of the merger control provision (the difference being that the penalties are enforceable against the New Zealand company, rather than the overseas acquirer).

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Foreign investment in New Zealand is governed by the Overseas Investment Act 2005 (OIA), and the Takeovers Act 1993 can apply to acquisitions of public companies or companies with extensive shareholdings.

Under the OIA consent is required if an overseas person proposes to directly or indirectly:

- acquire an interest in 'sensitive land';
- acquire a more than 25 per cent ownership or a controlling interest in a New Zealand entity (or increase an existing 25 per cent interest) and either:
  - the consideration exceeds NZ$100 million; or
  - the gross value of the entity's assets in New Zealand exceeds NZ$100 million; or
- incur more than NZ$100 million in capital expenditure to establish a new business in New Zealand; or
- acquire assets in New Zealand that are used to carry on business in New Zealand for consideration greater than NZ$100 million.

Higher thresholds than the NZ$100 million threshold above apply to investments by non-government related investors from certain countries with trade agreements with New Zealand.

A new 'national interest test' was introduced in June 2020, which empowers the Minister of Finance to review certain transactions that require consent under the OIA to determine whether they are contrary to New Zealand's national interest. The test mandatorily applies to overseas investment transactions in certain 'strategically important businesses', including those involved in military or dual-use technology, ports or airports, electricity, water, telecommunications, and financial market infrastructure, and to overseas investment transactions by 'non-New Zealand government investors'. The minister also has the discretion to call in, for national interest assessment, any other consent application that does not meet the mandatory criteria but gives rise to national interest concerns.

The national interest test also applies under a temporary emergency notification regime that was introduced in response to the covid-19 epidemic. This temporary notification regime requires notification to the Overseas Investment Office (OIO) of any transaction (regardless of value, but except where the transaction requires consent) pursuant to which an overseas person acquires a more than 25 per cent interest in a New Zealand business or its assets. Any transaction notified to the OIO can be escalated by the minister for national interest assessment.

When the government is satisfied that the effects of covid-19 on the New Zealand economy have desisted, the temporary notification regime will be replaced by a new permanent national security and public order call in power. The new call in power will allow the minister to call in certain investments in 'strategically important businesses' that do not require consent under the OIA for assessment for significant national security and public order risks.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As notification is voluntary, no sanctions apply for failure to file. However, mergers cannot be cleared or authorised retrospectively and the New Zealand Commerce Commission (NZCC) may investigate non-notified mergers that it considers could negatively impact competition in New Zealand.

In the 2020/21 financial year, the NZCC continued investigating non-notified mergers. In terms of enforcement proceedings, in 2019 the NZCC challenged First Gas Limited's acquisition of certain gas distribution assets in the High Court, and in 2020 the NZCC agreed to settle High Court proceedings against Wilson Parking for acquiring certain car park leases (with Wilson Parking agreeing to divest some car park leases as part of that settlement).

The NZCC's average time over the last decade to reach a decision for clearances is 67 working days, and for authorisations, it is 146 working days.

10 Which parties are responsible for filing and are filing fees required?

Applications for clearance or authorisation of a merger are made by the purchaser. The fee is NZ$3,680 to seek clearance or NZ$36,800 to seek authorisation (including goods and services tax).

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Act provides the NZCC 40 working days to decide on clearance applications and 60 working days for authorisation applications, but in practice the NZCC can, and frequently do, seek extensions. If applicants do not agree to such an extension, the application is deemed to have been declined if the NZCC has not made a decision by the deadline. This means, in practice, merging parties always agree to extensions sought by the NZCC.

For the NZCC's year ending June 2020, the NZCC took on average 49 days to make a decision with respect to a clearance application. There is more variability with respect to how long the NZCC takes to reach a decision with respect to authorisation applications. The last five authorisation applications decided by the NZCC have taken between 45 and 252 working days.

As the NZCC cannot grant clearance or authorisation retrospectively, any proposed merger that might give rise to competition issues should be made conditional on NZCC approval and should not complete until approval is obtained.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Mergers cannot be cleared or authorised retrospectively, so a transaction agreement must remain conditional on regulatory approval until clearance or authorisation is obtained.

If the NZCC believes a merger (that is no longer conditional) may breach the Act it can investigate and, if necessary, take proceedings. Courts can impose penalties of up to NZ$5 million on bodies corporate (NZ$500,000 for individuals), impose injunctions and make divestiture (and other) orders. If the NZCC was considering a clearance or authorisation application at the time of completion it would close that clearance investigation and open an investigation into a potential breach.

In 2008 the Court of Appeal upheld penalties for breach of the merger provisions of the Act (*New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433). The purchaser had filed for clearance, but subsequently withdrew its application and completed the acquisition. The NZCC brought proceedings alleging the acquisition was likely to substantially lessen competition, and the High Court ordered the purchaser to pay a penalty of NZ$500,000. Two directors of the vendor were found liable as accessories for agreeing to waive the clearance condition.

Accordingly, both acquirers and vendors need to be aware that, while merger clearance remains voluntary:

- seeking clearance may be the safest option for potentially problematic mergers; and
- withdrawing a clearance application and completing a transaction is likely to be high risk.

Until closing, merger parties are treated as separate businesses for the purposes of the Act's restrictive trade practices prohibitions. Therefore, any integration between parties prior to closing gives rise to 'gun-jumping' risks under the restrictive trade practices prohibitions. In 2010 the NZCC successfully prosecuted two pathology businesses for agreeing not to compete pending a proposed merger (*Commerce Commission v New Zealand Diagnostic Group Ltd and Ors* HC Auckland CIV 2008-404-4321, 19 July 2010). The Court imposed penalties of $65,000 and $35,000, respectively. Those fines would likely be significantly higher in today's context (and intentional cartel conduct is a criminal offence as of April 2021).

The government has announced its intention to increase the maximum penalties for breaching the merger control prohibition. A bill is currently before Parliament.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Foreign-to-foreign mergers that close before obtaining clearance are subject to the same potential sanctions as domestic mergers. However, in practice, there are limits on the ability of New Zealand authorities to enforce orders made against offshore companies. Therefore, there is an additional process for the NZCC to seek remedies in respect of acquisitions by 'overseas persons'. While the NZCC has not, to date, used these new 'overseas persons' powers, it has opened investigations into foreign-to-foreign mergers since then.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The NZCC does not have jurisdiction to clear any merger after closing. Accordingly, the New Zealand aspect of the merger would need to remain conditional until clearance is obtained if clearance is required.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No. However, in practice, the NZCC applies lower thresholds for finding a 'substantial degree of for public companies than private companies (for a public company the NZCC normally examines shareholdings of 15 per cent or more).

The Takeovers Code (the Code) also applies to listed companies. The Code is administered by the Takeovers Panel, separate from the NZCC. The Code is far-reaching and should be considered carefully in relation to public company acquisitions.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There are prescribed application forms for both clearances and authorisations. The forms require information concerning the transaction, the parties, the rationale, the markets, etc. Economic evidence is often advisable for more complex clearance cases. For authorisation applications, economic analysis of public benefits and detriments is invariably required.

The applicant must also provide the documents bringing about the merger and ancillary agreements; documentation prepared for or considered by senior management and directors that sets out the rationale for the merger, analyses the merger or competitive conditions, and includes the business plans, annual reports, and management accounts.

While there are no sanctions for not providing all required information, until the NZCC is satisfied it has received all required information, it will not register the application.

There are sanctions for deliberately providing incorrect information, including deliberately misleading the NZCC about the existence of requested information as it is an offence under the Act to deceive or knowingly mislead the NZCC. Companies found in breach can be fined up to NZ$300,000, and individuals up to NZ$100,000.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

There are no phases to a clearance process mandated by statute. However, the NZCC has published guidance setting out its expected process and timelines for clearance applications.

Prior to formal filing, merger parties are encouraged to contact the NZCC as early as possible to inform it of potential applications and engage in pre-notification consultation. This typically enables the NZCC to plan ahead, which can help expedite the process. The NZCC generally expects a substantially developed draft, alongside supporting documents, at least a week prior to pre-notification consultations. The NZCC will generally advise whether parties need to supplement their application with further information before the NZCC would be willing to register a formal filing.

Once the NZCC registers a formal filing, a media release is published on its website announcing it has received the application. Subsequently, according to the NZCC's indicative time frames (although these can vary depending on complexity and opposition):

- By working day five, a draft investigation timeline will be published on the NZCC's website alongside a 'Statement of Preliminary Issues'. This sets out the issues the NZCC intends to explore and invites submissions from third parties (which are typically due by working day 15).
- The NZCC aims to complete initial interviews and information gathering by working day 30.
- By working day 40, the NZCC is required to either reach a determination or obtain an extension. If the NZCC has not granted clearance by working day 40, it will seek an extension and publish a 'Statement of Issues' setting out the issues it continues to investigate. Both the merger parties and third parties are able to submit responses, typically due by working day 65.
- If the NZCC has not granted clearance by working day 90, it will likely issue a 'Statement of Unresolved Issues', setting out those issues it considers have not been satisfactorily addressed. Merging parties and third parties will then have until approximately working day 110 to make submissions.
- Following submissions on the Statement of Unresolved Issues (working day 130+) the NZCC will decide to either grant or decline clearance.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Act provides the NZCC 40 working days to decide clearances and 60 working days to decide authorisations, but in practice, the NZCC invariably seeks extensions. If applicants do not agree to an extension, it is open to the NZCC to simply fail to make a determination in the prescribed time, in which case the application is declined. This means that merging parties, in practice, always agree to extensions sought by the NZCC.

The NZCC's average time over the last decade to reach a decision for clearances is 67 working days, and for authorisations is 146 working days.

The best ways to expedite the NZCC's process are to:

- contact the NZCC as early as possible about potential applications and engage in a pre-notification consultation;
- have all required information ready to submit to the NZCC at least one week prior to the targeted formal filing date; and
- respond expeditiously to all NZCC information and interview requests.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

In order to grant clearance, the New Zealand Commerce Commission (NZCC) must be satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market. If the NZCC is not so satisfied, it must decline to give clearance.

Analytically, this test requires the NZCC to compare the situation if the transaction does not proceed (the counterfactual) against the situation if the transaction does proceed (the factual). In assessing the counterfactual, the NZCC must consider any possible hypothetical that has a 'real chance' of eventuating. New Zealand courts have stated a hypothetical can have a 'real chance' of occurring despite it being less likely than not. This means the NZCC can consider multiple counterfactual outcomes and will compare the factual against the most competitive of these (effectively a 'worst-case scenario' analysis).

There is no separate 'failing firm' defence in the Act. However, as the NZCC's analysis is forward-looking, parties may argue that at least one of their businesses will leave the market if the transaction does not proceed. The NZCC has accepted such arguments provided this can be demonstrated to a satisfactory level of probability. The NZCC's M&A Guidelines include an appendix setting out its approach to assessing failing firm arguments.

20 | Is there a special substantive test for joint ventures?

No. To the extent formation of a joint venture involves the acquisition of business assets or shares it will be analysed as any other merger.

However, other aspects of a joint venture relationship, such as an ongoing collaboration, are analysed pursuant to the restrictive trade practices regime in Part 2 of the Act, which prohibits:

- 'cartel' arrangements between actual or potential competitors (such as price fixing, output restriction, or market allocation arrangements) (section 30); and
- arrangements that have the purpose, effect, or likely effect, of substantially lessening competition in a market in New Zealand (section 27).

There is a 'collaborative activities' exception to the section 30 cartel prohibition. The NZCC has issued Competitor Collaboration Guidelines on the application of this exception. This exception does not provide protection from the section 27 prohibition.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Broadly speaking, the NZCC will consider the extent to which an acquisition will increase the risk of:

- 'Unilateral effects', where an acquisition removes a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the combined firm can profitably increase prices (often said to be by 5 per cent or more) without the profitability of that increase being thwarted by rival firms' competitive responses.
- 'Coordinated effects', the scope for an acquisition to increase the potential for the combined firm, along with some or all of the remaining competitors, to (implicitly) coordinate their behaviour so that prices increase in the market. This typically occurs in highly concentrated markets (four or fewer competitors) where the remaining competitors are of a similar size or market share to each other.
- 'Conglomerate effects', where the purchaser's and target's products are complementary or adjacent to one another, such that the acquisition could result in the purchaser having an unmatched portfolio of products it can use to lessen competition in the market by bundling or tying products together across that portfolio.
- 'Vertical input foreclosure', where the purchaser is acquiring an upstream supplier it can use to lessen competition by cutting off access to inputs from its competitors.

- 'Vertical customer foreclosure', where the purchaser is acquiring a downstream customer it can use to lessen competition by cutting off access to customers from its competitors.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The NZCC is an independent Crown entity and is not subject to direction from the government. However, section 26 of the Act provides that when exercising its powers and functions, the NZCC must 'have regard to' the economic policies of the government where such policies are provided to the NZCC in writing by the Commerce Minister and laid before Parliament. This is a highly transparent process and such statements are rarely issued. However, they have been issued in relation to specific applications before the NZCC. Nevertheless, the ultimate decision remains with the NZCC and while it must consider such a statement, the statement does not change the competitive, or public benefits and detriments, assessment that the NZCC must make.

Besides the potential for a section 26 statement, non-competition issues are not relevant in the clearance context (which focuses on whether or not there is a substantial lessening of competition).

Parties may also apply for authorisation for a merger, where the NZCC can approve a transaction that would otherwise substantially lessen competition where that transaction would be likely to result in public benefits that outweigh the detriments arising from the lessening of competition. Public benefits and detriments have historically been predominantly economic efficiencies. However, in its 2017 decision to decline the merger of two media organisations Fairfax New Zealand Limited and NZME Limited, the NZCC took a loss of media plurality into account as a public detriment in its analysis. This consideration was upheld on appeal, so the NZCC's Authorisation Guidelines now set out 'benefits or detriments can relate to matters such as the environment, health, media or social welfare'.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

When considering a clearance application, the only question is whether the merger has the effect of substantially lessening competition in a market. That test implies some consideration of efficiencies within the affected market or markets, as it is a 'net effects' test. However, the NZCC considers it is rare that efficiencies would be sufficient to outweigh what would otherwise be a substantial lessening of competition. Accordingly, a merger that relies on efficiencies is better dealt with under the authorisation regime.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The New Zealand Commerce Commission (NZCC) cannot unilaterally prohibit a transaction, declare the Act has been breached, or impose penalties. It can, however, bring an action in the High Court seeking remedies such as:

- an injunction preventing a proposed merger;
- a declaration that a merger breaches (or would breach) the Act;
- an order for divestiture of assets or shares; or
- penalties of up to NZ$5 million per offence for bodies corporate and NZ$500,000 per offence for individuals.

The Act also gives the NZCC broad powers of investigation and failure to comply with any compulsory NZCC request can give rise to penalties of up to NZ$300,000 for a company and NZ$100,000 for an individual.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The NZCC can accept undertakings to divest assets or shares in the context of either a formal clearance or authorisation application, or an investigation of a merger (where the parties have not sought clearance or authorisation). The NZCC cannot accept behavioural undertakings in relation to mergers.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

If given in the context of a formal clearance or authorisation process, a divestment undertaking may be proposed as part of the initial application, or as an amendment, but must be offered prior to the NZCC's final determination. If an undertaking is accepted by the NZCC, it is deemed to form part of the application. Merging parties typically will then have six months (or sometimes up to 12 months) to fulfil the undertaking. Potential purchasers of assets or shares do not have to be identified at the time the undertaking is given, but must ultimately be approved by the NZCC.

If an acquirer of assets or shares does not fulfil a divestment undertaking by the specified date (which is negotiated with the NZCC), the parties lose the benefit of the clearance. If the NZCC is satisfied that there is a contravention of an undertaking, it can apply to the court for a divestment order or pecuniary penalties.

Outside of a formal clearance or authorisation process, the NZCC also has a separate power to accept a written undertaking to dispose of assets or shares. Again, if the NZCC considers that a person has breached such an undertaking, it may apply to the High Court for orders directing the person to comply with the undertaking; pay to the Crown an amount reasonably attributable to the breach; or any consequential relief that the court considers appropriate.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The NZCC can apply to the High Court for a declaration if an overseas person acquires a controlling interest, either directly or indirectly, in a New Zealand body corporate through an acquisition outside New Zealand. The NZCC has not yet used these powers (introduced in 2017), although it has investigated foreign-to-foreign mergers since then, including one where it is understood a divestment remedy was provided to the NZCC to resolve its concerns.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The NZCC can only give clearance for the acquisition itself. Ancillary restraints will be governed by the restrictive trade practices provisions of Part 2 of the Act, which prohibit cartel provisions or arrangements that have the purpose, effect, or likely effect of substantially lessening competition in any market.

There is an exemption from these restrictive trade practices prohibitions for covenants in business acquisition agreements that are 'solely for the protection of the purchaser in respect of the goodwill of the business'. This provides an exception for restraints imposed on vendors that are reasonable in both scope and duration to protect the goodwill being acquired.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The New Zealand Commerce Commission (NZCC) seeks information from competitors, suppliers and customers to 'test' the information provided by the applicant. The NZCC publishes a public version of the application on its website to enable third parties to make submissions. In addition, during its clearance process, the NZCC publishes statements on its website outlining the issues under consideration to allow interested parties the opportunity to submit. The NZCC will typically upload a non-confidential version of any third-party submission to its website to allow the merger parties to respond.

If an acquisition occurs in the absence of a clearance or authorisation, then both the NZCC and interested parties have the ability to apply to the court for relief. At that stage, the usual court rules relating to disclosure and documents apply.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Once an application is received by the NZCC it will issue a media release announcing the fact of the application, the parties' identities, and a link to the public version of the application document (confidential or commercially sensitive information, including the parties' estimates of market share, is excluded from the public version).

Subsequently, the NZCC will publish on its website any statement of preliminary issues, statement of issues, statement of unresolved issues, final decision, and public versions of any further submissions (from the parties or third parties).

As a public body, the NZCC is subject to the Official Information Act 1982 (OIA), meaning any person can request information held by the NZCC, which includes any information submitted as part of a merger process. Under the OIA's principle of availability, such information should be disclosed unless there is a good reason not to (such as where disclosure would disclose a trade secret or unreasonably prejudice the commercial position of the provider). The NZCC will consider requests for information against its obligations under the OIA. The NZCC has a good track record of resisting disclosure of genuinely confidential or commercially sensitive information.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The NZCC regularly cooperates with overseas regulators regarding merger applications and has a particularly close relationship with the Australian Competition and Consumer Commission (ACCC). The two regulators coordinate through the formal cross-appointment of commissioners, including by having the NZCC cross-appointee appointed to the panel deciding ACCC decisions that involve both Australia and New Zealand (and vice versa).

Additionally, the NZCC has statutory powers to enter into 'cooperation agreements' with its overseas counterparts to enable it to share compulsorily acquired information and perform searches for the purposes of assisting an overseas regulator. Unless such a cooperation agreement has been entered into, confidential information provided to the NZCC cannot be shared with another regulator without a waiver from the provider of the information, as New Zealand's domestic confidentiality and privacy laws will continue to apply. To date, the NZCC has entered into formal cooperation agreements with the ACCC and the Canadian Competition Bureau.

The NZCC is also a member of the International Competition Network and maintains contact with overseas regulators through that network. In 2020, the NZCC signed a Multilateral Mutual Assistance and Cooperation Framework with authorities in Australia, Canada, the United Kingdom and the United States, to enhance international cooperation on competition enforcement. This allows for the sharing of public information and investigative information to the extent permitted by law or by waiver of confidentiality and coordinating investigative activities.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Appeals of clearance or authorisation decisions made by the New Zealand Commerce Commission (NZCC) may be made to the High Court by giving notice of appeal within 20 working days after the date of the NZCC's decision, or within such further time as the court allows. Appeals proceed by way of rehearing. Persons entitled to bring an appeal are:

- the applicant;
- the target; and
- for authorisations, any person who has a direct and significant interest in the application (provided they participated in the NZCC's process prior to its decision).

Third parties cannot appeal an NZCC clearance decision but can judicially review the clearance process.

The court on appeal can confirm, modify or reverse the NZCC's determination, or exercise any powers that could have been exercised by the NZCC. The court can also direct the NZCC to reconsider, either generally or in respect of specified matters, the matter to which the appeal relates. Parties can subsequently appeal a High Court decision to the Court of Appeal and, if leave to appeal is granted, the Supreme Court.

Time frame

33 What is the usual time frame for appeal or judicial review?

Appeals may be made to the High Court by giving notice of appeal within 20 working days after the date of the NZCC's decision.

It is difficult to assess the 'usual' time frame for appeals against the NZCC's merger determinations as there have been very few. The most recent appeals to be heard in both the High Court and Court of Appeal were those of media organisations Fairfax New Zealand Limited and NZME Limited against the NZCC's decision to decline their application for clearance or authorisation to merge. The NZCC declined the application on 3 May 2017. The parties filed a notice of appeal on 26 May 2017, and the High Court hearing was held from 16–27 October 2017. On 18 December 2017, the High Court issued its judgment, in which it upheld the NZCC's decision. On 22 February 2018, the High Court granted leave to appeal its decision to the Court of Appeal. The hearing was held from 5–8 June 2018. On 26 September 2018, the Court of Appeal issued its judgment, upholding the NZCC's decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The New Zealand Commerce Commission (NZCC) granted two conditional clearances in 2020. In both cases, the clearance determination was subject to a divestment undertaking. By comparison, all clearances were granted unconditionally in 2019. The identification and investigation of non-notified mergers have become a publicly stated priority of the NZCC since it identified an increase in such mergers in 2018. Consequently, there have been several non-notified mergers that have been investigated, subject to enforcement action, or required commitments from merger parties to resolve NZCC concerns. This applies across all industries and sectors.

Reform proposals

35 Are there current proposals to change the legislation?

The Commerce Amendment Bill, currently before Parliament, proposes increasing the maximum pecuniary penalties for breaches of merger control provisions from NZ$5 million for a body corporate, to the higher of NZ$10 million, three times the commercial gain from the contravention or (if that cannot be ascertained) 10 per cent of the business' group turnover. This would align merger control penalties with those for breach of the Act's trade practices prohibitions.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In October 2020, the New Zealand Commerce Commission (NZCC) published its priorities for the 2020/21 period. These included using its new 'fast track' process to consider authorisation applications (that new power has been introduced temporarily in response to covid-19) and reviewing mergers and acquisitions that occur in response to 'changing circumstance, given failing firms and increased concentration could affect sectors for years to come'. This is understood to be a reference to covid-19 and reflects that the NZCC intends to take the impacts of covid-19 into account in making its assessments.

In addition to these more recent priorities, the NZCC has had a publicly stated enduring priority on identifying and investigating non-notified mergers. Reflecting this focus on non-notified mergers, in 2020 the NZCC:

- Obtained a divestment undertaking from Wilson Parking, following its non-notified acquisition of an additional car park lease in Wellington. Wilson Parking also agreed to pay NZ$500,000 towards the NZCC's costs.
- Opened an investigation into Beijer Ref AB's non-notified acquisition of Heatcraft New Zealand Limited, being an acquisition in the refrigeration and air conditioning equipment industry. The investigation was closed without further action.
- Opened an investigation into Objective Corporation Limited's non-notified acquisition of Master Business Systems Limited, both suppliers of software used in the building consent process. This investigation is ongoing as of May 2021.
- Opened an investigation into the non-notified acquisition of Wallace Group GP Limited by associated interests of Glenninburg Holdings Limited, both involved in the animal rendering industry. This investigation is ongoing as of May 2021.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Law on the Protection of Competition (LPC) is a primary source of competition law in North Macedonia, whose purpose is to ensure free competition on the domestic market to stimulate economic efficiency and consumer welfare. The LPC entered into force on 13 November 2010 (Official Gazette No. 145/10) and was subsequently amended and supplemented in 2011, 2014, 2016 and again in 2018. It replaced the former competition legislation from 2005.

In 2012, on the basis of the LPC, the government of North Macedonia adopted nine by-laws (Decrees):

- on the detailed conditions for block exemption of certain types of agreements for the transfer of technology, licence or know-how;
- on the detailed conditions for block exemption of certain types of research and development agreements;
- on the conditions for block exemption of certain categories of horizontal agreements for specialisation;
- on block exemption of certain categories of insurance agreements;
- on block exemption of certain categories of agreements on distribution and servicing of motor vehicles;
- on block exemption of certain categories of vertical agreements;
- on the detailed conditions on agreements of minor importance (de minimis);
- on the form and content of the notification for concentration and the documentation to be submitted with the notification; and
- on the detailed conditions and procedure under which the Commission for Misdemeanour Matters decides on immunity from fines and reduction of fines (leniency).

They regulate some specific institutions that are prescribed within the LPC to enable the proper enforcement in the practice of, as well as total harmonisation with, EU principles, especially the secondary legislation of the European Union.

The body responsible for implementing the LPC is the Commission for the Protection of Competition (the Commission), as an independent state body.

The Commission supervises the application of the provisions of the LPC by monitoring and analysing the conditions of the market to the extent necessary for the development of free and efficient competition, as well as conducting procedures and making decisions in accordance with the provisions of the law.

The misdemeanour procedure is conducted and the misdemeanour sanction is imposed by a separate Commission for Misdemeanour Matters within the competition authority.

From 2012 to the end of 2016, the Commission adopted a set of various guidelines aiming to elaborate in more detail the provisions of the LPC and the Decrees, as well as to give instructions on the manner of proceeding of the Commission and assessment of various competition issues:

- Guidelines on the term concentration (2012) – harmonised with the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings;
- Guidelines for the method of submission and filing of notifications for concentration (2015) – harmonised with Commission Regulation (EC) No. 802/2004, dated 21 April 2004 for implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between enterprises;
- Guidelines on determining the cases in which the Commission shall pass a decision on assessment of the concentration in simplified form (2012) – harmonised with the Commission Notice on a simplified procedure for the treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (2005/C 56/04);
- Guidelines for the assessment of horizontal concentrations for the purposes of the LPC (2015) – harmonised with the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 5 February 2004, pages 5 to 18;
- Guidelines for the assessment of vertical and conglomerate concentrations (2015) – harmonised with the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings Official Journal C 265 of 18 October 2008;
- Guidelines for possible amendments and undertaking of commitments with regard to the notified concentrations, acceptable for the Commission, according to the LPC (2015) – harmonised with the Commission Notice on remedies acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004;
- Guidelines for defining the cases in which the Commission shall usually determine that certain concentrations assessed are compliant with the law (2016) – harmonised with the Commission Notice on a simplified procedure for the treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (2013/C 366/04);
- Guidelines on the application of article 7, paragraph 3 of the LPC (2012) – harmonised with the Commission Notice – Guidelines on the application of article 81(3) of the Treaty (text with EEA relevance);
- Guidelines for the vertical restrictions (2015) – harmonised with the Commission notice – Guidelines on Vertical Restraints, Official Journal C 130, 19 May 2010, page 1;
- Guidelines for the implementation of article 7 of the LPC for horizontal agreements for cooperation (2015) – harmonised with the Guidelines on the applicability of article 101 of the Treaty on the

Functioning of the European Union to horizontal cooperation agreements, Official Journal C 11, 14 January 2011, pages 1 to 72;
- Guidelines for detecting collusive agreements in the procedures for granting public procurement agreements (2015) – harmonised with the recommendations for prevention and avoiding of collusive tendering of international organisations, such as the OECD; and
- Guidelines for immunity or reduction of fines – leniency (2016).

Scope of legislation

2 What kinds of mergers are caught?

The LPC's merger control rules are based on the concept of change of control. A concentration shall be deemed to arise where a change of control on a lasting basis results from:
- the merger of two or more previously independent undertakings or parts of undertakings; or
- the acquisition of direct or indirect control of the whole or parts of one or more other undertakings by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by the purchasing of securities or assets, by means of an agreement or in other manner stipulated by law.

3 What types of joint ventures are caught?

The creation of a joint venture that permanently performs all the functions of an autonomous economic entity (full-function joint ventures) shall constitute a concentration according to the provisions of the LPC (ie, the acquisition of direct or indirect control).

The Guidelines on the term concentration closely defines the specific requirements under which the joint venture would be considered a concentration.

The joint venture must fulfil the full-functionality criterion to constitute a concentration, irrespective of whether the joint venture is created as a 'greenfield operation' and whether the parties contribute assets to the joint venture that were previously in individual ownership. It is sufficient for the joint venture to be autonomous in an operational respect.

'Full function' means that a joint venture must operate on the market, performing functions that are normally carried out by the undertakings operating on the same market. For that purpose, the joint venture must have a management dedicated to its daily operations and access to sufficient resources including finance, personnel and assets (tangible and intangible) to perform its business activities on a permanent basis within the framework determined in the joint venture agreement.

The Guidelines on the term concentration outlines more specific directions with respect to the situations that would be considered when examining the notification of concentration in cases involving joint ventures (for example, the sufficient resources to operate independently on a market, the activities outside the specific function of the ruling or parent undertakings, sale and purchase relations with the ruling or parent undertakings, sustainable operations on a lasting basis, and changes in the activities of the joint venture).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The concept of control, under the LPC, comprises rights, contracts or any other means that either separately or in combination, and having regards to the factual or legal conditions confer the possibility of exercising decisive influence on an undertaking, in particular through:
- ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that confer decisive influence on the composition, voting or decisions of the bodies of the undertaking.

Control is acquired by persons or undertakings who are holders of the rights or have acquired the rights under the contracts referred to above, or that still have the power to exercise such rights under the contracts even though such persons or undertakings have not been holders of such rights or have not acquired the rights under the contracts.

Minority interests may fall within the definition of control if they are associated with veto rights over strategic decisions of the undertaking. Contractual arrangements, such as organisational contracts under law; a lease of the enterprise's business, which grants control over the management and the resources; or the right to use the enterprise's assets, may also lead to change of control on a lasting basis, despite the fact that property rights or shares are not transferred.

With the Guidelines regarding the term concentration, the Commission provided more information and instructions to questions when the concentration arises in accordance with article 12 of the LPC, thus specifying the types of control.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The participants in a concentration are obliged to notify such concentration to the Commission, if:
- the collective aggregate annual income of all the participating undertakings, generated by the sale of goods or services on the world market, exceeds the equivalent amount of €10 million expressed in denars counter value, made during the business year preceding the concentration, and where at least one participant is registered in North Macedonia;
- the collective aggregate annual income of all the participating undertakings, generated by sales of goods or services in North Macedonia, exceeds the equivalent amount of €2.5 million expressed in denars counter value, made during the business year preceding the concentration; or
- the market share of one of the participants exceeds 40 per cent or the total market share of the participants in the concentration exceeds 60 per cent in the year preceding the concentration.

The LPC does not specify any conditions under which the Commission would be competent to investigate transactions falling below the abovementioned thresholds.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory and there are no exceptions provided in the law. Therefore, any merger qualifying as a concentration that meets the turnover thresholds or market share thresholds must be filed.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The implementation of the LPC is not limited only to practices undertaken within the territory of North Macedonia, but also abroad if they produce certain effects on the territory of North Macedonia. The LPC shall be applied to all forms of prevention, restriction or distortion of competition that produce an effect on the territory of North Macedonia, even when they result from acts carried out or undertaken outside the territory of North Macedonia.

If the thresholds are fulfilled, the presumption stands that a foreign-to-foreign merger produces effects in North Macedonia, and it has to be notified in North Macedonia.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special provisions on foreign investments or on special sectors in the LPC; the general rules shall apply.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The deadline for filing the notification is generally described: the participants are obliged to notify the Commission for the Protection of Competition (the Commission) before implementation of the concentration and following the conclusion of the merger agreement, or the announcement of a public bid for the purchase or acquisition of a controlling interest in the charter capital of the undertaking.

Failure to notify represents a misdemeanour penalised by a fine amounting to up to 10 per cent of the value of the aggregate annual income of the undertaking made in the business year preceding the year when the misdemeanour was committed. In addition to the fine, the Commission for Misdemeanour Matters may impose to the legal person a temporary ban on the performance of specific activity in duration of three to 30 days, and to the natural person – a ban on the performance of an occupation, activity or duty in duration of three to 15 days.

The competition authority in North Macedonia has had a past track record of sanctioning the undertakings for failure to notify the concentration when the jurisdictional thresholds were met (even for foreign-to-foreign mergers). One of the latest decisions was adopted on 18 February 2021 in which the Commission sanctioned a foreign entity for filing a belated notification and closing a transaction before obtaining a clearance.

10 | Which parties are responsible for filing and are filing fees required?

Merging undertakings or acquirers of joint control are obliged to submit a joint notification of the concentration arising as a result of a merger or of a concentration resulting from the acquisition of a joint control.

In all other cases, the notification shall be filed by a person or undertaking that acquires control of the whole or part of one or more other undertakings.

The initial filing fee amounts to 6,000 denars and is payable with filing. An additional fee of 30,000 denars will be charged for a decision declaring the concentration compliant with the provisions of the LPC, and is payable after the concentration has been appraised by the Commission.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The concentration shall not be performed either before its notification to the Commission or after the submission of the notification until a decision is made declaring the concentration compliant with the LPC or before the expiry of the legal terms in which the Commission should pass the decision. This shall not prevent the implementation of a public bid for the purchase of securities or a series of securities transactions, including those convertible into other securities for the purpose of trading on the market if the concentration has been notified to the Commission without delay, and the acquirer of securities does not exercise the voting rights attached to the securities in question or does so only to the extent that is necessary to maintain the full value of its investment and based on a Commission's decision for exemption.

After the complete notification is received, the Commission has up to 25, and at most 145, business days, depending on the case, to pass its decision.

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the undertakings do not comply with the suspension obligation as stipulated in article 18 of the LPC, they can be fined for a serious misdemeanour with up to 10 per cent of the value of the total annual income of the undertaking (respectively, of the group) realised in the business year preceding the year in which the concentration was performed. The total annual income is calculated under article 16 of the LPC. In addition, the Commission may impose temporary bans on the performance of an occupation, activity or duty of three to 30 days on legal persons and three to 15 days on natural persons.

In its decision of 18 February 2021, in which the Commission sanctioned a foreign entity for filing a belated notification and closing a transaction before obtaining a clearance, the Commission only imposed a fine on the foreign entity as the transaction was eventually cleared as compliant with the law.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

If the undertaking does not file a notification on concentration in cases of foreign-to-foreign mergers that fall under the provisions of the LPC, the Commission for Misdemeanour Matters shall impose a fine amounting to up to 10 per cent of the value of the aggregate annual income of the undertaking made in the business year preceding the year when the misdemeanour was committed. In addition to the fine, the Commission for Misdemeanour Matters may impose temporary bans.

The Commission for Misdemeanour Matters imposed fines in several cases involving closing before clearance in foreign-to-foreign mergers.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

All mergers (not only foreign-to-foreign) that fulfil the thresholds can apply for an exemption from the suspension obligation by submitting a justified written request, which is subject to approval by the Commission (article 18 of the LPC).

The Commission may, upon a reasoned request by the participants in a concentration, decide and allow an exemption from the obligations that the concentration shall not be performed before its notification and clearance. In deciding upon the request for exemption, the Commission shall, inter alia, take into account the effects of the suspension of the concentration on one or more undertakings concerned by the concentration or on a third party, as well the threat to the competition posed by the concentration. This exemption may be subject to the imposition of conditions and obligations to ensure effective competition. The exemption may be applied for and granted at any time, that is, prior to filing of the notification or following the transaction that refers to the public bid for the purchase of securities or a series of securities transactions, including those convertible into other securities for the purpose of trading on the market. The Commission prescribed a special form of request for exemption, regulating in general manner its content; however, details of the documents to be enclosed to the request are not provided. The decision following the request for exemption has to be issued within 15 days of the day of receipt of the complete documentation necessary to assess the request.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules applicable to public takeover bids.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The LPC does not prescribe special form for submission of the notification. It only stipulates that the notification of the concentration must include (original or a verified transcript of): the legal act that is the basis for the creation of the concentration; financial reports of the participants regarding the business year preceding the concentration; certificate from the trade register or other register of legal persons containing the basic information on the undertaking, the registered office and the scope of operation of the participants; data regarding the market shares of the participants and the shares of their competitors. The Commission ex officio obtains the financial reports and registration documents for the participants in the concentration registered in North Macedonia.

However, the 'Regulation on the form and content of the notification of concentration and necessary documentation that shall be submitted along with the notification' sets out detailed rules with regard to the notification's content and format (written and electronic) as well as additional enclosures. Inter alia, the notification on concentration should contain the following information: a short resume on the notification – excluding any confidential information (to be published on the Commission's website), exact data on the participants in the concentration (name, address, business activity, annual income gained on a group level in the business year preceding the concentration – worldwide and on the North Macedonian market, calculated under article 16 of the LPC), detailed description and legal basis of the concentration, relevant markets and market shares of the participants in the concentration and their main competitors, etc.

The notification for concentration should mandatorily include a statement signed by or on behalf of the notifying party (in the practice it should be signed by all the participants in the concentration) relating to the accuracy of the data, information and documents enclosed to the notification. In the case of submitting false or misleading data to the Commission, a misdemeanour fine could be imposed on the notifying party of up to 1 per cent of the value of its total annual turnover, calculated under article 16 of the LPC; and more important, the Commission may revoke its decision declaring the concentration as compliant with the provisions of LPC if it was adopted on the basis of such false or incomplete data for which one of the participants in the concentration is responsible or they were obtained by way of deceit, and they had a decisive influence when adopting the decision.

In addition to the compulsory data, the Commission may require the submission of all other data considered necessary for the evaluation of the concentration. In particular, this would take place in cases of horizontal relations (where two or more of the participants in the concentration are engaged in business activities related to the same market of goods and geographical market) or vertical relations (when one or more of the participants in the concentration are engaged in business activities on the market of goods that is upstream or downstream in relation to the market of goods in which any other participant in the concentration participates) between the participants in the concentration, provided that in cases of horizontal relations their mutual market share is higher than 15 per cent, and in cases of vertical relations their individual or mutual market shares are equal to or higher than 25 per cent.

The 'Guidelines for submission and filing of the notification for concentration' prescribe the form and content of the introductory (first) page of the notification for concentration, which is of a very general nature. In addition, the Guidelines provide some more technical details about the form, content and technical description of the elements of the notification of concentration (all mandatory data to be provided on a separate sheet of paper, to include description of the circumstances related to the concentration, or to indicate and elaborate that such information is not relevant for the assessment of the concentration, to provide a detailed list of all enclosures, etc).

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The Commission shall examine the notification once it is received, and decide:

- that the notified concentration does not fall under the provisions of the LPC;
- to declare the concentration as compliant with the provisions of the LPC if:
  - it finds that the concentration notified, although falling under the provisions of the LPC, shall not have as its effect significant impediment of effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position (significant impediment of effective competition);
  - the participants, after the notification is filed, have modified the concentration, and the Commission finds that as a result of those changes the concentration shall no longer have as its effect significant impediment to effective competition; or
  - to initiate an in-depth procedure if it finds that the concentration notified falls under the provisions of the LPC and may have as its effect the significant impediment of effective competition. No appeal or legal action on instituting an administrative dispute is allowed against this procedural order.

In August 2016, the Commission adopted separate Guidelines that define the cases in which it will usually declare certain concentrations compliant with the competition rules in a simplified procedure (within the term of 25 working days), aiming to make the merger control procedure more focused and effective.

During the in-depth procedure the following steps may occur:

- the Commission may decide to adopt a decision declaring that the concentration is compliant with the provisions of the LPC, if after the notification is filed or after the performed concentration modifications by its participants, the Commission finds that the concentration shall not have as its effect significant impediment of effective competition;
- the participants in the concentration may enter into commitments with the Commission with a view to rendering the concentration compliant with the provisions of the LPC. In this case, the Commission may adopt a decision declaring that the concentration is compliant with the provisions of the LPC and in the same decision shall determine the conditions and impose obligations intended to ensure that the participants act in line with the commitments undertaken with the Commission; any breach of the commitment attached to the decision declaring the concentration as compliant with LPC is a justified reason for the Commission to revoke such decision; or
- the Commission may adopt a decision declaring that the concentration is not compliant with the provisions of the LPC if it finds that the concentration shall have as its effect a significant impediment of effective competition.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Once the Commission receives all the data and documents, it shall issue a certificate of completeness and start to examine the notification of the concentration. Within 25 working days of receipt of the complete notification (in average, 14 working days for proceedings conducted in 2020), the Commission shall make the decision on the compatibility of the merger with the LPC, or it shall make a procedural order initiating an in-depth procedure if it finds that the notified concentration falls under the provisions of the LPC, but might not be compliant with the LPC.

This term may be extended up to 35 working days if the participants in the concentration undertake commitments in relation to the Commission with a view to rendering the concentration compliant with the LPC.

If an in-depth procedure has been initiated, the decision appraising the concentration has to be passed within 90 working days of the date of initiating the procedure. The LPC and the Commission practice shows that the time limits may be extended by the Commission in agreement with the participants in the concentration at any time after initiating the procedure and the total duration of each extension may not exceed 20 working days.

If the Commission has not adopted a decision within the prescribed deadlines, the concentration shall be considered to be compliant with the provisions of the LPC.

By exception, the legal time limits shall not be binding on the Commission when, as result of circumstances for which one of the participants is responsible, the Commission had to request ex officio from the undertakings to submit necessary data regarding their economic-financial standing, their business relations, data regarding their statutes and decisions, and the number and identity of the persons affected by such decisions, as well as other necessary data, or if the Commission had to perform other relevant actions by inspection and obtaining of evidence on the site.

The procedure cannot be speeded up.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A concentration that significantly impedes the effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position of its participants, is not in compliance with the provisions of the Law on the Protection of Competition (LPC).

20 | Is there a special substantive test for joint ventures?

To the extent that the creation of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of undertakings – part of the joint venture that remains legally independent, such coordination shall be appraised according to the criteria applicable to the prohibited agreements, decisions and concerted practices as well as the exemptions thereof.

In making such appraisal, the Commission for the Protection of Competition (the Commission) in particular shall take into account whether the parties to the joint venture continue to retain, to a significant extent, the activities on the same market as the joint venture or on the market that is downstream or upstream from that of the joint venture or on a neighbouring market closely related to the market of the joint venture; and the coordination that arises as a direct effect from the creation of the joint venture affords the parties in the joint venture the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Commission shall investigate whether the concentration shall significantly impede the effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position of its participants.

In making the appraisal of the concentration, the Commission especially takes into account:

- the need to maintain and develop effective competition on the market or in a substantial part of it, especially in terms of the structure of all markets concerned and the actual or potential competition from undertakings located in and outside North Macedonia; and
- the market position of the undertakings concerned and their economic and financial power, the supply and alternatives available to suppliers and users, as well as their access to the supplies or markets, any legal or other barriers to entry on and exit from the market, the supply and demand trends for the relevant goods or services, the interest of the consumers and the technological and economic development, provided this is of benefit for the consumers and the concentration does not form an obstacle to competition development.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not reviewed by the Commission.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Commission will take into account economic efficiencies to the extent that the parties are able to offer a defence that the efficiency gains will benefit consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Interim measures for restoring or maintaining effective competition may be imposed when the concentration has:

- been implemented before filing the notification and its clearance (as compliant with the Law on the Protection of Competition (LPC));
- been implemented contrary to the conditions and commitments attached to the decision for its clearance; and
- already been implemented and declared not compliant with the provisions of the LPC.

The Commission for the Protection of Competition (the Commission) has the power to annul its decision for clearance of the concentration and to declare that the concentration is not compliant with the LPC, and, if necessary, impose measures and obligations to restore effective competition on the relevant market. In this procedure, the Commission is not bound by the time limits outlined in the statutory timetable for clearance.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues.

After the notification is filed, the participants may enter into commitments (divestiture or behavioural remedies) with the Commission. In its decision, the Commission shall attach conditions and impose obligations intended to ensure that the participants act in line with the commitments entered into with the Commission, with a view to rendering the concentration compliant with the provisions of the LPC.

In December 2015, the Commission adopted the latest Guidelines for possible amendments and undertaking of commitments with regard to the notified concentrations, acceptable for the Commission, according to the LPC.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no strict provisions in the LPC related to the basic conditions and timing issues applicable to a divestment or other remedies; the situation is appraised by the Commission on a case-by-case basis.

Under the Guidelines for possible amendments and undertaking of commitments with regard to the notified concentrations, the parties may modify the concentration to eliminate the competition concerns and obtain clearance of the concentration. Such modifications have to be fully implemented in advance of a clearance decision.

However, it is more common that the parties submit commitments (adequate to eliminate the competition concerns and to ensure competitive market structures) with a view to rendering the concentration compliant with the LPC, and that those commitments are implemented following clearance.

The commitments could include the following.

Divestiture

Sale of a business unit (assets or part of the business) to a suitable purchaser – which is used to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.

The divestiture has to be completed within a fixed time period agreed between the parties and the Commission: a period for entering into a final agreement ('first divestiture period' – to take around six months, and 'trustee divestiture period' – to take additional three months), and a further period for the closing of the transaction (to take three months). The deadline for the divestiture shall normally start on the day of the adoption of the Commission decision. These periods may be modified on a case-by-case basis.

Removing links between the parties and competitors

In cases where these links contribute to the competition concerns raised by the merger (such as divestiture of a minority shareholding in a joint venture, or waiving of rights linked to minority stakes in a competitor, comprehensively and in a permanent way, or termination of agreements with companies supplying the same products or providing the same services).

Other structural remedies

Other structural remedies such as granting access to the key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs on non-discriminating terms – which may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects.

Commitments

Commitments are possible relating to the future behaviour of the undertaking after the concentration, which may be acceptable only in very specific circumstances (such as change of long-term exclusive contracts, other non-divestiture remedies – such as promises by the parties to abstain from certain commercial behaviour, eg, bundling products, only in cases of conglomerate structures).

The parties have to submit enough information relevant for assessment of the commitments. The Commission may grant waivers or accept modifications or substitutions of the commitments only in exceptional circumstances. This will very rarely be relevant for divestiture commitments.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, there has been one foreign-to-foreign merger with remedies imposed, which have been duly fulfilled by the merging parties. On 8 July 2015, 4 July 2018 and 28 October 2020, the Commission conditionally approved another three mergers. Fulfilment of the commitments is ongoing.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

If the concentration is approved, it is considered that the clearance decision includes the ancillary restrictions. The Guidelines on restrictions directly related and necessary to concentrations from 2011 sets out principles for assessing whether and to what extent the most common types of agreements (non-competition clauses, licence agreements, purchase and supply obligations) are deemed to be ancillary restraints. It introduces the principle of self-assessment of the ancillary restrictions; however, the parties may request from the Commission to provide its opinion on the residual character of the restrictions with regard to specific novel or unresolved issues giving rise to genuine uncertainty, when such case is not already covered with the Guidelines. The provisions of article 7 (regulating prohibited agreements, decisions and concerted practices) and article 11 of the LPC (regulating abuse of dominant position) shall apply to restrictions that cannot be regarded as ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

After the short resume of the notification of the concentration (which includes the name, headquarters and subject of activity of the participants, the type of concentration – merger, or acquiring a joint control, etc) is published on the website of the Commission for the Protection of Competition (the Commission), all interested parties (including the customers and competitors) can provide their comments, opinions and remarks regarding the concentration concerned within the deadline stipulated by the Commission. Their input will be adequately assessed by the Commission and addressed in the decision upon the notified concentration.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The participants in the concentration should clearly mark all the confidential data in the notification. However, the Commission shall accept the classification of data as a business secret if it concerns data that have economic or market value and whose discovery or use may lead to economic advantage of other undertakings. When submitting data classified as a business secret, the undertaking is obliged to justify such determination by indicating objective reasons.

The short resume of the notification of concentration should not contain any confidential data and business secrets, as it is published on the Commission's website, and is a forum for interested parties to provide their comments, opinions and remarks.

After adopting a decision on concentration, the Commission delivers the decision to the notifying party, asking it to clearly mark all confidential data.

The non-confidential versions of the decisions of the Commission and the Commission for Misdemeanour Matters are published in the Official Gazette of the Republic of North Macedonia and on the website of the Commission. The judgments and the decisions of the court are published only on the Commission's website.

The president and the members of the Commission and its employees, as well as the president and the members of the Commission for Misdemeanour Matters, are obliged to keep business or professional secrets regardless of how they have been learnt. This obligation lasts for five years as of the termination of the employment with the Commission or after the expiry of the term of office of the president or the Commission member. The above persons may not give public statements that could harm the reputation of the undertaking or statements on the measures they have undertaken or the procedures they have initiated while performing the activities under their competence until they are final, unless it regards the announcement of general information.

The parties in the procedure are not entitled to inspect, transcribe or copy any documents that are a business or professional secret within the definition under the LPC.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission participates in the implementation of projects of international authorities and the authorities of the European Union, and cooperates with the competition authorities and institutions of other countries, mainly through sharing the experience. The Commission has signed memorandums of cooperation with the competition authorities of countries in the region (such as Serbia, Bosnia and Herzegovina, Kosovo, Bulgaria, Croatia, and Turkey). North Macedonia has been a member of: the International Competition Network; the OECD Regional Centre for Competition (RCC) – established in 2005 for the south-eastern European countries; and the Energy Community Competition Network established in 2012 within the frameworks of the Energy Community. The Commission regularly follows the competition practice and applies the competition criteria of the European Union.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Participants in the procedure are entitled to lodge lawsuits with the Administrative Court of North Macedonia against administrative and misdemeanour decisions of the Commission for the Protection of Competition (the Commission). Judgments of the Administrative Court can be appealed to the Higher Administrative Court. The Supreme Court decides on extraordinary legal remedies against decisions of the Higher Administrative Court.

The Law on Administrative Disputes applies to disputes initiated in accordance with the above.

Time frame

33 What is the usual time frame for appeal or judicial review?

The legal term to file a lawsuit to the Administrative Court is 30 days of receiving the decision; while the lawsuit shall not defer the enforcement of decisions adopted in administrative procedure, it will suspend the enforcement of decisions on misdemeanour matters.

Judgments of the Administrative Court can be appealed to the Higher Administrative Court within 15 days of receiving the first instance court decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

So far, all of the Commission for the Protection of Competition's merger decisions have been complied with.

The Law on the Protection of Competition (LPC) introduced misdemeanour procedures in which the Commission for Misdemeanour Matters shall simultaneously determine the existence of violation of the LPC, the existence of a misdemeanour, and it shall also impose certain fines as sanctions for such behaviour. It is expected that the LPC would further expedite the enforcement and the system of sanctioning LPC violations, as it would no longer be necessary for the violation to be initially determined in an administrative procedure, which would then be followed by a separate misdemeanour procedure.

On 8 July 2015, 4 July 2018, 20 July 2020 and 29 October 2020 the Commission for the Protection of Competition conditionally approved mergers (domestic and foreign) in different sectors (telecommunications; construction materials, specifically modular suspended ceilings and concrete additives; and automotive industry, in the market of passenger vehicles). Fulfilment of the commitments is ongoing.

Reform proposals

35 Are there current proposals to change the legislation?

At present there are no proposals for adoption of regulations or for any changes (amendment and supplement of the current regulation) pending. The by-laws adopted in March 2012 are still in force. With this set of by-laws, competition legislation under the LPC is up to date with the most important parts of EU legislation. The Commission for the Protection of Competition regularly adopts and publishes on its website specific guidelines on various competition issues.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The merger control track record in 2020 includes 62 unconditionally approved concentrations and two concentrations approved subject to successful implementing of structural measures. No misdemeanour sanctions for failure to notify concentration or any temporary measures were imposed in the past year and there are no annulled decisions referring to previously approved mergers. However, the Commission for the Protection of Competition sanctioned an undertaking for filing wrong or misleading data in a merger control procedure. The average duration of the procedure in 2020 was 14 business days from the day of receipt of complete notification.

The Commission continues to monitor fulfilment of the commitments (structural remedies) in the following sectors: telecommunications (case Up No. 08–1 from 2015), construction materials – modular suspended ceilings (case Up No. 08–4 from 2018), concrete additives (domestic merger, case Up No. 08–4 from 2020), and the automotive industry – market of passenger vehicles (case Up No. 08–36 from 2020).

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control in Norway is regulated by Chapter 4 of the Norwegian Competition Act and the Regulation on Notification of Concentration. Both the Competition Act and the Notification Regulation were amended in 2016 and are now to a large extent harmonised with the EU Merger Regulation (EUMR).

The primary enforcer of merger control is the Norwegian Competition Authority (NCA). All appeals are handled by the Norwegian Competition Tribunal, an independent and court-like administrative body for competition cases established in 2017. Decisions of the Competition Tribunal are appealed to the Gulating Court of Appeal.

Scope of legislation

2 | What kinds of mergers are caught?

Merger control in Norway applies to concentrations. According to section 17 of the Competition Act, a concentration is deemed to arise either where:

- two or more previously independent undertakings or parts of undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire direct or indirect control on a lasting basis of the whole or parts of one or more other undertakings.

The concept of 'concentrations' under the Competition Act is harmonised with the EUMR and encompasses lasting changes to the structure of the market. Case law from the Court of Justice of the European Union and the European Commission's jurisdictional notice and decisional practice are relevant to the assessment of the concept of 'concentrations' pursuant to the Competition Act.

3 | What types of joint ventures are caught?

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitutes a 'concentration' and is, therefore, subject to merger control. The concept of a full-function joint venture is the same as under the EUMR.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

As defined in section 17 of the Competition Act, control is constituted by the possibility in law or facts of exercising decisive influence on a company. Also, the concept of control is the same as under the EUMR.

Minority shareholdings that do not confer control are not subject to a mandatory filing requirement. However, it follows from section 16(a) of the Competition Act that the NCA can intervene against acquisitions of non-controlling stakes if it has ordered the acquirer to submit a notification within three months from the final agreement.

In addition – pursuant to section 16(a) – if an anticompetitive, minority stake in another company has been achieved through successive purchases, the NCA can intervene against all of the transactions that have taken place within two years from the date of the most recent acquisition.

Under the present Competition Act, the NCA has only intervened once against an acquisition of a minority shareholding that did not confer control. That happened in March 2019, when the NCA intervened against Sector Alarm's acquisition of 49.99 per cent in its competitor Nokas.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration must be notified to the NCA if:

- at least two of the undertakings concerned each have an annual turnover in Norway exceeding 100 million kroner; and
- the combined annual turnover in Norway of the undertakings concerned exceeds 1 billion kroner.

The principles for calculation of turnover in Norway are the same as under the EUMR.

The NCA can choose to investigate transactions falling below the thresholds and require a notification if there are reasonable grounds to assume that competition will be affected by the concentration. The order must be given within three months of the final agreement or the acquisition of control, whichever comes first. In a 2019 case (Sector Alarm's acquisition of 49.99 per cent in its competitor Nokas), the NCA also ordered Sector to submit a notification about its acquisition of sole control over Nokas's security alarm portfolio, which had revenue below the thresholds. On appeal, the Competition Tribunal upheld the NCA's decision to require a notification.

In 2020, the NCA has on two separate occasions already ordered parties to submit notification of concentration with competitors below the thresholds: in February 2020, the media group Amedia was ordered to submit a notification about the acquisition of the local newspaper company Nu Publishing, although the latter only had a marginal turnover. In March 2020, the media group Schibsted was ordered to submit a notification about its acquisition of Nettbil – a start-up that offers a digital marketplace for auction-based car sales to dealers in Norway. This underlines that the NCA is not afraid to intervene below the notification threshold in concentrated sectors.

If the turnover thresholds of the EUMR are met, the NCA will not be competent to review the merger and no notification is required in Norway – except for transactions involving markets for products that fall outside the scope of the EEA Agreement. The rules of the EUMR on referral of cases between the European Commission and national competition authorities are largely applicable to Norway through Protocol 24 of the EEA Agreement.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notifications of concentrations above the jurisdictional turnover thresholds are mandatory. Concentrations below the thresholds and acquisition of minority shareholdings, on the other hand, can be notified voluntarily. There are no exceptions from the mandatory notification obligation except for foreign-to-foreign mergers with no local effects.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Neither the Competition Act nor the Notification Regulation contains an explicit exception for foreign-to-foreign transactions. The turnover thresholds apply regardless of whether the undertakings concerned are establish in Norway or not. However, the Competition Act only applies to transactions that have an effect, or are liable to have an effect, within Norway or in a market of which Norway is a part.

The NCA has confirmed that a merger filing is not required where a transaction does not meet this 'local effects test'. As regards the meaning of local effects, the NCA has taken the position that only effects on competition are relevant and that such effects must pertain to a market within Norway or a wider market that includes Norway. Accordingly, transactions that only affect competition in markets outside Norway will not meet the local effects requirement.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There is no general legislation in Norway applicable to foreign investments. In some sectors, there is special legislation on concessions, limitations on ownership etc, particularly in the finance, aquaculture, telecom and energy sectors.

The Norwegian Media Authority's control over media ownership was abolished on 1 July 2016, rendering a review of changes in media ownership the exclusive responsibility of the NCA.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no filing deadline pursuant to the Competition Act. As long as the transaction is not implemented, it is for the parties to decide when to submit the notification.

The Norwegian Competition Authority (NCA) may impose fines of up to 10 per cent of the undertaking's turnover for not filing. In practice, the NCA will fine the undertaking for implementing the transaction in breach of the standstill obligation if it has failed to notify.

10 Which parties are responsible for filing and are filing fees required?

The parties or party responsible for the notification of the concentration to the NCA varies:

- In the case of mergers, the obligation to file rests with the merging parties jointly.
- If two or more undertakings acquire joint control over one or more other undertakings, the obligation to file rests with the acquiring undertakings jointly.
- If a single undertaking acquires control over one or more other undertakings, the obligation to notify rests with the acquiring undertaking alone.

No filing fees are required.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

An automatic standstill rule applies to all concentrations that are subject to notification to the NCA. The transactions cannot be implemented until the NCA has concluded its handling of the case in question or an express exemption from the standstill obligation has been obtained.

The NCA has granted a number of exemptions from the standstill obligation on a case-by-case basis. This includes several cases concerning acquisition where the target has been in financial difficulties and where the value of the target business could be significantly diminished if the parties could not begin implementation prior to the NCA's clearance. The last example is from February 2020 when the ultimate owners of the sports retailer Sport1 were given partial exemption from the standstill obligation to implement the proposed takeover of its bankrupt competitor Gresvig.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Infringement of the standstill obligation can lead to significant fines. Fines may be imposed both in case of full and partial integration of the parties' businesses before the end of the standstill obligation.

Pursuant to the Competition Act, the NCA may issue a fine of up to 10 per cent of the undertaking's turnover for infringements of the standstill obligation. In February 2015, the NCA issued a record fine of 25 million kroner for failing to notify a concentration.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions may also be imposed in cases involving closing before clearance in foreign-to-foreign mergers, provided that the concentration is notifiable in Norway owing to local effects. There are no examples in the NCA's decisional practice of sanctions in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Competition Act does allow for an exemption from the standstill obligation on a case-by-case basis. By obtaining such exemption, the parties to a foreign-to-foreign merger may be allowed to close the proposed transaction as long as Norwegian markets, or markets of which Norway forms part, are not affected. An exemption on this basis has so far only been granted in one case.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

A specific regulation provides for an exemption from the automatic standstill obligation for public takeover bids. The regulation corresponds to article 7(2) of the EU Merger Regulation (EUMR).

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The level of detail required in a notification depends primarily on the existence of affected markets, namely an overlap between the businesses of the undertakings concerned, and the position of the undertakings in those markets. The requirements are relatively extensive if the undertakings have a combined market share of more than 20 per cent in a market or more than 30 per cent in markets that are vertically connected. These market share thresholds correspond to Form CO of the Implementing Regulation under the EUMR.

Notifications are to include the following categories of information:

- contact information;
- description of the transaction;
- descriptions of the undertakings concerned;
- descriptions of affected markets, including as a minimum a description of the market structure, lists of the most important competitors, customers and suppliers, and a description of barriers to entry;
- account of any efficiencies;
- information on whether the concentration is subject to notification to other competition authorities;
- latest version of the agreement giving rise to the concentration, including any attachments; and
- annual reports and financial statements of the undertakings concerned.

Notifications must be submitted in Norwegian if there are affected markets.

Any business secrets must be clearly marked in the notification and all confidentiality claims must be substantiated for the notification to be regarded as complete by the NCA. Furthermore, a proposal for a public version of the notification is to be included with the notification. The NCA is required to publish some basic information about every notification on its website.

The Notification Regulation includes a system of simplified notifications. On conditions similar to those of the 'Simplified Procedure' under the EUMR, the notifying parties may submit a simplified notification. Such notifications can be submitted in Norwegian, Swedish, Danish or English.

If the parties do not satisfy the requirements for notification, the deadlines for the NCA's handling of the case will not start running until the information requirements are met. Section 32 of the Competition Act provides a legal basis to impose fines, or in the most severe cases, criminal sanctions, if the parties provide the NCA with incomplete, incorrect or misleading information.

Like other national and supranational competition authorities, the NCA has recently strengthened its focus on misleading or incorrect information. In March 2020, the NCA fined the Norwegian state-owned train operator Vygruppen 7.5 million kroner for giving incorrect information when notifying a joint venture. From the NCA's decision, it follows that there is a fairly low threshold for such sanctions if the NCA first finds that incorrect or misleading information about relevant topics has been provided.

Notably, however, this fine was later repealed in February 2021, as the Competition Appeals Board found that the NCA had not fulfilled its duty to investigate whether the substantive condition set out in section 29(1)(d) of The Competition Act had been met, as required by section 17 of the Public Administration Act.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The parties are under no obligation to consult with the NCA before notifying a merger. However, in complex cases, it is often advisable to approach the NCA at an early stage and present the main issues and the available data, and to enter into pre-notification discussions. Confidentiality is respected, so that discussions with the authority may take place before the deal is public.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Phase 1

From the date when the notification is submitted, the NCA has 25 working days to give notice that intervention may take place. In its notice, the NCA must briefly state its reasons for intervention. If no notice of possible intervention is given, the transaction is cleared. In non-problematic cases, the practice of the NCA is to clear the transaction before the Phase 1 deadline by way of an informal notice.

If the notifying parties present remedies within 20 working days of submission of the notification, the initial deadline of the NCA is extended by 10 working days. In such a case, it may accept and make binding the remedies within the extended deadlines. In November 2019, the NCA made its first remedy decision in Phase 1 according to this procedure in the case concerning the proposed merger between Tieto and Evry.

Phase 2

If the NCA gives notice of a possible intervention, it has 70 working days (ie, 45 additional working days) from receipt of the notification to either accept and make binding any remedies presented by the notifying parties or issue a reasoned draft decision of intervention. If the notifying parties present remedies later than 55 working days after submission of the notification, the deadline is extended accordingly.

The parties have 15 working days to submit their comments to the draft decision of intervention. After the parties submit such comments, the NCA has 15 working days to issue its decision. If remedies are presented to the NCA after it has issued its reasoned draft decision, the final deadline can be extended by 15 working days. The NCA can also, on request or approval from the parties, extend its final deadline to issue a decision with 15 additional working days. In such cases, the maximum timetable for clearance is, therefore, 145 working days.

It follows that the deadlines of the NCA are primarily prolonged owing to incomplete notifications and presentation of remedies by the parties. The NCA has a strict approach to the marking of business secrets and substantiation of confidentiality claims, and has on numerous occasions not accepted notification as complete on those grounds.

If the NCA considers intervention in Phase 2, and if acceptable remedies are not presented at an early stage, the NCA will usually exhaust its deadlines before making a final decision. The review process in such cases could take about six months if remedies are submitted during the in-depth investigation.

Owing to the covid-19 outbreak, an interim regulation was introduced that extended the most important procedural deadlines by 15 working days. Addressees of intervention decisions adopted by the

NCA were also afforded an extension of the deadline to appeal by 15 working days.

The interim regulation was repealed on 31 October 2020.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Under the Competition Act, the Norwegian Competition Authority (NCA) shall intervene against concentrations that significantly impede effective competition (the SIEC test), in particular as a result of the creation or strengthening of a dominant position. The substantive test is harmonised with that of the EU Merger Regulation (EUMR). It follows from the preparatory works to the Act, that the decisional practice under the EUMR is directly relevant for the interpretation of the Competition Act.

Until July 2016, the NCA was obliged to intervene against concentrations that significantly lessened competition (the SLC test). Under the SLC test, if a significant restriction of competition were deemed to have existed pre-merger, there was no de minimis threshold with respect to concentrations that would entail a further reduction of competition. Under the current SIEC test, the threshold for intervention is arguably higher in such cases. However, according to the preparatory works of the Act, the change from the SLC to the SIEC test is not to have any practical significance for NCA's ability to intervene against such concentrations.

Under the SIEC test, the NCA also has to assess whether the transaction generates efficiencies that outweigh the anticompetitive effects, as well as assessing the parties' arguments relating to a potential 'failing firm' defence. The NCA's practice indicates a very high threshold for clearing a concentration owing to efficiencies or the failing firm defence, but there are examples of both.

20 | Is there a special substantive test for joint ventures?

Section 16 of the Competition Act contains a special substance test for joint ventures. Similar to article 2(4) of the EUMR, the NCA shall consider whether the joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent. That coordination shall be appraised in accordance with section 10 of the Competition Act (which corresponds to article 101 of the Treaty on the Functioning of the European Union).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The NCA will investigate possible unilateral, coordinated, vertical and (theoretically) conglomerate effects of the concentration. The notices, guidelines and decisional practices of the European Commission and the EFTA Surveillance Authority in the field of merger control have direct relevance for the NCA's intervention competence.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues cannot be taken into account by either the NCA or the Competition Tribunal when reviewing merger cases. Moreover, as of April 2017, the government's prerogative to decide in merger cases involving questions of principle or interests of major significance to society has been removed.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The NCA's practice indicates a very high threshold for clearing concentrations on efficiencies. In intervention decisions, alleged efficiencies are normally dismissed by the NCA as undocumented. However, some Phase 2 clearance decisions refer to efficiencies as part of the ground for clearing the concentration, although the level of scrutiny of efficiencies may not have been as high as in intervention decisions.

In an anomaly decision from April 2017, the NCA cleared Telia's acquisition of the mobile service provider Phonero on efficiencies, although it found that the concentration would significantly impede effective competition. The outcome was most likely due to service providers having considerable and easily verifiable marginal costs compared with mobile network operators.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the conditions for intervention are fulfilled, the Norwegian Competition Authority (NCA) must either prohibit the concentration or accept and make binding the remedies presented by the notifying party or parties.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Both structural and behavioural remedies can be offered to remedy competition issues. Divestitures are in general considered more likely to succeed than behavioural remedies. Proposed remedies are, however, assessed on a case-by-case basis and the NCA has recently approved both categories of remedies.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

For a remedy to be approved, it must be considered by the NCA as being sufficient to alleviate the competition concerns raised by the transaction.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Since the entry into force in 2004 of the current Competition Act, the NCA has intervened against four transactions in which both parties were headquartered outside Norway:

- First, the NCA required the divestiture of the Norwegian subsidiaries of one party in a case relating to oil drilling services. The concentration was, however, cleared on appeal.
- Second, the NCA accepted behavioural remedies in a case regarding ticket services. On appeal, the behavioural remedy was replaced by a structural remedy – the divestment of the acquirer's Norwegian subsidiary.
- Third, the NCA imposed a structural remedy in a case concerning laboratory services. The acquirer was required to divest its Norwegian subsidiary.
- Fourth, the NCA accepted behavioural commitments in a case concerning two Sweden-based suppliers of car spare parts.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Ancillary restrictions are covered by the clearance decision. Ancillary restrictions are treated in the same way as under the EU Merger Regulation. The restrictions are cleared automatically and the NCA does not normally assess ancillary restrictions in individual cases.

Restrictions are considered 'ancillary' if they are directly related to the concentration and necessary to its implementation. A further condition is that the concentration, together with the ancillary restriction, does not significantly impede effective competition.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Third parties, and customers and competitors in particular, are regularly involved in the merger procedures before the Norwegian Competition Authority (NCA), primarily as sources of market information. Third parties also have the possibility to bring, on its own initiative, arguments before the NCA.

The NCA will normally conduct relatively extensive investigations into proposed concentrations, including written requests for information to third parties, in particular in cases that go to Phase 2. Furthermore, the NCA will usually turn to third parties if in doubt as to whether to close a case in Phase 1 and to market test any proposed remedies from the merging parties.

The formal rights of third parties and complainants are limited to a right to see non-confidential versions of the documents in the case file. If so requested, affected third parties will normally be allowed a meeting with the NCA to express their views on a concentration.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The NCA is obliged by law not to disclose business secrets and other confidential information. However, the general rule pursuant to Norwegian public administration law is that all documents are public. Therefore, it is only the information that can be considered business secrets, such as market shares, strategies and other competitively sensitive information, that is kept confidential.

Any business secrets must be clearly marked in the notification and all other documents submitted during the merger procedure, and any secrecy claim must be substantiated. Furthermore, a proposal for a public version of the documents submitted must be included.

The NCA is required to publish some basic information about every notification on its website. It is also required to publish non-confidential versions of any commitment or prohibition decision adopted. It will in practice also make public the main reasons for closing cases in which a Phase II investigation has been initiated.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The NCA is part of the network of European Competition Authorities (ECA) and exchanges basic information about notified concentrations within the network on a regular basis.

The NCA has close contact with the other Nordic competition authorities, both on a general basis and in individual cases where such contact is advantageous to the NCA's case handling, including in merger cases. In 2018, a new cooperation agreement between the Nordic authorities entered into force, expanding the level of cooperation. The Nordic competition authorities may now, to a greater extent, exchange confidential information with each other, and get access to information submitted by companies located in another Nordic country.

The NCA is also a member of the EFTA Network of Competition Authorities. The members are the EFTA Surveillance Authority and the national competition authorities of the EFTA states party to the EEA Agreement. The NCA is also regularly invited to participate in meetings and working groups of the European Competition Network (ECN). However, these networks are not primarily established to be forums for discussions about individual merger cases.

Finally, the NCA is a member of the International Competition Network (ICN) and also regularly participates in meetings and discussions within the OECD involving competition issues.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

All decisions from the Norwegian Competition Authority (NCA) can be appealed to the Competition Tribunal. It is only decisions from the Competition Tribunal that can be subject to judicial review.

Time frame

33 What is the usual time frame for appeal or judicial review?

Decisions from the NCA to intervene against concentrations – in practice, prohibition decisions, but theoretically also remedy decisions – may be appealed to the Competition Tribunal within 15 working days. Appeals are sent to the NCA, which has 15 working days from receipt to (change its decision or) forward it to the Competition Tribunal. The Competition Tribunal must provide its decision no later than 60 working days after its receipt of the appeal.

Decisions from the Competition Tribunal may be appealed to the Gulating Court of Appeal. The appeal must be submitted within three months of the parties' receipt of the Competition Tribunal's decision. In a case before the Court of Appeal there are no fixed deadlines; the case will follow the normal procedure for civil cases.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since the entry into force of the present Competition Act in 2004, the Norwegian Competition Authority (NCA) has intervened in a total of 47 merger cases (as of May 2021). Of the intervention decisions, 32 cases were approved subject to remedies and the remaining 15 blocked. Only a small minority of these cases have been appealed, and only two case has been appealed to the Competition Tribunal after it was established as the appellate body in 2017.

Of the 45 intervention decisions of the NCA, four concerned transactions in which both parties were headquartered outside Norway.

In the past 10 years, the NCA has, inter alia, focused on the following markets in which competition in the NCA's view faces special challenges: the end-user market for electrical power, the TV market, the retail fuel market, the telecoms market, the grocery market and the dairy products market. Merger cases within these sectors will likely be monitored with particular attention.

Lately, the NCA has paid particular attention to the following markets: retail banking, books, broadband, mobile telephony, taxis, security services, local and regional newspapers, recycling and groceries.

Finally, the NCA has continued its focus on the effect on competition in local markets and its use of quantitative methods (eg, diversion ratios and Gross Upward Pricing Pressure Index (GUPPI) analyses).

Reform proposals

35 | Are there current proposals to change the legislation?

In October 2020, the Ministry of Justice and Public Security issued a report titled 'The third state power – the courts in change'. In the report, the Judicial Commission proposes a number of changes related to the administration of the courts, as well as the courts' tasks and work processes.

One of the proposals concerns an amendment to section 39(4) of the Competition Act, and entails that the Gulating Court of Appeal will no longer function as a first instance for claims against the Competition Tribunal's decisions.

At the time of writing, the proposal is still under review.

Additionally, there have been major revisions to the Competition Act during the last couple of years:

- As of 1 July 2016, the substantive test was harmonised with the SIEC test of the EU Merger Regulation. This included the introduction of a consumer welfare standard in Norway. Several other changes to the Competition Act and the Notification Regulation entered into force at the same time.
- As of 1 April 2017, the Competition Tribunal handles all appeals against decisions of the NCA. The Competition Tribunal is an independent body even though it is administratively subordinated to the Ministry. Decisions of the Competition Tribunal may be directly appealed to the Gulating Court of Appeal. As of the same date, the government's prerogative in rendering decisions in merger cases on other ground than competition concerns was removed.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In the past year, the Norwegian Competition Authority (NCA) has issued four statement of objections, but only blocked one merger. One case was cleared without the need for commitments, while one case was cleared subject to conditions. Finally, one case was withdrawn by the notifying party following the NCA's statement of objections. The number of interventions seem to be on par with previous years and any small variation in number of interventions is probably a matter of coincidence based on case-specific circumstances.

In November 2020, the NCA prohibited the proposed acquisition of Nettbil AS by Schibsted ASA. Both companies operate digital marketplaces for the sale of used cars. Schibsted is the owner of the marketplace Finn.no and provides online classified advertising, while Nettbil operates an online auction platform for used cars sold by private persons to car dealers. According to the NCA's findings, there are few players in the Norwegian market for online sales of used cars, with Finn as a clear market leader. Nettbil, though a newcomer in this market, has experienced strong growth in recent years. In light of the foregoing, the NCA surmised that, with Schibsted's acquisition of Nettbil, the market for online sales of used cars would become more concentrated. As a consequence, the NCA was of the opinion that Schibsted's acquisition of Nettbil would remove the increasing competitive pressure that Nettbil has exerted on Finn, weakening competition in the market for online sales of used cars and resulting in poorer services for consumers. In May 2021, the Competition Tribunal upheld the NCAs prohibition on appeal.

The NCA's first clearance decision concerns the merger between Gresvig and Sport1, two of the largest players in the Norwegian market for the sale of sports equipment. Notably, prior to the merger, Sport1 was on the verge of bankruptcy. As such, the cornerstone of the NCA's assessment of the merger lie in determining whether the merger may benefit from the failing firm defence. In its initial statement of objections, the NCA outlined its suspicion that, in the absence of the merger, there were one or more market actors that would potentially continue all or large parts of Gresvig's business. However, after having collected further information and conducted an overall assessment, the NCA concluded that such an outcome was not sufficiently probable on the basis of the information collected. As such, the NCA could not conclude that the merger would significantly impede effective competition in the market.

The third case, which was cleared subject to conditions as of May 2021, concerns the merger between Altia Plc and Arcus ASA. Altia and Arcus are two of the largest suppliers of spirits to the Norwegian Wine Monopoly (Vinmonopolet) and are regarded as close competitors in the markets for sale of aquavit, vodka and spirits marketed to consumers under 20 years through Vinmonopolet. In light of the fact that the combined Altia and Arcus would become the largest supplier in the market, the NCAs cleared the merger subject to conditions which would address concerns that the proposed merger may weaken competition in several markets for sale of spirits to Vinmonopolet.

The fourth case concerns the merger between Bonnier Books Holding AB and Strawberry Publishing Norge AS. The NCA's preliminary view was that the merger may weaken competition between publishers in the market for the sale of printed books and in the market for the sale of books to providers of streaming services. Following the NCA's statement of objections, the notification was withdrawn, and the transaction was amended to result in a minority share acquisition. The NCA has authority to consider and intervene against minority acquisitions, but has so far the NCA has not made use of its authority to request a notification of the amended transaction.

Merger control in Norway has to a limited degree been affected by the covid-19 outbreak. An interim regulation on the procedural rules in the Competition Act, effective until October 2020, extended all merger deadlines by 15 working days. Moreover, the Director General of the NCA has advocated strict merger control also in times of economic crises. However, the NCA has not made any official policy statements to that regard.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant merger control legislation in Pakistan is primarily the Competition Act, 2010 (the Act) and the Competition (Merger Control) Regulations 2016 (CMCR 2016). The Act is a piece of federal legislation (ie, an Act of Parliament) and succeeds the successive presidential ordinances (temporary legislation enacted in 2007, 2009 and 2010 by the president of Pakistan) on the subject of anticompetitive practices. The Act is enforced by the Competition Commission of Pakistan (CCP) – established by the Act as an independent regulator at the federal level. The CCP's top tier consists of members (appointed by the federal government) from among whom one is appointed by the federal government as the chair. Many substantive and procedural details of merger control are set forth in the CMCR 2016, which has repealed the earlier Competition (Merger Control) Regulations 2007 that were issued under a temporary legislation (under a presidential ordinance in 2007).

Scope of legislation

2 | What kinds of mergers are caught?

The definition of 'merger' in the Act and CMCR 2016 covers mergers, acquisitions, amalgamations, combinations or joining of two or more undertakings or parts thereof. If a merger that meets or exceeds specified thresholds 'substantially lessens competition by creating or strengthening a dominant position', it is caught by the competition regime. Without prejudice to this, any merger that meets or exceeds thresholds specified by CMCR 2016 has to receive clearance from the CCP. This is a mandatory requirement.

3 | What types of joint ventures are caught?

Joint ventures are covered within the definition of merger under the Pakistani competition law regime. However, joint ventures are only caught if (1) thresholds specified by CMCR 2016 are met, (2) the joint venture results in the creation of a new entity by two or more collaborators, (3) the new entity is subject to joint control, performing functions independently on a lasting basis, and (4) results in substantial lessening of competition by creating or strengthening a dominant position. However, if conditions (1) and (2) are met, then clearance has to be obtained for setting up a joint venture.

The CCP has generally made clear its view while granting clearances in the past that if two independent or even related companies collaborate on a particular (usually a one-off) project without creating a new entity, then with all other things being equal, no clearance would be required from the CCP.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The primary legislation (ie, the Act) does not provide any definition of 'control'. However, Regulation 3 of CMCR 2016 provides an 'explanation' regarding 'control'. 'Control' can exist either in relation to assets, or composition, voting or decisions of an entity. This explanation sets out a fairly loose definition of control by defining it as influence capable of being exercised as a result of securities (being not less than 10 per cent of their market value), contracts or any combination thereof. For the purposes of determining control, securities shall mean shares in the share capital of an undertaking carrying voting rights and includes any other security that entitles the holder thereof to obtain or exercise voting rights. This influence, in the case of assets, covers ownership of or the rights to use all or even a part of the assets of an undertaking. Alternatively, control is defined as influence capable of being exercised by reason of rights or contracts that enable decisive influence to be exercised with regard to composition, voting or decisions of any organs of an entity. Hence, in the case of assets, control has not been defined in terms of decisive influence and under this broader definition any ownership or right to use even a part of the assets of an undertaking would be covered.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

If the thresholds laid down in CMCR 2016 are met, filing a pre-merger clearance before the CCP is mandatory. Thresholds have been specified in relation to the value of gross assets of merging parties or their annual turnover linked with the value of the transaction or voting shares. Pre-merger clearance has to be obtained if the following thresholds are met:

- the value of gross assets of the acquirer undertaking exceeds 300 million Pakistani rupees or the combined value of parties to the acquisition transaction or merging entities is 1 billion Pakistani rupees; or
- the annual turnover of the acquirer in the preceding year was 500 million Pakistani rupees (or more) or the combined turnover of parties to the acquisition transaction or merging entities is 1 billion Pakistani rupees or more; and
- the transaction relates to shares or assets of the value of 100 million Pakistani rupees or more (ie, value of transaction threshold); or
- the acquisition results in the acquirer holding (post-merger) more than 10 per cent of the voting shares.

In a nutshell, if either one of the first two thresholds is met then the CCP examines whether either one of the third or fourth thresholds is met. Where this condition is satisfied, it becomes mandatory to file – provided one or both parties do business in Pakistan.

Generally, merger parties being asset management companies (AMC) carrying out asset management services may not be required to make an application for clearance unless:

- the merger results in a situation where post-merger the collective exposure of the AMC for itself and in all of its collective investment schemes in a single entity is more than 25 per cent of total voting rights, then pre-merger clearance has to be obtained; or
- if post-merger, the value of total assets under the management of the AMC will be 1 billion Pakistani rupees or more, then pre-merger clearance has to be obtained; and
- the transaction relates to acquisition of shares or assets of the value of 100 million Pakistani rupees (or more); or
- in case of acquisition of shares by an undertaking, if an acquirer acquires voting shares, which taken together with voting shares, if any, held by the acquirer shall entitle the acquirer to more than 10 per cent voting shares.

Therefore, in case of AMCs the CCP examines whether the transaction meets either one of the first two thresholds and one of the third or fourth thresholds.

Furthermore, transactions that do not meet the prescribed thresholds will not be required to obtain pre-merger clearance. However, such transactions may still be subject to investigation in case they contravene any other provision of the Act.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory as per the Act and CMCR 2016. Exceptions exist in certain cases even if thresholds are met. The following exceptions are specified in CMCR 2016:

- if a holding company increases its stake in a subsidiary (or subsidiaries thereof) or if subsidiaries of a holding company acquire or increase their equity investment in each other;
- if a holding company merges or enters into a joint venture with one or more of its subsidiaries or if the subsidiaries of a holding company merge with each other or enter into a joint venture with each other;
- if a bank, insurance company or investment company engages in trading of shares for its own account for earning of dividend income with no intention of acquiring a controlling interest in the company it invests in;
- if shares have devolved by inheritance or through a gift deed or a will;
- voting shares acquired by securities underwriters;
- voting shares pursuant to a right issue unless acquirer's percentage share in outstanding voting securities increases directly or indirectly;
- if an undertaking, the normal market activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others, acquires securities of another undertaking and sells back the acquired securities on predetermined price within a period of six months from the date of such acquisition;
- real property or goods acquired in the ordinary course of business as long as the acquirer does not hold on to 'substantially all' of the relevant assets; and
- unexplored real resource property acquired for development or exploration purposes.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The law catches all transactions where the parties do business in Pakistan and meet the relevant thresholds. The way the CCP interprets 'doing business in Pakistan' is quite broad; direct sales as well as sales through a third party are covered. If foreign-to-foreign mergers meet the relevant thresholds and the merger can affect competition within Pakistan then these have to be notified to the CCP. Usually, the CCP will only look to the effects on competition in the local market where foreign players have a local presence. A recent example of this is the merger between Nestlé SA (incorporated in Switzerland) and Pfizer (incorporated in Delaware, US), where Nestlé SA acquired Pfizer's nutrition food business. Nestlé Pakistan Limited is a wholly owned subsidiary of Nestlé SA in Pakistan. Pfizer's subsidiary also exists in Pakistan. Since products of both companies are available in Pakistan and since both had a local presence, the CCP required parties to file a clearance application.

There is no specific local effects test laid down by the CCP. However, the Act covers all matters that occur and distort competition within Pakistan – this has been interpreted to mean that only the effects in the local market have to be seen, even if the origin is elsewhere.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Foreign investors coming into Pakistan are advised to engage a law firm to approach the Board of Investment (BOI), which offers a one-window facility for all relevant approvals and documentation required by the federal and provincial governments. If a foreign company is setting up a place of business in Pakistan or incorporating a local subsidiary, it shall have to approach the BOI and the Securities and Exchange Commission of Pakistan (SECP) for the relevant registration. The SECP will also require details of any foreign national directors of a local company or a foreign company setting up a branch office in Pakistan. The Ministry of the Interior coordinates with the BOI in granting security clearance to foreign nationals who are directors or shareholders of local companies or foreign companies entering Pakistan. Details of these procedures can be provided by local lawyers.

Sector-specific regulators exist, among others, for sectors such as banking, aviation, insurance companies, capital markets, non-banking finance companies, telecoms, media, oil and gas as well as the electricity or power sector. Depending on the type of activity, licences may be required and the details of these application and processing procedures should be sought from local law firms.

With the promulgation of the Companies Act 2017, a merger may also require approval from SECP or a court. Advice should be sought from local law firms on ensuring compliance with provisions of this law, where it is applicable.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Competition Act 2010 (the Act) and the Competition (Merger Control) Regulations 2016 (CMCR 2016) state that a pre-merger clearance has to be filed as soon as the concerned parties agree in principle, or a non-binding letter of intent to proceed with the merger is signed.

Section 11(12) of the Act sets out that sanctions can be imposed where parties have consummated a merger without complying with the pre-merger clearance procedure. Sanctions include the Competition Commission of Pakistan (CCP)'s power to undo a merger or prohibit it altogether. However, this can only be done after issuance of a show-cause notice and the opportunity of a hearing at the end of the Phase II review (if any). Penalties under the Act also include fines of up to 75 million Pakistani rupees or up to 10 per cent of the annual turnover of the undertaking or entity involved.

While the CCP has imposed heavy penalties in cases involving abuse of dominant position or prohibited agreements, it has never imposed a penalty for non-compliance with merger control provisions. In practice, where undertakings file for clearance with any delay they also file an application for lenient treatment (note, not leniency) and condoning of the delay. These have, up until 2014, been routinely granted.

10 Which parties are responsible for filing and are filing fees required?

Parties to the merger are equally responsible for the filing, although in practice the parties usually decide between themselves who should file the application. In the case of an acquisition of shares or assets, the acquiring party must be the notifying party to the merger application in accordance with section 11(2) of the Act. The party filing the application is supposed to issue a notice of filing to all other parties to the merger, with a copy of such notice to the CCP, stating that the application will be or has been made.

Filing fees are required and vary with turnover of parties to the merger or value of assets under management (the latter in case of AMCs). The minimum filing fee is 300,000 Pakistani rupees and depending upon the size of the parties to the transaction can go up to 2.25 million Pakistani rupees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The CCP is bound under the Act and CMCR 2016 to decide pre-merger applications within a specified number of days. Initial filing begins in the Phase I review. No objection in 30 working days means, as per the law, that the CCP has no objection to the merger. Normally, the CCP will issue a clearance within 30 working days. If the CCP wants to take the merger application to a Phase II review, it shall take this decision within 30 working days of filing and communicate this to the parties. However, a Phase II review has only been initiated in nine cases since the CCP's inception in 2007.

If and when a Phase II review is initiated by the CCP (and this happens very rarely) the CCP then has another 90 working days within which to conduct an extended review. If no decision is made within 90 working days of starting of the Phase II review, then as per the law the CCP shall be deemed to have had no objection and the proposed merger shall be deemed cleared.

Since the scheme of the law is that clearance has to be obtained before consummation of the merger, the CCP expects parties not to complete or implement the transaction until clearance has been granted and section 11(4) of the Act expressly states that the concerned undertakings shall not proceed with the intended merger until they have received clearance from the CCP. However, if the filing is late or if the parties satisfy the CCP that the matter will not go beyond a Phase I review, the transaction does not have to be suspended. If the parties have already completed the merger, it is good practice to place on record an application requesting the condoning of the delay without imposition of any penalties.

Where, after a Phase II review, the CCP wants to prohibit or undo a merger, it shall issue a notice after an inquiry report. Thereafter, a hearing is held (normally within 15 days of the issuance of the notice) and after a quasi-judicial proceeding a final order is passed.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The sanctions applicable to closing before clearance will essentially be the same as sanctions for not filing. Closing or non-filing will both violate section 11(12) of the Act, which, read with sections 38 and 31 of the Act, provides for the penalties including the CCP's power to undo a merger or prohibit it altogether. However, this can only be done after issuance of a show-cause notice and the opportunity of a hearing at the end of the Phase II review (if any). Penalties under the Act also include fines of up to 75 million Pakistani rupees or up to 10 per cent of the annual turnover of the undertaking or entity involved. However, as explained above, the CCP has never applied sanctions since its inception in 2007 for non-filing or closing before clearance. When it comes to mergers, its focus has been ensuring awareness and implementation of the law rather than its enforcement with penalties.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There are no examples of sanctions having been applied in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The law envisages asking for pre-merger clearance before closing. However, in practice the CCP has always condoned delays as long as parties seek clearance for the merger and give sufficient reasons with a request for condoning of the delay.

In practice, the CCP's mergers department takes the position that there is no bar to a 'hold-separate' arrangement. However, this facilitative approach is different from the letter of the law which requires pre-merger clearance. The safest way would be to notify the CCP of the merger and ensure requisite filing with the commitment that, until final clearance is given, the parties will put in place a 'hold-separate' arrangement.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Under the competition law regime, there are no special merger control rules applicable to public takeover bids. Generally, public takeovers are regulated by the SECP and the Pakistan Stock Exchange (PSX). The Securities Act, 2015 (Securities Act) and the Listed Companies (Substantial Acquisition of Voting Shares and Take-Overs) Regulations 2017 (Take-Over Regulations) prescribe a separate procedure for offers to acquire shares of a public listed company. The Securities Act is a piece of federal legislation and repeals the previous Listed Companies (Substantial Acquisition of Voting Shares and Take-Overs) Ordinance 2002 (Repealed Take-Over Ordinance), which related to the substantial acquisition of voting shares and takeovers of listed companies. The Take-Over Regulations enacted under the Securities Act repealed the Listed Companies (Substantial Acquisition of Voting Shares and Take-Overs) Regulations 2008 that were enacted under the Repealed Take-Over Ordinance. Presently, the Securities Act along with the Take-Over Regulations regulate takeovers. This supplements and does not exclude the Act and CMCR 2016.

The Securities Act does not apply to, inter alia, mergers under any law for the time being in force except in cases of acquisition of voting shares in a listed company. The Securities Act prescribes thresholds regarding the aggregate percentage of shareholding to be acquired in a listed company, which if met, trigger disclosure requirements or obligations of making a public offer of the acquisition of voting shares, as the case may be.

Advice should be sought from local law firms on ensuring compliance with provisions of the Securities Act and the Take-Over Regulations, where applicable.

If the applicable thresholds are met, the CCP clears public takeover bids following the Act and CMCR 2016.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Significant details go into preparation of a filing and local legal practitioners specialise in this field. The CMCR 2016 appends the relevant forms in its schedules, which are to be filled out along with supporting evidence for purposes of a filing. As per the said form, the information that needs to go into a filing includes (but is not limited to):

- corporate information about the parties and their holding and subsidiary companies;
- latest financial details of the parties;
- details of the transaction and consideration involved;
- nature of the merger and the markets on which it will have an impact;
- copies of all relevant agreements, analyses, reports provided to board of directors of relevant companies;
- market shares (pre- and post-merger) along with details of sales, production, volumes as the case may be;
- relevant market studies and anticipated changes in the market post-merger;
- explanation of the relevant market (product-wise as well as geographical);
- copies of business plans for the current year and the preceding five years;
- cooperative effects of any joint ventures and justifications; and
- any ancillary restraints being imposed or anticipated and their necessity.

Giving false or misleading information or impeding the work of the CCP carries a penalty of up to 1 million Pakistani rupees.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The statutory timetable for clearance is 30 working days for a Phase I review. This 30-working-day period begins from the date of filing the pre-merger clearance application. Most applications, unless they raise serious concerns, receive clearance within 30 working days of filing. Except for rare cases, most mergers are granted clearance after a Phase I review – within 30 working days. If a Phase II review begins in the wake of serious competition-related concerns, the time period (once the Phase II review begins) is 90 working days within which the CCP will make a decision. In practice, a decision is usually made within two to two-and-a-half months. The time frame also depends on how quickly parties respond to any queries by the CCP. Two worrying instances of slight delays in recent years involve applications by GlaxoSmithKline plc and Novartis AG. In GlaxoSmithKline's case, the Phase II review began on 13 November 2014. Final clearance was given through an order dated 20 February 2015 – slightly longer than the statutory period of 90 days. And in the case of application by Novartis AG, the clearance was sought through an application on 29 August 2014 but the final approval after a Phase II review was given on 9 February 2015. However, these two cases represent the exception rather than the rule.

Failure to make a decision within the relevant 30- or 90-working-day period has been deemed by law to mean that the CCP has no objection to the merger.

The only way of speeding up this process is to file a formal application before the CCP to expedite the process. Arrangements should also be made with lawyers to regularly follow up with the relevant personnel at the CCP.

18 What is the statutory timetable for clearance? Can it be speeded up?

The law prescribes a 30-working-day period for clearance of all Phase 1 applications. Most transactions are cleared in Phase 1. The law specifically says that if the CCP does not raise any objection to a transaction within 30 working days of it being notified, the transaction is deemed cleared. In practice, the CCP says that this 30-working-day period only begins to run from when a complete application is submitted. This means that when an application is filed before the CCP, it will usually write back within a week or two and demand more information. Once that information is provided, the CCP will say that the time is now running. There is no set timeline for how long it takes for a decision. In most cases, a decision is given within four weeks from the time of initial filing. In other cases, it has taken up to six weeks, since the CCP cites an initially incomplete application. Very few cases involving mergers actually result in a formal investigation or inquiry since most cases are cleared after a Phase I review. The inquiry or investigation for a Phase I review is largely informal in the sense that no formal reports are compiled and only final clearances are issued. Lawyers and representatives routinely meet officers of the CCP's mergers department to explain their transactions after filing of formal clearance applications – although such meetings are not mandatory or necessary in each case. In the event the CCP feels the need for a detailed formal investigation or inquiry, the process involves the following steps:

- appointment of inquiry officers by the CCP through a written authorisation;
- gathering of preliminary information by an inquiry team – this information may have come into the possession of the inquiry team as a result of its independent efforts or by virtue of the CCP's general powers to call on undertakings to furnish information on matters that may have an adverse impact on competition;
- interviews with representatives of relevant undertakings; however, this is not a mandatory step since the CCP interprets the law as not requiring any right of hearing at the investigation or inquiry stage. This view, it is submitted, is consistent with the letter and spirit of the law. However, at times the CCP will of its own accord interview representatives of relevant undertakings; and
- once the inquiry is complete, the inquiry officers will make a recommendation – either for issuance of a show-cause notice and initiation of proceedings or closing the file because of insufficient evidence.

No penalty has been imposed by the CCP since its inception in 2007 on parties to a merger transaction.

The investigation procedure outlined herein would generally only take place if a third party files a formal complaint regarding the merger or if the CCP intends to proceed against merger parties for not notifying a merger that meets the thresholds.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance is whether the merger will result in a substantial lessening of competition by creating or strengthening a dominant position of the undertaking in the relevant market. The term 'relevant market' has been defined by the Competition Act 2010 (the Act) in a way similar to the European jurisdiction with a focus on a product and a geographic market. Price, characteristics and intended uses are the criteria used to determine substitutability when defining the relevant market.

The Competition (Merger Control) Regulations 2016 (CMCR 2016) also set out the factors to be considered by the CCP when determining whether there is likely to be substantial lessening of competition. These include but are not limited to:

- actual and potential level of import competition in the market;
- ease of entry into the market, including tariff and regulatory barriers;
- level and trends of concentration and history of collusion in the market;
- degree of countervailing power in the market;
- dynamic characteristics of the market, including growth, innovation and product differentiation;
- nature and extent of vertical integration in the market;
- whether the business or part of the business of a merger party or merger has failed or is likely to fail; and
- whether the merger situation will result in the removal of an effective competitor.

Even if the CCP determines after a Phase II review that a merger substantially lessens competition it can still allow the merger if it can be shown that:

- the merger contributes substantially to economic efficiencies related to production or distribution of goods or provision of services;
- the said efficiency could not reasonably have been achieved by a less restrictive means of competition;
- in a cost-benefit analysis, the benefits of such efficiency clearly outweigh adverse effects on competition; and
- the undertaking adopted the least anticompetitive option for a failing undertaking's assets when faced with actual or imminent financial failure.

20 | Is there a special substantive test for joint ventures?

There is no special test for joint ventures. The substantive assessment remains pegged to substantial lessening of competition by creating or strengthening a dominant position. In a nutshell, a joint venture would be caught by Pakistani competition law if:

- thresholds specified by CMCR 2016 are met;
- the joint venture results in creation of a new entity by two or more collaborators;
- the new entity is subject to joint control, performing functions independently on a lasting basis; and
- it results in substantial lessening of competition by creating or strengthening a dominant position.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The substantive test expressly focuses on substantial lessening of competition by creating or strengthening a dominant position in the relevant market. This test, however, is slightly at odds with the rest of the Act since section 3 of the Act (prohibition against abuse of dominant position) does not prohibit a dominant position per se but only its abuse. When it comes to mergers, a dominant position itself may not be prohibited but the focus is on whether the merger results in a substantial lessening of competition.

However, since its jurisprudential development under this relatively new law is a work in progress, it cannot be said with certainty that the CCP has closed itself off to any theories of harm. Any potential theory of harm that will allow the CCP to evaluate substantial lessening of competition will be used. This includes but is not limited to unilateral effects, coordinated effects, conglomerate effects, vertical foreclosure as well an evaluation of any likely horizontal effects, boycotts, predatory pricing, likelihood of tie-ins and refusal to deal, etc.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The CCP is largely motivated by public interest and makes significant efforts to be seen as an enforcement organisation or regulator that is receptive and responsive to the concerns of the market – particularly vulnerable market players such as consumers or smaller competitors. However, the focus on public interest has thankfully not been allowed to lead to a situation where some abstract standards have been developed while ignoring the law itself. The review and evaluation still largely focuses on the law and economics involved along with a healthy regard for the public interest.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies play an important role in the review process. This has been commanded by the Act itself and is reflected in the CCP's practice. Even if the CCP determines after a Phase II review that a merger substantially lessens competition it can still allow the merger if it can be shown that:

- the merger contributes substantially to economic efficiencies related to production or distribution of goods or provision of services;
- the said efficiency could not reasonably have been achieved by a less restrictive means of competition;
- in a cost-benefit analysis, the benefits of such efficiency clearly outweigh the adverse effects on competition; and
- the undertaking adopted the least anticompetitive option for a failing undertaking's assets when faced with actual or imminent financial failure.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If after a Phase II review the Competition Commission of Pakistan (CCP) feels that a merger will substantially lessen competition, it can, after issuance of a notice and hearing the parties, decide to:

- prohibit the merger or unwind it;
- approve it subject to conditions; or
- approve it subject to undertakings regarding agreements that merging parties enter into contracts specified by the CCP.

It is also worth noting that while a Phase I or II review is under way and the CCP feels that there is a strong prima facie case of a substantial lessening of competition in the relevant market along with likelihood of immediate harm, it can also pass interim orders under the Competition Act 2010 (the Act) and the Competition (Merger Control) Regulations 2016 (CMCR 2016). However, to date, this power to pass interim orders has not been exercised in cases involving clearances for mergers.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, the CCP is quite accommodating when it comes to listening to the merging parties about solutions that would allay the regulator's concerns. Divestment undertakings as well as behavioural remedies can be suggested to the CCP to persuade it to grant clearance. However, these are likely to be necessary only after conclusion of a Phase II review where the CCP thinks the merger will substantially lessen competition.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

If during a Phase I review the CCP raises concerns about the merger, the parties or undertakings are free to approach the CCP with any suggestions for divestment. There are no strict conditions or timing issues applicable to a divestment or other remedy. Where a divestment is adopted as a remedy, the CCP is likely to pass an order saying that it shall occur within a specified time (and this may vary from case to case). As long as parties give an undertaking thereafter to comply with the CCP's directions or address its concerns, the clearance is likely to be granted.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

If the CCP feels that foreign-to-foreign mergers will produce effects in Pakistan then it can require remedies. A recent example of this is the acquisition of Pfizer's nutrition business by Nestlé, which resulted in the CCP demanding an undertaking from Nestlé to the effect that Pfizer's products will continue to be available to consumers in Pakistan for three years. By way of background it is submitted that the CCP's central concern was that a foreign-to-foreign merger should not result in a situation where choices available to consumers in Pakistan are immediately eliminated.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The forms provided in the schedules to the CMCR 2016 clearly expect parties to set out and justify ancillary restraints along with an explanation as to why each ancillary restriction is directly related and necessary to the implementation of the merger. Therefore, as per general practice, if an undertaking (and its lawyer) is detail-oriented and takes the care to set out related arrangements and explain how these are linked to the clearance requested, then the clearance decision will cover ancillary restrictions.

As has been the case in the recent past, if any ancillary restrictions or arrangements are part of the merger application, the CCP's merger clearance order either becomes conditional upon the merger parties seeking an exemption in accordance with section 5 of the Act or suggests that an exemption for the ancillary restriction may be required from the CCP.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

When conducting an assessment, the Competition Commission of Pakistan (CCP) will take a holistic view and will factor in the views of customers and competitors. However, this will not always be done by the CCP and this practice is more likely to be followed where there is some doubt as to whether clearance should be granted after a Phase I review.

A formal complaint can be filed as per the detailed formalities laid down in the Competition (Merger Control) Regulations 2016 (CMCR 2016) and the CCP's General Enforcement Regulations 2007. A complainant has a right to be heard during the hearing and make formal representation through a lawyer or other experts.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Unless the merger involves large companies with a very public profile, the process is not given and does not receive a lot of publicity. However, each merger clearance is notified on the CCP's website, which is regularly updated.

Both the Competition Act 2010 (the Act) and CMCR 2016 expressly envisage protection of commercial information including business secrets. Any confidential information must be so identified when being provided to the CCP, if the applicant fails to specify any part thereof as confidential, the CCP may treat the application as non-confidential. An explanation as to why the information is confidential is also required.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CCP cooperates with antitrust authorities in the South Asian region as well as globally. However, this cooperation has largely focused on capacity building rather than working together on particular cases.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Dealing with statutory appeal first, if an adverse order is passed by a single member of the Competition Commission of Pakistan (CCP), an appeal lies within 30 days of passing of the order before the Appellate Bench of the CCP. If an order is passed by two or more members of the CCP then the appeal lies within 60 days of communication of the order before the Competition Appellate Tribunal (CAT). Appeals against decisions of the CAT can be filed before Supreme Court within 60 days of the order.

The CAT is distinct from the CCP. It has only recently become functional again as the federal government has finally appointed new members to it.

As a matter of general practice, the CCP ensures that two or more members pass all orders. This is a reaction to the criticism of the CCP that its members sitting on the Appellate Bench of the CCP hear appeals from decisions made by their colleagues and, therefore, are likely to be biased.

Judicial review petitions before a High Court can be filed under article 199 of the Constitution of Islamic Republic of Pakistan 1973. A direct petition can also be made under article 184(3) to the apex court of the land (ie, the Honourable Supreme Court of Pakistan). In practice, it is usually more convenient and common to first approach one of the High Courts. The constitutionality of the Competition Act 2010 (the Act) is currently under challenge in various High Courts in the country. Undertakings from the sugar, cement and telecoms sectors (among others) have challenged this law. One major argument is that the Federation cannot enact a law such as the Act in exercise of its power to regulate inter-provincial trade and commerce. The other argument relates to the exercise of judicial power by members of the CCP as well as members of the CAT, since they are not a formal part of the judicial system as laid down by Pakistan's Constitution. The petitions are currently pending before the Islamabad and Sindh High Courts. The Lahore High Court has recently upheld the Act as being constitutionally valid and has dismissed the aforementioned petitions. An appeal against this decision has been filed with the Supreme Court of Pakistan.

Time frame

33 | What is the usual time frame for appeal or judicial review?

There is no limitation period for judicial review. Decisions can take anywhere between a couple of weeks, months or years, depending on the complexity of the case.

Appeals before the Appellate Bench of the CCP have traditionally been decided within two to four months. Appeals before the CAT have generally been decided within three months. The CAT has recently become functional – earlier it did not have the requisite number of members. There is a powerful criticism of the CAT that since the appointments to it are purely within the domain of the Executive, its existence therefore violates constitutional guarantees of due process, a fair trial and independence of the judiciary.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Competition Commission of Pakistan (CCP) has taken the position that as long as a foreign-to-foreign merger is likely to affect competition within Pakistan and the transaction falls within the jurisdictional thresholds for merger clearance, pre-merger clearance should be obtained. However, the CCP is bound by the requirement of the law that one or both parties should be doing business in Pakistan. In practice, the CCP will only act regarding foreign-to-foreign mergers if the merging undertakings have a local presence – whether through branch offices, subsidiaries or operations.

No penalty has ever been imposed because a foreign-to-foreign merger was consummated without first receiving complete clearance from the CCP.

In the past year, a number of Phase II merger reviews have received clearance from the CCP; one in the financial services market, one in the telecom market and another in the market for ride-hailing apps as Uber acquired its competitor Careem. The first of these involved the merging of three stock exchanges in the country (in the cities of Islamabad, Karachi and Lahore) into one national stock exchange, now called the PSX. Members of the three stock exchanges have been given membership of PSX. This amalgamation was envisaged by a law focusing on demutualisation of each of the three stock exchanges that existed as companies limited by guarantee. However, the three stock exchanges applied for clearance from the CCP. The clearance, however, was never in any doubt.

The second major merger review case involved the acquisition of a competitor in the telecom services market. Warid (which had a market share of 10 per cent) was acquired by the relevant market's biggest player Mobilink, which at the pre-merger stage had a share of 29 per cent. This will result in a post-merger share of 39 per cent – virtually touching the 40 per cent threshold in the law where dominant position is presumed. The merger received clearance with conditions and involved the passing of one of the most detailed orders in a merger review case. The current federal government in Pakistan has made clear its agenda regarding the privatisation of state-owned enterprises. The current enforcement concerns of the authorities significantly revolve around the market power that will be created or strengthened as a result of privatisation as large local and foreign entities compete for entry into the aviation, oil and gas, electricity distribution, railway and other sectors. The role of the CCP in clearing acquisitions or mergers as a result of privatisation is significant, but one cannot be sure how well it will perform. There are legitimate fears that the CCP is understaffed and needs to improve its capacity to perform better. The vision of its leadership will also make a big difference.

Reform proposals

35 | Are there current proposals to change the legislation?

None have been made public by the federal government.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The most significant activity in the area of mergers last year was the Competition Commission of Pakistan (CCP)'s clearance to the *Uber/Careem* transaction in which Uber acquired its major competitor in the Pakistan market. The merger received clearance with conditions.

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As far as legislative developments are concerned, while no new relevant legislation or regulation was promulgated, the previously ongoing challenges by undertakings belonging to the sugar, cement and telecom sectors (among others) to the Competition Act 2010 (the Act) were set aside by the Lahore High Court. These included challenges to the constitutionality of the Competition Act 2010 (the Act) and the ability of the federal government to enact a law such as the Act in exercise of its power to regulate inter-provincial trade and commerce. Another major challenge settled by the aforementioned decision of the Lahore High Court in favour of the CCP concerned the exercise of judicial power by members of the CCP as well as members of the CAT, since they are not a formal part of the judicial system as laid down by Pakistan's Constitution.

Since the onset of covid-19, the CCP has reconditioned its online filing mechanism in a bid to improve the previously non-user-friendly version of the same. However, owing to the lack of popularity of the technologically challenged (former) version of the online filing system, most filings are still performed by delivering hard copies of the application to the CCP. Although the CCP has tried to encourage use of the online filing system, parties are best advised to follow the conventional hard copy filing process until the new version proves to be a more useful and efficient means of filing.

With staff working in rotations because of the covid-19 pandemic and the periodic recommendations to reduce working hours and personnel present on premises by the government of Pakistan, it is expected that clearance time might increase as the CCP is likely to take longer to confirm that an application filed is complete for purposes of processing. It is only when an application is confirmed as complete that the 30-working-day period (for mandatory clearance of Phase 1 cases) starts running. However, in practice, despite the circumstances affecting working hours and working personnel, the CCP usually has been prompt with making requests to ensure that the information required to complete an application is received by the CCP as soon as possible.

The CCP has also seen a change in leadership and in addition to Ms Shaista Bano, the following members have been added: Ms Rahat Kaunain Hassan (as chair); Ms Bushra Naz Malik (as member) and Mr Mujtaba Ahmad Lodhi (as member).

Peru

Carlos A Patrón and David Kuroiwa

Payet Rey Cauvi Pérez Abogados

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant merger control legislations are the recently approved Law No. 31112, Law that establishes the prior control of corporate mergers (the Merger Act), and its Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation).

The Merger Act and the Regulation were approved in January and March 2021 and entered into force on 14 June 2021.

Through this legislation, the Peruvian government will enforce a mandatory merger control regime applicable to all fields of economic activities and will derogate Law No. 26876, which only imposed mandatory pre-notification and clearance requirements for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission or distribution.

The National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Peru's multipurpose market overseer, consolidates all merger review responsibilities. The Competition Commission at INDECOPI (the Commission), which already investigates and sanctions anticompetitive practices, will be charged with conducting the initial phases of review and issuing clearance decisions. The Technical Secretariat of the Commission (the Technical Secretariat) (whose name has changed to the National Directorate of Investigation and the Promotion of Competition) will provide administrative support, issue guidelines and conduct non-compliance investigations. The Tribunal for the Defence of Competition at INDECOPI (the Tribunal) will act as an appellate body.

In the case of operations involving economic agents from the financial system that collect deposits from the public or are insurance companies, the economic agents must submit an authorisation request to the Superintendency of Banking, Insurance and Private Pension Fund Administrators (SBS). The SBS determines whether the operation involves economic agents that present relevant and imminent risks that compromise the stability of the economic agents or of the systems they comprise. If the SBS determines that the operation is not in the aforementioned assumption (relevant and imminent risk), the SBS informs the requesting economic agents that they must evaluate the presentation of an authorisation request to INDECOPI (otherwise, only the SBS authorisation is necessary). The concentration operation proceeds if authorisation by the SBS and INDECOPI is obtained, provided that the latter is required (and if the thresholds described below are fulfilled).

The economic agents who have been granted authorisation to operate by the Superintendency of the Securities Market (SMV) and participate in concentration operations, must obtain from the SMV the authorisations that are required according to the special regulations on the matter that regulate them. That request must be submitted to the SMV prior to or simultaneously with the request for authorisation from INDECOPI. The concentration operation proceeds if the authorisation of the SMV and INDECOPI is obtained.

Scope of legislation

2 | What kinds of mergers are caught?

The Merger Act defines concentrations subject to clearance as transactions that involve a transfer or change of control over a company or part of it, including:

- the merger of two or more previously independent economic agents into any form of company or entity;
- the acquisition of rights by one or more economic agents that, directly or indirectly, allow the holder to, individually or in association, exercise control over another economic agent;
- the incorporation of two or more independent economic agents of a joint company, a joint venture or any other form of association agreement in which the former share control over a new autonomous entity that performs an economic activity; and
- the acquisition by an economic agent, by any means, of direct or indirect control over productive operating assets of another economic agent.

3 | What types of joint ventures are caught?

The Merger Act and the Regulation will be applicable to those operations in which two or more independent economic agents incorporate a joint company, a joint venture or any other form of association agreement in which the independent economic agents share control over a new autonomous entity that performs an economic activity.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Merger Act defines 'control' as the power to exercise lasting and decisive influence over the composition, deliberations or decisions of an undertaking's decision-making bodies, allowing it to determine the latter's competitive strategy. Such influence may be exercised through ownership or rights of use over all or part of the assets of a company; or rights or agreements that may allow to control the undertaking's decision-making bodies.

Minority acquisitions do not require notification unless they confer control.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Merger Act has two concurrent financial thresholds that are determined by the value of a Peruvian tax unit (UIT). For the year 2021, the value of the UIT is 4,400 Peruvian soles or approximately US$1,190 (using an exchange rate of 3.7 Peruvian soles per dollar). The value of the UIT is updated each year.

A concentration operation is subject to the prior control procedure when the following is concurrently fulfilled:

- The total sum of the value of annual sales or gross income or the value of assets in Peru of the companies involved in the concentration operation during the fiscal year prior to that in which the operation is notified, is equal to or more than 118,000 UIT, which is equivalent to 519.2 million Peruvian soles or approximately US$133.13 million (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021.
- The value of annual sales or gross income or the value of assets in Peru of at least two of the companies involved in the concentration operation, during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UIT, equivalent to 79.2 million Peruvian soles or approximately US$20.3 million (using an exchange rate of 3.9 Peruvian soles per dollar) by 2021.

To calculate the sales, gross income or value of the assets in Peru obtained by the companies involved, the following rules shall be considered according to each type of operation:

- For mergers of two or more independent economic agents, under any form of corporate organisation of the merging entities or of the entity resulting from the merger, or the constitution by two or more independent economic agents of a joint company, joint venture or other similar modality that implies the acquisition of joint control over one or more economic agents that perform functions of an autonomous economic entity, the annual sales, gross income or the book value of the assets of the economic agents participating in the operation and their respective economic groups are considered.
- For acquisitions by one or more economic agents, direct or indirectly, of the rights that provide control over the whole or part or other economic agent, the annual sales, gross income or the book value of the assets of the acquiring agent and the economic group of the latter, and the annual sales, gross income or the book value of the assets of the target and the companies that are controlled by the latter are considered.
- For acquisitions by an economic agent, by any means, who have direct or indirect control over productive operating assets of other economic agents, the annual sales, gross income or the book value of the assets of the acquiring agent and its economic group, and the sales or gross income that have been generated by the acquired operating productive assets or the book value of such assets, are considered.

When determining the value for both the individual and combined threshold, only one of the two parameters must be used (ie, only sales or gross income, or the book value of assets).

The authority will consider as a single concentration operation the set of acts or operations carried out between the same economic agents within a period of two years. The concentration operation must be notified before the last transaction or act that would exceed the thresholds indicated above is carried out.

INDECOPI may act ex officio where reasonable indications of a concentration operation that may generate a dominant position or affect competition in the market are identified. This power allows a review by the authority regardless of whether the concentration exceeds the thresholds or not.

The Regulation identifies the special circumstances that would motivate action by INDECOPI, including:

- horizontal concentration operations carried out in concentrated markets;
- horizontal concentration operations that involve the acquisition of an economic agent with a small market share, but with growth potential, or of an innovative economic agent that has recently entered the market;
- horizontal concentration operations in which the acquiring economic agent or its economic group has previously carried out concentration operations that involved the acquisition of a competitor; or
- other concentration operations that have the potential to generate possible significant restrictive effects on competition.

INDECOPI may exercise this power in those acts of concentration that have an impact on the Peruvian market, that is, those that involve economic agents who have carried out economic activities or generated income, sales or cash flows in the country in the 12 months prior to the formal closing of the operation. Likewise, INDECOPI may only ex officio review any act of concentration until one year after its formal closing.

INDECOPI will not be able to review ex officio those operations that have completed the closing acts necessary to make the transfer or change of control effective before the Merger Act is in force.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing system is mandatory for operations that produce effects in Peru, qualify as concentrations under the Merger Act and meet the thresholds.

Concentrations that do not fulfil the above-mentioned requirements may be notified voluntarily. In either case (mandatory or voluntary filing), the concentration cannot be implemented unless and until INDECOPI grants clearance.

Economic agents may also consult INDECOPI to determine if the operation must be notified. The opinion issued by INDECOPI in this consultation is not binding.

No exceptions to notification have been developed so far by the Merger Act or the Regulation.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Merger Act is applicable to any operation that produce effects in Peru (ie, local effects test). Hence, any operations carried out abroad must be notified if they qualify as a concentration under the Merger Act; fulfil the thresholds described above; and directly or indirectly link economic agents who carry out economic activities in the country or includes economic agents that offer or demand goods or services in the market and carry out acts of concentration that produce or may produce effects in all or part of Peru.

The Merger Act does not contain explicit provisions on carveouts, setting specific legal requirements allowing parties to close a transaction outside of Peru before clearance has been issued by INDECOPI.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

No special regulations have been developed describing additional rules for foreign investment.

In the case of operations involving economic agents from the financial system that collect deposits from the public or are insurance companies, the economic agents must submit the authorisation to the SBS to determine if the operation only requires an authorisation from the latter (if it involves economic agents that present relevant and imminent risks that compromise the stability of the economic agents or of the systems they comprise) or also from INDECOPI (provided that the latter is required and if the thresholds are fulfilled).

In the case of economic agents who have been granted authorisation to operate by SMV and participate in a concentration operation, they must obtain an authorisation from the SMV and INDECOPI.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline. Reportable concentration acts must be notified to the Competition Commission at INDECOPI (the Commission) and cannot be implemented unless and until the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) grants clearance. As mentioned before, the authority will consider as a single concentration operation the set of acts or operations carried out between the same economic agents within a period of two years. The concentration operation must be notified before the last transaction or act that would exceed the thresholds is carried out.

Not filing a reportable operation may be subject to a fine of up 500 Peruvian tax units (UIT), equivalent to 2.2 million Peruvian soles or approximately US$564,102 (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021, provided that such amount does not exceed 8 per cent of the gross revenue of the offender or its economic group of all their economic activities in the year prior to the issuance of the decision by INDECOPI. INDECOPI may also seek to void and breakup the unauthorised concentration.

No infringement cases have been analysed at the time of writing this article. However, INDECOPI has previously imposed sanctions (150 UIT) for not filing under the Law No. 26876 in 1999.

10 Which parties are responsible for filing and are filing fees required?

In mergers or concentrations that involve the acquisition of joint control, the application must be filed by the economic agents involved in the transaction. For all other cases, the application must be filed by the economic agent acquiring the control over the other economic agents.

A fee will be required for filing. The value of such fee will be 91,629.40 Peruvian soles or US$23,494.71 (using an exchange rate of 3.9 Peruvian soles per dollar).

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The first phase review period is 30 business days. This period commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification.

If the Commission concludes that the transaction may potentially raise 'serious concerns' of generating restrictive effects upon competition, they can initiate a second phase review that may last up to a maximum of 120 business days.

If a decision has not been issued upon the expiration of the review periods, the transaction will be deemed to have obtained clearance.

Decisions issued by the Commission are appealable to the Tribunal for the Defence of Competition at INDECOPI (the Tribunal). The Tribunal must issue its determination within 90 business days.

Reportable concentration acts cannot be implemented unless and until INDECOPI grants clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The expiration of the review periods is subject to fines up to 1,000 UIT, equivalent to 4.4 million Peruvian soles or approximately US$1.1 million (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021, provided that such amount does not exceed 10 per cent of the gross revenue of the offender or its economic group of all their economic activities in the year prior to the issuance of the decision by INDECOPI, if executing a concentration operation before:

- it has been submitted to the prior control procedure;
- the decision of the Commission has been issued; or
- the transaction is deemed to have obtained clearance.

INDECOPI may also seek to void and break up the unauthorised concentration.

No infringement cases have been analysed at the time of writing. However, INDECOPI has previously imposed sanctions (100 UIT) for gun-jumping practices under the Law No. 26876 in 2009 (the concentration itself was approved).

Concentrations that have been closed before clearance will not have any legal effects in Peru.

Finally, the implementation of a denied concentration by INDECOPI is subject to fines of up to 12 per cent of the gross revenue of the offender or its economic group from all of their economic activities in the year prior to the issuance of the sanctioning decision by INDECOPI.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Foreign-to-foreign mergers that produce effects in Peru may be subject to sanctions if they are closed before clearance.

No infringement cases have been analysed at the time of writing this article.

However, INDECOPI has previously imposed sanctions (100 UIT) for gun-jumping practices under Law No. 26876 in 2009 for a cross-border operation that had local effects. In this case, the sanctioned party was a Peruvian company controlled by a European group that acquired control over another European company with a controlling share over another company in Peru.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Merger Act and the Regulation do not contain explicit provisions on carveouts setting specific legal requirements allowing parties to close a transaction outside of Peru before clearance has been issued by INDECOPI.

Economic agents may also consult INDECOPI to determine if the proposed solution might be acceptable to permit closing before clearance. The opinion issued by INDECOPI in this consultation is not binding.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No specific rules have been issued for public takeover bids in the Merger Act or the Regulation. Hence transactions that involve a transfer or change of control and fulfil the thresholds shall be notified to INDECOPI.

Public takeover bids have specific regulations issued by the Superintendency of the Securities Market (SMV) on the respective field.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation) details the documents required for the concentration application. The request for authorisation of the concentration operation submitted to the Commission must include (in addition to the date and number of the payment receipt), among others, the documents that support the following information:

- Identification data of the notifying economic agent.
- Identification data of the legal representative of the notifying economic agent, as well as the indication of their powers. If the powers granted abroad are not registered, they must be endorsed by the Peruvian consul and the Ministry of Foreign Affairs of Peru, or apostilled, as appropriate.
- Description and objective of the concentration operation and identification of the economic agents involved in it. For these purposes, the following must be included:
  - Copy of the final or most recent version of the agreement or contract signed on the concentration operation. If an agreement or contract on the concentration operation has not yet been signed, documents that evidence the real and serious intention of the economic agents to execute the operation, such as a memorandum of understanding or letter of intent.
  - Copy of the minutes of the meetings of the management and administration bodies of the companies involved where the concentration operation, the reasons for its execution and its effects have been discussed.
  - Copy of the reports, studies, presentations or internal or external reports that have been prepared or commissioned to evaluate or analyse the concentration operation, the reasons for its execution and its effects.
- Description of the ownership and control structure of each of the economic agents involved in the operation and their respective economic groups.
- Identification of the kinship, property or management ties existing between each of the economic agents described in the previous point with respect to other companies operating in the country.
- Identification and description of the markets involved in the concentration operation. For such purposes, markets involved are understood to be those markets in which the economic agents that directly intervene in the concentration operation and their respective economic groups participate. A copy of studies, reports, analysis, surveys and any comparable document corresponding to the identification and definition of the markets involved, the structure of supply and demand, differentiation of goods or services and intensity of competition, entry barriers and exit from the market and the existence of cooperative agreements must be provided.
- When applicable, a detailed description of the efficiencies related to the concentration operation, and how these are transferred to consumers, as well as the opportunity to transfer such efficiencies.
- Identification of the countries in which the concentration operation has been or will be notified; and, if applicable, its processing status. When appropriate, the pronouncements of said authorities must be provided. This may be reported after the application is submitted.
- The financial statements of the economic agents involved for the fiscal year prior to the date of the notification.

Failure to provide information within the period determined by the authority may be subject to a fine of up 500 UIT, equivalent to 2.2 million Peruvian soles or approximately US$564,102 (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021, provided that such amount does not exceeds 8 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior the issuance of the decision by INDECOPI.

Failure or denial to provide information or supplying wrong or missing information is subject to fines up to 12 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior the issuance of the decision by INDECOPI.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

For notification, the Merger Act establishes that, prior to the initiation of the control procedure, economic agents may consult the Technical Secretariat for guidance purposes to determine whether the transaction is within the scope of the law or what information is required for prior control, among other aspects. The opinions of the Technical Secretariat are not binding.

If there is no certainty about the potential effects of the concentrations or if there is a potential risk that the authority may analyse the concentration ex officio (eg, the concentration involves a sensitive or high exposure market), regardless of whether the concentration act exceeds the thresholds or not, we would suggest filing a voluntary notification.

Prior approval proceedings are organised in phases. The first phase review period is 30 business days. Said period commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification. If the Commission concludes that the transaction may potentially raise 'serious concerns' of generating restrictive effects upon competition, it can initiate a second phase review that may last up to a maximum of 120 business days. In the latter case, the Commission will issue a publication announcing the beginning of the second phase to allow third parties to file relevant information.

18 What is the statutory timetable for clearance? Can it be speeded up?

The first phase review period is 30 business days. This period commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification. If the Commission concludes that the transaction may potentially raise 'serious concerns' of generating restrictive effects upon competition, it can initiate a second phase review that may last up to a maximum of 120 business days. It is not possible to speed up a request.

No cases have been analysed at the time of writing. However, under Law No. 26876, INDECOPI has usually applied prolongations, particularly in complex cases.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test requires the evaluation of the effects of the transaction to identify whether it produces a significant restriction on the competition in the markets involved.

This test should include, among others, the following factors:

- the structure of the involved market;
- the actual or potential competition of the economic agents in the market;
- the evolution of the supply and demand of the products and services in market in question;
- the distribution and commercialisation sources;
- legal or other barriers (technological, investments, horizontal or vertical restrictions) that impede access to the market;
- the economic and financial power of the companies involved;
- the creation or strengthen of a dominant position; and
- the generation of economic efficiencies.

20 Is there a special substantive test for joint ventures?

No.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

There are no specific theories of harm contained in the Merger Act or the Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation). Likewise, no cases have been analysed at the time of writing. However, under Law No. 26876, the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) has usually analysed the market concentration, unilateral effects, vertical foreclosure, common ownership effects and conglomerated effects, among others.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

No cases have been analysed at the time of writing. However, under Law No. 26876, there are no cases that have been decided on explicit non-competition issues.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

One of the factors that the authority considers in the substantive test is the generation of economic efficiencies through the transaction.

In the case of economic efficiencies, the parties shall evidence that the efficiencies:

- are a part of concentration;
- compensate for the identified restrictions over the competition and focus on increasing the wellness of the consumers;
- can be transferred to the consumers; and
- are verifiable by the authority.

If successful, the transaction will be cleared.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) is entitled to void and breakup an unauthorised concentration (ie, by ordering the dissolution of operation that involved the merger or the acquisition of assets or shares) to revert the anticompetitive effects of said operation.

Likewise, the Merger Act establishes that concentrations that have been closed before clearance will not have any legal effects in Peru.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The Merger Act authorises parties to offer commitments to remedy competitive concerns that arise due to the concentration. Neither the Merger Act nor the Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation) describe any of the remedies that could be offered.

Likewise, INDECOPI could also authorise a concentration subject to the fulfilment of a condition of conduct.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In the first phase, parties may offer commitments to remedy competitive concerns that arise during the evaluation within 15 business days from the date after the authorisation request is deemed complete. Commitments could be modified within 10 business days after its submission, if applicable. The first phase will be suspended up to 15 business days (such period may be extended by 15 additional business days). After such period, the Commission may deny or authorise the commitments. In the latter, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Such parties shall submit their comments within five business days. After such period, the Commission will issue their final decision.

In the second phase, commitments may be submitted within 40 business days after such phase has begun and could be modified within 10 business days after said period. The second phase will be suspended up to 15 business days (such period may be extended by 30 additional business days). After such period, the Commission may deny or authorise the commitments. In the latter, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Such parties shall submit their comments within 10 business days. After such period, the Commission will issue their final decision.

Regarding the conditions imposed by INDECOPI, the authority establishes a period for its review. The Commission itself determines whether upon expiration the condition is maintained, overturned, or modified, and said decision may be appealable. In said procedure, the Commission may request information from other public entities or private sector agents. If the condition of conduct is modified, it cannot be more burdensome for the authorised economic agent than the one previously imposed. During the review the condition remains in force.

On the other hand, if the Commission or economic agent considers that there is a change in the conditions of competition in the market during the review period established, they may request the Tribunal for the Defence of Competition at INDECOPI (the Tribunal) (second instance) to reverse or modify the referred condition. In said procedure, the Tribunal may request information from other public entities or private sector agents. If the condition of conduct is modified, it cannot be more burdensome for the authorised economic agent than the one previously imposed. If the Tribunal does not issue its final resolution within the legal term, positive administrative silence will be applied (for which the order made at the request of a party would proceed).

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign merger scenarios have not been observed yet at the time of writing this article.

As we mentioned before, the Merger Act is applicable to any operation that produce effects in Peru (ie, local effects test). However, under Law No. 26876 there are no cases involving foreign-to-foreign mergers with no effects in Peru (or with no corporate vehicles in the country).

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

No cases regarding ancillary restrictions have been analysed yet at the time of writing.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties with a legitimate interest may access the file and present relevant information to the Competition Commission at INDECOPI (the Commission) provided that they have attended the procedure within a period of 10 business days from: the day after the publication of the resolution to initiate the second phase of an application or the publication of the resolution to initiate the ex officio review of concentrations on the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) website.

Likewise, the Commission may consult private sector agents and public entities for their opinion regarding the commitments offered by the parties.

Private sector agents, who have not requested to be part of the procedure, and public entities can only send an opinion on the concentration operation when the competition authority requires it or when they wish to formulate one.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The final resolutions of merger control operations will be published on INDECOPI's website, which is publicly accessible to any user.

Until the procedure is completed at the administrative level, only the parties involved in the concentration and third parties with legitimate interests may know the status of the file. However, if a transaction qualifies for the second phase, the authority will issue a summary of such decision.

The involved parties may request the confidentiality of the information provided which must be approved by the Commission. If so, only a non-confidential version will be made public.

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Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Within the framework of an international agreement or arrangement with a foreign competition authority, INDECOPI may investigate anticompetitive conducts developed in the national territory and may exchange information, including confidential information, with the competent authorities of the countries that are part of such agreements or conventions.

In practice, INDECOPI has cooperated with many international authorities or jurisdictions to discover antitrust practices in Peru and abroad.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The final decision issued by the Competition Commission at INDECOPI (the Commission) may be appealed within 15 business days after its issuance. The Tribunal for the Defence of Competition at INDECOPI (the Tribunal) will act as an appellate body. The final resolution issued by the Tribunal will end the administrative procedure.

The decision issued by the Tribunal may be questioned or appealed in the judiciary within three months from their notification.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Since the Merger Act and the Regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation) came into force on 14 June 2021, no case has been concluded yet at the time of writing. However, the Merger Act establishes that the Tribunal shall issue their final decision within 90 business days from the date the appeal has been filed.

The judicial review does not have a clear time frame.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

No cases have been analysed at the time of writing.

However, under Law No. 26876 no case has been rejected and only a few transactions have been accepted with conditions. Most of the cases have been approved without any kind of conditions.

Reform proposals

35 | Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No cases have been analysed at the time of writing.

Poland

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The basic act regulating merger control in Poland is the Act of 16 February 2007 on competition and consumer protection (the Act). Other major legislation on this issue includes:

- the Regulation of the Council of Ministers of 23 December 2014 concerning the notification of the intention of concentration of undertakings (establishing, inter alia, the official filing form); and
- the Regulation of the Council of Ministers of 23 December 2014 concerning the method of calculation of the turnover of undertakings participating in the concentration.

Although not legally binding, there is another regulatory instrument worth mentioning because of its considerable practical significance, namely the Guidelines on the criteria and procedure of notifying the intention of concentration to the OCCP (the Guidelines), which were issued by the Polish competition authority, the Office for Competition and Consumer Protection (OCCP). The aim of the Guidelines is to help entrepreneurs assess how the OCCP generally understands procedural aspects of the Act. Additionally, the authority also published Clarifications concerning the assessment by the OCCP of the notified concentrations on its website. These Clarifications provide a discussion and explanation of the substantive aspects taken into account in the framework of the assessment of concentrations carried out by the Polish competition authority.

In Poland, the OCCP is the sole authority responsible for the enforcement of competition rules, including merger control.

Scope of legislation

2 | What kinds of mergers are caught?

The following types of transactions are subject to the notification obligation:

- a merger of two or more independent undertakings;
- one or more undertakings to take direct or indirect control over one or more undertakings, whether by acquisition of stocks, shares or other securities, or otherwise;
- several undertakings to create one joint undertaking; and
- acquisition by the undertaking, of a part of another undertaking's property, if the turnover generated by the assets in any of the two financial years preceding the notification exceeded the equivalent of €10 million on Polish territory.

3 | What types of joint ventures are caught?

There were some doubts as to whether the notification requirement should also extend to a situation where one undertaking first creates another undertaking and then disposes its shares to others. The Guidelines and case law (Decision No. DKK-104/10 of 10 November 2010, *PGNiG/Tauron*) confirm that such a scenario requires notification. However, there is no such certainty with regard to the treatment of situations where a company exists on the market for some time and then a new shareholder acquires a minority interest (which does not give control over the company). The Guidelines seem to suggest that such a situation also needs to be notified. However, it is difficult to agree with this approach (the acquisition of a non-controlling minority interest was removed from the list of concentration types several years ago). It may be thus assumed that a situation where one undertaking creates a joint venture and then transfers it to another party shall be notifiable when this is in fact one functionally linked process of creation of a new undertaking, albeit divided into stages and not a situation where a minority stake in an already running business is acquired.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act defines 'takeover of control' as a situation where an undertaking acquires in any form, whether directly or indirectly, such rights which, whether individually or jointly and taking into account all legal or factual circumstances, allow it to exercise a decisive influence upon another undertaking or other undertakings; in particular, such powers are created by:

- holding directly or indirectly a majority of votes at the shareholders' meeting or general meeting of shareholders, also in the capacity of a pledgee or user, or on the management board of another undertaking, also under agreements with other persons;
- the right to appoint or dismiss a majority of members of the management board or supervisory board of another undertaking, also under agreements with other persons;
- appointing members of one undertaking's management board or supervisory board to form more than half of the members of another undertaking's management board;
- holding, directly or indirectly, a majority of votes in a dependent partnership or at the general meeting of a dependent cooperative, also under agreements with other persons;
- the ownership of all or some of the assets of another undertaking; or
- an agreement for the management of another undertaking or transfer of profit by such undertaking.

The above is not a close-ended list.

The Act does not provide for an obligation to notify a concentration where the acquisition involved is that of a minority or other interests that does not result in a takeover of control. Nevertheless, acquisition of control may also take place in case of some factual circumstances that eventually lead to takeover of control (eg, possession of a substantial package of shares, not giving the right to more than 50 per cent of votes in the bodies of another undertaking, but for example to 40 per cent of votes with the significant fragmentation of votes of other partners).

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

An intention of concentration is notifiable where:

- the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of €1 billion; or
- the combined turnover of undertakings participating in the concentration in the territory of Poland in the financial year preceding the year of the notification exceeds the equivalent of €50 million.

The turnover of an undertaking that is jointly controlled by any member from the capital group of a party to the concentration will be attributed to such capital group in proportion to its interest in the jointly controlled undertaking.

In the case of acquisition of control, the turnover mentioned above relates to the turnover generated by the buyer's group as well as to the turnover generated by the target and its subsidiaries. In the case of acquisition of property of another undertaking, the turnover mentioned above relates to the turnover generated by the buyer's group as well as to the turnover generated by the acquired property.

In the case of separate concentrations occurring between the same groups of undertakings taking place within a period of two years, the turnover figures of the acquired targets have to be added together. This is meant to prevent undertakings from circumventing the obligation to notify by splitting a larger transaction into smaller parts that would not qualify for the notification if considered separately.

Apart from the aforementioned, there are no other thresholds (eg, related to market shares of the participants). This means that even those transactions that have de minimis impact on competition on the relevant markets are caught by the merger control regime, if only at least one of the thresholds is met. There are, however, exemptions from this general rule.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Under the Act, filing is mandatory when the jurisdictional thresholds are met and no exemptions from the notification obligation apply. The obligation to notify an intention of concentration does not apply in the following cases:

- the turnover generated by the undertaking over which the control is to be taken (the target undertaking and its subsidiaries) in the territory of Poland did not exceed the equivalent of €10 million in each of the two financial years preceding the notification;
- the turnover of none of the undertakings taking part in a merger or founding a joint venture exceeded in the territory of Poland €10 million in each of the two financial years preceding the transaction;
- where control is taken over an undertaking or a group of undertakings belonging to the same capital group and simultaneously a part of the assets of the undertaking or the group of undertakings belonging the capital group is acquired – if the turnover of the undertaking or undertakings to be taken over and the turnover generated by the part of assets to be acquired did not exceed in the territory of Poland €10 million in each of the two financial years preceding the transaction;
- a financial institution, the normal activities of which include investing in stocks and shares of other undertakings, for its own account or for the account of others, acquires or takes over, on a temporary basis, stocks and shares with a view to reselling them provided that such resale takes place within one year from the date of the acquisition or taking over, and that:
  - this institution does not exercise the rights arising from these stocks or shares, except from the right to dividend; or
  - this institution exercises these rights solely to prepare the resale of the entirety or part of the undertaking, its assets, or these stocks and shares;
- an undertaking acquires or takes over, on a temporary basis, stocks and shares with a view to securing debts, provided that such undertaking does not exercise the rights arising from these stocks or shares, except from the right to sell;
- the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over or the assets are to be acquired by a competitor or a participant of the capital group to which the competitors of the undertaking to be taken over or whose assets are to be acquired belong; and
- the concentration applies to undertakings participating in the same capital group.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There may be situations where foreign-to-foreign transactions will have to be notified to the OCCP. Under the Act, the notification obligation (even with respect to a transaction to be finalised outside the territory of Poland) exists where a concentration causes or may cause effects in the territory of Poland.

The Act is silent on what criteria are to be taken into account when assessing the effect. According to the Guidelines, it can be presumed that if at least one of the participants of the concentration (in practice, any member of the capital group to which the buyer, the seller or the party to the JV belongs) generates any turnover in the territory of Poland, the local effects test is met and such transaction has to be notified to the OCCP.

The broad interpretation of the local 'effect' applied by the Polish competition authority may mean that, in the case of formation of joint ventures especially, many foreign-to-foreign concentrations will formally be caught by the Polish merger control rules. For example, if 'A' and 'B' intend to form a joint venture in the United States, and 'A' and 'B' have joint worldwide turnover in excess of €1 billion, it will be sufficient for the obligation to notify to arise if any of 'A' or 'B', or any entity from the capital group of 'A' or 'B', has any (even insignificant) turnover in Poland.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

No. There are no special rules with respect to foreign investment. However, there are special rules for financial institutions when it comes to calculation of turnover for threshold purposes. Moreover, according to other special legislation, transactions in sectors such as banking may require special approval from regulatory bodies other than the OCCP.

On 30 September 2015, the Act on Control of Certain Investments (ACCI) entered into force. According to the ACCI, the Minister of Energy as well as the Prime Minister becomes another authority empowered to scrutinise mergers and acquisitions in Poland (the Control Body). The ACCI aims to create mechanisms to protect against hostile takeovers of companies operating in key sectors of the Polish economy. According to the ACCI, prior to the acquisition of shares of strategic companies (including the acquisition of proprietary interests in entities or their enterprises) the purchaser will need to notify the Control Body and get the required approval. The obligation to inform the Control Body is to apply to transactions involving the acquisition of at least a 'material stake' in companies doing business in the sectors that are deemed strategic for the Polish economy (ie, companies operating in the gas, power generation, chemical, petrochemical and defence sectors). Because of an amendment that entered into force on 6 February 2016, the application scope of the ACCI covers also transactions undertaken by firms operating in the production of rhenium and the extraction and processing of metal ores used in the manufacture of explosives, weapons and ammunition as well as products and technologies intended for military or police purposes. Upon the receipt of the notification, the Control Body will assess the impact of a given acquisition on strategic sectors of the Polish economy. The ACCI provides for broad and general criteria for assessment ('the market share of the entity in question'; 'the scale of the business', as well as the transaction's potential to 'upset public order or public security'). The Control Body has 90 days from the receipt of the notification or from the initiation of proceedings in a given case to decide whether or not to object. A decision is preceded by a non-binding recommendation presented to the Control Body by the Consultative Committee, an advisory body that involves representatives of relevant ministries and state authorities. As a rule, an objection made by the Control Body (as well as a transaction undertaken without prior notification) will result in rendering the acquisition null and void or in making it impossible to exercise rights attached to shares (except for the right to sell such shares) and in declaring the invalidity of resolutions adopted by the decision-making bodies of companies.

In 2020, Poland adopted an amendment to the ACCI as part of the 'Anti-Crisis Shield 4.0'. The law expands the state's control over M&A transactions in some strategic sectors of the economy. These provisions came into force on 24 July 2020, and there is a risk that they will be deemed to also apply to ongoing transactions (those not closed before that date).

The new provisions have been prepared to protect the Polish industry against 'hostile takeovers' performed by investors from outside the European Union, the European Economic Area (EEA), and the Organisation for Economic Cooperation and Development (OECD). The carveout for investors from OECD was added at the very last stage of the parliamentary works, and it significantly softens the impact of the new law, as not only investors from the European Union, but also those from Australia, Canada, Israel and the United States, as well as Japan or South Korea, will benefit from the carveout.

The new act will have a significant impact on M&A transactions, as it:

- concerns enterprises active in numerous sectors of the economy;
- establishes a low materiality threshold for transactions (transactions regarding enterprises with an annual Polish turnover exceeding €10 million are subject to notification);
- grants the competent authority – that being the OCCP – far-reaching powers (one of the conditions triggering their objection is a mere potential threat to the public policy or public security of the Republic of Poland, or public health in the Republic of Poland); and
- provides for strict financial penalties, as well as imprisonment for natural persons, in the event of a violation of the duties resulting from the draft act.

The list of entities covered by the new regulations (protected entities) is relatively broad and includes, among others:

- public companies;
- entities that hold assets listed as 'critical infrastructure'; and
- entities doing business in certain sectors of the economy: IT (software developers dedicated to certain specified sectors), entities involved in electricity generation (both conventional and renewables), entities involved in the transmission and storage of fuel and gas, telecommunication companies, entities in the medical and pharmaceutical industry (the manufacture of medical devices and instruments, as well as medicines and other pharmaceutical products, etc), as well as entities involved in the generation, transmission and distribution of heat, and also the processing of meat, dairy, grain and fruits and vegetables.

Only those transactions undertaken by entities from outside of the European Union, EEA and OECD are subject to control.

The Act concerns actions that may lead to the acquisition of dominant control or 'significant participation' (meaning acquiring or crossing the 20 per cent or 40 per cent shareholding thresholds). The law covers not only the direct acquisition of shares, but also indirect acquisitions through subsidiaries, asset deals and all types of indirect means of taking control or gaining influence over another entity (eg, mergers, demergers, amendments to articles of association, redemptions of shares, as well as all other transactions or acts resulting in the indirect acquisition of significant participation or control, including those performed on the basis of foreign transactions under foreign law).

The new law will only apply to cases where the target enterprise has achieved a turnover in excess of €10 million in the Republic of Poland in at least one of the previous two financing years.

The OCCP is intended to undertake the control of foreign investments. Therefore, it is possible that certain transactions may, in practice, require two approvals from the same government body, issued on the basis of different conditions.

In principle, a transaction must be notified prior to its consummation. Unfortunately, the amended ACCI Act is also imprecise in this regard, since in other sections it imposes an obligation to notify prior to the conclusion of 'any agreement creating an obligation to acquire', and, in relation to public companies, requires notification prior to the announcement of a public tender offer (which may indicate that it is impermissible to announce a public tender offer conditional on approval – in practice, this may create certain difficulties, including, for example, the leak of the intention to announce a tender offer prior to it being announced). The transaction should not be completed prior to clearance being granted or the lapse of the statutory time period for the issue of the clearance decision.

Approval of a transaction that does not raise any issues, or confirmation that the transaction is not subject to control, will be given within 30 business days. Cases requiring review from a public security or public policy perspective will be completed within 120 calendar days (where the clock stops any time the OCCP seeks additional information).

Any acquisition made without the required notification shall be invalid. Moreover, the draft provides for both very strict financial (fines up to the maximum amount of 50 million zlotys) and penal (up to five years' imprisonment) responsibility for non-compliance with the new regulations. These penalties may be imposed both on the entity acquiring an interest without notification, as well as natural persons acting on its behalf.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Act does not provide for a specific deadline as such for the filing of the notification. The 'intention of concentration' has to be notified. It means that the notification has to be submitted before the concentration is implemented (ie, prior to closing). In other words, the parties to a concentration are obliged to refrain from implementing the transaction until (unconditional or conditional) clearance is obtained or a one-month waiting period elapses without the authority making its decision (the 'guillotine effect'). However, it should be added that clearance by the mere passage of time is rather unlikely to occur.

It is worth noting that the Act provides for a worldwide bar on closing.

If an undertaking has implemented a concentration, even if unintentionally, without the Office for Competition and Consumer Protection (OCCP)'s clearance, the Act allows the OCCP to fine the undertaking by way of a decision, with a fine not to exceed 10 per cent of the turnover earned by the undertaking in the financial year preceding the year in which the fine is imposed.

Moreover, article 108 of the Act authorises fines on persons holding managerial positions or members of managing bodies of such undertakings if the persons or members have not notified an intention of concentration. The fine may be up to 50 times the average monthly remuneration in the business sector in Poland in the last month of the quarter preceding the day of issuance of a decision.

Additionally, the OCCP may revoke its decisions if they were based on misrepresentations for which the undertakings participating in the concentration were responsible or where undertakings did not comply with the conditions (remedies) specified by the OCCP. Once revoked, the decision may be re-adjudicated by the OCCP on the merits of the case.

If, in cases described above, the concentration is already implemented and restoration of the competition in the market is otherwise impossible, and if the intention to concentrate has not been notified, or if a concentration ban has not been respected, the OCCP may order such measures as division of the merged undertaking, disposal of the undertaking's assets, disposal of stocks or shares conferring control, or dissolution of a jointly controlled company.

Sanctions were imposed, for example, in Decision No. DKK-1/07 of 12 July 2007, where the OCCP fined Sobieski Trade 40,000 zlotys for failure to notify. In decision No. DKK-37/09 of 18 June 2009, the OCCP imposed a fine of 70,000 zlotys on Przedsiebiorstwo Panstwowe 'Porty Lotnicze' (the national airport operator) and the provincial government of the Subcarpathian Voivodeship, again, for failure to notify. Moreover, in 2012 the OCCP issued two decisions and in 2013 only one decision imposing fines for non-compliance with the obligation to notify the concentration. Among more recent cases, note two decisions from 2017: in decision No. DKK-86/2017 of 5 June, the grocery wholesaler Bać-Pol SA was fined of 527,000 zlotys for failure to notify of the takeover of a portion of assets of another company called Klementynka. The authority initiated proceedings against Bać-Pol after receiving information that one of its subsidiaries implemented a concentration without prior authorisation by the OCCP. In a second case the consumer eggs producer was obligated to pay 339,000 zlotys for failure to notify of its takeover of a portion of the assets of another company operating in the same relevant market (decision No. DKK-145/2017 of 19 September).

All fined undertakings were Polish-based companies. No penalties on individuals (management board members) were imposed.

Nevertheless, to the best of our knowledge, there have been no cases so far in Poland where the focus of the OCCP was on actions of the undertaking concerned that could qualify as 'gun jumping' (ie, a de facto implementation of the concentration prior to clearance). The only cases that have been made public are the cases where the concentration has been consumed (ie, the transaction has been closed or the joint venture has been formed and registered) prior to clearance. Moreover, such fines were imposed on undertakings that have notified a merger already, but their action was taken too late.

10 Which parties are responsible for filing and are filing fees required?

The intention of concentration should be notified by:

- the merging undertakings jointly;
- an undertaking taking over the control;
- jointly all undertakings participating in the creation of a joint undertaking; or
- an undertaking acquiring some of the assets of another undertaking.

The general rule is that the notification has to be submitted by the undertakings directly participating in the concentration. However, where a dominant undertaking implements a concentration through at least two dependent undertakings, the notification should be submitted by the dominant undertaking. Moreover, if the undertakings directly participating in the concentration include a corporate vehicle established only for the purpose of the transaction and to which the intent of concentration cannot be attributed, the notification can be submitted by the dominant undertaking with respect to such a corporate vehicle. However, in such a case the notifying party has to clearly indicate in the notification that the undertaking taking over control is a corporate vehicle only.

The fee to be paid for an application to initiate proceedings in concentration cases was raised on 1 January 2017 and currently amounts to 15,000 zlotys.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The undertakings whose intention of concentration is to be notified are under an obligation to refrain from implementing the concentration until the OCCP issues its decision or the time limit to issue the decision lapses.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Under Polish merger control regime sanctions, closing before clearance is treated similarly as the failure to notify. As a result, the consequences for both types of infringements are the same.

In practice, the OCCP rarely imposes fines for such infringements. In 2010, there was one decision imposing a fine on an undertaking for not notifying the intended concentration. In 2011, there were no cases of this kind. In 2012, there were two decisions and in 2013 only one such decision. In 2014, there was also only one decision of this kind. In 2015 and 2016, there were no cases of this kind. An upward trend can, however, be observed with two decisions in 2017 and three in 2018 (2019 statistics were not available at the time of writing; however, from the press releases we know about at least two such cases).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In the case of closing the transaction without (or before) the OCCP's clearance, the undertaking in question as well as persons holding managerial positions or members of managing bodies of such undertakings can be fined. The same rule applies equally to Polish and foreign-to-foreign mergers.

Nevertheless, to the best of our knowledge so far, cases where fines for closing transaction without (or before) the OCCP's consent involved purely domestic transactions.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act provides for a worldwide bar on closing. However, in one of the decisions issued by the OCCP (No. DOK-37/2007 *Olympus Capital Holdings Asia/Arysta Life Science*, 6 April 2007), the competition authority seemed to hold that the concentration may be completed before its clearance, as long as the parties refrain from implementing its Polish aspect that has local effects in Poland. In this decision, the OCCP did not question the rationale for completing the transaction before clearance. The OCCP only pointed out that no relevant evidence was offered to show that the parties refrained from implementing that aspect of the transaction that had local effects in Poland. Because there is only one such decision and the Guidelines suggest that this scenario is unlikely, such solutions will always be associated with risk and need a case-by-case analysis.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

The same rules and requirements apply. However, the bar on closing will not be considered breached by implementing a public offer to purchase or exchange stocks that has been notified to the OCCP prior to implementation, provided that the buyer does not exercise the voting rights arising from the acquired stocks or exercises them solely to maintain the full value of its capital investment or to prevent substantial damage that might affect the undertakings participating in the concentration.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The official filing form (the list of information and documents (LID)), as established by way of a regulation of the Council of Ministers, requires rather detailed information regarding the planned transaction to be provided by the notifying party in the notification (even if there are no overlaps between the undertakings concerned). Section 1 of the LID contains questions relating to the undertakings concerned (inter alia, data identifying undertakings involved, authorities authorised to represent them and the subject of the actual activity as well as the detailed description of intended concentration is included); section 2 involves information on the relevant markets and the effects of the transaction on the market.

A detailed market analysis is necessary when the market is affected horizontally or vertically or when the market is affected by a conglomerate concentration.

The LID, as well as the application itself, has to be submitted in Polish. Normally, the application runs to around 35 to 40 pages, plus attachments.

The LID has to be submitted together with certain documents, such as, inter alia, excerpts from relevant commercial registers for the applicants, executed versions of most relevant transaction documents, most recent financial statements of the parties concerned, structure charts of the parties concerned. Documents prepared in foreign languages have to be sworn translated into Polish.

In terms of possible sanctions, under the Act providing untrue data in a transaction notification may result in a financial sanction in the equivalent of up to €50 million. Such fines are rather uncommon in practice. Nevertheless, it should be mentioned that, in 2012, the OCCP imposed on UPC Polska a fine amounting to 775,000 zlotys for providing false information regarding possessing documents material for an assessment of the pending merger proceedings (decision No. DKK-6/2012, *UPC Polska/Aster*, 30 January 2012). In short, UPC applied to the OCCP for the consent to acquire Aster. The OCCP addressed the undertaking to complete the notification, inter alia, with providing information if the company and the to-be-acquired entity possessed any reports, analyses or marketing enquiry concerning the access market to pay TV in Poland. During the proceedings, it transpired that UPC concealed the market analysis containing significant information for the examined transaction. The document not revealed by the company confirmed, inter alia, the OCCP's opinion, stating that the concentration would have a significant impact on local markets of particular cities. This was contrary to the stance of UPC Polska, which claimed during the pending proceedings that the market of pay TV shall be defined on a nationwide level.

There were cases where OCCP imposed fines on the third parties (competitors, clients and suppliers of the parties to the concentration) for not providing information in the course of a market test carried out in a merger control case (such penalties were relatively low and aimed at disciplinary effect).

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

In 2015, Poland finally adopted a two-stage merger review procedure – something that has been desired since the first modern competition legislation was adopted in 1990.

The Act currently stipulates that the antimonopoly proceedings in non-problematic concentration cases should be finalised within one month from commencement (first stage review). Complex cases, cases that can cause competition concerns (where there is a risk that a significant impediment to competition might occur) or that require a sector inquiry will enter (by way of a resolution of the OCCP that cannot be appealed) a second stage of the review. This will entail a four-month extension of the process, prolonging the duration of the whole procedure to five months in total.

However, the OCCP is able to stop the clock – in any of the stages – each time it asks questions or requires new data or documents to be provided in the course of the proceedings. The deadline may also be extended if a statement of objections is issued or remedies are being discussed.

The Act does not provide for any measures to speed up the proceedings. Neither are there any fast-track procedures available.

On 31 March 2020, the Polish parliament enacted legislation aimed at mitigating impact of the covid-19 pandemic in Poland. The legislation was immediately signed by the president and published in the official journal, thus entered into force.

The legislation, among other things, had an impact on the deadlines in the administrative proceedings, including those before the OCCP. Based on the new law, the statutory deadlines in all administrative proceedings before the OCCP:

- do not start to run if proceedings were opened during the state of epidemic threat or state of epidemy (retroactively, proceedings opened after 14 March 2020 when the state of epidemic threat was announced in Poland); and
- are suspended if proceedings opened prior to the announcements of the state of epidemic threat or state of epidemy (retroactively, proceedings opened before 14 March 2020 when the state of epidemic threat was announced in Poland).

This legislation will last for an indefinite period of time (until the state of epidemic threat or state of epidemy is repealed by the Polish government). The new legislation, in practice, meant that:

- notifications shall still be filed to the OCCP (where the relevant thresholds are met);
- based on the notification, the OCCP opens and carries out merger control proceedings; and
- decisions are issued.

However, the OCCP is not bound by the statutory deadlines.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Act sets out a two-stage merger review procedure, where the first stage takes up to one month, potentially extendable to five months if the concentration requires an in-depth review in the second stage.

There are no official pre-notification contacts before the formal submission of the notification. However, the Guidelines indicate that it is possible to contact the OCCP before filing.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Office for Competition and Consumer Protection (OCCP) will clear concentrations that do not result in significant impediment to competition in the market, in particular, by the creation or strengthening of a dominant position in the market. This means that, in practice, the Polish competition authority follows the significant impediment to effective competition (SIEC) test.

The Act defines 'dominant position' as the position of the undertaking that allows it to prevent effective competition within a relevant market, thus enabling it to act to a significant degree independently of competitors, contracting parties and consumers. It is assumed that the undertaking holds a dominant position if its market share exceeds 40 per cent.

The OCCP may also issue conditional decisions (in 2011, there were three such decisions issued, in 2012 there was only one, in 2013 there were two such decisions issued, in 2014 there were four conditional clearances issued, in 2015 there was one such case and in 2016 two such decisions were issued) or a decision under article 20.2 of the Act, the latter offering clearance despite significant impediments to competition (there were no such decisions issued during the period 2011–2017).

20 | Is there a special substantive test for joint ventures?

No, there is no special substantive test for joint ventures. Both full-function and non-full-function joint ventures are caught by the Polish competition law.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In assessing concentrations, the OCCP focuses mainly on whether the SIEC test is met, especially where a dominant position is created or strengthened. In practice, post-merger market shares, concentration of the market (measured by the Herfindahl-Hirschman Index) and post-merger market structure still play a crucial role in the assessment of concentrations by the OCCP.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The OCCP may clear a concentration that will significantly impede competition in the market, including by the creation or strengthening of a dominant position, in any case where it is justifiable, including especially where the concentration is expected to contribute to economic development or technical progress or may have a positive impact on the national economy.

In decision No. DKK-32/07 of 28 September 2007, the OCCP concluded that even though the concentration could pose a significant risk to the competition at that particular moment, the following reasons should be taken into account: the transaction will contribute to the economic and technological development and will have a positive impact on the national economy as well as other benefits. In another decision of 8 March 2007, No. DOK-29/07, the OCCP pointed out that the concentration could pose a significant risk to competition, but there were arguments for clearance to be given (such as ensuring Poland's energy security). As a result, the OCCP issued unconditional clearance in both cases.

However, it should be stressed that those are exceptions and later decisions (in particular decision No. DKK-1/2011 of 13 January 2011) suggest that the current approach is different and the authority is unwilling to follow the above rationale.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Act does not explicitly provide for efficiencies to be a reason to clear a transaction that may otherwise in principle harm competition. However, in some cases, the authority took that into account when assessing the transaction. In one of their decisions (decision No. DKK-1/2011 of 13 January 2011 *PGE/Energa*) the OCCP took into account the economic efficiencies in the process of examining the concentration. However, finally the OCCP prohibited this transaction.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Office for Competition and Consumer Protection (OCCP) may, by means of a decision, prohibit implementation of the concentration if it results in a significant impediment to competition in the market, in particular by the creation or strengthening of a dominant position.

If the decision is not complied with, the OCCP may, if strict conditions are met, apply restorative measures, for example, order a division of the undertaking.

The OCCP may also impose a fine if the transaction is closed despite its veto.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Under the Act, the OCCP may clear a concentration provided the undertakings concerned fulfil certain conditions (conditional clearance).

These conditions may involve, in particular:

- disposal of all or some of the assets of one or several undertakings;
- divesture of control over an undertaking or undertakings, in particular by disposing of a block of stocks or shares, or dismissal of one or several persons from the management or supervisory board; or
- granting a competitor exclusive rights.

The decision will determine the time limit for meeting the conditions.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

In the case of transactions that are considered to significantly restrict the competition on the relevant market (owing to substantial aggregation of market share or reduction of strong competitors on the market), the OCCP will likely issue conditional decision including commitments. Commitments are intended as a means to ensure that affected markets remain competitive. The Act provides for two types of commitments: behavioural and structural. The OCCP is willing to impose structural rather than behavioural remedies, such as the obligation to permanently dispose of specified assets (eg, decision No. DKK-9/09 of 25 February 2009, decision No. DKK-64/10 of 12 July 2010, decision No. DKK-128/2011, decision No. DKK-70/11 and decision No. DKK-40/2014 of 31 March 2014). Regarding behavioural remedies, note the OCCP's decision No. DKK-49/08 of 19 June 2008, where the OCCP gave clearance on condition that the undertaking withdraw from and not initiate any actions designed to acquire any ownership rights in the other undertaking and decision No. DKK-156/2017 of 4 October 2017 where the OCCP gave clearance on condition that the acquirer within agreed time period would sell all the electric energy produced in one of the assets of the acquired company through the commodity exchange. In one of its decisions (No. DKK-51/2019 of 25 February 2019) the OCCP combined both structural (divestment of part of the business) and behavioural (certain length of the contracts with the clients, price limits for the certain clients) remedies to allow for the concentration and protect the competitive landscape of the markets concerned.

In practice, parties submit their proposal of commitments to the OCCP when the latter raises concerns over transaction. Although the commitment proposal is subject to the OCCP's revision, the conditional clearance may be issued only if the party consents to the type and scope of commitments. Otherwise, the OCCP issues a prohibition decision. The authority is entitled to determine, at its sole discretion, the type and scope of commitments. Moreover, the addressee of the conditional decision is required to provide the OCCP with information regarding enforcement of commitments. The authority obliges the acquiring party to submit such information in a period of time prescribed in the commitment decision.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To the best of our knowledge, there is no such track record. However, in principle, remedies apply also to foreign-to-foreign mergers.

In decision No. DOK-36/2004 of 18 May 2004, the OCCP gave clearance on condition that an undertaking based in France shall dispose of its assets, including those located in France, to a third party, which proves that the remedies may also involve assets located outside Poland.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The matter of ancillary restrictions is not regulated in the Act. However, the Guidelines Regarding the Assessment of Concentration clearly state that ancillary restraints are not the subject of examination or assessment during the concentration proceedings. Therefore, the clearance of the OCCP does not extend to the anticompetitive contractual clauses accompanying the concentration. In practice, during the concentration procedure, the OCCP may inform the notifying undertakings that the contractual provisions accompanying the concentration raise doubts as to their conformity with the ban on anticompetitive agreements and therefore, if the undertakings refuse to change them, it may result in instigation of the antimonopoly proceedings to assess whether the anticompetitive arrangement infringes Polish competition law. It means that, in principle, the OCCP does not make the clearance for concentration dependant on the previous amendment of ancillary restraints. To sum up, although the Guidelines are not legally binding on undertakings, in practice the OCCP's decisions do not automatically cover ancillary restrictions (that are directly related to, and necessary for, the implementation of the concentration). Therefore, caution and a case-by-case approach may be necessary while dealing with ancillary restraints in Poland.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Customers and competitors are not parties to the proceedings. That means that they do not have access to files nor can they appeal against the decision. However, third parties may at their own initiative file comments or they may be asked by the Office for Competition and Consumer Protection (OCCP) to file input regarding important aspects of the case.

The OCCP keeps a register of all notified concentrations, which may be helpful for third parties. It is available on the authority's website.

When it comes to complicated transactions, the OCCP will, in principle organise a market test and send questionnaires to competitors, clients as well as suppliers, allowing them to take a position.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The fact that a notification has been submitted, the date of submission, the notifying party and the current status of the proceedings are available at the OCCP's website.

During antimonopoly proceedings, undertakings are obliged to disclose all information available, including information that may involve business secrets. The OCCP may, on an ex officio basis or on application of the undertaking concerned, limit access to some information for other parties (if there is more than one party to the proceedings). In such a case, the undertaking should file all documents in two versions, one confidential and the other non-confidential. The latter is available for all parties. In March 2017, the OCCP published guidelines providing further clarifications on what conditions the undertaking should meet under, to successfully apply for limitations on other parties' access to the case files (including merger control proceedings) on the grounds of business secrets protection.

Since January 2015, the notifying party is obliged to submit a brief (up to 500 words) description of the intended concentration. This description is posted on the OCCP's website immediately after notification and should therefore be drafted in such a way that it does not contain secret information.

Furthermore, in the case of imposing conditions on an undertaking, the OCCP on application of the undertaking concerned does not disclose deadlines for fulfilling the imposed conditions. The obligation in question is valid until the fulfilment of these conditions, but not later than the expiry of the deadline for their fulfilment. Moreover, in case of the above-mentioned application, the OCCP does not involve such deadlines in the publicly available version of the decision. The amendment in question is aimed at protecting commercial interests of the undertakings concerned.

Notwithstanding that, there is a general obligation on the OCCP employees to protect business secrets. This may mean having to mark information for treatment as a business secret even if there is only one party to the proceeding. Additionally, when the OCCP prepares the statement of reasons for its decision, it shall not disclose information marked as a business secret.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The OCCP is a member of numerous international working groups (eg, the ICN), the most important of which being those involving the competition authorities from other EU member states. The officials from the Polish competition authority attend meetings of the Advisory Committee established by Regulation 139/2004. This Regulation provides for detailed rules of cooperation between member states and the Commission in concentration cases.

There are currently three binding bilateral agreements between the OCCP and its Ukrainian, Russian and Hungarian counterparts.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

An appeal arises from a decision of the Office for Competition and Consumer Protection (OCCP) to the Court of Competition and Consumer Protection. The appeal must be lodged within one month of the date on which the decision is served (owing to amendments, the time limit to lodge an appeal has been extended from 14 days to one month). Upon appeal, the OCCP should, without delay but not later than within three months of the date of filing the appeal, transmit the appealed decision to the court together with the record of proceedings. Where the OCCP considers the appeal to be justified, it may repeal or amend the decision, whether in whole or in part, without transmitting the record to the court. Any such repeal or amendment must be notified to the party concerned without delay by sending it a new decision; such a new decision is also open for appeal. Where justified, prior to transmitting an appeal to the court or repealing or amending his or her decision, the OCCP may also perform additional activities to clarify objections presented in the appeal.

To the best of our knowledge, widely recognised in Poland, one of the merger appeal cases – a prohibition decision in the energy sector *PGE/Energa* case (Decision No. DKK-1/2011) – was upheld by the court of consumer and competition protection. The second case, the OCCP's prohibition for the takeover of Merlin by NFI Empik (Decision No. DKK-12/2011) – intended concentration on the online sale of non-specialised books and music CDs – was withdrawn by the undertaking that lodged the appeal a few days before the court hearing.

Time frame

33 What is the usual time frame for appeal or judicial review?

The usual time frame for judicial review (in the first instance) is one to two years. The whole appeal process (the first and second instance and cassation to the Supreme Court) may take up to five years.

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ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

OCCP activities in numbers – 2018	Number		
New concentration control proceedings	252		
Issued decisions			
Concentration approval	228		
Including Phase I approval	220		
Including Phase II approval	8		
Conditional approval	0		
Other data			
Discontinuance of proceedings	1		
Return of the notification of the intended concentration	10		
To the applicant			
Proceedings moved to the Phase II stage	12		
Average time of proceedings conducted in Phase I	36 days*		
Average time of proceedings conducted in Phase II	199 days†		
Cases are given an opinion in terms of the impact of concentration on the Polish market in connection with proceedings before the EC	390		
New explanatory proceedings‡	7		
Concentration approvals in years 2015-2017			
	2016	**2017**	**2018**
Concentration approvals	194	205	228
Conditional approvals	2	1	0

* The actual case settlement period, taking into account the dates subject to exclusion under article 96, section 2 of the Act.
† The actual case settlement period, taking into account the dates subject to exclusion under article 96(a), section 8 of the Act.
‡ It pertains to the level of concentration in the economy and determination of the obligation to report concentration.

Source: OCCP.

Reform proposals

35 | Are there current proposals to change the legislation?

All changes to the merger control regime in Poland have been covered by the amendments to the Act that came into force on 18 January 2015.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No updates at this time.

* *This chapter was accurate as at July 2020.*

Portugal

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control is governed by Law No. 19/2012 of 8 May 2012 (the Act), which enacted the current Portuguese competition legal regime superseding the previous regime enacted by Law No. 18/2003 of 11 June 2003, as amended (the former Competition Act).

Decree-Law No. 125/2014 of 18 August 2014 adopted and approved the current statutes of the Competition Authority (the Competition Authority or the Authority).

The Competition Authority is entrusted with the mission of implementing competition rules, including those on merger control. It is a public entity endowed with administrative and financial autonomy, management autonomy and organic, functional and technical independence. It has been granted statutory independence for the performance of its activities, without prejudice to certain acts that are subject to ministerial approval (eg, the budget, the multi-annual plan and the management report and the accounts, including the balance sheet). The member of government in charge of economic affairs (currently the minister of economy) may also be called to intervene in merger control proceedings through an extraordinary appeal.

Without prejudice to the competence of the government as regards competition policy, the members of the Board of the Competition Authority shall be heard by the relevant parliamentary committee, whenever they are requested for such purposes, to provide information or clarification on their activities and on competition policy matters.

The Code of Administrative Procedure applies on a subsidiary basis to the procedure to be followed in the area of mergers.

The Code of Procedure in Administrative Courts applies on a subsidiary basis to the judicial review of the Competition Authority's administrative decisions, including merger control.

The General Regime on Quasi-criminal Minor Offences (enacted by Decree-Law No. 433/82 of 27 October 1982) applies on a subsidiary basis to the sanctioning procedure and decisions, and to their judicial review.

Scope of legislation

2 | What kinds of mergers are caught?

Portuguese competition law applies to mergers that occur in Portuguese territory or that may have an effect within it. A concentration is deemed to exist when a lasting change of control over the whole or part of an undertaking occurs, as a result of the following situations:

- two or more previously independent undertakings or parts thereof merge;
- one or more persons or undertakings who already have control of at least one undertaking acquire control, directly or indirectly, of the whole or parts of the capital stock or of assets of one or several other undertakings; or
- two or more persons or undertakings create a joint venture that is intended to perform on a lasting basis the functions of an autonomous economic entity.

However, a concentration does not exist in case of an acquisition of shareholdings or assets by an insolvency receiver in the framework of an insolvency procedure; the acquisition of a shareholding merely as a guarantee; or the acquisition by credit institutions, financial companies or insurance companies of shareholdings in undertakings with a corporate object different from that of any of these three types of companies, when the acquisition is made with a mere temporary nature and for resale purposes. As for this latter case, the concentration does not exist as long as the acquisition is not made on a lasting basis, the voting rights associated with the acquired shareholdings are not exercised with the purpose of determining the competitive behaviour of the concerned undertakings or are solely exercised with the purpose of preparing the total or partial transfer of such undertakings, the assets thereof or the acquired shareholdings, and also provided that such transfer occurs within one year from the date of acquisition (which may be extended by the Competition Authority if the acquirers show that the transfer was not possible within such period because of reasons worthy of consideration).

3 | What types of joint ventures are caught?

As stated above, merger control provisions apply to joint ventures that are intended to perform on a lasting basis the functions of an autonomous economic entity (full-function joint ventures).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Under the Act, 'control' is any act of whatever form that confers the ability to exert on a lasting basis, separately or jointly, a decisive influence, in the given legal and factual circumstances, on the activities of an undertaking. In particular, it is the case of the acquisition of the whole or part of the capital, the acquisition of ownership or of the right to use or enjoy the whole or part of the assets of an undertaking, or the acquisition of rights or the conclusion of contracts that confer a decisive influence on the composition or on the decisions of the corporate bodies of an undertaking. So far, nothing has been provided for outside the above boundaries.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Concentrations are subject to prior notification if one of the following conditions occurs:

- as a result thereof, a share equal to or higher than 50 per cent of the national market for a particular good or service or for a substantial part of it is acquired, created or reinforced;
- as a result thereof, a share equal to or higher than 30 per cent and lower than 50 per cent of the national market for a particular good or service or for a substantial part of it is acquired, created or reinforced, provided that in the preceding financial year the individual turnover in Portugal, net of directly related taxes, of at least two undertakings taking part in the concentration exceeds €5 million; or
- in the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding €100 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds €5 million.

In addition, two or more concentrations made within a period of two years among the same individuals or legal entities, which considered individually would not be subject to prior notification, are deemed to be a sole concentration subject to such prior notification when the set of concentrations reaches the turnover figures set out above.

Several rules on the calculation of both market share and turnover are established in the Act.

Only concentrations that meet one of the above conditions and that are therefore subject to prior notification may be investigated under the merger control rules. Concentrations that do not meet any of such conditions may, nevertheless, be investigated as restrictive practices.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification to the Competition Authority is mandatory where the statutory thresholds are met. No exceptions are admitted.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

As stated above, the Act applies to mergers that occur in Portuguese territory or that have or may have an effect within it. Accordingly, foreign-to-foreign mergers that have or may have effects within the Portuguese territory (ie, those where the statutory thresholds are met) are subject to the Act.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act is applicable to all economic activities, be they permanent or occasional, in the private, public and cooperative sectors. There are no provisions in the Act relating to specific sectors, other than the indication that the Competition Authority's powers over concentrations in regulated sectors are exercised in cooperation with the corresponding regulatory authorities, from which the Authority, prior to the adoption of a decision within a merger control procedure in the corresponding sector, shall request the position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers. In the cases of concentrations in the media sector (newspaper, news, television or radio companies), a negative opinion of the media regulator (ERC) is binding upon the Authority to the extent that it is grounded on risks to the freedom of expression and to the plurality of opinions.

Provisions influencing, directly or indirectly, mergers in specific sectors may also be found in the concerned area's legislation.

With reference to companies, which, by law, are in charge of the management of services of general economic interest, or companies that have the nature of a legal monopoly, they are subject to the provisions of the Act to the extent that the application of such rules does not constitute an obstacle to the fulfilment of the particular mission with which they have been entrusted.

In other contexts too, merger operations must comply notably with the relevant provisions of the Commercial Companies Code and with the applicable rules of the Securities Code.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations must be notified after the conclusion of the corresponding agreement and before they are carried out or, whenever relevant, after the date of disclosure of the preliminary announcement of a public takeover bid or of an exchange offer or the date of disclosure of the announcement of the acquisition of a controlling shareholding in a listed company, or, in the case of a public procurement procedure, after the definitive award of the contract and before the closing of the transaction. In these latter cases, the awarding public entity shall, in the public procurement programme, set the rules regarding the interplay between the public procurement procedure and the merger control regime established in Law No. 19/2012 of 8 May 2012 (the Act).

Furthermore, when the undertakings taking part in the concentration show to the Competition Authority a serious intent of concluding an agreement or, in the case of a public takeover bid or of an exchange offer, the undertakings show the public intent to carry out such bid or offer, the concentration may be notified to the Competition Authority before the above deadlines.

Under the Act, projected concentrations may be the object of pre-notification evaluation by the Authority, which shall be carried out in accordance with the guidelines adopted by the Authority on 27 December 2012.

Implementation of a concentration that is subject to prior notification without fulfilling such requirement may give rise to a sanctioning procedure launched by the Authority, which shall be subject to the opportunity principle set out in the Act, pursuant to which the Authority may, on public interest grounds, grant different degrees of priority in respect of the matters it is called to assess.

The said implementation without prior notification is punishable with fines, which, for each of the concerned undertakings, cannot exceed 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. In cases where under the Act individuals (eg, directors) are held responsible for the infringement, the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, the Competition Authority may decide to impose periodic penalty payments, not exceeding 5 per cent of the average daily turnover in the year immediately preceding that of the Competition Authority's decision, per day of delay, counted from the date the decision is notified. Furthermore, an ex officio merger control procedure may be initiated by the Competition Authority. This ex officio procedure has been initiated by the Authority notably in the case of the acquisition of the Hospital of São Gonçalo de Lagos by the Grupo HPA, a transaction implemented by the end of 2017 that albeit subject to mandatory prior notification has not been notified to the Authority, which the acquirer did only after the ex officio procedure was initiated.

The above-mentioned sanctions are, in principle, applied in practice, as shown, notably, in decisions of 26 June 2014, of 27 December 2017 and of 19 March 2020.

In the first decision, the Authority imposed fines of approximately €6,900 and approximately €112,000 on the National Pharmacies Association (ANF) and on Farminveste, respectively, for failure to notify the acquisition of the control over Consiste and Glintt, a transaction where the statutory thresholds for mandatory notification were exceeded. No fine was imposed on a third concerned undertaking, Farminveste 3, as it had no revenues in 2013.

In the second decision, the Authority imposed a fine of €38,500 to two companies of the Vallis group, for failure to notify the acquisition of the exclusive control over a network of dental clinics a transaction where the statutory thresholds for mandatory notification were also exceeded.

In the third decision, the Authority imposed on Grupo HPA a fine of €155,000 for failure to notify the acquisition of the exclusive control over the Hospital S Gonçalo de Lagos a transaction where the statutory thresholds for mandatory notification were also exceeded.

In all three cases, the fines imposed resulted from settlement proposals submitted by the concerned companies, which the Authority accepted.

10 Which parties are responsible for filing and are filing fees required?

In the case of full mergers, creation of joint ventures or the establishment of common control over the whole or part of one or several undertakings, notification must be made by the group of undertakings jointly, through a common representative. In other cases, notification is filed by the undertaking (or persons) intending to acquire control of the whole or part of one or more undertakings.

Pursuant to the Act, a filing fee shall be due for the assessment of concentrations subject to prior notification. In addition, a notification shall only be effective if filed together with the document that confirms the payment of the due fee.

As regards filing fees, according to Regulation No. 1/E/2003 of 3 July 2003, of the Competition Authority (which having been adopted pursuant to the former Competition Act has not been repealed or replaced), the basic fee payable for the appraisal of concentrations has been established in the following amounts:

- €7,500, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, is equal to or less than €150 million;
- €15,000, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, exceeds €150 million and is equal to or less than €300 million; and
- €25,000, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, exceeds €300 million.

The aforementioned fees shall be doubled when the Competition Authority decides to initiate proceedings in the following cases:

- concentrations of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified;
- concentrations for which the express or tacit decision of non-opposition was grounded on information provided by the participants in the concentration that was false or inaccurate with regard to essential elements for the decision; and
- concentrations in which there has been total or partial disregard of the obligations or conditions imposed at the time of the decision of non-opposition.

Also, if the Competition Authority, during the first phase of the merger control procedure, considers that the transaction is likely to affect competition and decides to proceed with an in-depth investigation, a further fee of 50 per cent of the basic fee shall be payable.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period for a Phase I decision is 30 working days from the date on which the notification is effective. This deadline may be suspended if requests for additional information are made by the Authority. It may also be suspended for 20 working days if the notifying party offers commitments. Prior hearing of the notifying party and of interested third parties that have submitted observations also suspends the deadline.

When a Phase II in-depth investigation takes place, it must be completed within a maximum of 90 working days from the effective date of the notification. This deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for up to 20 working days upon request of the notifying party or with the latter's agreement. Prior hearing of the notifying party and of the interested third parties that have submitted observations, which must take place no later than 75 working days from the effective date of the notification, also suspends the deadline.

The Act prohibits the implementation of concentrations subject to prior notification before this latter is filed. Furthermore, until tacit or express clearance is granted, a concentration subject to prior notification shall not be put into effect. However, this does not prevent the implementation of a public takeover bid to purchase or an exchange offer that has been duly notified to the Competition Authority, provided that the acquirer does not exercise the voting rights attached to the securities in question. Upon reasoned request from the participant, undertakings submitted before or after the notification of the obligations of not putting into effect a concentration or of not exercising voting rights may, in exceptional cases, be subject to a derogation granted by the Competition Authority, which may attach conditions or obligations to such derogation to ensure effective competition. Legal transactions carried out in breach of the prior notification or suspension obligations are ineffective.

In addition, and without prejudice to the applicable sanctions, after the notification of a concentration implemented in breach of the above obligations and before a decision is adopted by the Competition Authority, the individuals or legal entities that acquired the control must immediately suspend the corresponding voting rights and the management body shall not perform any act outside the normal course of business, the transfer of shareholdings or assets of the acquired undertaking being prohibited. Upon reasoned request from the concerned individuals or legal entities, these obligations may, in exceptional cases, be subject to a derogation granted by the Competition Authority, which may attach conditions or obligations to such derogation to ensure effective competition.

Furthermore, the Competition Authority may adopt measures it considers necessary or adequate to restore the situation existing prior to the breach, notably divestment.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Until tacit or express clearance is granted, a concentration subject to prior notification shall not be (partially or totally) put into effect and legal transactions carried out in breach of such suspension obligation are ineffective. Furthermore, the violation of such suspension obligation is punishable with fines, which, for each of the concerned undertakings, cannot exceed 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. So far, the Authority's decision record does not include any case concerning the specific violation of the suspension obligation (all cases refer to implementation of concentrations that were not notified albeit subject to mandatory prior notification). However, this should not allow for the conclusion that the Authority shall not investigate and punish any such violation.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

So far the Authority's public record of decisions does not include any case concerning the violation of the suspension obligation. As also stated, this should not allow for the conclusion that the Authority shall not investigate and punish any such violation, including in cases of foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The law does not specifically address this situation; solutions must therefore be found on a case-by-case basis, and would not differ from those applicable to local mergers.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There is no other reference in the merger control rules to public bids specifically. Such bids are, in any event, subject to other rules, notably those provided for in the Securities Code and the Commercial Companies Code.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Notifications must, in principle, be filed according to a 'Regular Notification Form' that was adopted by the Competition Authority as an attachment to its Regulation No. 60/2013 of 14 February 2013.

Pursuant to said Regulation, the following information must, notably, be provided in a notification:

- a summary of the transaction;
- the identity of the parties including the indication of their activities (and, in the case of the notifying party, of the activities of the entities with which it has interdependence links), the indication of their turnovers for the last three years and the submission of their individual and consolidated accounts and reports;
- the indication of other competition authorities to which the transaction is being notified;
- the indication of the activities subject to sectoral regulation;
- the nature (merger, acquisition of exclusive or joint control or joint venture) and the type (horizontal, vertical or conglomerate) of the concentration;
- a description of the concentration, which shall include the submission of the relevant contractual, public bid or public tender documents (as applicable), its economic and financial structure, the estimated timing and required acts, the existing financial support, if any, and the submission of reports, studies or other documents prepared for the purposes of assessment of the notified transaction;
- the control structure of the participant undertakings, including:
  - a list of the undertakings that control, or are controlled by, the participants or are part of the participants' group of undertakings;
  - the turnover in Portugal of such undertakings;
  - the identity of the members of their boards of directors;
  - copies of the articles of association;
  - copies of shareholders' agreements, when relevant for the concentration; and
  - if the transaction will create a joint venture, a detailed description of the decision-making rules and of the demonstration that it shall perform on a lasting basis the functions of an autonomous economic entity;
- the personal and financial connections of the participant undertakings (list of undertakings active in the relevant markets in which the directors of the participants hold similar positions or in which the participants hold a minority shareholding);
- a reasoned identification of the relevant product and geographical markets;
- identification of the relevant product and geographically related markets with indication of the estimated market shares of the participant undertakings and of the five major competitors in the past three years in each of such related markets;
- information on the relevant markets; notably, their size in value and in quantity in the last three years and the description of facts that influence the entry in and the exit from the relevant markets;
- the offer structure in the relevant markets (including an indication of the participants' turnovers and market shares in the past three years and of the five major competitors and estimated market shares in the same period);
- the demand structure in the relevant markets by indicating, notably, the consumers' or end users' preferences as to certain products or brands, after-sales services, network effects and consumption habits;
- information on the participants, which must include the indication of the 10 major suppliers and the 10 major clients; and
- other information that the participants may deem relevant, including the reasons why they consider that the notified transaction should be cleared.

The aforementioned Regulation No. 60/2013 covers in a very detailed manner not only the above information but also other information that may be deemed relevant for the review procedure.

To preserve confidentiality, notifying parties may identify in a reasoned manner the information to be considered confidential and file non-confidential versions of the notification.

Regulation No. 60/2013 also includes a Simplified Notification Form that requires a lower level of information to be provided within each of the above categories of data, as listed in detail in the regulation. The Simplified Notification Form is to be used in concentrations that, on a preliminary assessment, do not create significant impediments to competition, in accordance with the following criteria established in Regulation No. 60/2013:

- none of the parties to the concentration performs economic activities in either the same relevant geographic or product markets (no

horizontal overlap) or in markets that are located upstream or downstream in the production or commercialisation process (no vertical effects), or in neighbouring markets (no conglomerate relationships), in which operate any other parties to the concentration. This criterion also applies to situations of change from joint to exclusive control, in which prior to concentration the party acquiring exclusive control is not active outside the joint venture in markets where this latter is present or in upstream or downstream vertically related markets, or in neighbouring markets. It further applies to situations of change from exclusive to joint control, in which prior to concentration the undertakings acquiring the joint control (other than the undertaking that had exclusive control) are not active outside the joint venture in markets where this latter is present or in upstream or downstream vertically related markets, or in neighbouring markets;
- when the parties to the concentration are engaged in activities in the same relevant geographic or product markets (horizontal overlap) provided that within the geographical scope of the market, as defined by the notifying parties, and in the national territory their combined market share does not exceed 15 per cent; or their combined market share exceeds 15 per cent, but is lower than or equal to 25 per cent, and the corresponding increase of market share does not exceed 2 per cent;
- when the parties are engaged in activities in markets vertically related, provided that the individual or combined market shares at any level of the production or commercialisation process (upstream or downstream) within the geographical scope of the markets, as defined by the notifying parties and in the national territory do not exceed 25 per cent; and
- when the parties to the concentration are engaged in activities in neighbouring markets, provided that the individual or combined market shares in any of these markets, within the geographical scope of the markets, as defined by the notifying parties, and in the national territory does not exceed 25 per cent.

If the notification is incomplete or includes inaccurate data, the Authority shall, within seven working days of the filing, invite the notifying party to complete the notification. In such a case, the notification becomes effective only on the date the missing elements are filed.

In addition, in the cases where the concentration was cleared on the basis of false information provided by the concerned undertakings that was essential to the decision, the Authority shall revoke such clearance decision and may also adopt measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment.

Furthermore, the provision of false or inaccurate information in response to an Authority's request for information in merger control proceedings is punishable with fines, which, for each of the concerned undertakings, cannot exceed 1 per cent of the corresponding turnover in the year immediately preceding that of the decision adopted by the Competition Authority. In cases where, under the Act, individuals (eg, directors) are held responsible for the infringement, the applicable fine ranges between 10 and 50 'account units' (currently an 'account unit' corresponds to €102).

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The timetable for the merger clearance procedure is as follows:
- if the notification is complete, it becomes effective on the date it is filed together with the document that confirms the payment of the due filing fee. If the notification is incomplete or includes inaccurate data, the Authority, within seven working days, invites the notifying party to complete the notification and the notification becomes effective on the date the missing elements are filed. The notifying party may at any time withdraw the notification or waive its rights or legitimate interests;
- within five working days of the date on which it is effective, the Competition Authority shall publish the essential elements of the notification in two national newspapers, at the expense of the notifying party, so that any interested third parties may submit their observations within the prescribed time, which may not be less than 10 working days; and
- within 30 working days of the date on which the notification is effective, the Competition Authority shall complete the investigation and shall accordingly decide:
  - the concentration is not subject to prior notification;
  - not to oppose the concentration, with or without conditions or obligations attached thereto; or
  - to initiate an in-depth investigation when it considers that the concentration in question is likely to create significant impediments to competition in the Portuguese market or in a substantial part of it.

The above 30-working-days deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for 20 working days if the notifying party offers commitments. Prior hearing of the notifying party and of interested third parties that have submitted observations also suspends the deadline.

The lack of a decision within the period of 30 working days referred to above (plus suspensions) shall be considered as a decision of non-opposition to the concentration.

This initial 30-day period may be shortened under the simplified decision procedure, introduced on 24 July 2007. This procedure, which currently is merely an internal guideline, is applied on a case-by-case basis depending on the specifics of each transaction. It may apply, in particular, to transactions that do not result in a significant change in the competitive structure of the market (for example, because they only consist of a transfer of a market share, as opposed to an increase).

If the Competition Authority decides to initiate an in-depth investigation, this must be completed within a maximum of 90 working days of the effective date of the notification. This deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for up to 20 working days upon request of the notifying party or with the latter's agreement. Prior hearing of the notifying party and of the interested third parties that have submitted observations, which must take place no later than 75 working days from the effective date of the notification, also suspends the deadline.

Until the end of this period, the Competition Authority must either authorise the concentration, with or without conditions or obligations attached thereto, or prohibit the concentration if it considers that the concentration, as initially notified or following the amendments made by the notifying party, is likely to create significant impediments to competition in the Portuguese market or in a substantial part of it. In this latter case, the Competition Authority shall prescribe appropriate measures should the concentration have already been implemented. The lack of a decision within the 90-working-day period referred to above (plus suspensions) shall also be considered as a decision of non-opposition to the concentration.

In the case of concentrations that occurred in less than five years of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified, the procedures initiated ex officio by the Competition Authority shall be subject to the above time limits.

The above delays may, to a certain extent, be accelerated if, during a pre-notification assessment, all the required data and all relevant competition issues are discussed and clarified with the Authority, thereby avoiding future suspensions and allowing for a more swift response by the Authority. Typically, non-complex merger control proceedings may take approximately one month.

18 What is the statutory timetable for clearance? Can it be speeded up?

The timetable for the merger clearance procedure is as follows:

- if the notification is complete, it becomes effective on the date it is filed together with the document that confirms the payment of the due filing fee. If the notification is incomplete or includes inaccurate data, the Authority, within seven working days, invites the notifying party to complete the notification and the notification becomes effective on the date the missing elements are filed. The notifying party may at any time withdraw the notification or waive its rights or legitimate interests;
- within five working days of the date on which it is effective, the Competition Authority shall publish the essential elements of the notification in two national newspapers, at the expense of the notifying party, so that any interested third parties may submit their observations within the prescribed time, which may not be less than 10 working days; and
- within 30 working days of the date on which the notification is effective, the Competition Authority shall complete the investigation and shall accordingly decide:
  - the concentration is not subject to prior notification;
  - not to oppose the concentration, with or without conditions or obligations attached thereto; or
  - to initiate an in-depth investigation when it considers that the concentration in question is likely to create significant impediments to competition in the Portuguese market or in a substantial part of it.

Delays may, to a certain extent, be accelerated if, during a pre-notification assessment, all the required data and all relevant competition issues are discussed and clarified with the Authority, thereby avoiding future suspensions and allowing for a more swift response by the Authority. Typically, non-complex merger control proceedings may take approximately one month.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

Concentrations falling within the scope of Law No. 19/2012 of 8 May 2012 (the Act) are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it, in particular if such impediments result in the creation or strengthening of a dominant position. Pursuant to the Act, notified concentrations shall be appraised to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market or in a substantial part of it, in the interests of users and consumers.

The following shall notably be taken into account:

- the structure of the relevant markets and the existence or absence of competition from undertakings established in such markets or in distinct markets;
- the position of undertakings participating in the relevant markets and their economic and financial power, in comparison with their main competitors;
- the potential competition and the existence, in law or in fact, of entry barriers to the market;
- the opportunities for choosing suppliers and users;
- the access of the different undertakings to suppliers and markets;
- the structure of existing distribution networks;
- supply and demand trends for the products and services in question;
- special or exclusive rights granted by law or attached to the nature of the products traded or services provided;
- the control of essential facilities by the undertakings in question and the access opportunities to such facilities offered to competing undertakings;
- technical and economic progress to the extent that it does not create an obstacle to competition and as long as the concentration provides efficiency gains to end users and consumers; and
- the contribution that the concentration makes to the international competitiveness of the Portuguese economy.

Failing firm defence and other special circumstances may be taken into account in terms similar to those applied by the European Commission in the assessment of concentrations under Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). As regards the failing firm defence, in its Guidelines on the Economic Analysis of Concentration Operations the Authority specifically considers that it may be used as a potential argument to be taken into account in the appraisal of a concentration, provided that the alleged firm whose insolvency is imminent is indeed in financial difficulties and alternative scenarios with a less serious impact on competition may be excluded. Reportedly, the failing firm defence has only been used twice by the Competition Authority, the latest in *Grupo HPA/Hospital S Gonçalo de Lagos* (Case 45/2018).

20 Is there a special substantive test for joint ventures?

Joint ventures, which have as their object or effect the coordination of competitive behaviour between the undertakings that remain independent, shall – as regards those coordination aspects – be assessed under the provisions of the Act governing prohibited agreements and practices.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

Concentrations are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it. In the above-mentioned Guidelines on the Economic Analysis of Concentration Operations, the Authority addresses various aspects it considers in the assessment of a concentration, which include market dominance (market shares, levels of concentration), unilateral effects, coordinated effects, conglomerate effects, common ownership concerns (including going from joint control to exclusive control) and market foreclosure.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The former Competition Act had already eliminated the possibilities contemplated in the previous competition regime of special justification criteria for the approval of concentrations, which inevitably gave room to the application of non-competition criteria and even to possible industrial policy considerations.

Since then, a more rigorous and competition-oriented system of merger control has been in place.

Nevertheless, the statutes of the Competition Authority, adopted and approved by the above-mentioned Decree-Law No. 125/2014, have, in very debatable terms, maintained one possibility, already contemplated in the Competition Authority's former statutes, of application of non-competition criteria, which despite its exceptional nature, may bring about some distortions to the system.

In fact, prohibition decisions adopted by the Competition Authority may be appealed by the notifying parties to the member of the government responsible for the economy (extraordinary appeal), who in turn may, with a duly reasoned decision, authorise the concentration at stake, whenever the resulting benefits to fundamental strategic interests of the national economy are deemed to exceed the inherent disadvantages for competition. The ministerial decision that authorises a concentration, under the extraordinary appeal regime, may contain conditions and obligations that minimise its negative impact on competition. The extraordinary appeal has been used in *Brisa/AEA* (Case 22/2005). The terms of the ministerial decision adopted in this case do not remove the concerns that the procedure may raise. In fact, the overall broadness of the vocabulary and grounds of the decision may have set a precedent and an incentive that may be invoked too often whenever the Authority issues a prohibition decision.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Besides the basic substantive test, the main criteria for the appraisal of concentrations essentially follow the structure established at EU level. Accordingly, pursuant to the Act, notified concentrations shall be appraised to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market or in a substantial part of it, in the interests of users and consumers. As stated above, in the assessment of concentrations the Authority takes into account a number of aspects, including the technical and economic progress where the concentration provides efficiency gains to end users and consumers. In the above-mentioned Authority's Guidelines on the Economic Analysis of Concentration Operations, the Authority also addresses efficiencies, referring notably that it will only consider efficiencies with a high likeliness of being implemented, efficiencies that are specific to the concentration and verifiable efficiencies. According to these guidelines, it is up to the concerned undertakings to allege and demonstrate possible efficiencies, in a timely fashion, that may be associated with a concentration.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority may prohibit or interfere as follows:

- Prohibit a concentration. If the transaction has already been carried out, appropriate measures to re-establish effective competition may be ordered, including divestment.
- Approve a concentration, subject to conditions and obligations.
- Begin proceedings on its own initiative in the case of concentrations that occurred in less than five years of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified, adopting measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment.
- Revoke its decisions in the cases where the concentration is put into effect in breach of the conditions or obligations attached to the clearance decision or when a decision not to oppose a concentration was based on false information, provided by the concerned undertakings, that was essential to the decision. In these cases, the Authority may also adopt measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment.
- Following a sanctioning procedure (subject to the opportunity principle), impose fines of up to 10 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority where undertakings fail to give prior notification of concentrations under the Competition Act, execute concentrations that had been suspended or prohibited by the Competition Authority, or do not comply with the conditions or obligations imposed.
- Following the aforementioned sanctioning procedure, impose fines of up to 1 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority where undertakings refuse to provide or provide false information.
- Following the aforementioned sanctioning procedure, impose periodic penalty payments of up to 5 per cent of the average daily turnover in the year immediately preceding that of the Competition Authority's decision, per day of delay counted from the date the decision is notified, where the undertakings:
  - do not comply with a Competition Authority decision that imposed a sanction or ordered the adoption of certain measures; or
  - fail to give prior notification of concentrations under the Competition Act.

Legal transactions relating to a concentration are null and void if they put into effect operations condemned by an order that prohibited the concentration, if they breach the conditions and obligation attached to a clearance decision or if they disregard measures imposed to re-establish effective competition.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The notifying party may, at any time during the merger control proceedings, offer commitments to preserve effective competition, in which case the review period is suspended. Such commitments may include divestment or other structural or behavioural remedies. During the suspension, the Authority may request information it deems necessary to assess the commitments offered. Moreover, the authorisation of a concentration may be subject to conditions or obligations designed to maintain effective competition. Furthermore, if a prohibited transaction has already gone ahead, the Competition Authority may impose appropriate measures to ensure effective competition such as divestment, or the relinquishing of corporate control.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

At any time during the merger control proceedings, the notifying party may offer commitments, including divestment and other structural or behavioural remedies to preserve effective competition. For this purpose, the Authority issued on 28 July 2011 the Guidelines on the Adoption of Commitments in Merger Control, which address the selection, design, execution and monitoring of commitments in merger control proceedings. While the Authority expresses in these guidelines its preference for structural remedies, such preference is not so clearly reflected in the existing case law. In fact, both structural and behavioural remedies have been implemented (see, notably, *Sonaecom/PT*, Case 8/2006; *BCP/BPI*, Case 15/2006*; Arena Atlântida/Pavilhão Atlântico*Atlântico, SA*, Case 38/2012; *Kento*Unitel*Sonaecom/ZON*Optimus*, Case 5/2013; and *Rubis/Repsol Assets*, Case 39/2017; *Pigments/Ativos Ferro*, Case 16/2020). Behavioural remedies and the corresponding supervision obligations were applied for periods ranging from two to five years (see *Unibetão/Sicóbetão*, Case 30/2005; *TAP/PGA*, Case 57/2006; *Sonae Distribuição/Carrefour*, Case 51/2007; *Pingo Doce/Plus*, Case 01/2008; and *TRPN/Internorte*, Case 49/2010).

Furthermore, the Authority may adopt measures, notably divestment, necessary or adequate to re-establish effective competition, in case a prohibited concentration was already put in effect (see *TAP/SPdH*, Case 12/2009), in case of ex officio proceedings initiated by the Authority in respect of concentrations that occurred in less than five years, of which the Authority becomes aware and though subject to mandatory notification have not been notified, and in case of revocation, by the Authority, of clearance decisions.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Two cases may be mentioned where remedies were applied in foreign-to-foreign mergers.

In the *Dreger Medical/Hillenbrand* merger (Case 44/2003), the Competition Authority imposed the following conditions:

- the keeping of a second distribution channel in a non-exclusive regime for a period of three years;
- the keeping of non-discriminatory conditions for a period of three years;
- keeping the product available as long as there was demand for a period of three years;
- refraining from directly selling products in Portugal for three years; and
- keeping spare parts available for seven years after the production of the last device.

In *SC Johnson/Sara Lee's Insecticide Business* (Case 25/2010), the clearance decision was subject to SC Johnson divesting a number of assets previously controlled by Sara Lee related to certain insecticide businesses.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Under Law No. 19/2012 of 8 May 2012, restrictive provisions directly related and necessary to the implementation of the concentration are presumed to be also covered, within certain terms, by the decision clearing such concentration.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In the absence of a required notification, the Competition Authority may initiate proceedings ex officio, on the basis of information on the transaction it has obtained, which may include facts brought to its attention by third parties.

In addition, all holders of rights or legally protected interests that may be affected by the concentration who submit to the Authority their observations on the notified transaction are eligible to intervene in the concerned merger control proceedings. For these purposes, the Competition Authority publishes the essential elements of a notification in two national newspapers, at the expense of the notifying party, fixing a deadline, which may not be less than 10 working days, for submission of observations. Before the adoption of final decisions by the Competition Authority, any interested parties that have submitted observations shall be heard by the Competition Authority.

Furthermore, during the investigation, the Authority may request from any private or public entities the information it may deem necessary for the decision.

The Competition Authority's powers over concentrations in regulated sectors are exercised in cooperation with the corresponding regulatory authorities, from which the Authority, prior to the adoption of a decision within a merger control procedure in the corresponding sector, shall request the position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers. In the cases of concentrations in the media sector a negative opinion of the ERC is binding upon the Authority to the extent that it is grounded on risks to the freedom of expression and to the plurality of opinions.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Within five working days from the date the notification becomes effective, the Competition Authority shall publish the essential elements thereof in two national newspapers, at the expense of the notifying parties, so that any interested third parties may submit their observations within the prescribed time, which may not be less than 10 working days. The notifying party may request that parts of the information provided are kept confidential. To preserve confidentiality, the notifying party may file non-confidential versions of the notification or of any further information provided during the procedure.

Under the Act, confidentiality of commercial information provided by third parties within the merger control proceedings may also be protected.

The Competition Authority's merger database, which may be accessed through its website, provides information on all concentration cases that have been notified and decided by the Competition Authority since its creation in January 2003. Besides giving access to non-confidential versions of the decisions adopted since the Competition Authority's creation, the merger database also provides other data relating to the procedure, including relevant dates, a description of the undertakings involved and the economic activities in question in the operation.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

According to its statutes, the Competition Authority is responsible notably for keeping contacts with other countries' competition authorities and establishing cooperative links with such authorities, as well as with EU and international authorities, carrying out the tasks conferred upon member states' administrative authorities by EU law in the field of competition, and representing the Portuguese state in the European Union or international institutions in competition matters.

As regards the merger control area, the above responsibilities indicate that the Competition Authority is expected to maintain informal contacts with other competition authorities in multi-jurisdiction filings. However, no formal agreements with other competition authorities regarding merger control are publicly known. Nevertheless, at a multilateral level, the Competition Authority participates in various fora and groups, notably the European Competition Network and the International Competition Network.

The notification form includes, as mandatory information, the indication of the other member states' competition authorities with which the notifications are also being filed.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (Court of Competition, Regulation and Supervision (the Specialised Court)), which was established in the town of Santarém as of 30 March 2012. The Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Competition Authority.

Therefore, decisions of the Competition Authority adopted in merger control proceedings, as well as decisions of the member of government responsible for the economy within the 'extraordinary appeal' proceedings referred to above, may be appealed to the new Specialised Court. This court's rulings are subject to review by the Appellate Court of Lisbon, the decisions of which, though limited to matters of law, may be appealed to the Supreme Court of Justice. Appeals of the decisions in question that exclusively involve matters of law are filed directly with the Supreme Court of Justice.

The decisions of the Competition Authority adopted in proceedings initiated regarding infringements of merger control rules (under Law No. 19/2012 of 8 May 2012, these infringements constitute quasi-criminal minor offences) may also be appealed to the Specialised Court. The decisions of this court may be appealed to the Appellate Court of Lisbon, as a court of last resort, if they:

- apply a fine higher than €249.40;
- impose ancillary sanctions;
- acquit the defendant or close the case in situations where either the Competition Authority has imposed a fine higher than €249.40 or such fine has been claimed by the public prosecutor's office; or
- reject the appeal of the Competition Authority's decision.

Time frame

33 | What is the usual time frame for appeal or judicial review?

As regards judicial review, it is not possible to establish a typical time frame until a final decision is adopted, as this depends on factors such as the relevant courts' workload and the complexity of the case under review. However, in general terms, one may expect that judicial proceedings, including appeals, might take months or even years before they come to an end.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, 50 merger control cases were concluded by the Competition Authority, with the following outcomes:

- 43 clearance decisions without conditions or obligations attached;
- one clearance decision with conditions and obligations attached;
- one prohibition decision;
- two decisions where it was found that the notified transaction was not subject to prior notification; and
- three decisions closing the proceedings following the withdrawal of the corresponding notification.

By 11 June 2021, 30 merger control cases had been concluded by the Competition Authority, with the following outcomes:

- 26 clearance decisions without conditions or obligations attached;
- three decisions, where it was found that the notified transaction was not subject to prior notification; and
- one decision closing the proceedings, following the withdrawal of the corresponding notification.

Competition in specific sectors, such as telecommunications, energy, oil and ports' operations, continues to be a cause for concern of the Competition Authority.

Reform proposals

35 | Are there current proposals to change the legislation?

Following a long-awaited reform of the competition regime, Law No. 19/2012 of 8 May 2012 (the Act) enacted the current competition regime, superseding the previous regime enacted by Law No. 18/2003 of 11 June 2003. Pursuant to the Act, the current regime should be reviewed in accordance with the evolution of the EU competition law regime.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There have been no key developments to highlight to date.

Regarding merger control decisions, the most relevant in unquestionably the decision adopted by the Competition Authority on 6 October 2020, opposing the concentration operation *RBI/Grupo Fundão* (Case 51/2019).

The notified concentration consisted of the acquisition by Rodoviária da Beira Interior SA (RBI) (a public road passenger transport company that is part of the Transdev Group, which, in turn, is controlled by the French Group Caisse des Dépôts et Consignations), of the exclusive control over the Fundão Group (composed of the companies ATF – Auto Transportes do Fundão, SA and Joaquim Martins da Fonseca, Lda), which operates in the heavy passenger road transport sector, and of public service concessions currently held by the companies Transerramar – Viagens de Turismo, Lda and Auto Transportes do Fundão, SA.

The Authority considered that in view of a strong presence of the Transdev Group in the regions corresponding to the Intermunicipal Community of Beiras and Serra da Estrela, Intermunicipal Community of Coimbra Region and the Coimbra region, the transaction would result in the elimination of competition in future transport concessions or transport services agreements, harming consumers and the entities that award such concessions.

For the purposes of determining the relevant market, the Authority identified, simultaneously, competition at the market level – the markets for the provision of regular heavy road transport of passengers public service on routes or point-to-point connections – and competition in the access to the market – public tender procedures that were launched by the inter-municipal communities.

As for the relevant geographic market, the Authority considered that it has a regional or local dimension.

The concentration went through a phase 2 in-depth investigation, in which the competition conditions in the heavy road transport of passengers were assessed, having also taken into account the liberalisation of that market. According to the Authority, by virtue of the competitive advantages resulting from their presence in the relevant geographic areas where the Fundão group is present, the Transdev Group and the Fundão Group were likely to limit the entry of other operators in future public tenders for the award of public concessions or in future services contracts for passengers' public transport.

Indeed, although competition in the market for the provision of public service of regular heavy road transport of passengers carried out in point-to-point routes was not considered likely to create competition barriers, since the overlapping routes were negligible, at the level of the competition in the access to the market it was considered that the reduction of the number of potential bidders was likely to impact on the results of the bidding procedures, leading to a reduction of the prices offered by the bidders in the context of the tenders and of the transport services contracts.

On the other hand, the know-how or business secrets inherent in a long-lasting strong local presence result in an advantage for incumbent operators over new entrants, stemming notably from the difficult or excessive cost of information gathering for new entrants, the competitive inability of larger operators to penetrate new markets or the incompleteness of the information in the tender documents regarding all operational factors.

In accordance with the Competition Act, the sector regulator, the Mobility and Transport Authority, issued an opinion that, albeit non-binding, also raised concerns in respect of the transactions. Likewise, third interested parties have also shown concerns as to the outcome of the transaction.

The notifying parties did not offer any commitments to overcome the competition concerns identified by the Authority and the transaction was ultimately prohibited.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control, as well as the other main areas of competition law, is governed primarily by the Competition Law 21/1996 (the Competition Law), as republished and amended. The provisions of the Competition Law are further completed by the provisions of the Regulation on Economic Concentrations (the Merger Regulation) approved by RCC Order No. 431/2017, as well as the provisions of the Guidelines on the concepts of concentration, concerned undertaking, full-function joint ventures and calculation of turnover, approved by RCC Order No. 386/2010 (the Guidelines). Ancillary restraints are covered by the Guidelines regarding ancillary restraints approved by RCC Order No. 387/2010 (the Ancillary Restraints Guidelines). Remedies are covered by the Guidelines on remedies in the merger sector, approved by RCC Order No. 688/2010 and the relevant market by the Guidelines on the definition of the relevant market approved by RCC Order No. 388/2010.

The authority in charge of enforcing the merger control rules in Romania is the Romanian Competition Council (RCC). Furthermore, the approval of the Superior Council for National Defence (SCND) is required in the case of mergers that take place in sectors that may impact national security. The current FDI screening procedure is inbuilt in merger control procedure, with the RCC acting as the interface between the control aquirer that notifies the investment and the SCND. A reform of the current FDI screening regime is pending and it is expected that a new stand-alone procedure shall be enforced for non-EU investors.

Scope of legislation

2 | What kinds of mergers are caught?

A merger is defined, for the purposes of the Competition Law, as being a transaction that results in a change of control over an undertaking or undertakings, or parts of an undertaking or undertakings on a lasting basis.

As such, there are two types of mergers:

- a merger between previously independent undertakings or parts of undertakings; and
- the acquisition of control over one or more undertakings or parts of one or more undertakings by one or more natural persons already controlling at least one undertaking or by one or more undertakings.

3 | What types of joint ventures are caught?

The creation of a joint venture may amount to a merger, provided that the joint venture is a full-function joint venture (ie, an undertaking that carries out its activity on a lasting basis and that performs all functions of an autonomous economic entity).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is defined by article 9(6) of the Competition Law as the possibility of exercising decisive influence on an undertaking. Control may arise on the basis of rights, contracts or any other elements that, either separately or taken together, and taking into account the legal or factual considerations involved, allow a party to exercise a decisive influence over the behaviour of an undertaking, in particular through:

- ownership or rights to use over all or part of the assets of an undertaking; or
- rights or contracts conferring a decisive influence over the structure of an undertaking, the voting process or the decision-making process of the management bodies of an undertaking.

The acquisition of a minority shareholding may amount to a notifiable concentration if – and only if – it is considered to amount to an acquisition of control, in particular through the existence of veto rights concerning certain strategic decisions of the respective undertaking. There are no plans made public to review legislation regarding review transactions that do not involve control acquisition.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions are applicable to concentrations where the undertakings concerned generated combined worldwide turnover exceeding the equivalent of €10 million in the previous financial year and each of at least two of the undertakings concerned achieved Romanian turnover exceeding the equivalent of €4 million in the previous financial year. There is no intention publicly anounced to set up alternative thresholds based on the transaction value.

Transactions falling below the above thresholds may only be scrutinised on national security grounds, based on the FDI screening mechanism.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory and there are no exceptions.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are subject to merger control by the RCC, if the respective parties meet the turnover thresholds test. The lack of local effect, while not removing the requirement for notification, may lead to the concentration being assessed under the simplified procedure.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Acquisition of control on undertakings active in a wide area of sectors that are considered sensitive trigger the review on national security grounds by the National Defence Superior Council, irrespective of whether the merger control requirements are met. The FDI screening regime is currently undergoing a reform, which is in line with Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union. Specific notification and standstill obligations shall be applicable to non-EU investors (draft law as at 8 May 2021).

Also, concentrations in certain sectors, such as the financial sector, media sector, energy sector and telecommunications sector, may be subject to a notification obligation to the sector regulator.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Economic concentrations that meet the turnover thresholds mentioned above must be notified to the Romanian Competition Council (RCC). The notification may be submitted following the entry into a binding agreement concerning the transaction (for example, share or asset purchase agreement, but even a letter of intent, memorandum of understanding, etc, outlining the main points of the transaction, such as the parties, the object or the price) or, in case of an acquisition of control over traded companies, following the announcement of the public bid or the acquisition of a controlling interest.

There is no specific deadline for filing, as the Competition Law states that it must be made before implementing the transaction and, consequently, there are no sanctions for late filing.

10 Which parties are responsible for filing and are filing fees required?

The notification must be filed by the party or parties acquiring control. Should the transaction involve a merger or the creation of a full-function joint venture, the parties will file the notification.

An initial filing fee of approximately €1,000 is payable prior to the submission of the notification, and proof of payment must be submitted to the RCC together with the notification. An additional fee between €10,000 and €25,000, for Phase I or between €25,001 and €50,000 for Phase II, depending on the turnover of the target, is payable within 30 days after the RCC issues a clearance decision.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

An economic concentration that meets the thresholds outlined above cannot be implemented prior to clearance (standstill obligation). The RCC may, in particularly justified cases, upon request of the parties, grant a derogation from standstill obligation.

Pre-notification

According to the Merger Regulation, parties are advised to initiate pre-notification contacts with the RCC at least two weeks prior to the submission of the notification. While not mandatory, such informal discussions are useful to clarify certain aspects of the concentration with a view to expediting the process.

Completeness of filing

Within seven days of the filing, the RCC will inform the parties whether the notification meets the formal requirements.

Effective date

The notification shall become effective on the date of registration at the RCC. Where the notification is incomplete in any material respect, the RCC has 20 days from filing to request the parties to complete the notification. The deadline for submitting information is up to 15 days as of receiving the request. There may be several requests for information before a notification is effective.

The RCC can declare a notification effective either in an express manner – official letter – or tacitly, by not requesting additional information within the 20-day period. In practice, the effective date is always confirmed in writing.

Phase I proceedings

The RCC has 45 days from the effective date to either:

- issue a letter if the concentration notified does not fall within the scope of the law;
- issue a clearance decision authorising the merger if the transaction raises no competitive concerns or if those concerns have been removed through the commitments put forth by the parties; or
- launch a Phase II investigation if the transaction raises competitive concerns and those concerns have not been removed through the commitments put forth by the parties.

In accordance with the past reports of the RCC, the average duration of a Phase I merger notification, from filing to clearance, was approximately two months.

Phase II proceedings

Following the launch of a Phase II investigation, the RCC has five months from the effective date to:

- issue an unconditional authorisation decision;
- issue a conditional authorisation decision, subject to commitments; or
- issue a negative decision, prohibiting the merger.

Both the 45-day period and the five-month period mentioned above are mandatory and cannot be extended. Should the RCC fail to issue a decision within the said deadlines, the transaction will be deemed tacitly approved and closing is allowed.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As a general rule, breaching the standstill obligation may result in a fine ranging from 0.5 to 10 per cent of the total turnover obtained in the previous financial year or, if the sanctioned company did not generate turnover in the previous year, of the last turnover registered by the company. If the offending company is a non-resident entity, the turnover on the basis of which the fines are assessed is replaced with the sum of the following:

- turnover achieved by each of the companies registered in Romania and controlled by the infringing party;
- turnover derived in Romania by each of the non-resident companies controlled by the infringing party; and

- any turnover obtained in Romania by the infringing party and accounted for in its financial statements.

Newly established companies that have yet to register turnover may be sanctioned with fines between approximately €3,100 and €515,000. In addition to the fines, the RCC may order, following the examination of the transaction, any interim measures aimed at restoring and maintaining the conditions of effective competition in the relevant market.

In practice, the RCC has a rich decisional practice of sanctioning companies for failure to comply with the standstill obligation.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for implementing the merger before receiving clearance from the RCC are also applicable in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

While the Competition Law does not expressly provide for carveout solutions, there are two potential solutions to the problem outlined above, as follows.

The RCC may, in particularly justified cases, upon request of the parties, permit certain limited actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period. Whenever such occasional requests arise, the RCC will assess them on the merits and, provided that the requests are justified, prior implementation will be granted; as such, in 2015, in relation to a merger in the banking sector, the RCC allowed the acquirer to implement the concentration prior to obtaining clearance and to offer the retail customers of the target, which had entered into mortgage agreements based on loans in Swiss francs, certain customised solutions.

Otherwise, the Competition Law prohibits the implementation of the merger, rather than the corporate closing of the merger. Prohibited implementation measures of the buyer include, inter alia, the following:

- exercising voting rights in respect of the strategic business decisions of the target;
- changing the scope of the business or the commercial name of the target undertaking;
- causing the market entry or exit of the target;
- restructuring, dissolution or spin-off of the target;
- selling assets of the target;
- laying off of employees of the target;
- initiating the conclusion or termination of long-term or other important agreements between the target undertaking and third parties; and
- listing of the target undertaking on a stock exchange market.

In conclusion, it is conceivable that the acquirer could close the transaction prior to receiving approval from the RCC, provided that it refrains from undertaking any implementation measures until clearance is received. As this measure is not tested in practice, prior notification of the RCC would be advisable.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The merger filing in connection to a public bid must be submitted following the announcement of the public bid. Furthermore, the public takeover bid may take place and the securities may be acquired provided that the acquirer does not exercise its voting rights before the clearance decision or before it receives a special derogation from the RCC.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The standard notification form and simplified notification form are provided as an Annex to the Merger Regulation and are similar to the forms applied by the European Commission (EC).

Inter alia, the following needs to be provided:

- information on the parties to the concentration (eg, names, registered seats, excerpts from the commercial register, nature of the business, ownership and control; description of the undertakings' business; annual financial reports for the preceding business year);
- power of attorney;
- description of the intended concentration;
- certified copies or originals of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- market shares held by the undertakings concerned in the relevant markets;
- information on main competitors and their market shares in the relevant markets;
- information regarding the top five suppliers and customers of the undertakings concerned;
- description of the distribution and retail networks in the relevant markets, relevance of research and development;
- economic rationale of the concentration;
- description of the benefits expected to result from the concentration for consumers; and
- (if available) copies of analyses, reports or studies related to the relevant markets.

Supplying inaccurate, incomplete or misleading information in the filing process, intentionally or not, may result in a fine ranging from 0.1 to 1 per cent of the total turnover obtained in the previous financial year.

The Competition Law also envisages the possibility of submitting a simplified notification in certain cases that usually do not give rise to competition law concerns, as follows:

- when parties acquire joint control over an undertaking that does not carry out any business in Romania or has only an insignificant business in Romania (ie, has a turnover below the €4 million threshold);
- transactions where there is no horizontal overlap or where parties are active on non-related markets;
- transactions where the horizontal overlap is limited (aggregate market share of less than 20 per cent) and neither party operating on an upstream or downstream market to another party has a market share exceeding 30 per cent; or
- when one of the parties holding joint control over an undertaking acquires sole control over the respective undertaking.

The RCC may, in specific circumstances, move from a simplified notification to a full-form notification.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

As a matter of principle, the vast majority of the concentrations are cleared in Phase I.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Pre-notification
According to the Merger Regulation, parties are advised to initiate pre-notification contacts with the RCC at least two weeks prior to the submission of the notification. While not mandatory, such informal discussions are useful to clarify certain aspects of the concentration with a view to expediting the process.

Completeness of filing
Within seven days of the filing, the RCC will inform the parties whether the notification meets the formal requirements.

Effective date
The notification shall become effective on the date of registration at the RCC. Where the notification is incomplete in any material respect, the RCC has 20 days from filing to request the parties to complete the notification. The deadline for submitting information is up to 15 days as of receiving the request. There may be several requests for information before a notification is effective.

The RCC can declare a notification effective either in an express manner – official letter – or tacitly, by not requesting additional information within the 20-day period. In practice, the effective date is always confirmed in writing.

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The RCC has 45 days from the effective date to either:
- issue a letter if the concentration notified does not fall within the scope of the law;
- issue a clearance decision authorising the merger if the transaction raises no competitive concerns or if those concerns have been removed through the commitments put forth by the parties; or
- launch a Phase II investigation if the transaction raises competitive concerns and those concerns have not been removed through the commitments put forth by the parties.

In accordance with the past reports of the RCC, the average duration of a Phase I merger notification, from filing to clearance, was approximately two months.

Phase II proceedings
Following the launch of a Phase II investigation, the RCC has five months from the effective date to:
- issue an unconditional authorisation decision;
- issue a conditional authorisation decision, subject to commitments; or
- issue a negative decision, prohibiting the merger.

Both the 45-day period and the five-month period mentioned above are mandatory and cannot be extended. Should the RCC fail to issue a decision within the said deadlines, the transaction will be deemed tacitly approved and closing is allowed.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test applied by the Romanian Competition Council (RCC) in merger control proceedings is the same test applied by the EC (ie, whether a concentration leads to a significant impediment to effective competition on the Romanian market or a substantial part thereof, in particular through the creation or strengthening of a dominant position). The failing firm defence may be invoked in front of the RCC, but we are not aware of any cases where it has been successfully invoked.

20 | Is there a special substantive test for joint ventures?

There is no special test for joint ventures. Having said that, if the RCC finds that the effect or object of a full-function joint venture is not the creation of an autonomous economic entity performing on a lasting basis, but the coordination of the competitive behaviour of undertakings that remain independent, such coordination will be assessed in the context of anticompetitive agreements.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The RCC will evaluate all mergers to determine whether or not they are compatible with a normal competitive environment. Within this evaluation, the RCC will take into account the following:
- the need to protect, maintain and develop effective competition on the relevant market;
- the market position of the parties and their competitors, both actual and potential, as well as their economic and financial power;
- alternatives available to suppliers and users and their access to supply sources or markets;
- any barriers, legal or otherwise, to entry into the market;
- the development of offer and demand for the relevant goods and services;
- the interests of the intermediary customers and consumers; and
- technical and economic progress, insofar as it benefits the consumer and is not an impediment to competition.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

While the main factor taken into account in the assessment of a merger is the effect on competition of the said merger, non-competition related issues may also be taken into account, for example, when the implementing measures prior to clearance are mainly for the benefit of consumers.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

While economic efficiencies are not expressly provided for in the Merger Regulation, it is arguable that one of the theories of harm (technical and economic progress, insofar as it benefits the consumer and is not an impediment to competition) refers to efficiencies. In practice, the RCC uses the approach taken in the EC guidelines when confronted with a case where the aggregate market shares come close to 40 per cent, and it looks at reduction of costs and prices, increase in innovation or improvement of supply when assessing efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Other than the Romanian Competition Council (RCC), only the Superior Council for National Defence can prohibit a merger based on national security concerns.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If, during their analysis, the RCC representatives identify any competition concerns raised by the transaction, they may bring up the question of commitments. The parties are free to offer both behavioural and structural remedies, with structural remedies being preferred. According to the applicable regulations, the commitments proposed have to be sufficient to remove the competition concerns and contain sufficient information and data to allow an evaluation of their effectiveness (market test) to be carried out by the RCC. The parties are free to initiate preliminary contacts with the RCC before formally transmitting their proposed commitments to better understand the competition concerns raised by the transaction as well as to discuss the envisaged commitments.

Possible remedies encompass one or more of the following:

- divestments;
- termination or amendment of existing exclusive agreements;
- granting access to necessary infrastructure, networks or key technologies by way of licence agreements or otherwise; and
- behavioural remedies, such as price-reporting obligations and mechanisms designed to prevent customer discrimination.

The RCC, for example, imposed structural remedies in a case concerning the acquisition of a retail chain by a competitor, obliging the acquirer to divest two stores operated in a certain geographical area. In a separate transaction concerning the same market, the RCC imposed behavioural remedies and required the acquirer to refrain from increasing prices charged in a particular store above the prices charged in other stores, which were located in a more competitive geographical market.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Remedy proposals may be submitted in both phases of a merger control proceeding.

In Phase I, remedies should be submitted before the notification becomes effective or, at the latest, within two weeks of the effective date.

In Phase II, remedies should be summited within 30 days after the opening of the Phase II proceedings. In exceptional circumstances, the parties may request an extension up to 15 days to find an acceptable solution.

Should the remedies be accepted, the RCC will issue a conditional clearance decision expressly stating the commitments and the time frame for implementation.

Failure to properly implement the commitments may result in the revocation of the decision by which to restore the situation prior to the implementation of the merger or the levying of a fine between 0.5 and 10 per cent of the total turnover.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign transactions, which do not have effects on the Romanian market but become subject to notification given the parties' turnover, should not require remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

As a matter of principle, in accordance with the Merger Regulation, a clearance decision covers the related ancillary restraints. Having said that, the parties will carry out an individual assessment as to what amounts to an ancillary restraint, taking into account the Ancillary Restraint Guidelines.

In practice, the RCC will usually inform the parties as to the existence of any restrictions that, prima facie, do not qualify as ancillary restraints.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

As a matter of practice, the Romanian Competition Council (RCC) will publish a short press release on its website stating that they are currently analysing or investigating a merger and anyone interested is free to submit observations. In particular, in cases that raise competition concerns, the RCC may actively request the opinion of the competitors, clients, suppliers or other relevant authorities, such as the sector regulators, regarding the merger.

Furthermore, should the parties propose commitments and those are accepted by the RCC, these are published on the RCC website and all interested parties can submit observations within a set time frame.

Plus, competitors or undertaking affected by a merger clearance decision may challenge such decision before the administrative courts.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The RCC and its representatives are under an obligation not to disclose business secrets, namely, information that is defined as a business secret by law or by the undertakings concerned. Business secrets, inter alia, encompass any business information that has actual or potential economic and market value, and the disclosure of which could seriously harm the interests of undertakings concerned.

To ensure the effective protection of commercial information, it is advisable to mark such information as confidential in all documents sent to the RCC. The RCC will publish a non-confidential version of the clearance decision on its website. Also, other documents published by the RCC (ie, press releases, proposals for commitments) do not contain any business secrets or other confidential information.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The RCC is a member of the International Competition Network and the European Competition Network and can therefore request documents and information from other national authorities regarding merger cases. In addition, the RCC may provide confidential information to other competition authorities in merger cases that are notifiable in more member states based on the Waiver Form, annex to the Merger Regulation.

The RCC, as a national competition authority of an EU member state, has all the rights and obligations pursuant to the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation). The RCC has an active contribution and cooperation role within the European Competition Network, in the form of informal and formal exchange of information between national competition authorities depending on the merger cases at issue.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

All Romanian Competition Council (RCC) decisions, including those in merger cases, can be challenged in front of the Bucharest Court of Appeals within 30 days of being served. The judgment of the Bucharest Court of Appeal can be further challenged by means of a final appeal before the High Court of Cassation and Justice.

To the best of our knowledge, there have been no recent cases challenging a merger decision of the RCC.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The actual duration of the judicial proceedings can vary significantly depending on the complexity of the case and the procedural steps employed (ie, naming an expert, requesting the intervention of the EC as an amicus curiae and requesting that a preliminary ruling procedure in front of the European Court of Justice is initiated). Usually, the appeal proceedings in front of the Bucharest Court of Appeals last between three and nine months from the first hearing, while the proceedings before the High Court of Cassation and Justice last between three and six months from the first hearing. However, because of the high number of cases pending in front of the High Court of Cassation and Justice, the first hearing may take place only 12 to 18 months after filing the appeal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The number of merger cases in Romania has seen a steady increase, from around 45 cases per year between 2011 and 2015 to 62 cases in 2016, 60 cases in 2017 and 57 cases in 2018, as a direct result of the encouraging economic growth experienced by Romania. Similar to other years, the vast majority of the cases were cleared unconditionally in Phase I, with a few cases being cleared subject to commitments. There has been a significant drop in standard procedure clearances of approximately 30 per cent compared to 2012; conversely, simplified procedure clearances have seen an increase of roughly 35 per cent compared to 2012. In 2019, the Romanian Competition Council (RCC) cleared 75 mergers, only one of which was cleared subject to conditions and obligations.

Reform proposals

35 | Are there current proposals to change the legislation?

There is no publicly discussed initiative to amend the merger regulation rules. In the area of FDI screening, the new law is expected to be adopted in 2021.

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UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the RCC has cleared 54 mergers, out of which three were cleared subject to conditions. One merger case involved the acquisition by the dominant player on the fixed electronic communications market of a regional competitor (*RCS&RDS/Akta*), which was cleared with behavioural commitments related to the future pricing and content policy of the acquirer.

A second case cleared with behavioural remedies related to a cash management joint venture set up by three commercial banks (BRD – Groupe Société Générale SA, Raiffeisen Bank SA și Banca Comercială Română). The parties committed to specific internal procedures preventing sensitive information exchanges and to maintain a non-discriminatory and fair pricing policy towards third parties. This case is in line with the increasing trend in the RCC policy to address problematic merger cases with behavioural commitments, in recognition of the fact that specific market circumstances might dictate that structural remedies are not always a choice.

In a third case, the RCC proposed structural remedies in a merger involving retail pharmacies (*Help Net Pharma/Remedia*). Given the increasing consolidation trend of large retail pharmacy chains, the RCC had proposed, at the end of the year, specific guidance aimed at narrowing down the geographical size of the market in the retail pharmaceutical sector in the urban areas, based on market surveys indicating specific circumstances of the Romanian market. This is likely to impact the competitive assessment of future mergers in this sector and thus the increased use of divestment remedies can be expected.

Russia

Alexander Viktorov
Freshfields Bruckhaus Deringer

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Russian Law on Protection of Competition (LPC) entered into force in October 2006 and has been amended several times since its enactment. The LPC governs, inter alia, merger control in commodity and financial markets and applies to transactions in which the targets are Russian entities or foreign entities operating in Russia (including those that do not have a physical presence there).

The Russian merger control provisions are enforced by the Federal Antimonopoly Service (FAS) and a large network of its local agencies established in 84 Russian regions. The FAS is subdivided into several divisions, each of which deals with a specific economic sector. More detailed information on the structure and powers of the FAS can be found on its website.

Scope of legislation

2 | What kinds of mergers are caught?

The LPC sets out a comprehensive list of events constituting economic concentrations and falling within the control of the FAS. The most important events triggering merger control are:

- the acquisition of (direct or indirect) rights to determine the business activities of a Russian company by one or several enterprises (through shareholdings, agreements, voting arrangements, rights, etc);
- the acquisition of certain blocks of shares in another company, resulting in the acquirer and its group holding in total over 25, 50 or 75 per cent of voting shares in a Russian joint-stock company or over 33.3, 50 or 66.6 per cent of the shares in a Russian limited liability company;
- the incorporation of a company by contribution of assets of or shares in a Russian company;
- the consolidation of two or more companies resulting in the formation of a new company and the end of the corporate existence of the consolidated companies; or the merger of one company into another resulting in the former no longer having separate corporate existence;
- the acquisition of more than 20 per cent of fixed production (subject to certain exceptions) or intangible assets located or registered in the territory of Russia from another company;
- the acquisition of certain blocks of shares, resulting in the acquirer and its group holding in total over 50 per cent of voting shares in a foreign company if its Russian turnover in the preceding year exceeded 1 billion roubles;
- the acquisition of (direct or indirect) rights to determine the business activities of a foreign company (through shareholdings, agreements, voting arrangements, rights, etc) if its Russian turnover in the preceding year exceeded 1 billion roubles; and
- entry into agreements between competitors providing for their joint activities in the territory of Russia.

Internal restructurings in which an intra-group transfer is made to a transferee in which the transferor directly or indirectly holds more than 50 per cent of voting shares or that directly or indirectly holds more than 50 per cent of voting shares in the transferor are exempt from the filing requirements. However, certain intra-group mergers are still subject to the prior approval requirement, but may alternatively be subject to post-completion notification. In particular, a post-completion filing is permitted if one of the group entities files a list of its group members with the FAS no later than one month before completion. The list should specify the reasons for inclusion in the group for each of the group members. Within 14 days of receipt of this list, the FAS informs the applicant either that it accepts the submitted list or that the list does not comply with the statutory requirements. The FAS is supposed to make the list publicly available on its official website but as a practical matter it does not currently publish such information.

3 | What types of joint ventures are caught?

Joint ventures are subject to the general rules set out above. There are no specific rules on full-function and non-full-function joint ventures. Agreements on joint activities between competitors in the territory of Russia are subject to mandatory merger control filing if the parties' groups' assets or turnover exceed certain thresholds, namely if the aggregate book value on a worldwide basis of all parties (and their groups) exceeds 7 billion roubles or their aggregate turnover on a worldwide basis exceeds 10 billion roubles for the calendar year preceding the entry into joint venture agreement. A joint venture agreement may be either a 'concentrative' (or corporate) joint venture or 'cooperative' joint venture.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The LPC contains a definition of 'control' for the purposes of certain clauses of the LPC, including for disclosure of the group of the acquirer and the target in a merger control filing. 'Control' means the ability of an individual or a legal entity to determine, directly or indirectly, the decisions to be taken by another legal entity (including the ability to determine the terms of conduct of business by another legal entity), through holding more than 50 per cent of the voting shares in such legal entity; or acting as an executive body of such legal entity.

Under Russian merger control provisions, acquisition of interests less than control are caught. Even an acquisition resulting in a holding of more than 25 per cent in a joint-stock company or an acquisition of more than 20 per cent of the fixed production (subject to certain exceptions) or intangible assets of another legal entity constitutes economic concentration under the LPC.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Pre-approval of an acquisition is required if:

- the aggregate book value on a worldwide basis of all companies within the acquirer's group and the target's group exceeds 7 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group exceeds 400 million roubles; or
- the aggregate turnover on a worldwide basis of all companies within the acquirer's group and the target's group exceeds 10 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group exceeds 400 million roubles; and
- for joint venture agreements between competitors: the aggregate book value on a worldwide basis of all parties (and their groups) exceeds 7 billion roubles or their aggregate turnover on a worldwide basis exceeds 10 billion roubles for the calendar year preceding the entry into joint venture agreement.

Different thresholds apply to transactions with financial entities as targets.

If the thresholds for a notification are not met, the transaction is not subject to merger control.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory. There are no exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Under the LPC, foreign mergers are subject to Russian merger control if they have or may have an impact on competition in Russia. The acquisition of shares, resulting in the acquirer and its group holding directly or indirectly in total over 50 per cent of voting shares in, or of rights to determine the business activities (through shareholdings, agreements, voting arrangements, rights, etc) of a foreign company is caught by Russian merger control rules if the target's Russian turnover in the preceding year exceeded 1 billion roubles.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

For transactions in which financial organisations and natural monopolies are targets, special rules apply.

The LPC defines 'financial organisations' as banks, legal entities carrying out transactions or providing services in the securities market, insurance services or other services of a financial nature under an appropriate licence, non-government pension funds and their managing companies, managing companies of share investment trusts, leasing companies, credit consumer unions and other organisations, and individual entrepreneurs carrying out operations and transactions in the financial services market.

Companies providing, inter alia, the following services are deemed 'natural monopoly entities': gas and oil pipeline distribution, electricity transmission, rail transport, services provided at transport terminals (including sea ports and airports) and public electronic and postal communications and telecommunications providers. Law No. 147-FZ of 17 August 1995 on Natural Monopolies, in addition to the LPC, governs Russian merger control with respect to transactions involving natural monopolies.

Federal Law No. 57-FZ on the Procedure for Making Foreign Investments in Business Entities with Strategic Value for the Defence of the Country and Security of the State (the Strategic Investments Law) became effective in 2008 and has been amended several times since its enactment. Under this law, the state controls transactions relating to the acquisition by foreign investors of Russian companies engaged in businesses that have strategic political interest for Russia and are active in the sectors listed in this law, namely, weaponry and military, nuclear, aviation, space exploration, explosives, etc. Depending on the subject matter of the transaction (eg, the acquisition of direct or indirect control over a 'strategic' company, the acquisition of a minority stake in it, or veto rights in relation to it), it may require prior approval and/or submission of a post-completion notification or disclosure of information on controlling parties, beneficiaries and beneficial owners of foreign investors.

Furthermore, in accordance with Federal Law No. 160-FZ of 9 July 1999 on Foreign Investments in Russia (the Foreign Investments Law) if a company owned or controlled by a foreign state or international organisation intends to acquire, directly or indirectly, a stake in a Russian company (including any company – not necessarily a 'strategic' one) that exceeds 25 per cent, or an ability to block, on any grounds, corporate decisions, such foreign company must make a filing under the procedure set out in the Strategic Investments Law. Also, under the Foreign Investments Law the Chairman of the Government Commission for Control over Foreign Investments in Russia can decide that any transaction to be entered into by a foreign investor in relation to any Russian entity (ie, including 'non-strategic' entities) requires, in order 'to ensure defence of the country and the security of the state', prior approval of the Government Commission and, accordingly, submission of a separate filing. Such decisions are made 'with the view of securing national defence and security of the state' and are based on the opinions of the government authorities, including the authorities supervising the sectors in which the entity concerned operates. As a practical matter, according to the FAS's officials, such decisions are rarely passed.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no legal deadlines for a pre-completion filing. Merger control clearance must be obtained before completion and the filing must be made well in advance of the envisaged completion date. The Federal Antimonopoly Service (FAS)'s clearance decision is valid for one year from its issue.

Failure to submit a required pre-completion filing can be penalised by fines on legal entities and on managers. These penalties are regularly applied.

In addition, the FAS may apply to a court to invalidate, in full or in part, agreements and other transactions for which its prior authorisation was required but has not been obtained, or to liquidate a company if it was incorporated without prior approval, provided that the relevant transaction or incorporation results in limitation of competition. These penalties are applied rarely.

10 Which parties are responsible for filing and are filing fees required?

Pre-completion notifications should be filed with the FAS by the acquirer of the shares, rights or assets. In the case of incorporation, a filing should be submitted by all parties that take decisions on incorporation. In the case of a joint venture agreement, a filing should be submitted by the parties to the agreement. The administrative liability for failure to submit a filing is borne by the party responsible for the filing. Pre-completion filings are subject to a fee of 35,000 roubles per filing.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The FAS is obliged to consider pre-completion filings within 30 days of the filing date. However, if the FAS determines that further disclosure, documents or information is needed or that the transaction may result in limitation of competition, the FAS may extend the term of review by up to another two months. In the latter case, the FAS will publish information on the transaction on its website and invite interested parties to file submissions on the impact of the transaction on the Russian market. Moreover, the FAS may return the filing as incomplete and in this case the review period will start anew as soon as the full set of documents is submitted.

In the event of a possible impact on competition, the FAS may also delay clearance until the parties perform certain actions. The FAS will then set a term for performance of such actions, which may not exceed nine months.

If a transaction is also subject to prior approval in accordance with the Strategic Investments Law or the Foreign Investments Law the antimonopoly clearance will not be issued until the 'strategic' or 'foreign investments' clearance is granted. The 'strategic' process, by statute, may take up to six months but, in practice, may take longer. There is no statutory deadline for the 'foreign investments' process (ie, where the Russian target is not a 'strategic' entity), but in practice it takes usually one to two months to obtain clearance (which is in fact a FAS letter to the effect that 'strategic' clearance is not required).

In pre-completion filings, implementation of the transaction should be suspended until clearance, regardless of whether the statutory waiting period has expired.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Completion of transactions and integrating the activities of the merging businesses (if such integration results in the acquirer actually beginning to control the target, eg, by way of giving binding instructions to it) before clearance may result in fines and invalidation of the transaction, as in the case of a failure to file.

In a recent merger control review, the FAS concluded that the transaction notified also required prior consent under the Strategic Investment Law and extended the review period until receipt by the notifying party of such consent. The notifying party apparently disagreed with the FAS and closed the transaction without applying for consent and, accordingly, before merger control clearance was issued. The FAS viewed such closing as 'conscious disrespect' for Russian law, imposed a fine and brought court proceedings seeking to deprive the acquirer of the voting rights at the meeting of shareholders of the Russian target, which is the regular procedure in case of non-compliance with the Strategic Investment Law. The FAS decision was upheld by courts at three instances and by the Constitutional Court of Russia.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

We are not aware of any sanctions applied for closing before clearance in foreign-to-foreign mergers. However, it can reasonably be assumed that the FAS would apply sanctions in such cases. There are cases involving deals between foreign and Russian legal entities, where the FAS applied sanctions for closing before clearance and the courts upheld the FAS decisions. By way of example, in one case the company made a pre-completion filing two months after the transaction had been completed. The FAS discovered this violation during the review of the filing and applied administrative sanctions.

Sanctions for failure to submit a pre-completion filing may even be applied on formal grounds in circumstances where the parties make a filing, obtain FAS clearance and then change the structure of the transaction with the actual result remaining unchanged. For example, in one case a foreign legal entity applied for FAS consent to the acquisition of the shares in, or direct control over, Russian legal entities and obtained clearance. Subsequently, control over these Russian entities was obtained indirectly by way of acquisition of direct control over a 100 per cent parent company (a foreign entity) of the Russian legal entities. In this case the FAS applied sanctions for closing without clearance and the courts upheld the FAS's decision.

There have been several cases in which foreign-to-foreign transactions were invalidated by courts or other sanctions were applied on the grounds of non-compliance with the requirement to obtain consent pursuant to the Strategic Investments Law.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

According to the merger control guidelines issued by the FAS in June 2021, the global closing of a foreign-to-foreign merger without Russian clearance is possible provided that the acquisition of the rights to determine the business activities of a Russian target is made conditional on obtaining Russian clearance. Thus, in a situation where clearances in all jurisdictions other than Russia have been received, a hold-separate agreement for the Russian target is an acceptable solution for the deal closing globally before clearance in Russia is obtained.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules and notably no exemptions from the prohibition on completing the transaction before clearance.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Russian Law on Protection of Competition (LPC) lists the documents and information that must be collected for the filing. These include agreements or other documents relating to the transaction, corporate documents of the acquiring party and the target, information on the business activities of the parties and the target with exact production and sales figures for the past two years, information on the companies of the acquirer's and the target's groups and also on the ultimate beneficiaries of the groups. Failure to provide all documents and information required under the LPC may result in the FAS rejecting the application as incomplete.

The information and documents included in the filing must be accurate and complete. Provision of false information may be sanctioned by fines on both legal entities and managers and, more generally, serve as grounds for refusing clearance. In practice, incomplete information is qualified by the FAS as false information, and the provision of incomplete information, therefore, entails the risk of the same sanctions as those for submission of false information.

Documents issued abroad must carry an apostille (if the country where a document is issued is a party to the 1961 Hague Convention on Apostille) or be legalised. They need to be translated into Russian and the translator's signature must be certified by a Russian notary.

The nature of the filing is rather technical. The waiting period begins after the filing has been submitted to the FAS.

There are specific procedures for filing of certain intra-group transfers. In particular, a post-completion filing is permitted if one of the group entities files a list of its group members with the FAS no later than one month before completion. The list should specify the reasons for inclusion in the group for each of the group members. Within 14 days of receipt of this list, the FAS informs the applicant either that it accepts the submitted list or that the list does not comply with the statutory requirements. Under the LPC, the list as filed is supposed to be posted on the FAS website, but in practice, owing to the ongoing changes in the FAS internal procedures, such information is currently not being published.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

After submission of the filing, the FAS must decide within 30 days whether to clear the merger or, if the transaction raises competition concerns, whether to enter into a second-stage investigation or impose conditions for clearing the transaction. The second-stage decision must be rendered within a further two months. If clearance is delayed until the parties perform certain actions, the deadline for such actions must not be longer than nine months.

Cases that raise no competition concerns and filings that are complete and meet all requirements (such as, for example, formalisation of documents) are typically cleared within 30 days of the filing date. At the same time, the timing of the review process is not always predictable, as the FAS has broad discretion in determining whether the deal gives rise to concerns and, accordingly, whether to extend the review period. If the FAS requires additional information or clarifications, it typically issues a formal written request, which may result in an extension of the review period, and from that perspective it is advisable to try to avoid them, by making the filing as complete as possible and trying to pre-empt the FAS's queries.

There are no legal means to speed up clearance.

Pre-notification consultations with the authority are not required but are possible. The notifying party may inform the FAS of the proposed transaction prior to submission of the filing, provide the authority with the relevant documents and information and suggest remedies for discussion. Such pre-notification contacts do not influence the timing or procedure of the review of the formal filing and the authority is not bound by the results of such pre-notification discussions. That said, when taking the decision in relation to the deal after it is formally filed, the authority is obliged to take into account the materials disclosed in the course of such pre-notification consultations. As a practical matter, such pre-notification contacts are recommendable in cases that may give rise to competition concerns.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Upon filing, the set of documents and information as filed is forwarded to the department of the FAS dealing with the relevant market sector.

The FAS will review the relevant market shares of the parties to the transaction (including the target market share) and investigate whether the transaction will influence competition in the Russian market. The FAS officials may use, apart from the filed documents, any sources of information, such as statistics from the databases of the Russian Statistics Committee and the Russian Customs Service, their own databases, and information from the internet and press, etc. They may also request additional information directly from the parties, competitors or other companies and individuals concerned.

If the transaction does not limit competition in the Russian market, the FAS is supposed to issue clearance within 30 days of receipt of the filing.

If competition concerns are identified, within 30 days the FAS either issues a prohibition order or informs the applicant in writing that the review period will be extended for up to two months (second-stage investigation) or that clearance can only be provided after the parties have fulfilled certain conditions. After the second stage, the FAS will issue either a prohibition or a clearance decision (conditional or unconditional).

The FAS usually meets the deadlines. That said, the timing of the review process is not always predictable as the FAS has broad discretion in determining whether the deal requires further analysis and, accordingly, whether to extend the review period. As a practical matter, in the absence of substantive issues, an extension is unusual.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A merger must be prohibited or made conditional by the Federal Antimonopoly Service (FAS) if it leads to the creation or strengthening of a dominant position in the relevant Russian market sector or otherwise leads to a limitation of competition in the Russian market.

Dominance is defined in the Russian Law on Protection of Competition (LPC) as the position of one or several companies or groups in the market for a specific product or service that allows it or them to seriously influence the terms of trade of such product or service or to impede other companies' access to this market sector. If a company holds less than 35 per cent of the market, it may not be found dominant, except in case of collective dominance or if an industry-specific dominance threshold applies. Such industry-specific thresholds may be set by the federal laws regulating particular industries; for example, in wholesale and retail electricity markets an electricity generation company holding a market share of 20 per cent or above is deemed dominant. As a general rule, companies are deemed dominant if their market share is over 50 per cent. For companies with 35 to 50 per cent market share, additional criteria, such as competitive structure of the market and barriers to entry, are used to determine whether a company is dominant. Financial organisations are subject to a special dominance test.

The LPC does not provide for any special circumstances that would require, permit or encourage the FAS to qualify a 'problematic' merger as acceptable. That said, the parties are allowed to submit efficiency arguments to try to convince the FAS that the merger is permissible despite a dominance issue or any other potentially anticompetitive effects of the transaction.

20 | Is there a special substantive test for joint ventures?

The general merger control rules apply to joint ventures. Joint venture agreements between competitors providing for their joint activities in the territory of Russia are subject to mandatory pre-transaction clearance if the worldwide aggregate book value of all parties (and their groups) exceeds 7 billion roubles or their worldwide aggregate turnover exceeds 10 billion roubles for the calendar year preceding entry into the joint venture agreement. If the thresholds are not met, the application can still be submitted on a voluntary basis. A joint venture agreement cannot be cleared if its purpose is to limit competition in the market or if it directly or indirectly imposes obligations on one of the parties, which may result in abuse by that party of its dominant position.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The FAS investigates whether the transaction may lead to limitation of competition in the Russian market, signs of which may be:

- a reduction in the number of companies in the relevant market sector that do not belong to the same group;
- an increase or decrease in the price for a product or a service that is not because of market forces;
- the abandonment of independent action in the market by companies not belonging to the same group;
- the determination of the conditions of trade in a product or service in the market by companies not belonging to the same group through agreements or concerted practice; or
- other circumstances that allow a company or several companies to unilaterally influence trade in a commodity or service in the market.

Creating or strengthening dominance is also considered harmful to the market.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Generally, the legal test for clearance is competition-related. However, the FAS may also refuse clearance if it finds out that information provided in the filing that has significance for the FAS decision is false or insufficient (eg, the ultimate owners or beneficiaries of the acquirer's or target's groups were not disclosed).

Clearance may also be delayed if the filed documents do not comply with the mandatory rules of Russian law.

Also, political considerations may have an impact on the review process. Some transactions relating to certain 'sensitive' sectors (military, aircraft industry, energy, insurance, etc) have given rise to political rather than competition-related decisions in the past, with clearance denied or made conditional on behavioural commitments, or the approval process taking much longer than usual.

Furthermore, public interest seems to be taking on increased importance in the review process. By way of example, in a recent *Bayer/Monsanto* case, the FAS came to the conclusion that the transaction might have a negative impact on the Russian agricultural technologies market and required that Bayer should transfer certain of its technologies to Russian companies and give them access to certain of its digital solutions so that the Russian companies could compete with foreign companies on equal terms.

There are no formal tests for assessing whether or not a deal gives rise to political or public interest concerns, so in practice assessment is made by the FAS in cooperation with other government authorities, including those supervising the relevant markets.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The task of the FAS is to find a compromise between protection of competition and economic development in Russia. The FAS takes the economic efficiency of the transaction into account and may give clearance even if the transaction results in limitation of competition, provided that the parties perform certain actions aimed at mitigating or eliminating the negative effects and achieving positive effects, including, for example, actions aimed at improvement of the local production or distribution processes.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Federal Antimonopoly Service (FAS) is authorised to either prohibit a transaction that has an adverse effect on competition or to require the parties to fulfil certain conditions before a clearance is issued or before completion of the transaction. In such cases, the FAS issues binding orders aimed at protecting competition (eg, divestiture or conclusion, amendment or termination of agreements). If a transaction that leads to a limitation of competition in the Russian market is closed without FAS approval, the FAS can challenge the transaction in court. The FAS has recently become more active in combating anticompetitive behaviour.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The FAS may delay clearance of the transaction until the parties perform certain actions aimed at protection of competition (eg, grant access to important assets or information, provide third parties with industrial property rights, divest assets or claims to third parties or restructure their respective groups – that is, divest company shares).

Also, the FAS may make clearance of the transaction conditional on the parties' compliance with certain requirements, such as amending or entering into contracts; carrying out specific economic, technical or information measures to prevent the creation of discriminatory conditions in the market; granting access to assets or information; and divesting assets or, on the contrary, not transferring any important assets, as well as notifying the FAS of the intention to carry out particular actions.

If a transaction is likely to lead to distortion of competition in Russia, it is advisable to discuss with high-level FAS officials how to remedy such effects. The parties may propose certain undertakings to mitigate the effect of the transaction on competition.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The basic condition for a divestment or another remedy is mitigation of the negative effects of the transaction by encouraging competition in the market.

The FAS usually sets a term within which the relevant remedy should be implemented, or the term during which the remedy should be maintained. Where the FAS delays clearance until performance of the remedies by the parties, this term may not exceed nine months.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The remedies required in foreign-to-foreign mergers could be the same as in Russian local mergers. In the past, the FAS has usually applied remedies in Russian-to-Russian or Russian-to-foreign transactions rather than in foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Related arrangements are covered to the extent that full information on these arrangements has been provided to the FAS and that such arrangements are not subject to approval themselves. If the transaction involves several arrangements that each require clearance, the FAS consent in relation to such arrangements should be sought either in one filing or in separate filings, depending on the subject matter of each particular arrangement.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Federal Antimonopoly Service (FAS) publishes information on all filings submitted to it on its website (except where the government of Russia determines that the FAS has the right not to publish information on any particular transaction) and information on extending the review period (second-stage investigation) if the FAS suspects a competition issue, so that any interested third parties can provide comments on the possible impact of the transaction on competition.

Moreover, during the review process, the FAS may invite customers and competitors to give their opinion on the contemplated transaction. Applications for clearance should contain information on all customers that buy over 5 per cent of the production or sales volume of the relevant party and all sellers supplying over 5 per cent of its purchases or consumption volume.

Interested third parties wishing to comment, as well as the customers or competitors invited by the FAS to give their opinion, are not permitted access to the filing documents and have to rely on publicly available information.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Commercial information, including business secrets, cannot be withheld in a filing. The FAS has the right to demand it from the parties and extend the review period if it is not provided promptly.

The FAS is under an obligation not to disclose commercial secrets (provided that they are designated as such) contained in filings. FAS officials are criminally liable for unauthorised disclosure, and the damage done by such disclosure is to be compensated from the Russian federal budget. However, the information required for filings sometimes does not meet the criteria of commercial secrets as provided for by Russian law and thus remains unprotected.

Under the Russian Law on Protection of Competition, general information on the transaction notified to the FAS is public and the FAS must publish information on all filings submitted to it on its website (except where the government of Russia determines that the FAS has the right not to publish information on any particular transaction). Also, until recently, the FAS information policy required it to publish on its website all decisions (including binding orders, if any) issued upon review of the filings. However, it follows from the recent changes to the FAS information policy that such decisions and binding orders are no longer public, so, currently, their publication is not mandatory. As a practical matter, the FAS publishes most of its decisions. The changes to the information policy did not affect the rules on disclosure of group-related information, under which the FAS may publish a list of the companies of the group for the purposes of a post-completion notification. In practice, however, the FAS has not been publishing group-related information for a while now.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The FAS cooperates with the antitrust authorities of the former socialist countries (Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia), Commonwealth of Independent States countries, some EU member states (Austria, Finland, France, Greece, Italy and Sweden), Asian states (China and Korea), the United States and South American states (Argentina and Bolivia).

Cooperation between Russia and the European Union with regard to competition was established by the 1994 Partnership and Cooperation Agreement. In 2003, the FAS proposed to the Russian government to enter into a positive comity agreement with the European Union.

Finally, Russia, represented by the FAS, cooperates with antitrust authorities of other countries in the International Competition Network, the Organisation for Economic Cooperation and Development and the United Nations Conference on Trade and Development, of which Russia is a member.

The FAS has recently become more active in contacting antitrust authorities of other countries in the context of merger control and has issued recommendations 'On applying waivers of confidentiality when considering merger transactions'. The recomendations describe the mechanism for the use of waivers by the FAS when reviewing cross-border transactions and set out the principles of using this tool.

We are aware of several cases where the FAS contacted the European Commission and antitrust authorities in various countries (India, China, Germany, Kazakhstan, South Korea, Mexico, South Africa, Australia, Singapore and the United States) during the review of large foreign-to-foreign mergers to discuss the impact of the relevant transactions on competition in the respective jurisdictions.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the Federal Antimonopoly Service (FAS) may be challenged within three months of their issue before Russian courts in a civil law procedure. The parties concerned may challenge FAS decisions denying clearance or granting conditional clearance, or the lack of decision within the legal waiting period.

The majority of FAS rejection decisions are issued on the grounds of incompleteness of information provided in the filing (such as information on the ultimate beneficiaries). Some of those rejection decisions have been challenged in courts. Court practice is inconsistent – some court decisions uphold the FAS's formal position and some overrule them on the grounds that the FAS's requests contain excessive requirements that, from the courts' perspective, are irrelevant for the purposes of merger control.

Where rejection decisions are issued on the ground that the transactions notified would have anticompetitive effects, the decisions may not necessarily be final and may be reconsidered by the FAS if the applicant submits a new filing in which it substantiates why the deal is permissible. Recent cases show that the parties, having received a rejection decision from the FAS, could be better off if they first resubmitted the filing to the FAS instead of challenging the FAS's decision in court. By way of example, the FAS initially blocked the proposed acquisition by Elutek Beteiligungs GmbH of control of 11 Alutech Russian subsidiaries located in various cities and regions of Russia on the grounds that the acquisition would result in Elutek becoming dominant in certain regions of Russia. However, subsequently, Elutek submitted a new filing in relation to the same transaction, in which it provided evidence that the deal is permissible under the Russian Law on Protection of Competition (LPC), and upon review of that filing the FAS ultimately cleared the transaction subject to behavioural remedies.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The Russian judicial process takes up to six months in the court of first instance, and up to two months at each of the two further review levels – the court of appeal and the court of cassation. A further appeal may be filed with the Collegium of the Supreme Court of Russia in charge of considering commercial disputes, which only accepts the cases for consideration in exceptional circumstances (ie, if there are severe violations of substantive or procedural law). The Collegium's resolution could finally be referred to the Presidium of the Supreme Court within three months of the date of the resolution. The judicial process at the Collegium and Presidium of the Supreme Court could take up to three months. So, it could take more than a year to overturn a decision of the FAS.

If the claimant or another participant in the court action is a foreign company, judicial review may become a very lengthy process. If the foreign participant is incorporated (located) in a country that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), the Russian court may need to serve judicial documents on such company through a special authority in the country of such company's incorporation (location), which will lead to delay at each level of review for up to a year. However, if the parties to a dispute agree on direct delivery of judicial documents by post this may significantly reduce the time.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Based on the most recent statistics available, in 2019, the Federal Antimonopoly Service (FAS) reviewed 1,196 merger control filings, out of which 99 were cleared subject to binding orders (approximately 8 per cent of all filings reviewed) and, in 40 cases, clearance was denied (approximately 3 per cent of all filings reviewed). According to FAS officials, the changes to merger control rules that have been gradually introduced since the Russian Law on Protection of Competition (LPC) came into effect in 2006 have resulted in a significant reduction of filings.

The FAS aims to further transform merger control in Russia from a formal procedure into actual control by enabling it to have a better focus on mergers of particular interest to it by reducing the total number of filings.

Reform proposals

35 | Are there current proposals to change the legislation?

The LPC is an evolving statute. Following the Fourth Antimonopoly Package, which came into effect in 2016, several further amendments relating to merger control rules were made. However, these did not cover all open issues in Russian anti-monopoly legislation. In recent years, several complex global transactions reviewed by the FAS, including the *Bayer/Monsanto* transaction, revealed a number of problem areas in the merger control rules that require changes to the legislation, especially in high-technology sectors and new 'digital' markets. The FAS took the relevant experience into account in the course of preparation of a new set of amendments to the LPC, called the Fifth Digital Antimonopoly Package. Some of the proposed changes relate to the merger control procedure. More specifically, the proposed amendments provide that the authority will have the right to extend the review period for a term significantly longer than currently provided by the LPC (those extensions, however, will be subject to approval by the Russian government and may be applied in relation to multi-jurisdictional cross-border transactions only). Furthermore, as part of the new merger control rules, the FAS will have to prepare a report setting out the details of the assessment and send it to the parties before issuance of the final decision, so the parties can submit additional evidence that the notified transaction is permissible. The parties will also have the right to offer remedies to the authority in the course of the review of the filing. Also, it is expected that a new notification threshold will be introduced, which will be based on the value of the proposed transaction, namely, if the value of the proposed transaction exceeds 7 billion roubles, the transaction will require clearance even if the relevant asset or turnover thresholds are not met. Furthermore, the proposed changes envisage the introduction of an institute of independent trustees that will control and monitor the implementation of remedies imposed.

Work on the Fifth Digital Antimonopoly Package is ongoing.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In June 2021, the Federal Antimonopoly Service (FAS) issued merger control guidelines that contain detailed clarifications on the substantive and procedural aspects of the merger control process. The guidelines are aimed at ensuring transparency and predictability of decisions of the FAS and answer the most common questions on preparing, and the procedure for review of merger control filings. The Russian version of the guidelines is posted on the FAS website.

Saudi Arabia

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The New Saudi Arabian Competition Law (the Competition Law) was adopted by Royal Decree (M/75) dated 6 March 2019 and came into force on 23 September 2019, replacing the previous competition law. The overall objective of the Competition Law is to protect and encourage fair competition and to combat and prevent monopolistic practices that affect lawful competition or consumer interest to lead to an improved market environment and economic development.

The General Authority for Competition (GAC) is the regulatory body in charge of implementing and enforcing the Competition Law. The GAC has primary jurisdiction over any matters arising from the application of the Competition Law and the Implementing Regulations even in cases of conflict or overlap with the jurisdiction of other government bodies.

New implementing regulations (the Implementing Regulations) were issued by the GAC board of directors (the Board) and came into force on 24 September 2019.

The GAC has also issued specific guidance regarding its interpretation of the rules relating to economic concentration transactions and the circumstances under which transactions (including foreign-to-foreign transactions) are notifiable in Saudi Arabia (the EC Guidelines). The EC Guidelines, among other matters, set out who the GAC considers as parties to an economic concentration transaction, and the method for calculating turnover.

Scope of legislation

2 | What kinds of mergers are caught?

Notification of an economic concentration transaction is required where the combined global turnover of the entities party to the economic concentration transaction exceeds 100 million Saudi riyals. There is no minimum local turnover threshold.

An economic concentration transaction is defined by the Competition Law as:

> *any act that results in the total or partial transfer of ownership of assets, rights, equity, shares, or obligations of an entity to another, or the joining of two or more administrations in a joint administration or any other form that leads to the control of a firm(s) including influencing its decision, the organization of its administrative structure, or its voting system.*

3 | What types of joint ventures are caught?

The definition of economic concentration under the Competition Law and its Implementing Regulations, which covers any transaction combining the management of two or more entities into one joint management, is widely drafted and may therefore apply to a broad range of joint ventures. The EC Guidelines provide that the Competition Law requires notification of full-function joint ventures, both in the case of newly formed joint ventures or where a new entity acquires control of an existing joint venture. However, the EC Guidelines do not define what constitutes a 'full function' joint venture nor do they detail what constitutes a newly formed joint venture.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law and its Implementing Regulations do not provide a definition of what constitutes control (or joint control), and no guidance has been issued by the GAC in this regard.

The GAC will consider any majority acquisition of shares to be an acquisition of control. Minority interests may also be caught under the regime (especially where such interests confer negative control rights on the acquirer), as a concentration may arise where there is a partial transfer of ownership rights and no minimum level is specified for such partial transfers. Other interests, notably usufruct, are also caught.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The KSA regime requires notification of an economic concentration transaction where the combined global turnover of the entities party to the transaction exceeds 100 million riyals. The GAC considers the entities party to the transaction to include the purchaser, seller (or sellers) and target.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory and must occur at least 90 days prior to the completion of a prospective transaction.

The Competition Law does not apply to public establishments and fully owned state enterprises, provided that those entities are solely authorised by the Saudi government (by virtue of Royal Decree or Council of Ministers' Resolution) to provide the goods, services, or commodities subject of the transaction.

It is possible for the GAC to grant exemptions, on a case-by-case basis, to transactions that result in economic concentration if the exemptions would lead to better market performance, provide benefits to consumers that outweigh any detrimental effects to competition, and do not grant exempted entities conditions that would enable them to force competitors out of the relevant market. Decisions relating to such exemptions will be based on a recommendation of a technical committee formed by the GAC to study those exemptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Law expressly captures foreign-to-foreign economic concentration transactions (as defined above) that have an effect on the Saudi market or on fair competition in Saudi Arabia and that meet the combined worldwide turnover test for the parties engaged in the transaction.

The Competition Law and Implementing Regulations do not include a market nexus test. The GAC has, in the past, considered that, if any of the entities party to the transaction have turnover in Saudi Arabia, the transaction is notifiable.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes. Foreign investment is not permitted in a number of sectors, which are specified in a list maintained by the Ministry of Investment of Saudi Arabia (MISA). The relevant sectors include:

- oil exploration, drilling and production;
- catering to military personnel;
- security and detective services;
- tourist orientation and guidance services related to Hajj and Umrah;
- real estate investment in Makkah and Al Madinah;
- recruitment offices;
- commission agents;
- services provided by midwives, nurses, physical therapy services and certain quasi-doctoral services;
- fisheries; and
- poison centres, blood banks and quarantine.

In addition, in 2016, MISA, previously known as the Saudi Arabian General Investment Authority, announced that they would permit 100 per cent foreign ownership in certain sectors (eg, retail and wholesale trade) subject to a number of obligations and requirements, including a minimum share capital requirement of 20 million riyals. In addition, entities with 100 per cent foreign ownership are obliged to invest at least 200 million riyals over five years after their licence is granted. Previously, a minimum of 25 per cent Saudi participation was required.

For other sectors, non-Gulf Cooperation Council countries (Saudi Arabia, Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates) must apply for and obtain a foreign investment licence from MISA.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Transactions resulting in an economic concentration must be notified to the General Authority for Competition (GAC) at least 90 days prior to their completion.

Failure to file can result in a fine of up to 10 per cent of the total annual sales value of the products or services subject of the violation. If it is impossible to estimate the annual sales, that fine may not exceed 10 million riyals.

The GAC may also, at its discretion, impose a fine not exceeding three times the gain made by a violating entity as a result of the transaction if aggravating circumstances are present.

Separately, the GAC has the power to require violating entities to:

- remove a violation;
- dispose of certain assets, shares or property rights, or perform any other act to ensure the removal of the violation;
- pay a daily fine not exceeding 10,000 riyals until such violation is removed (that fine may be doubled if the violation is not removed within the time period specified by the GAC); or
- temporarily close down an entity for a 30-day period if a violation is not removed within 90 days of the GAC's notification of violation.

The GAC can increase penalties from the above-mentioned limits should an entity be a recidivist (ie, a repeat offender).

The Competition Law also establishes a right of action before the competent courts for natural or legal persons who suffer harm as a result of a violation of the Competition Law.

10 Which parties are responsible for filing and are filing fees required?

The obligation to file falls on all parties to an economic concentration transaction (ie, the seller, purchaser and target).

The GAC board has set the filing fee at 0.0002 of the combined turnover of all parties participating in the transaction with a cap of 400,000 riyals in total.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The GAC has 90 calendar days to provide a decision following the formal filing. If no decision is reached after 90 days, the parties may proceed with their transaction.

The regime is suspensory and does not provide any exceptions to the suspension obligation.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing a transaction prior to receiving clearance from the GAC can result in the same fines as those that apply for failure to file.

The GAC may also require the parties to terminate or unwind the transaction.

To date, there are no public records of the GAC imposing a fine on parties for closing a notifiable transaction prior to receiving clearance.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Closing a foreign-to-foreign transaction prior to receiving clearance from the GAC can result in the same fines as those that apply for domestic transactions.

To date, there are no public records of the GAC imposing a fine on parties for closing a notifiable foreign-to-foreign transaction prior to receiving clearance.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In theory, hold-separate arrangements may be a solution, but those arrangements have not yet been tested with the GAC.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Competition Law applies to public takeovers but does not provide special rules for them.

The Merger and Acquisition Regulations (the M&A Regulations) issued by the Saudi Capital Markets Authority require that, where a public offer for shares would, if completed, be subject to the Law, the offeree company and the offeror must, inter alia, notify the GAC pursuant to the applicable provisions of the Law.

The M&A Regulations further provide that an offer that is subject to the Law must contain a condition that the offer will lapse if the GAC notifies the offeror or the offeree company in writing that it objects to the deal or has placed it under study and review as specified in the Law.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The filing must be made using the forms published by the GAC with initial notification made through an online portal. Separate forms must be completed with respect to each entity involved in the economic concentration transaction.

The notification must include, for example, information on the relevant markets, the value of the notifying party's (or parties') sales in those markets, positive effects of the concentration on the market, and competitive dynamics in the market. Supporting documentation, namely the signed transaction agreement and the constitutional documents and financial statements of the entities party to the transaction must also be provided.

The Competition Law and Implementing Regulations do not contemplate derogations from the amount of information to be provided.

Provision of false information or failure to provide required documentation within 15 days of the GAC's request could result in invalidating an approval, rejection of a filing or the imposition of a fine not exceeding 2 million riyals.

The GAC is in the process of instituting a new online filing system but that is not yet online. It is expected that no separate paper filing forms will be required under this new system.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Upon notification, the GAC will verify whether all the necessary information has been provided. If the notification is complete, the GAC will notify the relevant party (or parties) to pay the filing fees. Once the payment of filing fees is made, the GAC will provide a confirmation of the commencement of the review period. If the GAC requires additional information, or certain information is missing from the filing, the relevant party or parties shall be informed of the missing information that must be provided.

18 What is the statutory timetable for clearance? Can it be speeded up?

The GAC can take up to 90 calendar days to provide a decision following formal filing. The GAC can either: approve, conditionally approve or reject the filing. The 90-calendar-day period begins from the date on which the GAC accepts the completed file and can be paused if it requires additional information as part of its review and there is delay in provision of that information.

In practice, the GAC has provided approvals within shorter time frames where they saw no competition concerns, although this cannot be guaranteed.

There currently is no fast-track review procedure.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

When reviewing economic concentration transactions the General Authority for Competition (GAC) is required to maintain and encourage fair competition in Saudi markets, and will take into account the following factors:

- the structure of the relevant markets and level of actual or potential competition between firms in Saudi Arabia or abroad;
- the financial positions of the parties;
- availability and existence of alternative commodities or services that are available to consumers, vendors and clients;
- product differentiation;
- consumer interest and welfare;
- the potential impact of the transaction on prices, quality, diversification, innovation or development in the relevant market;
- actual or potential harm or benefits to competition as a result of the transaction;
- growth in supply and demand and trends in the relevant market or commodities;
- barriers to entry or exit in the relevant market, including the continuation or expansion of such barriers and regulatory barriers;
- whether the transaction will create or strengthen a significant market concentration or dominant entity (or group of entities) in a relevant market;
- the level and historical trends of anticompetitive practices in a relevant market, either by parties to the transaction or entities influential in such markets; and
- the views of the public, the parties and sector-specific regulators.

The Implementing Regulations further require that conditional approvals and rejections be reasoned.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The factors set out in the Competition Law and Implementing Regulations for the consideration of economic concentrations suggest that the GAC's review will entail an economic analysis based on the effects of the merger on competition and will look beyond the market shares of the merging entities.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

In the context of exemptions, the GAC can consider other non-market factors relating to a transaction; however, those factors are not set out in detail and will be balanced against effects on competition.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are a factor for consideration in the GAC's review of a filing, although these are balanced against potential effects on fair competition.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The General Authority for Competition (GAC) may exercise a number of powers to interfere or prohibit transactions, including:

- imposing conditions on the parties as part of its approval;
- prohibiting the transaction; and
- requiring parties to dispose of assets.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The GAC may adopt a clearance decision subject to conditions.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Competition Law and Implementing regulations do not specify the conditions or the timing relating to remedies.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The GAC has required firms to comply with conditions in foreign-to-foreign transactions (most notably in the Authorities clearance decision of Uber's acquisition of Careem in late 2019).

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is no specific guidance as to whether a clearance decision would cover ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Yes, the Implementing Regulations permit the General Authority for Competition (GAC) to consider the views of the public, market participants and sector-specific regulators in its review of a transaction.

Separately, the Implementing Regulations allow any natural person or any concerned party to raise an objection or report an anticompetitive practice to the GAC. The complaint can be anonymous.

The Competition Law also establishes a right of action before the competent courts for natural or legal persons who suffer harm as a result of a violation of the Competition Law.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Commercial information will normally be protected from disclosure through the confidentiality obligations to which the GAC is subject under the Law. Specifically, the Law requires the GAC's members and employees to maintain the confidentiality of information and documents that are obtained from firms through investigations and prohibits them from providing such information to any other party without the approval of the GAC.

Separately, the filing forms for economic concentration contain statements relating to the GAC's obligation to maintain the confidentiality of information provided.

The Law also provides, on the other hand, that a firm may not conceal information from the GAC on the pretext of confidentiality or for any other reason.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Law permits the GAC to liaise with competent foreign authorities with respect to practices occurring outside of Saudi Arabia that have an effect on competition within Saudi Arabia.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Decisions of the General Authority for Competition (GAC) with respect to violations of the Law are heard before the GAC Committee on the Adjudication of Violations (the GAC Committee) who also issue the GAC's decisions in relation to violations.

A decision of the GAC Committee can be appealed before the competent court within 30 days of notification of the decision, after which the decision becomes final.

Decisions relating to fines or the temporary suspension of business are, in principle, effective and enforceable upon issuance (rather than on the determination of any appeal), unless a decision is issued by the competent court to stay their enforcement.

Time frame

33 | What is the usual time frame for appeal or judicial review?

A decision of the GAC Committee can be appealed before the competent court within 30 days from of notification of the decision, after which the decision becomes final.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Based on publicly available information, there has not been any enforcement action by the GAC in the context of foreign-to-foreign mergers, although there has been enforcement action against parties for failure to file under the old regime.

In July 2014, the GAC issued its first prohibition decision, in relation to Saudi Vitrified Clay Pipe Co's proposed acquisition of Ceramic Pipes Co (Al Khazif for Pipes Co). Details of the prohibition were not published, and the transaction related to Saudi entities.

Reform proposals

35 Are there current proposals to change the legislation?

The Gulf Cooperation Council is currently considering draft legislation that would create a 'unified competition law' applicable to all Gulf Cooperation Council countries.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The General Authority for Competition (GAC) is in the process of implementing new filing procedures with respect to economic concentration filings, which are expected to go live during the third quarter of 2021.

The GAC has also been more active in following up on non-reported local transactions.

Serbia

Maja Stanković
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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

Since 1 November 2009, the Serbian merger control regime has been governed by the Law on the Protection of Competition (LPC). It replaced the Competition Act 2005 (CPL). The LPC introduced some changes. In essence, however, it maintained the competition law framework established under the CPL. Since its entry into force, the LPC was further amended and its current version has been applicable since 8 November 2013. In addition to the LPC, the Serbian government has passed two regulations regarding merger control aspects: the Regulation on the Form and Manner of Filing a Notification of a Concentration (newly adopted version applicable since 2 February 2016) and the Regulation on the Criteria for Determining the Relevant Market.

The relevant authority for merger control (and competition law in general) is the Commission for the Protection of Competition (the Commission), which is competent for reviewing notifications and issuing decisions on notified concentrations. The Commission was established on 12 April 2006 and reports on its activities to the Serbian parliament. The Commission consists of the Council and the Technical Service. The Council consists of the president of the Commission as a separate body and four members who are each appointed for a term of five years (renewable for an additional five-year term) by the Serbian parliament.

More information on the Commission may be found on its website.

Scope of legislation

2 What kinds of mergers are caught?

The LPC defines the following as concentrations:

- mergers and amalgamations of undertakings within the meaning of company law;
- the direct or indirect acquisition of control over all or part of an undertaking by one or more undertakings; and
- the creation of a full-function joint venture.

The temporary acquisition of shares or a participating interest by banking, insurance or other financial institutions for the purpose of resale does not qualify as a concentration, provided that the resale occurs within 12 months from the date of the acquisition and that, during that period, the ownership status has not been used to influence the undertaking's market behaviour. Also, the acquisition of control by a bankruptcy administrator in the course of bankruptcy proceedings is not deemed to be a concentration. In addition, the acquisition of shares or a participating interest in an undertaking by a company for the management of investment funds or an investment fund does not qualify as a concentration, provided that the ownership status has not been used to influence the undertaking's market behaviour and provided that this status is only used to maintain the value of the investment.

The Commission will prohibit concentrations if they significantly restrict, distort or limit competition on the Serbian market, in particular where such restriction, distortion or limitation of competition results from the creation or strengthening of a dominant position.

3 What types of joint ventures are caught?

The LPC distinguishes between full-function joint ventures and cooperative joint ventures. The creation by at least two independent undertakings of a joint venture that will perform on a lasting basis all the functions of an independent business entity is deemed to be a concentration. On the other hand, the creation of a joint venture aiming at coordinating the market activities of two or more undertakings that maintain their legal autonomy does not constitute a concentration within the meaning of the LPC. The latter may be subject to provisions on restrictive agreements.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The LPC (article 5(2)) defines control as the ability to exert decisive influence on an undertaking's business activities, in particular on the basis of:

- shareholders' rights (corporate governance on the basis of company law);
- the ownership of or other proprietary rights to use all or part of the assets of an undertaking;
- contractual rights, covenants or securities; or
- claims, means of securing claims, or de facto due to existing business practice determined by the controlling undertaking.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Commission must be notified of a concentration when in the business year preceding the concentration:

- the combined worldwide turnover of the undertakings concerned exceeded €100 million and the turnover of at least one undertaking concerned exceeded €10 million in Serbia; or
- the combined turnover of the undertakings concerned exceeded €20 million in Serbia and the turnover of each of at least two undertakings concerned exceeded €1 million in Serbia.

In addition, the LPC provides for a filing obligation in the case of certain public takeover bids even where the above thresholds are not met. This provision generally relates to joint-stock companies, the shares of which are traded on a Serbian stock exchange. Under certain conditions, public takeover bids may be implemented prior to clearance.

Further, the LPC introduced the possibility of opening an ex officio investigation into concentrations where, even when the turnover thresholds set out above are not met, the undertakings concerned have a market share in Serbia of at least 40 per cent. However, there is no Commission practice yet in this regard.

The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between the undertakings affected by the concentration (thus, intra-group or mutual transactions are not taken into account).

In the case of undertakings providing financial services, insurance companies and companies engaged in the reinsurance business, the turnover is to be calculated as follows:

- for credit institutions and other financial institutions, as the sum of the following income items, after deducting VAT and other taxes directly related to those items:
  - interest income and similar income;
  - income from securities (ie, income from shares and other variable yield securities; income from participating interests; or income from shares in affiliated undertakings);
  - commissions receivable;
  - net profit on financial operations; and
  - other operating income; and
- for insurance companies and undertakings engaged in the reinsurance business, as the sum of gross premiums (all amounts received and receivable) with respect to insurance and reinsurance contracts issued by or on behalf of the insurance undertaking, after deducting the taxes charged by reference to the amounts of the individual premiums or total volume of such premiums.

Two or more business transactions between the same undertakings concerned within the last two years are deemed to constitute one single concentration that occurred on the date of the occurrence of the last transaction.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the jurisdictional thresholds are met, the filing of a notification to the Commission is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are subject to Serbian merger control if the turnover of the parties to the concentration exceeds the jurisdictional thresholds set out above. To date, the Commission's practice has not developed a de minimis or effects-based exemption. In the past few years, most of the cleared concentrations have been foreign-to-foreign mergers. The nexus test is equally not yet developed.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The most important rules in this context are as follows.

Banking

In addition to scrutiny by the Commission, the acquisition of a qualified shareholding (ie, 5, 20, 33 and more than 50 per cent) in a Serbian bank and the acquisition of control over a company active in the financial sector or the establishment of such company by a Serbian bank are subject to prior approval by the National Bank of Serbia.

The Commission and the National Bank of Serbia signed a Protocol on Cooperation in Antitrust Matters in the Financial Sector on 11 February 2008. In the Protocol, the two institutions undertook to exchange information and operate jointly and in a harmonised manner in the event of a violation of competition in the financial sector. In 2015, changes to the Banking Law were adopted; making it clear that the Commission (and not the National Bank of Serbia) is competent to review anticompetitive aspects of concentrations in the financial sector.

Insurance

All corporate transformations of insurance companies (including mergers) must also be approved by the National Bank of Serbia.

There are similar rules for investment funds, voluntary pension funds, the telecommunications industry and the media sector.

Public takeover bids

The LPC provides for a filing obligation in the case of a public takeover bid even where the jurisdictional thresholds are not met. The provision generally relates to the (direct or indirect) acquisition of control over open joint-stock companies, the shares of which are traded on the Serbian stock exchange (exceptionally also closed joint-stock companies can be caught).

On 11 November 2009, the Commission issued a statement on the filing deadline for notifications in the case of public takeover bids. The statement had been requested by the Serbian Securities Commission because of the unclear wording of the LPC. The LPC provides that the notification must be filed within 15 days of the announcement of the public takeover bid or its closing (whichever occurs first). The confusion occurred because of the fact that an undertaking launching a takeover bid does not know the exact percentage of the shareholding it will have acquired until the bid is closed (and, respectively whether such shareholding will confer control to the bidder once the bid is closed). The Commission clarified that in such situation the notification will be deemed timely even if submitted within 15 days of the date of the closing of the bid. Another point raised with the Commission with respect to public takeover bids was the question of whether a notification is always required when a public takeover bid is – by law – required in Serbia. On 16 December 2009, the Commission stated that if there is no change of control, there is no filing obligation (irrespective of the fact that a public takeover bid is required in Serbia).

It remains to be seen how the above rules will affect foreign-to-foreign transactions. The Serbian Securities Commission stated that a public takeover bid in Serbia would be required, under certain conditions, if a change of control occurs in a foreign undertaking (that controls a Serbian joint-stock company) (ie, there is an indirect change of control over a Serbian undertaking). Thus, in such cases, an argument can be made that a notification to the Commission would also be required in Serbia (regardless of whether jurisdictional thresholds are met). The Commission has not opined on this issue to date. However, the Serbian takeover legislation has been amended in the meantime to support the aforementioned interpretation of the Serbian Securities Commission.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Law on the Protection of Competition (LPC) provides that a merger notification has to be submitted to the Commission within a period no later than 15 days after the signing of the relevant agreement, the announcement of a public offering, the announcement of the start or end date of a public takeover bid, or the acquisition of control (whichever of these triggering events occurs first).

The filing may already be submitted at the time at which the parties have a serious intention to conclude the relevant agreement; that is, they sign a letter of intent, or announce their intention to make a public offer for the purchase of shares in an undertaking.

Late filing may lead to the imposition of a fine by the Commission on the notifying party in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of that undertaking). The deadline for payment of such procedural penalty is set out in the Commission's decision imposing such penalty and cannot be less than one month or more than three months following the delivery of the decision.

10 Which parties are responsible for filing and are filing fees required?

Article 63(3) of the LPC provides that the notification has to be submitted by the person or undertaking acquiring control of all or part of one or more undertakings. In all other cases, the undertakings concerned must jointly submit the notification of a concentration.

The filing fees are determined by a specific tariff (which has been revised as of 14 July 2011), and amount to the following:

- for an expedited procedure (Phase I), the fee is calculated at 0.03 per cent of the combined turnover of all undertakings concerned for the preceding year, but is capped at €25,000; and
- for the regular procedure (Phase II), the fee is calculated at 0.07 per cent of the combined turnover of all undertakings concerned for the preceding year, but is capped at €50,000.

The filing fee for Phase I has to be paid within three days of submission of the merger notification. The filing fee for Phase II (ie, up to additional €25,000) must be paid after the Commission has decided to open Phase II.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The LPC provides that the intended concentration must not be implemented until the Commission issues a decision authorising the transaction or until the expiry of the waiting period.

The duration of the waiting period depends on whether Phase I or Phase II proceedings are applied.

The Commission decides in Phase I proceedings if the concentration will not prevent, restrict or distort competition on the market, especially by creating or strengthening a dominant market position. The Commission then must issue its decision within one month of the submission of the notification. After expiry of this period, it is presumed by law that the concentration has received approval.

In cases that may raise competition concerns, the Commission may initiate Phase II proceedings within one month of submission of the complete notification. The Commission must then issue a decision within four months of initiating such proceedings. Again, after expiry of this period, it is presumed by law that the concentration has received approval.

The suspension obligation does not prevent the implementation of a takeover bid of which the competent authority has been notified in accordance with the regulations on public takeovers or on privatisation. This applies only under the condition that the filing was submitted on time, and that the acquirer does not exercise its voting rights, or does so only to maintain the full value of the investment and based on an explicit written approval of the Commission.

We are not aware that the Commission's approach to the suspension obligation has changed as a consequence of the economic crisis.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

In the case of closing before clearance, the Commission may require the undertakings concerned to:

- dissolve the concentration, sell shares, terminate a contract or take other measures necessary to re-establish the same status that existed before the implementation of the concentration (the measure of de-concentration); and
- impose a fine of up to 10 per cent of the total annual turnover of the responsible undertaking generated in the territory of Serbia in the preceding financial year (the protective measure). The deadline for payment of the fine is set out in the Commission's decision imposing this fine and cannot be less than three months or more than one year following the delivery of the decision. Fines may not be imposed after the expiry of five years following the prohibited implementation of the concentration. Because this five-year period restarts with each Commission's action directed at discovering the breach, the Commission ultimately loses the right to prosecute the infringement after the expiry of an overall period of 10 years. Once the Commission's decision imposing the fine becomes enforceable or final, it may only be enforced within five years.

We are not aware that the above measure of de-concentration has so far been applied in practice. However, there are indications that the Commission's willingness to investigate and sanction infringements of the standstill obligation may be increasing. In April 2013, the Commission opened an investigation against a Serbian company for failure to file (the investigation was based on an anonymous hint and information the Commission extracted from the publicly accessible corporate registry). In the course of that proceeding, the company having infringed the filing obligation submitted the outstanding notification and the Commission cleared the transaction in July 2013. The acquirer was not fined for late filing or for failure to file. However, the Commission, before clearing the case, opened Phase II proceedings and thus the acquirer was required to pay the higher Phase II fees amounting to €50,000 (instead of only €25,000 for Phase I). The Commission applied the same (punitive) approach in at least three other cases in the course of 2014 (all involving unreported acquisitions by a major Serbian telecommunications operator).

Further, in 2014, the Commission opened investigative proceedings against a Russian company for failure to file its acquisition of a 50 per cent share in a Serbian company running one of the oldest Serbian daily newspapers. In the course of the proceedings, the Commission adopted a procedural measure forbidding any disposal of the disputed shareholding until all the relevant facts were established. The Russian company was also required to notify the transaction and, in 2015, the Commission imposed on the Russian company a procedural fine of €143,500 for failure to provide certain information during the merger control proceedings. That was the first time a fine had been imposed by the Commission on a foreign undertaking.

In early 2016, after several public invitations to undertakings to comply with their local notification obligations, the Commission opened investigative proceedings against a local bank for its failure to notify the acquisition of certain real estate property (business premises) in Serbia. These proceedings were stopped in early 2017 owing to the Commission's finding that no concentration in fact occurred.

In late 2016, the Commission opened investigative proceedings against a local software developer for not reporting its acquisition of sole control in a local computer retailer (the software developer had previously reported its acquisition of joint control in the latter). The company was eventually fined in 2017 with a fine amounting to 0.25 per cent of its turnover generated in Serbia in the preceding year (ie, approximately €56,000).

In late 2019, the Commission opened another investigation against a Croatian food and retail conglomerate for not reporting its acquisition of a number of local companies active mainly in the food sector. In February 2021, the Commission issued a clearance decision for that acquisition, while at the same time fining the acquirer with a fine amounting to approximately €75,000 for failure to file.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable in case of foreign-to-foreign mergers. However, we are not aware of any cases where the Commission has applied these sanctions to such mergers since the introduction of the LPC in November 2009. Under the provisions of the Competition Act 2005, only one case has been reported where misdemeanour proceedings were initiated against a Croatian company in connection with a foreign-to-foreign merger.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There have been indications in practice that in certain instances the Commission may find local 'hold-separate' arrangements acceptable to permit the implementation of foreign-to-foreign mergers outside Serbia before clearance in Serbia. However, such arrangements have not been tested formally with the Commission and the Commission has not issued a written opinion in this regard.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The LPC provides for a filing obligation in the case of a public takeover bid even where the jurisdictional thresholds are not met. The provision generally relates to the (direct or indirect) acquisition of control over open joint-stock companies, the shares of which are traded on the Serbian stock exchange (exceptionally also closed joint-stock companies can be caught).

On 11 November 2009, the Commission issued a statement on the filing deadline for notifications in the case of public takeover bids. The statement had been requested by the Serbian Securities Commission because of the unclear wording of the LPC. The LPC provides that the notification must be filed within 15 days of the announcement of the public takeover bid or its closing (whichever occurs first). The confusion occurred because of the fact that an undertaking launching a takeover bid does not know the exact percentage of the shareholding it will have acquired until the bid is closed (and, respectively whether such shareholding will confer control to the bidder once the bid is closed). The Commission clarified that in such situation the notification will be deemed timely even if submitted within 15 days of the date of the closing of the bid. Another point raised with the Commission with respect to public takeover bids was the question of whether a notification is always required when a public takeover bid is – by law – required in Serbia. On 16 December 2009, the Commission stated that if there is no change of control, there is no filing obligation (irrespective of the fact that a public takeover bid is required in Serbia).

It remains to be seen how the above rules will affect foreign-to-foreign transactions. The Serbian Securities Commission stated that a public takeover bid in Serbia would be required, under certain conditions, if a change of control occurs in a foreign undertaking (that controls a Serbian joint-stock company) (ie, there is an indirect change of control over a Serbian undertaking). Thus, in such cases, an argument can be made that a notification to the Commission would also be required in Serbia (regardless of whether jurisdictional thresholds are met). The Commission has not opined on this issue to date. However, the Serbian takeover legislation has been amended in the meantime to support the aforementioned interpretation of the Serbian Securities Commission.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

On 2 February 2016, a new Regulation on the Form and Manner of Filing a Notification of a Concentration (the Filing Regulation) entered into force. The new Filing Regulation determines the information to be submitted in a merger filing and, for the first time, distinguished between a short and long-form filing.

A short-form notification is sufficient where the undertakings concerned have no overlapping activities in Serbia or where the competitive impact of the transaction would be small (ie, where the combined market share of the undertakings concerned in a horizontal merger is below 20 per cent, and where the individual or combined market shares of the undertakings concerned in a product market which is upstream or downstream of a product market in which any other undertaking concerned is engaged (vertical relationships) is below 30 per cent; or where the combined market share of the undertakings concerned in a horizontal merger is below 40 per cent, and the change (delta or Δ) of the Herfindahl-Hirschman Index (HHI) is below 150). Concentrations concerning changes from joint to sole control will also benefit from a short-form notification. However, even in all these cases, the Commission can ask for a long-form notification under certain conditions (one of such conditions being that a relevant market is a highly concentrated one (ie, where HHI is equal or above 2,000) and the HHI Δ is equal or above 150). Where the notifying party wishes the authority to review and assess restrictions that are directly related and necessary to the transaction (otherwise known as ancillary restraints), it will need to submit a long-form notification.

Short-form filings must in principle provide certain basic information about the business activities of the undertakings concerned, their representatives, revenues and local Serbian activities, as well as their suppliers and customers. Furthermore, the transaction structure must be explained (including the expected deadline for its closing) as well as the markets concerned and the competitive situation therein. To the extent possible, the market and business information provided should also be supported by documentation; apart from that, the authority expects to receive at least the following formal supporting documents: power of attorney, certificates of incorporation and annual reports of the undertakings concerned, and a copy of the transaction documents. Except for the power of attorney (which must be provided as original and addition must also be legalised), simple copies are sufficient (instead of originals).

If a long-form notification is required, the level of detail to be provided with respect to the relevant market increases significantly. In particular, market data must be provided for the last three completed business years (instead of only for the last year prior to the transaction).

The Commission has the right to require additional information and documents. If the notifying party is not able to submit some of the documents or information required, it should provide a brief explanation as to why a particular document or piece of information is not available.

Providing wrong information or ignoring the Commission's requests for information may lead to fines in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of the undertaking).

The notification and all documents attached need to be submitted in the Serbian language.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The concentration must not be implemented until the Commission issues its decision authorising the transaction or until the expiry of the waiting period. In Phase I proceedings, the Commission decides within one month of the submission of a complete merger notification. In Phase II proceedings, the Commission has to issue a decision within four months of initiating such proceedings. If the Commission does not decide within these waiting periods, the concentration is deemed to be approved. In our experience, the Commission typically decides within the given deadlines.

The LPC does not provide the possibility for the parties to obtain a waiver or to apply for expedited proceedings.

18 What is the statutory timetable for clearance? Can it be speeded up?

The Commission may apply Phase I proceedings if an accurate assessment of the case may be undertaken already based on the submitted evidence or if the assessment can be based on facts already known to the Commission, and it may be reasonably assumed that the concentration is likely not to impede effective competition, mainly by not creating or strengthening a dominant position in the market.

In more complex cases that do not satisfy these criteria, the Commission may initiate Phase II proceedings. Apart from the four-month deadline for decision-making, the procedural setup of such in-depth investigations is largely unregulated and thus subject to the Commission's discretion.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The Commission determines in its assessment whether the notified concentration will lead to a significant prevention, restriction or distortion of effective competition; in particular, whether it will result in the creation or strengthening of a dominant position in the relevant market.

The Law on the Protection of Competition (LPC) provides the following general criteria for the assessment as to whether a concentration prevents, restricts or distorts competition:

- the structure of the relevant market;
- actual and potential competitors;
- the market position of the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users in the relevant market;
- legal and other barriers to entry on the relevant market;
- the domestic and international competitiveness of the undertakings concerned;
- supply and demand trends for the relevant goods or services (or both);
- the development of technical and economic progress; and
- the interests of the intermediate and ultimate consumers.

In the proceedings, the Commission will assess the effect that the intended concentration is likely to have (even if the 'failing firm' defence is pleaded with respect to the target). In practice, the Commission often relies on criteria developed by the European Commission.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures, but the Commission would assess whether the establishment of the joint venture is likely to trigger 'spillover' effects on the competitive behaviour of the parent companies.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The theory of harm applied by the Commission is in general very much in line with the approach under EU competition law. In addition to a test of dominance (over 40 per cent market share), the Commission will consider anticompetitive effects that could potentially arise out of a concentration (eg, loss of current and potential competition, unilateral effects resulting from horizontal mergers, joint dominance, conglomerate effects and vertical effects).

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The LPC exempts companies performing activities in the public interest as well as official monetary institutions if the application of the LPC could prevent them from performing activities in the public interest (ie, from performing entrusted affairs).

According to its 2009 Report, the Commission rejected a merger notification regarding the acquisition of 51 per cent of the shares in the public Serbian petroleum company NIS owing to a lack of jurisdiction. The Commission took the view that the Law on Confirming the Agreement in the Oil and Gas Sector (Official Gazette of the Republic of Serbia – International Agreements, No. 83/2008), which required the Republic of Serbia to sell 51 per cent of the shares in NIS to the acquirer, constituted a lex specialis and that therefore it did not have jurisdiction to assess this concentration.

We are not aware that the Commission's approach has been affected by the economic crisis.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Commission will, to some extent, take into account economic efficiencies in assessing whether a concentration prevents, restricts or distorts competition. However, as the Commission is a relatively new institution, there is hardly any precedent in the merger control sector on the Commission's approach in this respect.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission is competent (inter alia) to issue a clearance decision, a conditional clearance decision or to prohibit the concentration.

The Commission will prohibit the concentration if the conditions for approval are not fulfilled. If the Commission understands (following a first assessment of the case) that the notified concentration may not fulfil the conditions for approval, it will inform the notifying party about the relevant facts, evidence and other elements on which this assessment is based. The notifying party may then present its view before the

Commission and propose modifications (conditions and obligations) to meet the requirements for approval within a given time frame set by the Commission. If the Commission, after the modification of the notification, concludes that the concentration no longer raises serious doubts, it shall issue a conditional clearance decision providing conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they entered into with the Commission to approve the concentration. Such commitments are binding for the parties and, in the case of a breach, the Commission may repeat the proceedings.

As regards ancillary restraints, these are for the first time now specifically addressed in the new Filing Regulation, which became applicable in February 2016. The Filing Regulation makes clear that the notifying party needs to submit a long-form notification if it wishes the Commission to review and assess restraints that are directly related and necessary to the transaction. For the time being, there is no further guidance available on how the Commission will assess them.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Law on the Protection of Competition (LPC) provides for the undertakings concerned the possibility to propose conditions and obligations to remedy competition concerns. However, the LPC does not specify the type of remedies acceptable to receive merger clearance. Hence, they have to be negotiated in the course of the proceedings on an individual basis.

In 2009, the Commission issued two conditional clearance decisions. In the first case, the acquirer was ordered to maintain certain current lease agreements of which the target company was the lessor and to annually report on the status of those agreements for the next three consecutive years. In the second case (a foreign-to-foreign transaction in the aviation business) the undertakings concerned were obliged to maintain an existing code-share agreement for a certain flight route to or from Belgrade and to abstain from increasing the ticket price on that flight route for a certain period of time without prior approval from the Commission. We are not aware that any conditional clearance decisions were issued by the Commission in 2010. In 2011, after exhaustive negotiations, the Commission prohibited the implementation of a concentration in the sugar sector, as it found that the remedies proposed were insufficient to compensate for the distorting effects caused by the concentration. However, this decision was overturned on appeal by the Administrative Court and the Commission conditionally approved the concentration ultimately in early 2013 (the commitments, inter alia, included the divestment of a part of the target's business in Serbia to an unrelated, financially sane buyer with experience in the sugar business).

In 2012, the Commission issued conditional clearance decisions in the context of the acquisition of a bankrupt company in the retail sector and with regard to a merger relating to the sector of e-prepaid top-up cards and services for mobile phones. In 2013 the Commission cleared a concentration between two retail chains prescribing structural and behavioural remedies. In 2014, two more conditional clearances were issued, one in the cement sector (with one undertaking committing to divest all of its Serbian business operations) and one in the airline industry (where the commitments of the undertakings concerned included, among other things, an obligation to release certain daily slots in relevant airports to one or more new interested market entrants). The Commission issued no conditional clearance decisions in 2015, but issued one decision subject to conditions, in the sugar industry, in 2016 and one, in the telecommunications sector, in 2017. In the 2016 conditional clearance decision, the acquirer committed to various reporting remedies as well as to offer for sale the underperforming sugar factories prior to any business decision to permanently close such factories. The conditional clearance decision of 2017 combined a divestiture commitment and behavioural remedies. The incumbent telecommunication services operator committed to divest a part of its network infrastructure in the territory of the city of Belgrade, where overlapping activities were found to exist. This was combined with reporting commitments as well as the commitment by the acquirer to offer an alternative solution to the current service users of the target company when entering into an agreement with them. In 2018, one further conditional clearance followed in the yeast sector that subjected the undertakings concerned mostly to reporting. In 2019, at least two more conditional clearances followed – one in the retail sector of domestic home appliances, TV audio and video equipment, mobile and fixed phones, computers and IT equipment (where the acquirer committed to either divest, sublease or terminate the lease on a number of retailing outlets in several cities in Serbia) and the other in the sector for the production and selling of fresh bread in several cities in Serbia (where the acquirer committed to various reporting obligations, including regarding its future wholesale prices and rebate policy).

The overall number of conditional clearances issued since the Commission was first set up in 2006 is approximately 20.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

As there are no specific provisions in the LPC that identify the type of remedies acceptable and the practice of the Commission in this regard is scarce, much is left to the discretion of the Commission. The 2014 conditional clearance cases were interesting in the sense that the commitment processes (including the timing issues related thereto) followed the procedural steps and formalities applicable under the EU regulatory framework. This may have been a consequence of the fact that the undertakings concerned had to coordinate their commitment process before the Commission with the respective case pending before the European Commission. For future cases and to improve legal certainty, guidelines by the Serbian Commission on the procedural steps to follow and on the formalities and provisional timing of the proposed remedies or commitments would be welcomed.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

See above.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Where the notifying party wishes the authority to review and assess restrictions that are directly related and necessary to the transaction (otherwise known as ancillary restraints), it will need to request that and submit a long-form notification.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In Phase I proceedings, customers and competitors are typically not involved in the review process.

In Phase II proceedings, the Commission may require information and data from the undertakings concerned, competitors, customers, complainants, public bodies and organisations (eg, communal authorities, statisticians and tax authorities). Also, third parties can submit observations to the Commission.

The Law on the Protection of Competition (LPC) explicitly defines who is not considered to be a party in the proceedings:

- providers of information and data;
- experts and organisations whose analysis is used in the procedure; and
- other public entities and organisations cooperating with the Commission in the proceedings.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

In line with the LPC, the Commission publishes in the Official Gazette and on the website of the Commission general information about decisions made on the infringement of competition (eg, the infringement of the filing or standstill obligation) and orders to initiate ex officio proceedings. Notice on the submission of a merger filing is not published.

In recent years, the Commission has gradually developed its approach regarding the publication of decisions. In a first step, in early 2012 the Commission started making public the operational part of its decisions (and in some exceptional cases even whole decisions). In mid 2013, the Commission began publishing complete non-confidential versions of its decisions (ie, entire decisions with confidential data redacted). Information is redacted from the decision only following the party's well-founded request accompanied by a reasonable explanation as to why confidentiality is of utmost importance (instead of simply stating that it considers the case and related information to be confidential).

Only the parties to the proceedings may request access to the file. Third parties that may have an interest in monitoring the procedure receive only general information on the course of the proceedings.

A party that provided information to the Commission may request from the Commission that it protects its source of information or the information itself, provided that there is a justified reason to believe that the disclosure of the source or the information itself may cause substantial damages. The president of the Commission is competent to issue the respective order on the protection of the source or the protection of information.

Merger filings also receive some publicity from the Commission's annual report on its activities for the preceding year.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission generally cooperates with antitrust authorities in other jurisdictions, in particular with those from the region (ie, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Montenegro, Romania and Slovenia). In June 2010, it concluded a memorandum of understanding with the Austrian Federal Competition Authority that, inter alia, refers to the exchange of case-related information. In 2011 and 2012, the international cooperation has been further increased (eg, in 2012, cooperation agreements were signed with the competition authorities of Kazakhstan, Romania and Russia; in 2013, cooperation agreements were signed with Slovenia and Croatia). Most recently, cooperation agreements were signed with the competition authorities of Belarus and Turkey.

In addition, the Commission cooperates with a number of international organisations that are (to some extent also) involved in antitrust matters. Such organisations include the International Competition Network, the Organisation for Economic Cooperation and Development, the Secretariat of the United Nations Conference for Trade and Development and the Network for the Protection of Competition in South Eastern Europe. In September 2013, the Commission also became a member of the Merger Working Group.

Within the framework of Serbia's Stabilisation and Association Agreement, the Commission also cooperates on a regular basis with the European Commission and the Delegation of the European Union to Belgrade.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Against the final decision of the Commission, a legal action may be filed with the Administrative Court (which became operational in 2010). For a recent example of judicial review see, for example, the successful appeal submitted in a case relating to the sugar industry.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The legal action has to be filed within 30 days of the date the decision was submitted to the party concerned. The Administrative Court shall then decide at the latest within a period of three months. However, the law does not provide for a sanction if the court fails to issue its decision within this period. In practice, judicial review may take several months, depending on the complexity of the case.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2008, according to publicly available information, the Commission (still under the provisions of the Competition Act 2005) initiated with regard to a foreign-to-foreign merger misdemeanour proceedings against a Croatian company (and a responsible person within such company) with a misdemeanour court for implementing a concentration without obtaining the Commission's prior approval. When the misdemeanour court rejected the Commission's request, it filed an appeal, the outcome of which has not been published. Further details of this case have not been made public. In 2017, the Commission imposed its first fine for failure to notify and another fine followed in early 2021. In general, enforcement activities of the Commission are increasing.

One of the current concerns of the Commission is the possibility of enforcing sanctions in the event of a foreign-to-foreign merger (ie, in situations where the undertakings concerned, although they do not have a registered entity in Serbia, realise income on the basis of their product sales in this market, thus meeting the turnover thresholds).

Reform proposals

35 | Are there current proposals to change the legislation?

Following the remarks and recommendations of the European Commission expressed in its 2012 Progress Report for Serbia, the Law on the Protection of Competition (LPC) was amended in late 2013. Furthermore, a new Filing Regulation started to apply in February 2016. In 2018, a new set of amendments to the LPC was prepared by the working group within the Serbian government, which currently continues to be subject to public debate. The Commission is also expected to provide guidance on frequently asked questions in the merger control sector.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The working group set up within the Serbian government to prepare a new Competition Protection Law has circulated the first proposal of the new law for comments by the public in 2018. The proposal was updated and circulated for an additional round of comments in early 2019. On the one hand, the proposal attempts to consolidate into existing rules the Commission's practices since its establishment and, on the other, to reconcile the procedural aspects of the Commission's work with recently enacted Law on Administrative Proceedings.

As regards merger control, it is proposed that the jurisdictional thresholds for notifiable concentrations are increased (something that has long been lobbied for by industry representatives) as well as to introduce a mandatory filing obligation regarding acquisitions leading to shares of more than 40 per cent in a product market in Serbia (ie, regardless of whether the turnover thresholds are met). The existing exceptions from the notion of a 'concentration' are restricted insofar as, for example, acquisitions by investment funds can no longer benefit from this exception. The time limits for the submission of the notification and for deciding on the case are prolonged. Furthermore, the procedure for requesting a derogation from from the suspension obligation (eg, in cases of public takeovers or privatisations) shall be facilitated.

In early 2019, the Serbian Commission also initiated two Phase II merger control proceedings: one in the sector of retailing of home appliances and the other in the telecommunications sector. The former ended with a conditional clearance and the latter was unconditionally cleared. In 2020, the Commission initiated three Phase II merger control proceedings, one in the pest control sector and two in the sandwich panels' market. Two out of three latter cases were unconditionally cleared, whereas the outcome of the third proceeding is not yet made publicly available.

In 2021, the Serbian Commission issued a long awaited guidance with respect to interrelated transactions acknowledging that it would follow the guidelines streaming from the EU Competition Law in that respect. This marks a significant turn in the Serbian Commission's decisional practice, as this was one of the rare merger control areas, where, owing to lack of explicit regulation in the Law on the Protection of Competition, the Commission's practice diverged from the EU guidelines.

In late 2019, the Commission's leadership (the president and most members of the Council) changed.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Singapore Competition Act (Cap 50B) (the Competition Act), which was passed in October 2004. The Competition Act is administered and enforced by the Competition and Consumer Commission of Singapore (formerly known as the Competition Commission of Singapore) (the Commission), which was established as a statutory body under the Competition Act, and is under the purview of the Ministry of Trade and Industry. The Commission has powers to investigate and impose sanctions. The Competition Act, with some exceptions (set out in its Third and Fourth Schedules), applies generally to prohibit:

- anticompetitive agreements (section 34 prohibition);
- the abuse of a dominant position (section 47 prohibition); and
- mergers and acquisitions that substantially, or may be expected to substantially, lessen competition within any market in Singapore (section 54 prohibition).

The Competition Act was implemented in three phases. On 1 January 2005, the provisions establishing the Commission came into force. The provisions on anticompetitive agreements, decisions and practices, abuse of dominance, enforcement, appeal processes, and other miscellaneous areas under the Competition Act came into force on 1 January 2006. The provisions relating to mergers and acquisitions came into force on 1 July 2007. On 1 November 2016, the Commission released revised versions of its guidelines. Particularly in respect of mergers, the Commission issued the CCCS Guidelines on the Substantive Assessment of Mergers 2016, which took effect on 1 December 2016.

In addition to enforcing the Competition Act, with effect from 1 April 2018, the Commission took over the role as the government agency responsible for administering and enforcing the Consumer Protection (Fair Trading) Act (Cap 52A) (CPFTA). The CPFTA sets out provisions for the protection of consumers against unfair practices, and gives consumers certain statutory rights in respect of goods that do not conform to contract, and related matters. The Commission will assume investigative and enforcement powers to take timely action against recalcitrant retailers. For example, the Commission's investigative powers include the power to require documents, articles or information, the power to enter premises with and without warrant, and the power to examine and secure the attendance of any person who appears to be acquainted with any of the facts or circumstances relevant to an investigation.

Laws against anticompetitive behaviour in respect of particular industry sectors such as telecommunications, media, post, gas and electricity can be found in certain statutes that regulate such sectors, and are enforced by industry-specific regulators. These industry sectors are carved out from the Competition Act. On cross-sectoral competition matters, the Commission will work with the relevant sectoral regulator to determine which entity is best placed to handle the case in accordance with the legal powers given to each. The Commission and the sector-specific regulators will cooperate and coordinate closely to prevent double jeopardy and to minimise the regulatory burden in dealing with the case. The lead will be taken by the agency best placed in terms of the ability to investigate the alleged anticompetitive conduct and impose any necessary remedies.

Scope of legislation

2 | What kinds of mergers are caught?

Subject to certain exclusions and exemptions, mergers and anticipated mergers that result, or may be expected to result, in a substantial lessening of competition within any market in Singapore will be caught.

Under section 54(2) of the Competition Act, a merger is regarded as occurring for the purpose of the Competition Act 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 concerned of the business in which that undertaking was engaged immediately before the acquisition.

Section 54(7) of the Competition Act provides that a merger shall not be deemed to occur if:

- the person acquiring control is a receiver or liquidator acting as such or is an underwriter acting as such;
- all 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 the carrying out of transactions and dealings in securities for its own account or for the account of others under the circumstances set out in section 54(9) of the Competition Act.

As set out in the Fourth Schedule to the Competition Act, the section 54 prohibition does not apply to any merger:

- if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects because of the substantial lessening of competition in the relevant market in Singapore;

- approved by any minister or any regulatory authority (other than the Commission) where the requirement for approval is imposed by written law (in the case of the Monetary Authority of Singapore, the section 54 prohibition also does not apply where the requirement for approval is imposed by instruments issued under written law);
- under the jurisdiction of another regulatory authority under any written law relating to competition or a code of practice relating to competition issued under any written law (eg, in the energy, telecommunications and media industries); or
- relating to the supply of licensed and regulated ordinary letter and postcard services, potable piped water, waste water management services, licensed and regulated bus services, licensed and regulated rail services, or licensed and regulated cargo terminal operations.

Where the Commission proposes to make an unfavourable decision, the merging parties may apply to the Minister for Trade and Industry, within 14 days of the date of the notice given by the Commission, for the merger to be exempted on the grounds of any public interest consideration. The CCCS Guidelines on Merger Procedures 2012 clarify the meaning of 'public interest consideration' with reference to section 2 of the Competition Act. 'Public interest consideration' for the purposes of the Competition Act refers to 'national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe'. Therefore, for a matter to qualify as a 'public interest consideration' for the purpose of an exemption from section 54 of the Competition Act, such a matter will first have to be gazetted. The Minister's consideration of an application for a transaction to be exempted on the grounds of any public interest consideration is hence limited to matters of national or public security and defence, unless other matters are gazetted as such. The decision of the Minister for the exemption will be final. The Minister may revoke any exemption of a merger (or anticipated merger) that has been granted if he or she has reasonable grounds for suspecting that the information on which he or she based the decision was incomplete, false or misleading in a material particular. As of 10 May 2021, the Minister has not exercised the power to gazette any matter as a 'public interest consideration' set out under section 2 of the Competition Act.

3 What types of joint ventures are caught?

A joint venture is subject to the section 54 prohibition if it is considered a 'merger' under the Competition Act. A joint venture constitutes a merger when:

- it is subject to joint control;
- it operates in the market and performs all the functions of an autonomous economic entity operating in that market; and
- it is intended to operate on a lasting basis.

Joint ventures are broadly defined as collaborative arrangements by which two or more undertakings devote their resources to pursue a common objective.

Joint control exists where two or more parties have the possibility of exercising decisive influence over the undertaking, including the power to block actions that determine the strategic commercial behaviour of the undertaking. It is characterised by the possibility of a deadlock resulting from the power of two or more parent companies to reject proposed strategic decisions, and a requirement that these 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 the functions normally carried out by undertakings operating in that market. Joint ventures that take over one specific function – for example, R&D or production – without access to the market will generally not be caught. However, a joint venture that uses the distribution network of its parent companies or relies heavily or entirely on sales to its parent companies may be performing the functions of an autonomous economic entity, as may a joint venture performing the normal functions of a trading company operating in a trade market.

Joint ventures are subject to the section 54 prohibition only if they operate on a lasting basis. This may be shown by the commitment of resources from parent companies to perform its functions. Provisions that provide for the dissolution of the joint venture, the withdrawal of parent companies or a fixed duration for the joint venture do not prevent the joint venture from being considered as operating on a lasting basis. For joint ventures of a fixed duration to be considered as operating on a lasting basis, it must be sufficiently long to bring about a lasting change in the structure of the undertakings concerned, or where the agreement provides for possible continuation of the joint venture beyond this period. On the other hand, a joint venture will not be considered to operate on a lasting basis where it is established for a short, finite duration.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The essence of 'control' is the ability to exercise 'decisive influence' in relation to an undertaking.

For this purpose, control over an undertaking is defined by section 54(3) of the Competition Act to exist if, by reason of rights, contracts or any other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, 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 generally deemed to exist if there is ownership of more than 50 per cent of the voting rights. Where the ownership is between 30 per cent and 50 per cent of the voting rights of the undertaking, there is a rebuttable presumption that decisive influence exists. 'Voting rights' refers to all the voting rights attributable to the share capital of an undertaking that are currently exercisable at a general meeting. However, these thresholds are only indicative and control could potentially be established at levels below these thresholds if other relevant factors provide strong evidence of control. Other forms of voting rights will also be taken into account in assessing control.

Besides legal ownership through the acquisition of property rights and securities, de facto control may also be established. As there are no precise criteria for determining when an acquirer gains de facto control of an undertaking's activities, the Commission will adopt a case-by-case approach taking into account all relevant circumstances.

In determining whether decisive influence is capable of being exercised, all relevant circumstances must be considered, and not solely the legal effect of any instrument, deed, transfer, assignment or other act.

It is possible that decisive influence may be capable of being exercised by a person who has only a minority interest. For example, control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major investments, appointment of senior management or market-specific rights.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

In general, mergers should be notified to the Commission if the merger parties think the merger may result in a substantial lessening of competition within any market in Singapore. Merger parties should note the risk that, if a merger is not notified, the Commission may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for believing that the section 54 prohibition has been infringed or will be infringed, and has the ability to subsequently make directions or impose financial penalties in respect of any infringement.

The Commission is unlikely to consider a merger or anticipated merger to give rise to competition concerns unless it meets or crosses the following indicative thresholds:

- the merged entity will have a market share of 40 per cent or more; or
- the merged entity will have a market share of between 20 and 40 per cent and the post-merger market share of the three largest firms, that is, the concentration ratio of three largest firms (CR3), is 70 per cent or more.

If the merger situation meets or crosses either of the two thresholds, the Commission may review the merger situation further. However, because market concentration is only one of the various factors used in assessing a merger situation, a merger that does not cross the thresholds but raises competition concerns may still be subject to the Commission's consideration.

The Commission is also unlikely to investigate a merger situation that only involves small companies, namely where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below S$50 million.

The above thresholds are merely indicative, and the Commission may investigate merger situations that fall below these indicative thresholds in appropriate circumstances. Conversely, merger situations that meet or exceed the thresholds stated in the CCCS Guidelines on the Substantive Assessment of Mergers 2016 are not necessarily prohibited by section 54 of the Competition Act.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification to the Commission for a decision in respect of a merger or anticipated merger is voluntary. Merger parties may either make an application to the Commission in respect of an anticipated merger that has been made known to the public, or in the alternative, merger parties may wait until the anticipated merger has been carried into effect before making an application. If a merger or anticipated merger meets or exceeds the thresholds for notification, the Commission encourages merger parties to consider making an application for a decision, as the Commission is likely to give further consideration to the merger situation before being satisfied that it does not raise any competition concerns under the Competition Act.

To assist with the planning and consideration of future mergers, in particular at the stage when the merger parties consider it necessary to preserve the confidentiality of the transaction, the Commission is prepared to give confidential advice on whether or not a merger is likely to raise competition concerns in Singapore, with the necessary qualification that such advice is provided without having taken into account third-party views. The Commission also qualifies that confidential advice is only available in certain circumstances, and at the absolute discretion of the Commission, so that its resources may be managed appropriately.

Following self-assessment, merger parties may approach the Commission for confidential advice if the following conditions are met. First, the merger must not be completed but there must be a good faith intention to proceed with the transaction, as evidenced to the satisfaction of the Commission by the party or parties requesting the confidential advice.

Second, the merger must not be in the public domain. In exceptional circumstances, the Commission may consider giving confidential advice in relation to mergers that are no longer confidential, but the requesting party or parties must provide good reasons as to why they wish to receive confidential advice and not proceed with a notification. In this regard, the Commission has clarified in its response to the public consultation on the amendments to the Competition Act (that came into effect on 16 May 2018) that, while section 55A(2) of the Competition Act allows for the Commission to give the advice where information about the anticipated merger enters the public domain after the Commission accepts an application for confidential advice, the Commission will only do so if the parties provide good reasons why they are not applying for a decision under section 57 of the Competition Act.

Third, the merger situation must raise a genuine issue relating to the competitive assessment in Singapore. For example, there may be a genuine issue if there is a lack of relevant precedents and, therefore, the Commission's approach to the merger situation is genuinely in doubt. On the other hand, there would be no genuine issue if, for example, both merger parties have an insignificant market presence in Singapore. Finally, the requesting party or parties are expected to keep the Commission informed of significant developments in relation to the merger situation in respect of which confidential advice was obtained, for example, completion date or abandonment of the merger.

Prior to 1 July 2012, the Commission was unable to accept the notification of an anticipated merger if it was still confidential. This process, introduced as part of the Commission's revisions of the merger procedures, allows parties to obtain guidance from the Commission early in the merger process without having to wait until the public announcement of the transaction.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

With regard to foreign-to-foreign transactions, merger parties should note that the Competition Act will apply to any merger or anticipated merger that substantially lessens competition or that may substantially lessen competition in any market in Singapore for goods and services, notwithstanding that the merger takes place outside Singapore or that any party to the merger resides outside Singapore.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Singapore does not have general legislation prohibiting, or requiring consent for, foreign investment. Some sectors and industries, however, have specific requirements on foreign ownership. For example, sections 11 and 12 of the Newspaper and Printing Presses Act (Cap 206) require the approval of the Minister for Communications and Information before any person can become a substantial shareholder (5 per cent), a 12 per cent shareholder, or an indirect controller of a newspaper company. The Telecommunications Act requires that approval from the Info-communications Media Development Authority be obtained before any party becomes a 12 per cent controller, a 30 per cent controller, or obtains effective control over a designated telecommunications licensee, or acquires any business (or any part of such business) of a designated telecommunications licensee as a going concern.

In addition to the general framework provided by the Competition Act, there are also sectoral competition regulatory frameworks.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Notification is voluntary and the Competition Act does not specify any deadlines for notification. If the merger parties wish to notify their merger to the Competition and Consumer Commission of Singapore (the Commission) for a decision, they may do so at any time before, during or after the merger. In the case of completed mergers, parties are encouraged to notify as soon as possible after completion. Parties that wish to apply for a decision for an anticipated merger should only do so when the anticipated merger is no longer confidential. In deciding whether to notify a merger and when to notify the Commission, merger parties should bear in mind that the Commission may 'unwind' a merger that has already been effected, and (in the case of intentional or negligent infringements) impose financial penalties, if the Commission decides that the merger infringes the section 54 prohibition.

There are no deadlines for notification or sanctions for failure to notify as Singapore operates a voluntary merger regime. Merger parties have the option of proceeding, at their own commercial risk, with any merger during the notification process, before notifying the Commission, or without notifying the Commission at all. The risk is that the Commission may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for believing that the section 54 prohibition has been infringed or will be infringed, and has the ability to subsequently make directions or impose financial penalties in respect of any infringement.

10 Which parties are responsible for filing and are filing fees required?

Any party to a merger or anticipated merger may apply to the Commission for a decision. The Commission encourages joint filing.

In general, 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 S$200 million, the fee payable is S$15,000;
- where the turnover of the target undertaking or asset is between S$200 million and S$600 million, the fee payable is S$50,000; and
- where the turnover of the target undertaking or asset is above S$600 million, the fee payable is S$100,000.

If the merging parties are small or medium-sized enterprises (SMEs) or if the acquiring party is an SME and direct or indirect control in the small or medium-sized enterprise will not be (or has not been) acquired, the filing fee will be S$5,000. SMEs have been defined in the Competition (Fees) Regulation 2007 as undertakings with annual sales turnover of not more than S$100 million or employing no more than 200 staff.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Waiting periods are set out in the timetable for clearance. Notification is voluntary and there is no requirement to suspend the implementation of a merger or anticipated merger prior to clearance.

However, parties who give effect to or proceed with mergers prior to clearance by the Commission should note that they do so at their own commercial risk.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As mentioned above, no requirement to suspend a merger or anticipated merger is specified in the Competition Act. However, where there is completion before clearance and the Commission subsequently finds that the merger infringes or is likely to infringe the section 54 prohibition, the Commission may take action to remedy, mitigate or prevent the harmful effects of infringement and prevent the recurrence of infringement. The Commission has the power to, inter alia, require a merger to be dissolved or modified.

Parties should also note that the Commission has the power to impose interim measures where it has not completed its investigations but has a reasonable suspicion that the section 54 prohibition has been infringed or will be infringed. It may make such directions as it considers appropriate for the purpose of preventing merger parties from taking any action that might prejudice the Commission's ability to consider the merger situation and to impose the appropriate remedies; preventing serious, irreparable damage to a particular person or category of persons; or protecting the public interest. These measures could include a direction that the merger or anticipated merger be suspended. As a matter of practice, the Commission is unlikely to use these powers unless it believes that there is a real possibility of the merger situation raising serious competition concerns. In view of the risks involved in proceeding to implement a merger that may infringe the prohibition, parties may choose to voluntarily suspend implementation in whole or in part.

As at 10 May 2021, the Commission has only exercised its power to take interim measures once, namely in the *Grab/Uber* case where the parties, without seeking clearance from the Commission, proceeded to complete Grab's acquisition of Uber's Southeast Asian business in exchange for Uber's acquisition of a 27.5 per cent stake in Grab.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Notification of a merger is voluntary and merger parties may, at their own risk, proceed with closing before clearance or without seeking clearance. This applies equally to foreign-to-foreign mergers. Parties should take note of the actions that the Commission may take if the merger is found to have an anticompetitive effect in Singapore.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is no prohibition against closing before clearance. However, parties should take note of the actions that the Commission may take if the merger is found to have an anticompetitive effect in Singapore.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no special rules in the Competition Act itself. Takeovers and mergers in Singapore are subject to non-statutory rules in the Singapore Code on Take-overs and Mergers, which is administered by the Securities Industry Council. Parties involved in public takeover bids should refer to the Singapore Code on Take-overs and Mergers and the Securities Industry Council Practice Statement on the Merger Procedures of the Competition Commission of Singapore for further information.

An offeror making a 'mandatory general offer' subject to the Singapore Code on Take-overs and Mergers is required to include a precondition that the offer lapses if the Commission proceeds to a Phase II review or prohibits the acquisition before the close of the offer. If the Commission prohibits the acquisition, the Securities Industry Council may require the offeror to reduce its shareholding back to the level before the mandatory general offer was triggered.

An offeror making a 'voluntary general offer' subject to the Singapore Code on Take-overs and Mergers is required to impose a precondition that the offer lapses if the Commission proceeds to a Phase II review or prohibits the acquisition before the close of the offer, and may include further conditions that the Commission's favourable decision must be on terms acceptable to the offeror.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Before submitting Form M1 and commencing the formal notification process, merger parties intending to make an application may approach the Commission for pre-notification discussions (PNDs), to facilitate their preparation of the form and to expedite the review process. PNDs are intended to help merger parties ascertain what information will be required by the Commission during the merger review process, and to help the Commission plan its work to facilitate an expeditious merger review process. The Commission is prepared to engage in PNDs for anticipated mergers not yet in the public domain, but will not entertain discussions on purely speculative or hypothetical transactions.

Merger parties seeking a PND should contact the Commission by phone through its hotline or email. The formality and length of the PND process depends on the preference of the merger parties, the complexity of the transaction, and the potential concerns raised by the merger. The Commission considers PNDs to be most useful where parties can provide a draft Form M1.

During the PND, the Commission will help to identify the information needed to provide a complete submission and any other useful information that might expedite its review. For mergers that involve more complex products or that raise potential competition issues, PNDs minimise the risk that the mergers will not be cleared in Phase I. The Commission will generally not, in the context of PNDs, give its views on whether a merger situation is likely to require a Phase II assessment or if it would lead to a substantial lessening of competition.

The Commission will review a merger situation in one or two phases and the level of detail required will increase with each phase. For each phase, merger parties must submit the duly completed merger review Forms M1 and M2 respectively (available on the Commission's website).

Form M1 requires information relating to, inter alia:

- ownership structure;
- the notified transaction;
- the activities of the merger parties;
- the industries affected;
- the market definition;
- market shares;
- efficiency gains; and
- ancillary restrictions, if they are included in the notification.

Merger parties are also required to provide their competitive assessment of the transaction, including:

- their assessment of the counterfactual (the competitive situation without the merger);
- competitors in the market;
- barriers to entry;
- existing and future countervailing buyer power;
- coordinated and non-coordinated effects of the transaction;
- vertical effects, if there is a potential vertical relationship between the merger parties; and
- cooperative effects of the joint venture, if the transaction is a joint venture.

Form M2 requires further information relating to, inter alia:

- the market conditions in the relevant markets, including the structure of demand and supply;
- the importance of research and development;
- the prevalence of cooperative agreements;
- possible efficiency gains arising from the merger;
- the likely effects of the merger; and
- any applicable failing firm or division arguments that the merger parties wish to submit.

The information required in Form M2 may also be submitted voluntarily by the applicant when submitting Form M1 to expedite the process in more complex cases. Otherwise, the submission of Form M2 will only be required when the Commission is of the view that it is necessary to proceed to a Phase II review, and in which case the applicant will be notified accordingly.

Parties should note that even where the applicant has submitted complete Forms M1 or M2, the Commission may require the applicant to provide additional information, over and above that which is required under Forms M1 and M2 during its review process in order to enable it to assess the merger situation.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

There are two phases of review. The Commission's Guidelines give an indicative time frame of 30 working days to complete a Phase I review and this time frame commences from the date on which the Commission accepts a complete Form M1 and receives the requisite filing fee. Should the Commission find that it is necessary to proceed to a Phase II review, the indicative time frame for completion is 120 working days, commencing from the date on which the Commission receives a complete Form M2 and a response to the Phase II information request that is deemed satisfactory by the Commission.

The receipt of an application by the Commission does not indicate that the application is complete. The indicative time frames for the review of the merger notification commence only when the Commission receives a complete form that meets all the applicable filing requirements, accompanied by the relevant supporting documents and the appropriate fee. To avoid any unnecessary delay, merger parties should therefore ensure that the relevant forms are complete and meet all the filing requirements upon submission.

While the Commission typically reviews mergers within the indicative time frames, the time frames are not binding on the Commission and the Commission may 'stop the clock' in a review, inter alia, if the merger parties do not respond to the Commission's request for information within the stipulated time period or when commitments are being considered. The indicative time frames may also be extended by the Commission to accommodate the commitments process.

The Commission strongly encourages merger parties to engage the Commission in PNDs. PNDs permit the parties to ascertain information that will be necessary for their notification and help the Commission to plan its work to facilitate an expeditious merger review process.

Merger parties may also wish to request confidential advice from the Commission to seek the Commission's view on whether the merger is likely to raise competition concerns in Singapore and whether a notification is necessary. However, the Commission's confidential advice is not binding and the Commission reserves the right to investigate mergers in all cases where confidential advice is given.

18 What is the statutory timetable for clearance? Can it be speeded up?

Two separate processes are available to parties before notification to the Commission. First, parties may seek confidential advice from the Commission on whether or not a merger is likely to raise competition concerns in Singapore and therefore whether a notification is advisable. Second, parties may engage the Commission in PNDs to discuss the content and timing of their notifications in order to expedite the merger review process.

Confidential advice may be requested through the Commission's hotline or by email. The Commission will then agree on a provisional timeline for the parties to submit full information similar to that required in Form M1. Third-party contact details are not required and third-party views will not be sought, and the Commission does not expect to request further information by way of written questions to the requesting party. The Commission will carry out an internal assessment of the merger and may meet with the requesting parties, and expects to provide its confidential advice in the form of a letter stating whether the merger is likely to raise competition concerns in Singapore and whether notification is advisable, within 14 working days of receiving all the required information. The advice is not binding on the Commission and the merger may be investigated regardless of the advice given.

PNDs are similarly commenced by contacting the Commission through its hotline or by email. No specific timetable is given, although the Commission states that their length and formality depend on the preference of the merger parties, the complexity of the transaction and the concerns that the merger may raise. The Commission states that PNDs are most useful where a draft Form M1 is provided.

The formal notification process begins with the filing of Form M1 with the Commission. The Commission will first determine if the application is complete, with the necessary supporting documents and filing fees. Once a completed Form M1 that meets all the applicable filing requirements is accepted, the indicative time frame of 30 working days for Phase I review commences and the Commission will review the transaction to determine whether it falls within the meaning of a 'merger' or 'anticipated merger' as defined in the Competition Act, and whether the transaction is excluded under paragraphs 1 and 2 of the Fourth Schedule to the Competition Act.

The Commission adopts a two-phase approach when evaluating applications.

Phase I

Phase I review entails a quick review and allows merger situations that clearly do not raise any competition concerns to proceed without undue delay.

The Commission expects to complete a Phase I review within 30 working days commencing from the date on which the Commission receives a completed Form M1, accompanied by relevant supporting documents and the appropriate fee. The Commission may extend the Phase I review period in exceptional circumstances. By the end of this period, the Commission will decide whether to issue a favourable decision to allow the merger situation to proceed or to carry on to a Phase II review.

Phase II

If, during the Phase I review, the Commission is unable to conclude that a merger situation does not raise competition concerns and is of the view that a more detailed examination of the merger is required, it will notify the merger parties of the decision to carry out a more detailed assessment (ie, Phase II review). The indicative time frame of 120 working days for a Phase II review commences when the Commission receives a complete Form M2 and a response to the Phase II information request that is deemed satisfactory by the Commission. The Commission may extend the Phase II review period in exceptional circumstances.

During the review, the Commission may impose interim measures to preserve its ability to review the merger situation further or preserve its ability to impose appropriate remedies later, or both. Interim measures may also be imposed as a matter of urgency to protect public interest or to prevent serious, irreparable damage to persons.

Apart from notifications, the Commission may also investigate a merger arising from a third-party complaint or other sources of information if there are reasonable grounds for suspecting that the section 54 prohibition has been or will be infringed. The Commission may exercise its powers of investigation, which include the right to require the production of specified documents or information, the power to enter premises with or without a warrant, and the power to search premises with a warrant. In the recent amendments to the Competition Act that came into effect on 16 May 2018, the Commission's powers were widened to enable enforcement officers empowered or authorised to enter any premises for the purposes of an investigation, to conduct interviews with persons on the premises without having to issue a notice under section 63(1) to any of such persons (as currently required). The Commission may also invite comments from interested third parties on the merger situation under investigation through a notice on the Commission's website.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

For the Competition and Consumer Commission of Singapore (the Commission) to clear the merger or anticipated merger, it must be satisfied that the merger does not, or will not be expected to, result in a substantial lessening of competition within any market in Singapore for goods or services. In applying the substantial lessening of competition test, the Commission will evaluate the prospects for competition in the future with and without the merger (commonly termed as a comparison between the 'factual' and the 'counterfactual'). In many cases, the best guide to the appropriate counterfactual will be the prevailing conditions of competition in the market without the merger. However, the Commission will take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry without the merger. For instance, where one of the parties is a failing firm, pre-merger conditions of competition might not prevail even without the merger.

Further, a merger or anticipated merger may be exempted on the grounds of any public interest consideration with the approval of the Minister for Trade and Industry, or by virtue of one of the exclusions specified in the Competition Act itself.

As set out in the Fourth Schedule to the Competition Act, the section 54 prohibition does not apply to a merger:

- if the economic efficiencies arising, or that may arise, from the merger outweigh the adverse effects because of the substantial lessening of competition in the relevant market in Singapore;
- approved by any minister or any regulatory authority (other than the Commission) where the requirement for approval is imposed by written law (in the case of the Monetary Authority of Singapore, the section 54 prohibition also does not apply where

the requirement for approval is imposed by instruments issued under written law);

- under the jurisdiction of another regulatory authority under any written law relating to competition or a code of practice relating to competition issued under any written law (eg, in the energy, telecommunications and media industries); or
- relating to the supply of licensed and regulated ordinary letter and postcard services, potable piped water, waste water management services, licensed and regulated bus services, licensed and regulated rail services, or licensed and regulated cargo terminal operations.

20 | Is there a special substantive test for joint ventures?

No, the same test applies.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Commission has set out the factors that it will take into account in its assessment of the competitive effects of a merger in the CCCS Guidelines on the Substantive Assessment of Mergers 2016.

In the case of horizontal mergers, the Commission has stated that a horizontal merger may result in a substantial lessening of competition by virtue of coordinated or non-coordinated effects, or both.

Non-coordinated effects may occur where, as a result of a merger, the merged entity could raise prices (or reduce output or quality) with the objective of increasing profits because of the loss of competition between the merged entities. Other firms in the market may also find it profitable to raise their prices because of the loss of competitive pressure arising from the merger. For example, the higher prices of the merged entity's products may cause some customers to switch to rival products, thereby increasing demand for the rivals' products.

Coordinated effects may arise where the merger increases the possibility that, post-merger, firms in the same market may find it profitable to coordinate their behaviour by raising prices or reducing quality or output. The Commission will also consider the structure of the market, its characteristics and any history of coordination in the market concerned.

In the case of non-horizontal mergers, the CCCS Guidelines on the Substantive Assessment of Mergers 2016 describe situations in which vertical mergers and conglomerate mergers may trigger competition concerns. With respect to vertical mergers, factors that the Commission will consider include the possibility of foreclosure, the increased potential for collusion, and the creation of barriers to entry.

With respect to conglomerate mergers, factors that the Commission will consider include the likelihood of the conglomerate merger increasing the feasibility of anticompetitive strategies and whether it may facilitate coordination. In assessing whether a conglomerate merger could have anticompetitive effects, the Commission will consider the ability of customers to exercise countervailing power and whether another firm could replicate the portfolio of products offered by the merged entity. The Commission will also consider whether the creation of the portfolio of products itself represents a strategic barrier to entry.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Minister for Trade and Industry has the power to exempt a merger or an anticipated merger on the grounds of any public interest consideration. The power may be exercised on the application of a merger party, which has been notified that the Commission proposes to issue a decision that the section 54 prohibition has been infringed.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Competition Act allows the Commission to take efficiency gains into account at two separate points in the analytical framework. First, efficiencies may be taken into account where they increase rivalry in the market so that no substantial lessening of competition would result from a merger. For example, the efficiency gains from a merger between two of the smaller firms in a market may enable the merged entity to exert greater competitive pressure on its larger competitors. Second, efficiencies may also be taken into account where, despite not averting a substantial lessening of competition, they are of sufficient magnitude that the merger could be said to give rise to net economic efficiencies in markets in Singapore.

In order to be taken into account by the Commission, efficiencies must be demonstrable (in that they are clear and quantifiable), likely to arise from the merger within a reasonable period of time, sufficient in extent and merger-specific. Such efficiencies could include lower costs, greater innovation and greater choice or higher quality.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Where the Competition and Consumer Commission of Singapore (the Commission), upon completion of its investigations, decides that there has been an infringement of the section 54 prohibition or that an anticipated merger, if carried into effect, will infringe the section 54 prohibition, it will decide on the appropriate action to remedy, mitigate or prevent the harmful effects of such practice and to prevent the recurrence of infringement.

The Commission may implement the remedies by issuing directions or by accepting commitments. The direction may prohibit an anticipated merger from being carried into effect or require a merger to be dissolved or modified in such manner as directed. The direction may also require the merger parties to:

- dispose of such operations, assets or shares of the undertaking as may be specified by the Commission in such a manner as the Commission may require;
- enter into such legally enforceable agreements as may be specified by the Commission and designed to prevent or lessen the anticompetitive effects that have arisen;
- provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine; or
- pay to the Commission such financial penalty in respect of the infringement as the Commission may determine if the Commission is satisfied that the infringement has been committed intentionally or negligently.

The financial penalty imposed by the Commission may not exceed 10 per cent of the turnover of the business of each relevant merger party in Singapore for each year of infringement, up to a maximum of three years. The Commission's basis of calculation of financial penalties is based on an undertaking's relevant turnover of the financial year preceding the end of the infringement (rather than of the financial year preceding the infringement decision). Information on the calculation of financial penalties is generally set out in its Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016, and particularly in respect of infringements of the section 54 prohibition, its Guidelines on Merger Procedures 2012.

The Commission may accept commitments at any time during a review or during an investigation before a final decision on whether there has been an infringement is made. Commitments are generally proposed by the merger parties. If the Commission considers the proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached. Applications may be made to the Commission to vary, substitute or release a commitment.

Both directions and commitments are enforceable in the District Court.

The Competition Act also gives the Commission the power to take interim measures.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Merger parties may propose, and the Commission may accept, commitments at any time during a review or during an investigation, before a final decision on whether there has been an infringement is made. Commitments are generally proposed by the merger parties, although the Commission may invite merger parties to consider whether they want to offer commitments. The commitments must aim to prevent or remedy the adverse effects to competition identified. If the Commission considers proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached. Applications may be made to the Commission to vary, substitute or release a commitment.

Generally, the Commission will only accept commitments that sufficiently and clearly address the adverse effects to competition and are proportionate to them. According to the CCCS Guidelines on the Substantive Assessment of Mergers 2016, a precondition to accepting any commitment is that the Commission must be confident that the competition concerns identified can be resolved through the commitment. Further, the commitments must not give rise to new competition concerns or require substantial monitoring by the Commission.

There are broadly two types of remedies that the Commission may consider: structural remedies and behavioural remedies.

Structural remedies are generally preferred to behavioural ones because they clearly address the market structure issues that give rise to the competition problems and require little monitoring by the Commission. Typically, structural remedies require the sale of one of the overlapping businesses or assets that has led to the competition concern. The CCCS Guidelines on the Substantive Assessment of Mergers 2016 states 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.

In appropriate cases, the Commission will consider other structural or quasi-structural remedies, for example, the divestment of the buyer's existing business (or part of it) or an amendment to intellectual property licences. Before the sale of any business, the Commission must approve 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. If that is not the case, it is unlikely that the proposed divestiture will be considered as an effective remedy for the anticompetitive effects previously identified.

The Commission will consider behavioural remedies in situations where it considers that divestment will be impractical or disproportionate to the nature of the concerns identified. Further, behavioural remedies may sometimes be necessary to support structural divestment.

In general, in assessing which remedies would be appropriate and comprehensive, the Commission will take into account how adequately 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 lessened 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.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In the CCCS Guidelines on Merger Procedures 2012, the Commission specifically sets out a process whereby the Commission and the merger parties can resolve competition concerns in Phase I by way of commitments. Merger parties are encouraged to take the initiative to propose suitable commitments that can appropriately resolve any competition concerns that they foresee arising from the merger situation. This can be done at any time during the review process.

The Commission will indicate its competition concerns in an 'issues letter' to the merger parties where the Commission considers that a Phase II review may be appropriate, although this letter does not constitute a decision to proceed to a Phase II review. At this stage, parties may propose commitments to address the competition concerns in Phase I.

If, towards the end of a Phase II review, the Commission is of the preliminary view that the merger situation is likely to give rise to a substantial lessening of competition, it will issue a Statement of Decision (Provisional) to the merger parties, stating the facts on which the Commission relies and its reasons. The Statement of Decision (Provisional) may outline remedies that the Commission considers appropriate. The Commission will give the parties an opportunity to make written representations to the Commission, which will also be the last opportunity to propose commitments or to give their views on remedies proposed by the Commission. The Commission may consider and impose alternative remedies different from those proposed by the parties.

If the Commission considers the proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached.

Applications may be made to the Commission to vary, substitute or release a commitment. Such applications must be made in writing and include an explanation as to whether the competition concerns addressed by the commitment still exist and what impact the variation, substitution or release of the commitment will have on the competition concerns. The Commission may consult with persons it thinks appropriate by publishing a notice on its website.

It is likely that Phase I will have to be extended to accommodate the commitments procedure. Phase II may also have to be extended if a commitments procedure is commenced in Phase II. Time extensions are at the discretion of the Commission, which also reserves the right to terminate the commitments process at any time.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

From the publicly available decisions as of 10 May 2021, three mergers were cleared conditional upon the Commission receiving remedies or commitments: the Commission's decision on the notification for decision of the proposed acquisition by Seek Asia Investments Pte Ltd of the Jobstreet Business in Singapore (which was granted on 13 November 2014), the Commission's decision on the notification for decision of the proposed acquisition by ADB BVBA of all the shares of Safegate International AB from Fairford Holdings Private AB (which was granted on 29 January 2016) and the Commission's decision on the notification for decision of the proposed acquisition by Times Publishing Limited of Penguin Random House Pte Ltd and Penguin Books Malaysia Sdn Bhd (which was granted on 25 September 2017). In 2008, in the Commission's decision on the Notification for Decision: Merger between The Thomson Corporation and Reuters Group Plc, the Commission considered that the commitments offered to other competition authorities (namely the European Commission and the United States Department of Justice) had a worldwide effect and that competition concerns arising in Singapore would be sufficiently addressed as such. The Commission stressed, however, that the fact that commitments were accepted by overseas competition authorities does not necessarily imply that the Commission will allow the merger to proceed in Singapore and any overseas commitments must be viewed in light of the facts and circumstances of the case to see whether they are capable of addressing competition concerns arising in Singapore, if any.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Ancillary restrictions to a merger or anticipated merger are defined in the CCCS Guidelines on the Substantive Assessment of Mergers 2016 as restrictive agreements, arrangements or provisions that are directly related and necessary to the implementation of a merger. Such ancillary restrictions are excluded from the prohibition against anticompetitive agreements (section 34 prohibition) and the prohibition against abuse of dominance (section 47 prohibition) under the Third Schedule to the Competition Act. To be directly related, the restriction must be 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 addition, in determining the necessity of the restriction, considerations such as whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger will also be taken into account. Merger parties must demonstrate that they have chosen the option that is the least restrictive of competition.

Merger parties should conduct a self-assessment as to whether any agreements, arrangements or provisions that are not integral to the merger, but that are concluded in conjunction with the merger, qualify as ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition and Consumer Commission of Singapore (the Commission) also requires the contact details of the five most significant competitors and customers to be provided in the notification forms, as well as of the five most significant end users if these are not customers. The Commission may contact them to solicit feedback in relation to the notified mergers.

The Commission will gather information about the competitive effect of the merger situation from the applicant and from third parties, including customers, competitors, suppliers, and other regulatory bodies and government departments, where relevant. The details of the merger will be published on the public register on the Commission's website.

Complainants may make complaints to the Commission by its online form (as found on the Commission's website), fax, telephone or email. The Commission will acknowledge receipt of the complaint within three working days and may ask for further information and may launch a formal investigation if there are reasonable grounds for suspecting that the merger may result in a substantial lessening of competition. The Commission prefers that complaints are not anonymous, although the Commission will protect the complainant's identity as far as possible.

Parties that suffer loss or damage as a result of the infringement will have a private right of action to seek relief in civil proceedings. Such rights of private action 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. There is also a two-year time bar from the time the Commission has made its decision or from the determination of the appeal, whichever is later. The relief that the court may grant includes an injunction or declaration, damages, and such other relief as the court deems fit.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Upon acceptance of a satisfactory application, the Commission will publish the details of notified mergers or anticipated mergers on the public register on the Commission's website. The information provided will usually include:

- the names of the merger parties;
- a description of the transaction;
- a description of the business activities of the merger parties 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 on the definition of the relevant markets, the way in which competition functions in these markets, barriers to entry and countervailing buyer power, and the competitive effects of the merger.

Third parties are invited to comment on the merger via an invitation to comment on the Commission's website, and when the Commission consults on commitments.

When applying to the Commission, merger parties must include all relevant information, including information that may be confidential. When submitting an application, parties must provide the Commission with both confidential and non-confidential versions. Non-confidential versions are necessary for the Commission's purposes of facilitating discussions and meetings with third parties and publishing a non-confidential version of its decision.

In the confidential versions of submissions, confidential information must be enclosed in square brackets. In non-confidential versions, redactions must be marked by square brackets containing the word 'confidential', with a separate annex identifying the confidential information and giving reasons why the information should be treated as confidential.

Information is confidential only if, in the Commission's opinion, disclosure of the information would:

- significantly harm the legitimate business interests of an undertaking, where it is commercial information;
- significantly harm an individual's interest, where it relates to an individual's private affairs; or
- be contrary to the public interest.

Where excessive or unreasonable confidentiality claims are made, the Commission may stop the working time frame until the applicant files an acceptable non-confidential version. In the CCCS Guidelines on Merger Procedures 2012, the Commission specifically cautioned against blanket and overly wide confidentiality claims.

The Commission will generally treat parties' submissions on confidentiality seriously. In exceptional circumstances, the Commission may wish to disclose confidential information, in which case it will discuss with parties in advance to minimise any detriment to them. The Commission will give applicants the opportunity to review its draft decision before publication to determine whether it contains confidential information, though the Commission maintains ultimate discretion in relation to decisions on confidentiality.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Under the Competition Act, the Commission has the ability to enter into cooperation arrangements with any foreign competition body with approval from the Minister for Trade and Industry. Cooperation may take the form of information exchange or any other assistance as necessary to assist in the enforcement or administration of competition laws.

The Commission concluded a memorandum of cooperation with Japan's Fair Trade Commission on 22 June 2017, a memorandum of understanding with Indonesia's Commission for the Supervision of Business Competition on 30 August 2018, and a memorandum of understanding with Canada's Competition Bureau on 17 September 2019. Generally, the memorandums formalise and reinforce existing cooperation and technical assistance activities between the Commission and the foreign agencies, including on areas such as case notification, information exchange, enforcement coordination, as well as technical cooperation and experience sharing.

On 16 May 2019, the Commission announced that it joined the International Competition Network's Framework on Competition Agency Procedures (CAP) as a founding member. The CAP advances basic and non-binding principles on procedural fairness and transparency among competition agencies, and enables closer cooperation between participating agencies through dialogues to better understand each other's processes.

Form M1 includes specific questions on which other jurisdictions' parties intend to notify (or have notified) the merger. Parties are requested to notify the Commission of any material change in status in relation to any of the notifications to overseas competition agencies, including, for example, approvals, unfavourable decisions and negotiations of commitments. Parties are also asked if they would be willing to provide the Commission with a waiver allowing the Commission to exchange confidential information with competition agencies in other jurisdictions.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

There is a right of appeal to the Competition Appeal Board (the Board) against any decision by the Competition and Consumer Commission of Singapore (the Commission) in respect of a merger or anticipated merger or any direction (including interim measures) imposed by the Commission. An appeal against the Commission's decision in respect of a merger or anticipated merger may be made by any merger party, while an appeal against a direction may be made by the person to whom the Commission gave the direction. 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. There is no right to appeal to the Board against the Commission's refusal to accept any commitments offered, but appeals may be made against the Commission's refusal to vary, substitute or release existing commitments. An appeal to the Board against a direction imposed 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).

Parties may make further appeals against the decisions of the Board to the General Division of the High Court and then to the Court of Appeal, but only on points of law and the quantum of the financial penalty. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made. The General Division of the High Court may determine any such appeal by confirming, modifying or reversing the decision of the Board and making such further or other order on appeal.

It is also possible to bring an action in judicial review. To do so, parties must make an application under Order 53 of the Rules of Court, before a judge, for leave to bring an action in judicial review. Once leave is granted, parties must make the judicial review application within 14 days.

On 29 December 2020, the Board dismissed Uber's appeal against the Commission's 2018 decision that found that Grab and Uber had infringed the section 54 prohibition. This was the first appeal in respect of the section 54 prohibition to the Board. The Board upheld the Commission's directions and financial penalties and awarded the Commission its costs of the appeal. Separately, there have been 18 appeals (three of which were withdrawn by the appellants) in respect of infringement decisions relating to anticompetitive agreements and abuse of dominance. There have been no appeals from the Board to the courts, and no cases of judicial review in respect of Commission decisions.

Time frame

33 | What is the usual time frame for appeal or judicial review?

A party who wishes 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 the earlier. The Board may, on the application of the appellant, in its discretion extend the time limit provided for the lodgement of the notice of appeal.

As soon as is practicable, the Board shall set a timetable outlining the steps to be taken by the parties in preparation for the oral hearing of the appeal, whether pursuant to the directions of the Board or otherwise, fix the date for the oral hearing, notify the parties in writing of the date and place for the oral hearing and of any timetable for that hearing, and, if it considers it necessary for the expeditious disposal of the appeal, send the parties a report that contains a summary of the factual context of the case and the parties' principal submissions.

The Competition Act does not prescribe a time frame or limitation period for judicial review. Accordingly, the time frame is prescribed by the Rules of Court of Singapore. Under Order 53, Rule 1 of the Rules of Court, no application for a mandatory, prohibiting or quashing order may be made unless leave to make such an application has been granted. For quashing orders, leave will not be granted to apply for the same unless the application was made within three months of the date of the proceedings.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The provisions relating to mergers and acquisitions came into force on 1 July 2007. As of 10 May 2021, a total of 85 mergers have been notified to the Competition and Consumer Commission of Singapore (the Commission), of which 75 have been cleared, four have been withdrawn, two anticipated mergers abandoned and four mergers pending. Regarding the abandoned anticipated mergers, on 11 March 2015, the Commission informed the parties of its provisional decision to block the proposed acquisition by Parkway Holdings Ltd of RadLink-Asia Pte Ltd. However, the anticipated merger was subsequently abandoned and the sale and purchase agreement relating to the proposed merger lapsed and ceased to be in effect as of 13 March 2015. More recently, on 30 July 2018, the Commission formally ended its assessment of Wilhelmsen Maritime Services AS's (WMS's) proposed acquisition of Drew Marine's technical solutions, fire, safety and rescue businesses after WMS announced on 22 July 2018 that the parties would abandon the proposed acquisition. The Commission had issued its provisional decision on 25 May 2018, which found that the proposed acquisition was likely to be in breach of the section 54 prohibition.

In addition to the notified mergers, the Commission on 27 March 2018 commenced an investigation into Grab's acquisition of Uber's Southeast Asian business in exchange for Uber's acquisition of a 27.5 per cent stake in Grab. The investigations concluded with the Commission issuing an infringement decision finding that Grab and Uber have contravened the section 54 prohibition. On 29 December 2020, the Competition Appeal Board dismissed Uber's appeal against the Commission's Infringement Decision.

Reform proposals

35 Are there current proposals to change the legislation?

While there are no current public proposals to revise or change the Competition Act, between September and October 2020, the Commission conducted a public consultation on proposed amendments to six sets of its guidelines. Key proposed changes to the CCCS Guidelines on the Substantive Assessment of Mergers include:

- clarifying that data protection can be an aspect of competition on quality;
- stating more clearly that a reduction in competition can harm innovation and that a merger of important innovators may change competitive dynamics even without large market shares;
- clarifying that proprietary rights and data can be barriers to entry and expansion;
- refining the position on conglomerate mergers and how they may be assessed;
- clarifying that countervailing buyer power is focused on customers' commercial significance to the suppliers; and
- clarifying that merger counterfactuals should not involve a violation of competition law.

As for changes to the CCCS Guidelines on Merger Procedures, the proposed changes include requiring information to be provided on the top 10 rather than top five customers as part of Form M1.

To introduce more clarity on timelines and the submission of commitments, the Commission has also proposed amendments to the existing CCCS Guidelines on Enforcement (which are proposed to be renamed as the CCCS Guidelines on Remedies, Directions and Penalties). Clarifications include:

- stating that, during Phase 1 review, commitment proposals that are accepted in-principle will trigger a 50-working day administrative timeline (extendable by the Commission by 40 days) for the market testing of commitment proposals; and
- stating that the existing 120-working day review period for Phase 2 will generally not be extended for the purposes of evaluating commitment proposals during Phase 2. However, if the notifying parties resubmit their commitments proposal or submit a fresh proposal after a Statement of Decision (Provisional) is issued, the Commission will 'stop the clock' to allow it to assess and market-test the proposed commitments.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Grab/Uber merger

Over the past year, there have been a number of developments stemming from the 24 September 2018 infringement decision issued by the Competition and Consumer Commission of Singapore (the Commission) against Grab and Uber (the Infringement Decision). By way of background, the Infringement Decision against Grab and Uber was issued in response to an unnotified acquisition by Grab of Uber's Southeast Asian business in exchange for a 27.5 per cent stake in Grab. Apart from directing the parties to take certain remedial measures (Directions), the Commission also imposed a total of around S$13 million in financial penalties on Grab and Uber for completing an irreversible merger that harmed competition, as the transfer of acquired assets between

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the parties rendered it practically impossible to restore competition and the market conditions to the pre-transaction state. The Infringement Decision marked the first time in the Commission's history that financial penalties were imposed in respect of mergers that contravened the section 54 prohibition and highlighted the risk that companies face when deciding to proceed with a merger without notifying the Commission.

A recent development in the case sheds light on how the Commission might respond to the policies and regulations issued by other regulatory agencies. On 30 October 2020, the Point-to-Point Transport Regulatory Framework by the Land Transport Authority and the Public Transport Council came into effect. The new regulatory framework subjects ride-hail service operator licensees such as Grab to regulations requiring price-transparency and ensures that partnership arrangements with drivers are non-exclusive. In response, on 20 November 2020, the Commission considered it timely to release Grab from the Directions imposed in its Infringement Decision, including restrictions on raising prices and exclusive arrangements.

On 29 December 2020, the Competition Appeal Board (the Board) dismissed an appeal lodged by Uber against the Infringement Decision. The Board's decision is significant as it was the first appeal to the Board in Singapore in relation to a merger and it discussed notable issues such as the applicable standard of review on appeal and the approach the Commission should take towards voluntary commitments in the context of completed mergers.

Impact of covid-19 on merger control

As at 10 May 2021, the Commission has not issued any guidance on its approach towards merger control in the context of the covid-19 pandemic. Parties seeking to file a merger or other notification are encouraged to contact the Commission via email, and the Commission will provide guidance on the filing of such notifications.

Slovakia

Zuzana Hodoňová

Wolf Theiss

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control, as well as other aspects of competition law, was substantially governed by Act No. 136/2001 on Protection of Economic Competition (the old Act). On 1 June 2021, the new Act on Protection of Economic Competition (the new Act, or just the Act, if the particular provision remains unchanged in the new Act) became effective. The new Act is, inter alia, an implementation of Directive 2019/1 (EU) to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (EU Directive).

The changes in the area of merger control only partially modify the provisions governing the notification criteria. The new Act specifically abolishes the currently effective specific notification threshold for creating full functioning joint ventures. This will allow the merger control regulation to become more efficient considering the elimination of cases, when the formal assessment of a merger was necessary in the event of the creation of extraterritorial joint ventures that were not active in the territory of the Slovak Republic. The other substantive change consists of a declaration, which the joint control merger (not only the joint venture) is to be reviewed also under the article on coordination. Other major changes regarding the merger control regime concern procedural changes (starting from the assessment period), the possibility to impose periodic penalty payments for infringements with regard to merger control, the possibility to impose temporary remedies in certain cases and specific provisions regarding the pandemic situation and turnover calculations.

Furthermore, the new Act repeals a few decrees that are necessary for the execution of the Act, such as Decree No. 170/2014, which sets forth the details concerning the content of the notification and the respective documents required. This and other decrees have been replaced by new ones, which became effective on 1 June 2021. In addition, some other aspects are regulated by soft law, such as the guidelines on pre-notification contacts, turnover calculation, details of simplified notification, details of granting an exemption from the prohibition of merger implementation and the guidelines on ancillary restraints. These guidelines have been under revision, partly only under formal revision due to the formal changes in the Act. Guidelines on turnover calculation and guidelines on turnover calculation have been revised also substantially.

The filing fee is determined by the Act on Administrative Fees. The General Administrative Procedural Act applies to any procedural matters not specifically regulated in the Act.

The relevant authority for merger control (and competition law in general) is the Antimonopoly Office of the Slovak Republic (AMO). More information on the AMO may be found on its website.

Scope of legislation

2 | What kinds of mergers are caught?

The Act defines the following as a concentration (if on a lasting basis):

- a merger or amalgamation of two or more separate undertakings (including mergers and amalgamations pursuant to special legislation, as well as 'economic mergers', namely, situations whereby the undertakings concerned become economically combined, while retaining their legal independence, especially in the case of joint economic management);
- the acquisition of direct or indirect control by an undertaking or several undertakings over another undertaking, its part or their parts; or
- the creation of a joint venture controlled by two or more independent undertakings, performing all the functions of an autonomous economic entity (full-function joint venture) on a lasting basis.

A concentration does not arise if banks, branches of foreign banks, insurance companies or other financial institutions, the normal activities of which include trading in securities on their own accounts or on the accounts of others, temporarily acquire securities with a view to reselling them. This exemption only applies if they do not exercise voting and other rights with a view to influencing the competitive behaviour of that undertaking or if they exercise these voting rights only with a view to preparing for the sale of the entire undertaking or part thereof or the sale of securities, and upon such sale, they will lose the control, provided that this sale is effected within one year of the date of acquisition of the securities. If the disposal is not reasonably possible within this period of time, it may – upon request – be extended by the AMO. Further exemptions exist under special laws; for example, regarding the acquisition of control over an undertaking by liquidation trustees under the Commercial Code or by the bankruptcy trustee under the Bankruptcy Act.

3 | What types of joint ventures are caught?

The creation of a joint venture controlled by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration. If the creation of such joint venture has as its object or effect the coordination of the competitive behaviour of undertakings, the AMO appraises such coordination in accordance with the cartel prohibition (article 4 of the new Act).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

According to the Act, 'control' is the ability to exercise a decisive influence on the activities of an undertaking, especially by means of:

- ownership rights or other rights; and

- rights, contracts or other facts allowing the exercising of a decisive influence on the composition, voting or decisions taken by bodies belonging to the undertaking.

Minority interests are caught only provided that they confer control by any of the means described above.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The AMO must be notified of a concentration where in the business year preceding the concentration:

- the combined aggregate Slovak turnover of the undertakings concerned amounted to at least €46 million and each of at least two of the undertakings concerned achieved a turnover of at least €14 million in Slovakia; or
- the worldwide aggregate turnover of at least one of the undertakings concerned amounted to at least €46 million; and
- in the case of a merger or amalgamation of two or more separate undertakings (including mergers and amalgamations pursuant to special legislation, as well as 'economic mergers' (ie, situations whereby the undertakings concerned become economically combined, while retaining their legal independence, especially in the case of joint economic management)) the aggregate turnover of at least one other undertaking concerned amounted to at least €14 million in Slovakia; or
- in the case of the acquisition of direct or indirect control by an undertaking or several undertakings over another undertaking or part of another undertaking or undertakings, the target (different from the undertaking meeting the worldwide €46 million threshold) generated an aggregate turnover of at least €14 million in Slovakia.

In contrast to the old Act, under the new Act the sole creation of a joint venture is not one of the cases when the AMO has to be notified.

For the purpose of turnover calculation, 'turnover' means a total of revenues, yields or incomes from the sale of goods or services, to which – if applicable – in addition, financial assistance granted to the undertaking has to be added. Financial assistance means financial aid granted from public sources, which concerns an activity performed by the undertaking and will be reflected in the price of its goods, and the undertaking is the recipient of the respective aid.

According to the specific provision, the decisive period for which the turnover is calculated is not only the previous business year, but also the periods preceding if the turnover in the previous business year did not meet the turnover threshold (this specific provision is a reaction to the temporary decrease of turnover in certain industries owing to the pandemic).

The aggregate turnover of an undertaking concerned includes:

1 the turnover of the undertaking concerned;
2 the turnover of undertakings in which the undertaking concerned directly or indirectly:
    - holds more than 50 per cent of the share capital;
    - is entitled to exercise more than 50 per cent of the voting rights;
    - has the right to appoint more than 50 per cent of the members of bodies belonging to the undertaking; or
    - has the right to manage the undertaking;
3 the turnover of undertakings having the rights referred to in (2) in an undertaking concerned;
4 the turnover of undertakings in which the undertakings referred to in (3) have the rights referred to in (2); and
5 the turnover of undertakings in which two or more undertakings referred to in (1) to (4) have joint rights as referred to in (2).

In the case of an acquisition of direct or indirect control over an undertaking or part of one undertaking or several undertakings, only the turnover pertaining to the acquired undertaking (or the relevant parts thereof) being subject to the concentration is taken into account for the purpose of turnover calculation.

The aggregate turnover of an undertaking concerned does not include the turnover generated between companies belonging to the same group. The turnover generated between the joint venture and other undertakings shall be proportionally divided among the parties to the concentration.

Two or more concentrations that are effected between the same undertakings or between undertakings from the same respective economic groups within two years are deemed to constitute one single concentration that occurred on the date of the occurrence of the last concentration.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act and exceeds the jurisdictional thresholds, filing is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are subject to Slovak merger control if they qualify as a concentration and meet the jurisdictional thresholds set out above. The currently applicable jurisdictional thresholds intensified the local nexus requirement of notifiable concentrations. As a result, many foreign-to-foreign transactions that previously required a merger notification in Slovakia today usually fall outside the scope of the AMO's jurisdiction.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special rules on foreign investments.

Approval or at least a notification of acquisitions of interests above certain thresholds is required in certain other sectors, including energy, finance and media.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no explicit filing deadline. However, in any event the concentration has to be notified to the Antimonopoly Office of the Slovak Republic (AMO) prior to its implementation (ie, before any rights or obligations resulting from a concentration are executed) and after:

- an agreement on which the concentration is based has been concluded;
- the acceptance of a bid in a public tender has been announced;
- a state authority's decision has been delivered to an undertaking (eg, certain sector-specific approvals);
- announcement of a takeover bid;
- the day on which the European Commission informed an undertaking that the transaction falls within the jurisdiction of the AMO; or

- the day on which a particular event that led to the concentration occurred.

The notification can also be filed with the AMO prior to the conclusion of an agreement or other event causing the concentration to arise, provided that it results in a concentration that requires a filing with the AMO. Such notification must also contain reasoning and documents certifying the facts essential for the concentration.

In the event of a failure to notify the concentration, the AMO shall impose a fine of:

- up to 10 per cent of the undertaking's worldwide turnover generated in the preceding business year; or
- up to €330,000 on an undertaking that generated turnover not exceeding €330 or has not achieved any turnover, or when its turnover cannot be calculated.

The AMO is entitled to take into consideration the turnover generated in previous business years if there is a reasonable suspicion that an artificial decreasing of the undertaking's turnover in the preceding business year occurred. Furthermore, the Act on Protection of Economic Competition (the new Act) entitles the competition authority to penalise the association of undertakings. The AMO can impose fines up to 10 per cent of the turnover not of the association of undertakings itself, but of its member undertakings' turnovers in the aggregate. If the association is unable to pay the fine, it will become obliged to require contributions from its members. If the members do not comply with this requirement, the AMO may claim the fine amount either from any of the member undertakings, if its representatives are part of the decision-making bodies of the association, or from any member undertaking that is active on the relevant market.

The new Act also introduces periodic penalty payments, which secure the proper and on-time execution of the relevant duties. If the obligation is not fulfilled, this sanction forces the obliged subject to remedy the unlawful state of affairs in the shortest time possible. The new Act also responded to the EU Directive by authorising the AMO to use any interim measures necessary for the protection of the market and its conditions.

10 Which parties are responsible for filing and are filing fees required?

The responsibility for the submission of the filing depends on the type of the concentration. Against this background, the filing has to be submitted:

- jointly by the parties to the concentration in the case of a merger or amalgamation of two or more independent undertakings;
- in the case of a public tender, by the selected bidder;
- in the case of a decision issued by a state authority on a merger or amalgamation of undertakings pursuant to special legislation, by the parties to the concentration jointly;
- in the case of a takeover bid, by the proposer of the takeover bid; and
- in any other cases, the notification has to be submitted by the undertaking or undertakings that acquire control over another undertaking or its part or other undertakings or their parts.

The filing fee is determined by the Act on Administrative Fees. It currently amounts to €5,000 (with a decrease if the notification is made in electronic form). As of 1 March 2016, the filing fee is paid based on the payment order issued by the AMO. If the parties wish to evidence the payment together with the merger notification (and thus avoid losing time with additional formal letters), the AMO should be contacted at least one day before the actual notification and application for the payment order.

The responsibility for the failure to notify the AMO passes to the 'economic successor', who continues with the commercial activity of his predecessor, when the predecessor stopped with the legal or actual execution of this activity.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period falls under the statutory timetable for clearance.

The intended concentration must not be implemented prior to clearance (ie, the undertakings concerned may not exercise rights or obligations arising from the intended concentration until the AMO issues a clearance decision (suspension obligation)).

However, the Act on Protection of Economic Competition recognises the following exemptions:

- In the case of a public tender, the selected bidder may make its bid provided that it does not exercise the voting rights arising in relation to the implementation of the bid.
- The implementation of a public takeover bid or of transactions with securities at the securities market through which control is acquired from various subjects, provided that:
  - such concentration is immediately notified to the AMO (ie, in practice, as soon as the acquirer learns that it has acquired control); and
  - the undertaking acquiring control does not exercise its voting rights related to these securities or only does so to maintain the full value of its investments based on an individual exemption granted by the AMO.
- Under exceptional circumstances, the AMO may (upon request of the parties) grant an exemption from the standstill obligation if there are 'serious reasons'; for example, serious financial problems or insolvency threats. The AMO has to decide on the exemption request within 20 working days of its submission (however, if the AMO asks for the further information, the clock may be stopped). The exemption should generally concern only the performance of certain urgent actions if no threat to competition is identified. The AMO may bind the grant of the exemption to conditions and commitments to ensure effective competition.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the suspension obligation is breached (closing before clearance), the AMO shall impose fines.

In addition, the AMO may oblige the parties to restore the level of competition that existed prior to the implementation of the concentration, especially by ordering the division of a company or the transfer of rights, or the imposing of other obligations.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are applicable also in case of foreign-to-foreign mergers. During the past few years, the AMO imposed fines in the range of €1,000 to €600,000 for infringing the standstill obligation. In three instances, such fines have been imposed on undertakings based outside the Slovak Republic (in particular in the Czech Republic and Hungary).

On 16 October 2018, the AMO Department of Concentrations issued a decision imposing a fine in an aggregate amount of €600,000 on entrepreneur J&T Finance Group SE, Czech Republic (JTFG), and a fine in an aggregate amount of €7,751 on Ladislav Bödők, Slovak Republic (LB). In the decision, the AMO submitted that the parties to the proceedings breached the Act as they failed to notify a concentration resulting from the acquisition of joint control by the entrepreneurs JTFG and LB over PantaRhei. The parties to the proceedings also breached the Act as a result of exercising their rights and obligations resulting from the aforementioned concentration before the issuance of a valid decision concerning that concentration, which had already been implemented to the fullest extent (ie, the entrepreneur JTFG had acquired an ownership interest in PantaRhei), and this was followed by exercising joint control over that company by the parties to the proceedings.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In general, foreign-to-foreign concentrations are assessed and treated in the same way as domestic concentrations. The Act does not provide for hold-separate (carve-out) solutions.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Certain actions related to public takeover bids are – by law – exempted from the standstill obligation.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Details concerning the content of the notification and the respective documents required are set forth in the new Decree No. 189/2021, which entered into force on 1 June 2021. The new Decree does not contain notable changes, just the changes based on the adoption of the Act and several additional precise provisions. The Decree sets out the following situations where a short-form notification may be submitted:

- an undertaking intends to acquire sole control over another undertaking in which it already exercises joint control;
- there is no horizontal or vertical overlap between the undertakings concerned under any alternative definition of the relevant market; or
- the combined market share of the parties concerned (including their affiliated companies) is less than 15 per cent at the horizontal level and individually or combined less than 30 per cent at the vertical level also under any alternative definition of the relevant markets.

A short-form notification must contain only a limited level of information, in particular:

- information on the parties to the concentration (ie, their business activities);
- description of the concentration;
- information on the capital, financial and personnel structure;
- general market information (eg, list of all categories of goods produced or imported including the respective territories, possible product or geographical market definition based on such product categories, short characteristics of the markets, statement on the (non-)existence of affected markets and the possibility to use the short-form notification, total market size, individual market shares held by the parties, most important competitors);
- information on cooperative effects;
- reasons for and effects of the concentration and the impact on competition;
- information on other applicable competition authorities; and
- underlying documentation.

If the criteria for the submission of a short-form notification are not met, the usual long-form notification must be submitted that requires the parties to submit, in addition to the limited information contained in a short-form notification, rather extensive data on the affected markets and their functioning.

Together with the notification, a power of attorney must be submitted, which is not, however, required to be notarised and apostilled. If some of the required information is not available or known, the parties may ask (in the filing) for a waiver from providing such data and provide their best estimates or at least an indication of from where the AMO could get the information. Also, if some information is not deemed as relevant for the assessment of the concentration, the parties may ask the AMO to agree with the waiver.

The filing and all documents must be submitted in the Slovak language with the certified translation or the affidavit that the uncertified translations are correct and complete. Also, if only copies are submitted, the affidavit declaring the identity of the copy with the original is required. In practice, the AMO tends to agree with the submission of certain documents (such as annual reports) in English or the translation of only certain parts thereof into Slovak.

The submission of false or incomplete information in a merger filling is subject to fines, which may amount up to 1 per cent of the total turnover for the preceding accounting period.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

In practice, it is our experience that the AMO adheres to mandatory deadlines and usually strives to clear cases within Phase I proceedings. The Act does not provide for the possibility to request expedited proceedings.

18 What is the statutory timetable for clearance? Can it be speeded up?

The AMO recommends that pre-notification contacts are initiated before the notification is formally submitted with the AMO, even if the case does not raise substantial merger control concerns. Although the provision of a draft merger notification is not mandatory, practice shows that this is usually welcomed by the AMO. Pre-notification contacts should be initiated at least two weeks prior to the intended formal submission of the notification to the AMO.

Under the new Act, following the formal submission of the notification, the AMO assesses the completeness of the filing. Then the AMO issues an official letter informing the parties about the initiation of proceedings and of the completeness of the filing. It is recommendable to be in contact with the authority during this stage to ensure that this period is short. If the AMO finds that the submitted notification does not contain all the required information, it will issue a request to complete the missing information. Once the filing is accepted as 'complete', the AMO issues an official confirmation letter to this effect. Only complete notification starts the assessment period.

The subsequent handling of the case depends on whether Phase I or Phase II proceedings are applied. If the concentration does not require an in-depth analysis owing to the identification of competition concerns as to its compatibility with the Slovak competition law rules, the AMO issues a decision within 25 working days of receipt of the complete notification (Phase I proceedings). According to the new Act, the decision does not have to include a reasoning. However, if the reasoning is included, it shall only provide some general information about the parties to the concentration, and the business sectors or relevant markets where the parties are active. Under the old Act, the decision contained 'simplified reasoning'.

In cases that require in-depth analysis because of the identification of competition law concerns (Phase II proceedings), within the deadline for the Phase I proceedings the parties must be informed about the initiation of Phase II proceedings in writing. Once the AMO has initiated Phase II, it must issue a decision within 90 working days starting from the last day of the Phase I proceedings period.

If the AMO requests from the parties additional information or documents that it considers relevant for the assessment of the case, this effectively stops the clock. If the notification contains false (misleading) information, the clock is reset and newly starts running only as of the day following the delivery of the true information. At the request of the parties or with their consent, the AMO may prolong the Phase I and II periods, even repeatedly, by a total of up to 30 working days at most.

If the concentration raises competition law concerns, the AMO may request the parties in writing (including reasoning) to propose conditions (commitments) within 30 working days upon delivery of such request. Such request effectively stops the clock, namely, the above-described Phase I and II review or decision-making periods are not in effect until the parties submit their proposed conditions or commitments or the expiry of the 30-working-day period (whichever occurs first). At justified request, the 30-working-day deadline may be prolonged or the AMO may accept the proposal even after its expiry in exceptional cases. Moreover, inspired by the European Commission's practice, the AMO may test the proposed conditions or commitments by addressing them to natural persons or legal entities, publishing or in another manner or may appoint an independent trustee to supervise the fulfilment of such conditions or commitments.

Before issuing its final decision in Phase II, the AMO is required to inform the parties about its assessment of the matter and conclusions and asks them to provide their comments (if any) in writing. Subsequently, the final decision is issued and delivered to the parties. The decision becomes valid and effective if it is not appealed within 15 days of the delivery or the parties waive the right of appeal.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Antimonopoly Office of the Slovak Republic (AMO) follows the significant impediment to effective competition (SIEC) test, which is also applied by the European Commission. Therefore, the AMO assesses whether the concentration does not significantly distort effective competition on the relevant market, in particular owing to the creation or strengthening of a dominant position. We are not aware of any cases where the AMO took into account the 'failing firm' defence.

20 | Is there a special substantive test for joint ventures?

There is a special substantive test for joint ventures and for joint control, which are assessed under the SIEC test and under the coordination provision (if the conditions for coordination are met).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The AMO examines whether the concentration will not significantly impede effective competition in the relevant market, in particular owing to the creation or strengthening of a dominant position.

This may especially be the case if an undertaking or several undertakings are not subject to substantial competition or can act independently as a result of their economic power. As the Act on Protection of Economic Competition (the Act) does not contain any market share presumptions, each case requires an individual assessment on a case-by-case basis.

The Act does not list specific additional factors to be taken into account by the AMO for the purpose of its assessment. In practice, however, the AMO usually considers various factors, including the market position of the undertakings concerned, market structure and possible future developments, barriers to entry, existence of competitors, intentions of companies to enter the market, supply and demand structure, price development, etc.

When assessing the concentration on this basis, the AMO enjoys wide discretion. Inter alia, it takes into account the European Commission's guidelines on the assessment of horizontal and non-horizontal mergers, the guidelines on the definition of the relevant market and other relevant soft law.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Act does not expressly mention non-competition issues as being relevant for the assessment process. However, as the AMO enjoys wide discretionary powers for analysing the effects of the concentration and tends to follow in general the practice applied under the EU merger control regime, it is not unlikely that the AMO would take into account non-competition issues in a similar way as the European Commission.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Act does not expressly mention economic efficiencies. In practice, however, the AMO would most likely take them into consideration (in particular if the parties refer to them in the notification).

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Based on the assessment of the concentration under the substantial test, the Antimonopoly Office of the Slovak Republic (AMO) may issue:

- a decision approving the concentration;
- a decision approving the concentration provided that certain conditions and obligations imposed on the undertakings concerned are observed and met; or
- a prohibition decision.

After clearance has been granted, the AMO:

- on its own initiative, has to reverse a decision that has been made subject to conditions and decide on the concentration anew if the parties fail to fulfil the conditions imposed;

- at the request of the parties, may change a decision that has been made subject to conditions if:
  - the situation on the relevant market has changed so substantially that the imposed conditions or obligations are no longer justified; or
  - the parties request the prolongation of the fulfilment deadline, because they cannot fulfil the conditions or obligations for serious reasons; or
- on its own initiative, may change or reverse a decision if:
  - information relevant for granting clearance later proves incomplete or wrong; or
  - the parties fail to fulfil the commitments related to the condition imposed in the decision.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

At the request of the AMO, the notifying party may submit proposals suggesting certain conditions and related commitments in view of eliminating competition law concerns. In general, the AMO accepts both structural and behavioural remedies.

The AMO may test draft conditions and commitments by directly inviting natural persons and legal entities to provide comments and observations, making them public on its website or in any other manner. Inter alia, the conditions and commitments may include an obligation to appoint an independent trustee who monitors the compliance with the agreed conditions and commitments at the costs of the parties.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

If the AMO identifies competition law concerns, the notifying party is obliged within 30 working days to provide a proposal for commitments and conditions. If the notifying party fails to meet this deadline, the AMO may prohibit the concentration. The AMO does not usually consider any proposals submitted after the expiry of the 30 working days deadline. However, upon a justified request, the AMO may accept them even after the expiry of the deadline provided that the remaining time period for issuing the decision still allows for a proper review or assessment of the proposal. No explicit timetable is set for the execution of the divestment or other remedy. The timetable is set in individual decisions based on the individual characteristics of the case.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of any foreign-to-foreign mergers where the AMO has requested remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The clearance decision of the AMO usually covers restrictions directly related to and necessary for the implementation of the intended concentration. Details are set out in the AMO's Guidelines on Restrictions of Competition Relating Directly to a Concentration and Being Essential for its Realisation.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The fact that a notification has been submitted is made public on the website of the Antimonopoly Office of the Slovak Republic (AMO) and the Commercial Bulletin, inviting third parties to submit their observations and comments on the intended concentration.

Although third parties thus have the right to be heard, they do not enjoy procedural rights comparable with those of the notifying parties (eg, third parties in particular generally have no right to appeal the AMO's decision). Under the Act No. 136/2001 on Protection of Economic Competition, third parties could receive access to the file based on article 40(1), if they were able to demonstrate their legitimate interest. The new Act on Protection of Economic Competition does not provide the same opportunity for the unconcerned persons.

The AMO may also gather information ex officio, in particular by contacting customers and competitors to get their opinions on the intended concentration or for requesting information, clarifications or documents related to the concentration. The AMO may also market test the proposals for conditions or commitments.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The fact that a notification has been submitted is made public on the website of the AMO and in the Commercial Bulletin. The AMO also publishes its decisions in a similar way. The AMO may, however, not disclose information or documents that contain business secrets subject to protection under special laws (eg, banking secrecy) or that are marked as confidential information. In practice, it is therefore recommended to explicitly mark any business or confidential information as such in the notification and any other comments, statements and documents sent to the AMO, including reasoning as to why confidentiality has been requested. To be specific, as regards notification of the concentration, the notifying party is obliged to provide reasons for the requested confidentiality and provide a non-confidential version of the notification. The AMO published guidance on the assessment of information marked as business secrets, confidential information or personal data.

Otherwise, the parties may be requested by the AMO to provide a non-confidential version of the information or documentation, including reasons for the requested confidentiality. Only under exceptional circumstances could the protected information be made accessible by the AMO to another party to the proceedings (with the consent of the affected party) or to its representative (in the absence of such consent). Decisions issued within Phase I are rather short and contain only the simplified reasoning.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The AMO is a member of the European Competition Network and the International Competition Network. It actively cooperates with competition authorities that are members of these networks. According to the annual report of the AMO, its employees were actively involved in European Commission cases as rapporteurs within the Advisory Committee as well as in various working groups with the European

Commission. Moreover, the AMO maintains close cooperation with the Czech competition authority, including the regular exchange of experience and know-how, discussion of legal and other current issues and the organisation of seminars, conferences and workshops. Bilateral cooperation also exists with the Hungarian and Austrian competition authorities.

An important legislative development relevant to the implementation of the EU Directive is the enactment of international mutual assistance. The new Act on Protection of Economic Competition lays down the competency of the AMO to provide assistance in the matter of notification and delivery of relevant documentation to a party to the proceedings in other member states. The AMO also supports the execution of foreign final decisions that impose a fine or periodic penalty payment. This way, the decisions of the AMO are enforceable in other member states as well, which is particularly important because in the past there were cases in which the fined company ceased to exist or function on the market of the Slovak Republic, making it complicated to recover the fines.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Within 15 days of its delivery, the Antimonopoly Office of the Slovak Republic (AMO)'s decision may be appealed with the Council of the AMO (the Council). The decision of the Council may be appealed with the Regional Court Bratislava within two months of its delivery. The decision of the Regional Court Bratislava may be challenged only in limited occasions with the Supreme Court of the Slovak Republic based on the special remedy.

Filings with the courts do not have a suspensive effect. However, the courts may grant a suspension of the enforceability of the decision at the party's request, provided that serious harm would otherwise occur to the applicant.

There are only very few cases where the AMO has prohibited concentrations in the past (and thus merger control decisions of the AMO have been only very rarely challenged).

Time frame

33 | What is the usual time frame for appeal or judicial review?

The AMO is obliged to issue a decision within three years of the initiation of proceedings. The judicial review performed by the Regional Court Bratislava and the Supreme Court of the Slovak Republic is not subject to any time restrictions; therefore, the time frame largely depends on the complexity of the case and cooperation of the parties.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

All notified concentrations in 2020 were approved. The numbers of both administrative proceedings and decisions concerning mergers have been stable over the past three years, with a slight decrease in 2020 (possibly because of the pandemic). In recent years, in several cases where the Antimonopoly Office of the Slovak Republic (AMO) had competition concerns, the parties decided to refrain from offering commitments to overcome those concerns and decided to discontinue the intended transaction. They withdrew the notification and the proceedings were closed. In recent years, there has been a trend indicating increased activity of the AMO aimed at fining parties to non-notified mergers for the implementation of these mergers without having first obtained AMO's clearance.

The AMO does not distinguish between local mergers and foreign-to-foreign mergers in its assessment, but the new Act on Protection of Economic Competition will, in our opinion, considerably decrease the number of notified cases with regard to extraterritorial joint ventures, owing to the abolishment of the notification threshold related to joint ventures. All foreign-to-foreign mergers that have been notified to the AMO have been cleared.

Reform proposals

35 | Are there current proposals to change the legislation?

The new Act on Protection of Economic Competition became effective on 1 June 2021, together with the related new decrees. Proceedings before the AMO that have been initiated and were not closed under the old Act on Protection of Economic Competition shall be completed pursuant to the provisions of the new Act. Legal effects of the acts that occurred during proceedings before the new Act became effective shall remain preserved. If the proceedings regarding concerns were initiated according to the old Act, and in the new Act the specific concern would not be subject to control, the AMO shall dismiss the proceedings. In the case of imposing fines, the more favourable Act for the subject shall be used.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The most important legislative development is the implementation of Directive 2019/1 (EU) by adopting the new Act on Protection of Economic Competition, together with the relevant Decrees necessary for its execution.

With regard to key cases, on 20 May 2020, the Antimonopoly Office of the Slovak Republic (AMO) issued a decision in which it imposed fines on Grafobal Group Development, a. s., Bratislava of €27,000 and on Bratislavská vodárenská spoločnosť, a. s., Bratislava of a symbolic amount of €1,000. The undertakings infringed the Act by failing to notify a merger grounded in the acquisition of their joint control over the undertaking Infra Services, a. s., Bratislava and by exercising rights and

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obligations arising from this merger before the AMO's decision on the merger came into force.

Since 2020, other mergers have been approved by the AMO and without any other imposed fines.

Under the new Act, the AMO is able to stay the proceedings if the circumstances related to an emergency situation interfere with the proper assessment of the matter. Until the stay is lifted, the relevant time limits cease to run.

Slovenia

Klemen Radosavljević and Tjaša Lahovnik
Wolf Theiss

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In Slovenia, merger control, as well as other aspects of competition law, is substantially governed by the Prevention of Restriction of Competition Act (the Act). The Act became effective in 2008 and was amended in June 2009, April 2011, November 2011, July 2012, August 2013, April 2014, October 2015 and May 2017.

The information and documents to submit in a merger control notification are set out in the Decree on the concentration of companies notification form. The filing fees are determined by the Administrative Fees Act. With regard to procedural matters that are not specifically regulated in the Act, the General Administrative Procedure Act applies.

The relevant authority for merger control (and competition law in general) is the Slovenian Competition Protection Agency (CPA), which is competent for receiving, reviewing and issuing decisions on notified concentrations. In fulfilling its competencies, the CPA acts independently and autonomously.

The Agency Director and the Agency Council are the main bodies of the CPA. The latter consists of five members who are appointed by the parliament for a term of five years. The Agency Director is the chair (president) of the Agency Council. For each case, the Agency Council sets up a separate decision panel (which consists of all members of the Agency Council who in turn appoint from their midst a panel chair). The merger control review procedure until the adoption of the decision is then conducted by a public officer authorised by the Agency Director.

The decision to impose a fine (in cases envisaged by the Act) is adopted in a separate procedure that is decided by a panel composed of three members of the Agency Council and employees of the CPA. The panels adopt decisions by a majority of votes in sessions that are not open to the public. More information about the CPA and its activities can be found online.

Scope of legislation

2 | What kinds of mergers are caught?

The Act defines the following as concentrations:

- the merger of two or more previously independent undertakings or parts of undertakings;
- the acquisition of direct or indirect control of one or more other undertakings, in whole or in part, by one or more natural persons already controlling at least one undertaking, or by one or more undertakings, whether by purchasing of securities or assets, entering into a contract or by any other means; or
- creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity.

A concentration does not arise if banks, insurance companies, savings institutions or other financial institutions, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold business assets on a temporary basis that they have acquired in an undertaking with a view towards reselling them. This exemption only applies provided that they do not exercise any voting rights in respect of those business assets with a view towards determining the competitive behaviour of such an undertaking or that they exercise these voting rights only with a view towards preparing for the disposal of business assets and that any such disposal takes place within one year of the date of acquisition. If the disposal is not reasonably possible within this period of time, it may – upon request – be extended by the CPA.

3 | What types of joint ventures are caught?

The creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration. If the creation of this joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent (ie, the joint venture partners), the CPA appraises this coordination in accordance with the cartel prohibition (prohibition of restrictive agreements; article 6 of the Act). If the CPA concludes that the exemption criteria set out in article 6 of the Act are not met, it will not approve the concentration (article 11(3) of the Act).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

According to the Act, 'control' may be obtained through rights, contracts or any other means that separately or together, taking into account facts and regulations, confer the possibility of exercising decisive influence on an undertaking or part of an undertaking, in particular on the basis of:

- ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking.

Control is acquired by individuals or undertakings that are holders of rights or entitled to rights under the contracts concerned, or while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving from the contracts.

Minority interests are caught only provided that they confer control by any of the means described above.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The CPA must be notified of a concentration where in the business year preceding the concentration:

- the combined turnover of the undertakings concerned (including undertakings belonging to the same group) exceeded €35 million in Slovenia; and
- either the turnover of the undertaking acquired (ie, the target), including undertakings belonging to the same group, exceeded €1 million in Slovenia, or in the case of the creation of a full-function joint venture, the turnover of at least two undertakings concerned (including undertakings belonging to the same group) exceeded €1 million in Slovenia.

Even where these turnover thresholds are not met, the undertakings concerned should inform the CPA of the implementation of a concentration, if a combined market share of the undertakings concerned exceeds 60 per cent in Slovenia. The CPA may then request a notification of the concentration within 15 days following the date on which the undertakings concerned informed the CPA (article 42(3) of the Act). At present, it is unclear whether the above market share test would also be met if one undertaking concerned alone represents a market share exceeding 60 per cent and there are no overlaps with the other undertaking or undertakings concerned.

The undertaking or undertakings concerned are the merging undertakings, the undertaking gaining control over another undertaking (ie, the acquirer), the acquired undertaking (target), and undertakings creating a notifiable joint venture.

For the purpose of turnover calculation, the net revenues from the sale of products and the provision of services in Slovenia have to be taken into account. Turnover generated by sales or services between companies belonging to the same group is not taken into account. Where the concentration consists of the acquisition of control in part of one or more undertakings, regardless of whether these parts qualify as a legal entity, only the turnover relating to the parts that are subject to the concentration are taken into account for the purpose of turnover calculation. Two or more transactions that take place within a two-year period between the same persons or undertakings are treated as one and the same concentration arising on the date of the last transaction.

Specific rules apply to the calculation of the turnover of credit and financial institutions where the financial income from shares, loans granted and operating receivables has to be taken into account. With regard to insurance companies, the amount of the gross premiums written is relevant, comprising all revenues and receivables from insurance contracts, including reinsurance premiums paid, after the deduction of taxes or contributions associated with insurance premiums.

Concentrations falling within the jurisdiction of the European Merger Control Regulation are not subject to the Slovenian merger control regime (one-stop-shop principle).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act and exceeds the jurisdictional thresholds, filing is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign concentrations are subject to merger control if jurisdictional thresholds are met. The undertakings concerned could be exposed to fines in the case of a breach of the filing obligation. It is not required that any of the undertakings concerned have a registered seat or local branch in Slovenia. To date, the CPA's practice has not developed a de minimis or effects-based exemption.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act does not contain any provisions that would specifically relate to foreign investment or special sectors. However, provisions related to merger control, foreign direct investment and other relevant approvals can be found, inter alia, in the following areas.

Media sector

The Act applies to media mergers in the usual way (ie, the CPA is competent to review, assess and clear or prohibit the concentration if the jurisdictional thresholds are met). However, according to the Media Act, in addition, a special consent granted by the Ministry of Culture is required for the acquisition of shareholdings (or voting rights) of 20 per cent or more in publishers of radio or TV programmes or printed daily newspapers. According to article 58(3) of the Media Act, the Ministry of Culture may refuse to grant such approval if the merger results in the creation of a dominant position:

- on the advertising market;
- in the media market where coverage of more than 15 per cent of analogue terrestrial radio programmes is reached on the Slovenian market for radio programmes transmitted via analogue terrestrial radio signals;
- in the media market where coverage of more than 30 per cent of analogue terrestrial television programmes is reached on the Slovenian market for television programmes transmitted via analogue terrestrial radio signals; or
- where the number of issues of daily newspapers exceeds 40 per cent of all sold issues of daily informative printed media in the Republic of Slovenia that is issued at least three times a week.

Energy sector

In the energy sector, the role of the market regulator is performed by the Agency for Energy. According to the Energy Act, it is, inter alia, competent to supervise the transparency and competitiveness of the electricity and gas markets. In this function, the Agency for Energy may be involved in the assessment of sector-specific mergers.

Electronic communications sector

The market regulator in the electronic communications sector is the Agency for Communication Networks and Services of the Republic of Slovenia (ACNS). The Electronic Communication Act provides specific rules for the cooperation between the ACNS and the CPA. Inter alia, both authorities are authorised to exchange relevant information and cooperate in determining and analysing relevant markets and identifying significant market power. The ACNS is also competent to define relevant markets and to assess significant market power. Hence, in practice, it is likely that the CPA will involve the ACNS when assessing sector-specific mergers.

Financial sector

In the case of the acquisition of 'qualified shareholdings' (ie, above 10, 20, 33 and 50 per cent), the laws regulating banks, insurance companies, stock brokerage companies and fund management companies require the approval of the respective regulatory bodies. Obtaining such shareholding without the prior consent of the competent regulatory body results in the loss of voting rights based on the shares beyond the qualified shareholding.

Foreign direct investment

In 2020, Slovenia established a new foreign direct investment (FDI) screening mechanism, which is applicable to investments aiming to establish or to maintain lasting and direct links between the foreign investor (ie, any foreign citizen or entity including EU, EEA, Swiss citizen or entity) and an economic entity established in Slovenia through a direct or an indirect acquisition of at least 10 per cent participation in capital or voting rights in a Slovenian target company. Such investments may include takeovers, mergers, greenfield investments and even acquisition of real estate (acquisition by a foreign investor of real estate essential to critical infrastructure or in the vicinity of such infrastructure is also subject to the FDI screening). The Slovenian Ministry of Economic Development and Technology may conduct a screening procedure and can decide to authorise, condition, prohibit or unwind a particular foreign direct investment if the investment poses a threat to the security and public policy of Slovenia, such as in the following cases where it may have an effect on any of the following areas considered as risk factors:

- critical infrastructure;
- critical technologies and dual-use items;
- supply of critical inputs;
- access to sensitive information;
- the freedom and pluralism of the media; and
- certain programmes and projects in the interest of the European Union.

The decision to engage in a screening procedure is based particularly on a preliminary evaluation of the following points:

- whether the foreign investor is directly or indirectly controlled by third country (non-EU) governments, including national authorities or third-country (non-EU) armed forces, including through ownership structure or significant funding;
- whether the foreign investor has already been involved in activities affecting security or public policy in an EU member state; and
- whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

A decision to prohibit or unwind an individual foreign direct investment in the screening procedure has the consequence that the relevant merger agreement, takeover procedure or acquisition agreement is declared null and void. The screening procedure can apply even to foreign direct investments made up to five years before the adoption of the screening mechanism.

The respective FDI must be notified to the Ministry of Economic Development and Technology no later than 15 days after the day of the execution of the respective agreement or the publication of the takeover offer.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A merger notification has to be submitted to the Slovenian Competition Protection Agency (CPA) no later than 30 days after the conclusion of the agreement, the announcement of a public bid or the acquisition of a controlling interest (whichever of these triggering events occurs first). If the CPA requests the parties to notify the concentration because their combined market share in Slovenia exceeds 60 per cent, the merger notification must be submitted no later than 30 days from receipt of this request.

In the case of a failure to notify the concentration within the filing deadline, the CPA may impose fines in the amount of up to 10 per cent of the annual turnover generated by the undertakings involved in the concentration (including other undertakings belonging to the same group) in the preceding business year. In addition, a fine between €5,000 and €10,000 may be imposed on the responsible persons of such undertakings and (if applicable) a fine between €3,000 and €5,000 on a natural person already controlling at least one undertaking.

If the nature of the infringement of the filing obligation is particularly serious (eg, owing to the amount of damage inflicted, the pecuniary benefit, the infringer's intent or unlawful gain), a fine between €15,000 and €30,000 may be imposed on the responsible person of a legal entity, and (if applicable) a fine of between €10,000 and €15,000 on a natural person already controlling at least one undertaking.

With regard to the sanctions for closing before clearance.

10 Which parties are responsible for filing and are filing fees required?

Concentrations that consist of a merger or acquisition of joint control have to be notified jointly by the undertakings involved in the merger, or by those acquiring joint control. In all other cases, the undertaking acquiring control is responsible for the filing.

The filing fee is determined by the Administrative Fees Act. At present, it amounts to €2,000.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The intended concentration must not be implemented prior to clearance, as undertakings are not allowed to exercise rights and obligations arising from the intended concentration until the CPA issues a clearance decision (suspension obligation).

If the CPA requested the parties to notify the concentration because their combined market share in Slovenia exceeds 60 per cent, the undertakings must cease implementing the concentration as of the date of receipt of this request.

Under exceptional circumstances, the CPA may (upon the request of the parties) permit the implementation of the concentration prior to clearance, if such an implementation is essential to maintain the full value of the investment or to perform services of general interest.

The suspension obligation does not have an effect on the implementation of public bids pursuant to the Slovenian Takeovers Act, provided that the acquirer does not exercise voting rights (or exercises them only according to a permit for early implementation granted by the CPA).

The duration of the waiting period depends on whether Phase I or Phase II proceedings are applied.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

In the case of closing before clearance, the CPA may impose fines.

In addition, the CPA may file a legal action with the competent civil court to declare the implementation (the exercise of rights and obligations), which is contrary to the suspension obligation, null and void (articles 12(4) and 44(3) of the Act on the Prevention of Restrictions of Competition (the Act)). We are not aware that this legal action has so far been filed by the CPA.

Also, according to article 53 of the Act, the CPA may impose measures on the undertakings concerned to restore the situation prevailing prior to the implementation, in particular through the division of the undertaking or the disposal of all the shares acquired. The latter of these measures has recently been applied in a merger between two Slovenian newspaper companies (the acquirer was ordered to dispose of the acquired 75 per cent shareholding).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable with regard to foreign-to-foreign mergers. There is one case currently pending before the CPA, where the CPA is evaluating whether the implementation of a non-notified concentration was compatible with Slovenian competition rules. If it is established that the undertakings concerned did not comply with Slovenian competition rules, the CPA may apply sanctions and declare the concentration null and void. In the same case, the CPA already imposed a sanction for failure to notify in the amount of approximately €54 million. The CPA also seized the shares of the Slovenian subsidiary of the acquirer as collateral for the payment of the fine (once final).

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In principle, foreign-to-foreign concentrations are assessed in the same way as local concentrations. Hence, under exceptional circumstances, the CPA may (upon the request of the parties) permit the implementation of the concentration prior to clearance, if such implementation is essential to maintain the full value of the investment or to perform services of general interest.

The Act does not explicitly provide for hold-separate (carveout) solutions. Given that the Slovenian merger control regime assesses the effects of a merger in the Slovenian market, depending on the transaction structure, one could argue that it is possible to carve out the transaction steps related to the Slovenian market and to proceed with the implementation outside Slovenia without infringing the Slovenian suspension obligation. Although widely discussed in practice, we are not aware that such solutions have been tested with the CPA so far.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Public takeover bids are primarily monitored by the Slovenian Security Market Agency and subject to the provisions of the Slovenian Act on Takeovers. The CPA has to be informed of the intended public bid by a simple written notice on the day such intention is published. Also, the CPA must be provided with the bid document (ie, the prospectus).

Public takeovers that lead to notifiable concentrations within the meaning of the Act require the submission of a merger notification to the CPA no later than 30 days after the announcement of the public bid. Importantly, the suspension obligation does not apply to the implementation of public bids within the meaning of the Slovenian Takeovers Act, provided that the acquirer does not exercise voting rights or exercises them only according to permission for early implementation granted by the CPA.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The information and documentation to be submitted in a merger notification are set out in the Decree Defining the Contents of the Concentration of Companies Notification Form (the Form). The Form requires the parties to provide quite substantial information on the concentration, as well as on the relevant markets, market shares and market size. Inter alia, the following needs to be provided:

- information on the parties to the concentration (eg, name, registered seat, contact person, nature of business, ownership and control; personal and financial links and previous acquisitions; annual reports);
- description of the intended concentration;
- originals or certified copies of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- the total size of the relevant markets and market shares of the undertakings concerned;
- information on main competitors, customers and suppliers, the structure of supply and demand, market entry, the relevance of research and development, efficiency gains, etc;
- information on indispensable ancillary restrictions; and
- (if available) copies of analyses, reports or studies related to the relevant market.

The Slovenian merger control regime does not provide for a short-form notification. Therefore, as a general rule, each notification has to include all the (detailed) information requested in the Form. However, if the (combined) market shares after the concentration are lower than 15 per cent (horizontal relationships) or 25 per cent (vertical relationships) in the relevant product market, the parties may limit information in relation to such markets. In any case, however, the parties must provide information on the size of the relevant markets, their turnover and market shares in such markets, and information about the largest competitors and their market shares.

The parties may also request from the CPA a waiver from providing certain information required by the Form, if the entire set of such information is, in the opinion of the parties, not necessary for the accurate and complete filing and the assessment of the case.

If some of the information requested in the Form is not available to the parties, this must be stated in the filing, together with information on where the CPA may obtain such information.

The notification and all documents attached thereto need to be submitted in the Slovenian language. Documents on the basis of which the concentration takes place must be provided in certified copies; all other documents attached to the filing may be provided in simple copies.

The notification needs to be complete and must include accurate and true information. If information is missing in the notification, the CPA may request from the notifying party to supplement the required information within the deadline set by the CPA. The notifying party's failure to supplement the notification will trigger a legal presumption that the transaction has not been filed and will make the notifying party subject to the sanctions for failure to notify concentrations.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The CPA decides in Phase I proceedings if the concentration does not raise serious doubts as to its compatibility with the Slovenian competition law rules. The CPA then must issue its decision within 25 working days of the receipt of a complete notification.

In cases that raise serious doubts as to their compatibility with the Slovenian competition law rules, the CPA initiates Phase II proceedings within 25 working days of receipt of a complete notification. Once the CPA has initiated Phase II, it must issue a decision within 60 working days of initiating such proceedings.

If the parties propose remedies, the deadline for issuing the Phase I or Phase II decision is extended by an additional 15 working days.

The waiting period starts running only once a complete notification has been submitted. Hence, if the CPA finds that the submitted notification does not contain all mandatory information, it will issue a request for additional information and the clock does not start running.

There is no legal presumption that the concentration has received approval once the waiting period expires. In general, the parties may in such a case file a legal action with the Administrative Court of Slovenia.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Act does not provide for the possibility of obtaining a waiver or expedited proceedings and there is no formal procedure in respect of extensions of the waiting periods. There is no legal presumption that the concentration has obtained approval once the statutory waiting period has expired. Therefore, depending on the workload of the CPA, in practice Phase I clearance decisions are often rendered around two to two-and-a-half months after the submission of the notification.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Slovenian Competition Protection Agency (CPA) assesses whether the intended concentration would result in a significant impediment to effective competition within the territory of Slovenia, or in a substantial part of it, in particular because of the creation or strengthening of a dominant position.

We are not aware of cases in which the CPA took somewhat special circumstances into consideration.

20 | Is there a special substantive test for joint ventures?

No. However, if the creation of a joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination is assessed in accordance with the criteria of article 6 of the Act on the Prevention of Restrictions of Competition (the Act).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Inter alia, the CPA investigates the intended concentration on the basis of the following:

- market position of the undertakings involved in the concentration;
- options for financing the undertakings involved;
- the structure of the market;
- choices and alternatives that are available to suppliers and customers and their access to sources of supply or the market itself;
- barriers to entry;
- supply and demand projections with regard to the relevant markets;
- benefits to intermediate and final customers; and
- technical and economic development (provided that it is advantageous for consumers and does not hinder competition).

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Act does not expressly mention non-competition issues such as industrial policy or public interest issues as being relevant for the assessment process. In practice, however, it is not unlikely that the CPA would take into account non-competition issues in a similar way to the European Commission.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies (described rather generally as 'technical and economic development') are part of the appraisal of the concentration and are taken into account under the condition that they are advantageous to the consumers and do not hinder competition.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Slovenian Competition Protection Agency (CPA) assesses whether the intended concentration would result in a significant impediment to effective competition within the territory of the Republic of Slovenia, or on a substantial part of it, in particular owing to the creation or strengthening of a dominant position. The parties may propose remedies at any time and submit comments and evidence to remove the CPA's concerns. However, ultimately, if the remedies proposed or comments submitted by the parties cannot eliminate the CPA's concern, it may issue a decision declaring the concentration incompatible with Slovenian competition rules.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

According to article 51 of the Act on the Prevention of Restrictions of Competition (the Act), the notifying party may submit remedies to eliminate serious doubts as to the compatibility of the concentration with Slovenian competition rules. The Act does not distinguish between structural and behavioural remedies. In practice, depending on the individual cases, both may be accepted by the CPA.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Remedies can be submitted at any time during the proceedings to remove serious doubts as to the compatibility of the concentration with Slovenian competition rules. In this case, the time limit for the CPA to issue its decision is extended by an additional 15 working days.

When assessing the proposed remedies, the CPA takes into account their nature and scope, as well as the likelihood of their effective and timely implementation. If accepted by the CPA, it specifies the adopted remedies, the obligations to ensure their implementation and supervision, and time limits for their implementation in the clearance decision.

Later on, the CPA may require the notifying party to provide a report on the implementation of the remedies imposed.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CPA was in the past conducting a market test in relation to remedies proposed by undertakings participating in a foreign-to-foreign merger (the transaction concerns the market for the wholesale supply of sports television channels). However, according to public sources, the merger was not cleared.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In the merger filing, inter alia, the parties have to provide information on indispensable ancillary restrictions related to the transaction. If the CPA issues a clearance decision, either in Phase I or Phase II, that decision is deemed to cover restrictions directly related to and necessary for the implementation of the intended concentration.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Slovenian Competition Protection Agency (CPA) publishes a list of notified concentrations on its website. Phase I decisions are also made public on the CPA's website. In a similar way, in Phase II proceedings both the fact that such proceedings have been initiated and the final decision are published on the CPA's website. The information on the initiation of Phase II proceedings states the names of the parties, a brief summary of the grounds for initiation of the proceedings, and invites third parties to submit their observations and comments. Decisions of the court issued in a judicial review against the decisions of the CPA are published on the CPA's website in a non-confidential version.

Third parties able to demonstrate their legally recognised interest may lodge an application for participation in the proceedings. Such a request needs to be filed with the CPA within 30 days from the publication of the initiation of proceedings. If the participation in the proceedings is granted, the third party may take part in the entire proceedings, receive access to the file, lodge statements and opinions and, ultimately, challenge the final decision issued by the CPA.

Apart from the above, any third parties, even without formally joining the proceedings, may submit comments and statements to the CPA at any stage of the Phase I and II proceedings. Although the CPA is not legally obliged to consider such information, it usually takes it into account when assessing the case.

Also, the CPA may, in the course of the proceedings, approach third parties (eg, competitors, customers, suppliers) on its own initiative, in particular via written requests for information.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CPA publishes a list of notified concentrations on its website. Phase I decisions are also made public on the CPA's website. In a similar way, in Phase II proceedings both the fact that such proceedings have been initiated and the final decision are published on the CPA's website. The information on the initiation of Phase II proceedings states the names of the parties, a brief summary of the grounds for initiation of the proceedings, and invites third parties to submit their observations and comments. Decisions of the court issued in a judicial review against the decisions of the CPA are published on the CPA's website in a non-confidential version.

Upon request, the CPA must protect the identity of the complainant or provider of other information, if this person requests protection, and shows that it is likely that disclosure may cause significant harm to it.

Access to the case file may only be granted to the parties to the proceedings. However, inter alia, the parties are not allowed to review or make copies of confidential information or information relating to confidential sources. The burden of proving the existence of such confidential information (eg, business secrets) rests with the undertaking claiming so. The parties may also be asked by the CPA to submit a non-confidential version of their respective documents. It is advisable to explicitly mark any confidential information as such already in the merger notification and any comments, statements and documents sent to the CPA.

The CPA may disclose confidential information that constitutes a business secret to the notifying parties if the need for disclosing this information prevails over the interest in protecting it. To the best of our knowledge, we are not aware of any such case of disclosure with regard to merger proceedings.

Information on the initiation of the procedure as well as the Phase I and II decisions published on the CPA's website are non-confidential versions from which business secrets of the parties have been removed (the CPA requests the parties upfront to provide non-confidential versions of the decisions).

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CPA is a member of the European Competition Network and the International Competition Network. It also cooperates with the OECD and maintains informal contacts with some competition authorities of non-EU countries in the region.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Legal actions for judicial review against the Slovenian Competition Protection Agency (CPA)'s decision can be filed with the Administrative Court of the Republic of Slovenia. The court generally decides without an oral hearing. The plaintiff may not put forward any new facts or evidence, unless the plaintiff was not given the chance to put forward facts and evidence in the proceedings in front of the CPA. An appeal against the decision of the Administrative Court of the Republic of Slovenia can be filed with the Supreme Court of the Republic of Slovenia.

We are not aware of the merger cases that actually went through judicial review, as the undertakings involved usually satisfy the concerns of the CPA by offering corrective measures (commitments).

Time frame

33 | What is the usual time frame for appeal or judicial review?

The legal action has to be filed with the Administrative Court of the Republic of Slovenia within 30 days of the date on which the decision of the CPA was served. Because the Administrative Court of the Republic of Slovenia has, in the course of the amendment of the Competition Act in August 2013, only recently become competent for judicial review in first instance, there is not yet much experience concerning its usual time frame for decision-making. The appeal procedure before the second instance court (ie, the Supreme Court of the Republic of Slovenia) usually takes between several months and one year until the court issues its decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, Slovenian Competition Protection Agency (CPA) was deciding on several merger notifications, whereby the CPA cleared some mergers only after the notifying parties proposed sufficient commitments. In several cases, the CPA conducted market tests in relation to the concentration or the proposed commitments. Otherwise, the number of the notified (and cleared) mergers has remained relatively stable throughout recent years.

Reform proposals

35 | Are there current proposals to change the legislation?

In February 2021, the Ministry of Economic Development and Technology published a draft proposal of the new Prevention of Restriction of Competition Act (ZPOmK-2). The proposed act transposes the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (Directive 2019/1) into the Slovenian legal system. Key changes introduced by the proposed act directly affecting merger control are:

- merging of the administrative and misdemeanour proceeding into one single and more efficient proceeding (pursuant to the current legislation, the CPA may impose fines only in separate misdemeanour proceedings, which follow the completion of the administrative proceedings); and
- international cooperation of competition authorities (service and enforcement of decisions of the authorities responsible for the protection of competition of other member states in Slovenia; service of preliminary findings on the alleged infringement to an undertaking having its registered office or property in another member state).

The proposal is in the process of preparation at the Ministry of Economic Development and Technology, whereas a draft has already been submitted for public consultation.

A new draft amendment of the Media Act has been proposed in 2020, introducing a combined procedure under the Prevention of Restriction of Competition Act with the concentration assessment procedure under the Media Act, which would be the sole responsibility of the CPA. The CPA publicly opposed the proposed amendment for various reasons, among others, the unclarity of the proposed procedure, certain definitions, set competences, and the role of the CPA, whereas the CPA is of the view that the procedures should remain separate.

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UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In the past few years, the Slovenian Competition Protection Agency appears to have become stricter in assessing notified concentrations and has also started to track non-notified concentrations (in particular, foreign-to-foreign mergers).

South Africa

Burton Phillips and Shawn van der Meulen
Webber Wentzel

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Act No. 89 of 1998 (the Act) and the regulations promulgated thereto. The Competition Amendment Act No. 18 of 2018 (the Amendment Act), which, but for certain provisions, is now largely in force, has introduced several potentially far-reaching amendments that seek to address the high levels of economic concentration and the ownership profile of the South African economy.

The Act is enforced by the Competition Commission (the Commission), as an investigative body, and the Competition Tribunal (the Tribunal), as the adjudicative body. Decisions of the Tribunal can be appealed or taken on review to the Competition Appeal Court (CAC). In circumstances where a competition matter raises constitutional issues or if the matter raises an arguable point of law of general public importance, such matters can also be referred to the Constitutional Court (CC).

Scope of legislation

2 | What kinds of mergers are caught?

The Act stipulates that parties to transactions that meet the following two requirements must notify and obtain the approval of the relevant competition authority. First, the transaction must constitute a 'merger' as defined in the Act. Second, the transaction must exceed the prescribed financial thresholds.

In terms of the Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. The Tribunal has found that a 'business' must be something to which a market turnover can be clearly attributed, represents a measurable and relatively permanent transfer of market share or productive capacity from one firm to another, or tends to increase concentration or give the acquiring firm a larger market share even though the asset does not increase productive capacity. The CAC subsequently amplified this to indicate that parties should consider whether a transaction results in the 'transfer of an identified set of activities and structures which can now be identified as a separate business undertaking and which could be pursued by the transferee'.

Mergers are categorised as either being small, intermediate or large, depending on which financial threshold is met. Only intermediate and large mergers require merger control approval, although the Commission can request parties to a small merger to apply for merger control approval where the Commission considers that the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds.

The Commission is responsible for investigating and issuing a decision in respect of small and intermediate mergers. Large mergers are adjudicated by the Tribunal following an investigation and recommendation by the Commission on whether the transaction should be approved, approved with conditions or prohibited.

3 | What types of joint ventures are caught?

The merger control provisions of the Act do not specifically refer to joint ventures, but the Act's definition of a merger is broad enough to catch any transaction that results in an acquisition of control by a joint venture (or either parent of the joint venture) over any business that is transferred or contributed to the joint venture. In this regard, the establishment of a new 'green field' joint venture that does not acquire control of any existing business may not require merger approval.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act provides a list of examples of situations in which a firm is deemed to control another firm, including if that firm beneficially owns more than half of the issued share capital of the other firm, holds or controls the majority of votes at the shareholder or board of directors levels of the other firm, or has the ability to materially influence the policy of the other firm in a manner comparable to, for example, a majority shareholder.

The competition authorities typically consider a firm to have material influence over the policy of another firm where the former has a required say on or veto over strategic issues such as the budget, business plan, appointment of senior management, and direction of commercial policy of the latter, or a casting vote in the event of a tie in voting in members meetings or board meetings of the latter (similar to the factors considered by the European Competition Commission).

However, this is not an exhaustive list, and there may be matters not involving the typical decisions referred to above, which are of such a nature that they are nevertheless material to the strategic direction of a particular business (such as approving borrowing plans in a capital-intensive business requiring large amounts of loan funding).

The question of whether parties to an internal reorganisation must apply for merger control approval has been a hotly debated topic in South Africa for many years. The Commission has generally taken a view that certain internal reorganisations are subject to the merger control provisions of the Act, whereas the CC's decision in *Competition Commission and Hosken Consolidated Investments Limited/Tsogo Sun Holdings Limited* seems to suggest that internal reorganisations need not be notified for merger control approval – this interpretation is, however, untested in relation to a specific internal reorganisation case.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Parties to an intermediate or large merger may not implement the merger until the relevant competition authority has issued a clearance certificate.

Parties to a merger that does not meet the relevant merger notification thresholds (a 'small merger') may implement the merger without the approval of the Commission. However, the Commission has the discretion to require parties to a small merger to apply for merger control approval within six months of the implementation date in circumstances where the Commission considers that the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. Moreover, the Commission's guidelines on small merger notifications state that, if at the time of entering into the transaction, any of the firms (or firms within their groups) are subject to a prohibited practice investigation by the Commission or respondents following a referral by the Commission of a prohibited practice investigation to the Tribunal, then the Commission will require the notification of the small merger. The Commission's guidelines on small merger notifications do not have the force of law and any merger parties may use their own discretion in deciding whether to voluntarily notify a small merger. In May 2021, the Commission invited public comment on proposed amendments to its guidelines on small merger notifications. Significantly, the amendments propose that, if certain criteria are met, the Commission must be informed of all small mergers and acquisitions where the merger parties operate in digital markets. The approach to all other small mergers is likely to remain the same. At the time of writing, these amendments have not yet been finalised.

A merger will be categorised as an intermediate merger if:

- the turnover of the target firm in, into or from South Africa or asset value in South Africa (whichever the highest) equals or exceeds 100 million rand; and
- the combined turnover in, into or from South Africa or asset value in South Africa of the acquiring firm (whichever the highest) and the turnover or asset value of the target firm (whichever the highest) equals or exceeds 600 million rand.

A merger will be categorised as a large merger where:

- the turnover of the target firm in, into or from South Africa or asset value in South Africa (whichever the highest) equals or exceeds 190 million rand; and
- the combined turnover in, into or from South Africa of the acquiring firm (whichever is highest) and the turnover or asset value of the target firm (whichever the highest) equals or exceeds 6.6 billion rand.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Parties to a transaction that constitutes an intermediate or large merger must apply for merger control approval and may not implement the merger until such time as the Commission or Tribunal (as the case may be) has issued a merger clearance certificate.

The Commission can call upon parties to a small merger to apply for merger control approval in which circumstances the Commission may ask the parties to take no further steps in implementing the merger.

Mergers involving banks and insurance companies may be excluded from the suspensory provisions of the Act in circumstances where consent or approval is required in terms of the Banks Act, Financial Sector Regulation Act and Financial Markets Act and where the Minister of Finance has issued the relevant notice to the Commission.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Act applies to all economic activity within or having an effect within South Africa. The competition authorities have taken a broad view on what constitutes 'economic activity' and it would cover circumstances where firms outside of South Africa render services or supply goods to customers in South Africa. If the parties' annual revenues from sales in, into or from South Africa meet the relevant financial threshold for notification, a merger notification would be required.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act provides that the Commission and Tribunal may not make an order in relation to an intermediate or large merger where consent or approval is required in terms of the Banks Act, Financial Sector Regulation Act and Financial Markets Act and where the Minister of Finance has issued a notice to the Commission certifying that it is in the 'public interest' that the jurisdiction of the Act is excluded.

This public interest requirement has typically only been applied in circumstances where applying for the approval of a merger by the Commission or Tribunal would result in systemic or economic risk (due to timing or confidentiality reasons) as a result of a failing financial institution. Nevertheless, there is precedent for the Minister of Finance excluding the jurisdiction of the competition authorities even after a merger application has been filed to reduce confusion arising from approval having to be obtained from more than one regulator.

The Amendment Act will introduce provisions that allow the president of South Africa to intervene in mergers where the acquiring firm is foreign and where the merger may adversely affect South Africa's national security interests. The intervention by the president will take place via a committee, which is to be appointed by the president and which will comprise of cabinet members and other public officials. At the time of writing, this provision is not yet in effect.

The foreign acquiring firm will be required to notify the committee of an intermediate or large merger. The committee must consider whether the merger will have an adverse effect on South Africa's national security interests, and in doing so, may consult and seek advice from the competition authorities or any other regulatory authority or public institution. The committee will effectively have a veto over mergers that are deemed to have a national security interest as the Commission and Tribunal may not consider a merger if the committee was not notified of the merger and may not approve the transaction if it was prohibited by the committee.

The president is required to publish a list of national security interests and must take into account the following factors in determining what constitutes a national security interest: the potential impact of the merger on defence capabilities; sensitive technology; infrastructure security; supply of critical goods or services; foreign surveillance risks; foreign relations; terrorism; and the economic and social stability of the country.

This new provision is exceptionally broad and may result in many foreign mergers being subject to an additional level of scrutiny, which in turn may lead to procedural and timing delays and additional costs.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing a merger, but intermediate or large mergers may not be implemented until the merger has been approved by the relevant competition authority. The sanctions for failing to notify an intermediate or large merger may include: an administrative penalty of up to 10 per cent of a firm's South African turnover and or exports from South Africa; and any other order deemed appropriate by the Competition Tribunal (the Tribunal), including the unbundling of the merger and divestiture (most likely only in mergers giving rise to competition concerns). In terms of amendments introduced by the Competition Amendment Act No. 18 of 2018, an administrative penalty of up to 25 per cent of the firm's annual turnover in and exports from South Africa may also be imposed for a repeat contravention, and the administrative penalty may be increased to include the turnover of any firms controlling the respondent where the firms knew or should have known that the respondent was engaging in the prohibited conduct. Such firms may also be jointly and severally liable for the payment of the administrative penalty.

To date, the competition authorities have only imposed administrative penalties for failing to receive merger control approval and the penalties to date have typically ranged between 350,000 and 2 million rand.

10 Which parties are responsible for filing and are filing fees required?

The acquiring and target firm are responsible for filing a joint merger application. The applicable filings fees are set out in the table below.

Merger classification	Filing fee
Small merger	No fee
Intermediate merger	165,000 rand
Large merger	550,000 rand

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The implementation of intermediate and large mergers must be suspended until the merger has been approved by the relevant competition authority. For intermediate mergers, the Competition Commission (Commission) has an initial period of 20 business days within which to approve or prohibit a merger. This period can be extended by a further 40 business days, at the Commission's discretion (ie, a maximum of 60 business days).

In the case of large mergers, the Commission has an initial 40 business days to investigate the merger and make a recommendation to the Tribunal to approve or prohibit a merger. The Commission can, however, apply to the Tribunal to extend the 40-business-day investigation period by up to 15 business days at a time. The merger parties may consent or object to such an extension request. The number of extensions requested by the Commission typically depends on the complexity of the merger. Once the Commission has made its recommendation to the Tribunal, the Tribunal must convene a hearing within 10 business days of the Commission making its recommendation to: make a final decision on the merger; or, in the case of a contested merger or a merger where third parties wish to participate in the Tribunal proceedings, determine the procedure and dates for the hearing of the matter, including any interlocutory procedures (ie, discovery, procedures for intervening parties, filing of witness statements or expert reports, etc) as may be required.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The sanctions for implementing a merger before clearance are the same as the sanctions that may be imposed for failure to notify. The Commission has published Guidelines for the determination administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act No. 89 of 1998 (the Act) (the Guidelines). The Guidelines could result in higher administrative penalties being imposed for prior implementation in future. The Guidelines set out a series of steps to be followed by the Commission when determining the administrative penalty.

Under the Guidelines, as a first step, the base amount for the administrative penalty will be double the filing fee (ie, 330,000 and 1.1 million rand for intermediate and large mergers, respectively). This step is followed by multiplying the base amount by a percentage relevant to the duration of the contravention. For example, if the conduct endured for less than a year, 50 per cent is added for every month during which the conduct was ongoing, 75 per cent and 100 per cent is added for every month if the conduct endured for between one and two years, or for longer than two years, respectively. Mitigating and aggravating factors can also be taken into account in determining the appropriate penalty.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions for closing before clearance apply equally to local and foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act does not provide for any hold-separate arrangements, but parties who wish to implement foreign-to-foreign mergers prior to obtaining approval in South Africa have in the past established a 'hold-separate' arrangement to ring-fence the South African leg of the merger. While the Commission or Tribunal has not expressly proffered a view on such arrangements, it has in the past been accepted in circumstances where the parties are able to illustrate that the South African leg of a global merger can be ring-fenced and will not be implemented prior to approval being granted.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no specific merger control rules applicable to public takeover bids. To the extent that such bids meet the definition of a 'merger' in the Act (ie, results in a firm acquiring control over the whole or part of the business of another firm), such bids require the approval of the competition authorities, if the prescribed financial thresholds are met. In the case of a hostile takeover, the Commission's Rules do provide that parties can request to file a separate notification (eg, in the case of a target refusing to assist with the preparation of a joint notification).

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Regulations to the Act prescribe certain forms and schedules to be completed on behalf of the acquiring and target firm. The information required in these schedules include the control structure of the acquiring firm or group, its controlling interests in South Africa, details of the largest customers and competitors of the parties to the merger and the market shares of the parties in respect of each relevant market.

In March 2021, the Minister of Trade, Industry and Competition published proposed amendments to the forms, rules and regulations of the Competition Commission. Significantly, comprehensive amendments have been proposed to the merger filing forms for the first time in many years. These amendments will make the preparation of merger notifications substantially more onerous and time-consuming for merger parties. Firms will have to provide extensive information relating to the effect of the merger on public interest considerations, as well as more detailed information on their proposed transactions. At the time of writing, these amendments have not yet been finalised.

It is a criminal offence under the Act to provide the Commission with false information. The sanction for such offence is a fine of up to 500,000 rand, imprisonment for a period of up to 10 years, or both a fine and imprisonment. In addition, if information is missing or certain prescribed documentation is not provided, the filing may be deemed incomplete, and the review period will not commence until the outstanding information or documentation is provided.

Documents relating to the merger that must be filed include: all merger agreements, any document including minutes, reports, presentations and summaries prepared for or by the board of directors of both the acquiring and target firms relating to the transaction, financial statements and the parties' most recent business plan (or budget if a business plan is not available). If any of these documents are not available, the relevant firm must submit a sworn affidavit or declaration confirming why such documents are not available or do not exist.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

After a merger is filed with the Commission, an investigating team will be assigned. The investigating team will liaise with the parties' legal counsel throughout the investigation process. The typical steps taken by the investigating team during the investigation include contacting customers and competitors of the parties to get their views on the merger, sending out questionnaires to the parties or other market participants, conducting interviews or conference calls with relevant stakeholders, conducting site visits (if necessary) and meeting with the parties. Consultations with the Commission prior to filing a merger are not required. However, should the parties wish to meet with the Commission prior to filing, such a meeting can be arranged. These consultations may be helpful in extremely time-sensitive transactions, or transactions that are likely to have a substantial public interest impact (eg, significant job losses).

Once the investigating team has finalised its investigation, it will submit a report to the Commission's Executive Committee for decision-making.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The implementation of intermediate and large mergers must be suspended until the merger has been approved by the relevant competition authority. For intermediate mergers, the Commission has an initial period of 20 business days within which to approve or prohibit a merger. This period can be extended by a further 40 business days, at the Commission's discretion (ie, a maximum of 60 business days).

In the case of large mergers, the Commission has an initial 40 business days to investigate the merger and make a recommendation to the Tribunal to approve or prohibit a merger. The Commission can, however, apply to the Tribunal to extend the 40-business-day investigation period by up to 15 business days at a time. The merger parties may consent or object to such an extension request. The number of extensions requested by the Commission typically depends on the complexity of the merger. Once the Commission has made its recommendation to the Tribunal, the Tribunal must convene a hearing within 10 business days of the Commission making its recommendation to: make a final decision on the merger; or, in the case of a contested merger or a merger where third parties wish to participate in the Tribunal proceedings, determine the procedure and dates for the hearing of the matter, including any interlocutory procedures (ie, discovery, procedures for intervening parties, filing of witness statements or expert reports, etc) as may be required.

The Commission has published service standards for the review of mergers according to complexity. The table below summarises the Commission's anticipated time periods for approval under its service standards. These periods are not binding on the Commission and merely serve to indicate the typical time periods within which the Commission seeks to review mergers.

Type of merger	Description	Service standard
Phase 1	Non-complex Parties' market share is below 15 per cent, no complex control structure and no public interest concerns arise	20 business days
Phase 2	Complex Transactions involving actual or potential competitors, parties in a vertical (supply) relationship, where the parties hold more than a 15 per cent market share, or raising public interest concerns	45 business days
Phase 3	Very complex Transactions involving close competitors, high market shares, and requiring specific documents and information from parties (in addition to the prescribed documents and information) as well as third parties	60 business days (intermediate merger) 120 business days (large merger)

Although the Commission aims to finalise Phase 3 large mergers within 120 business days, these can often take longer to finalise, particularly in circumstances where third parties have raised issues with the merger. There is no formal process in terms of which the merger review period can be fast tracked. However, with mergers that are extremely time sensitive and where delays could result in significant consequences, such as job losses or the closure of a firm, the parties can engage with the Commission prior to filing or during the investigation to explain the challenges and work with the Commission in an attempt to expedite the review.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test has two legs, a competition assessment and a public interest assessment. The competition assessment considers whether the merger is likely to substantially prevent or lessen competition in any relevant market, and if so, whether the merger can be justified on the basis of any technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect of the merger. The public interest assessment considers the effect of the merger on certain public interest grounds set out in the Competition Act No. 89 of 1998 (the Act).

In considering whether a merger is likely to substantially prevent or lessen competition, the competition authorities must assess the strength of competition in the relevant markets, and the probability that the firms in question would behave competitively or cooperatively, by taking into account any relevant factors, including:

- whether the merger is likely to result in the removal of an effective competitor;

- the actual or potential level of import competition;
- ease of entry into the relevant market;
- the level and trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- market dynamics such as growth, innovation and product differentiation;
- the nature and extent of vertical integration in the market; and
- whether the business or part of the business of a party to the merger has failed or is likely to fail (the failing firm defence).

Three further factors that Competition Amendment Act No. 18 of 2018 (the Amendment Act) has introduced are: the extent of ownership by a party to the merger in another firm or other firms in related markets; the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission (the Commission).

In considering whether the merger can be justified on public interest grounds, the Commission or Competition Tribunal (Tribunal) must consider the effect of the merger on:

- employment;
- a particular industrial sector or region;
- 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; and
- the ability of national industries to compete in international markets.

In terms of the Amendment Act, firms now also need to consider 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.

20 | Is there a special substantive test for joint ventures?

No. The same substantive test as for clearance is applied to all transactions.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The theories of harm investigated by the competition authorities typically depend on the type of merger being considered. In the context of horizontal mergers, the authorities will generally consider whether the transaction will result in any unilateral effects (ie, whether, post-merger, the parties will have the ability to profitably increase prices or otherwise unilaterally exercise market power) or coordinated effects (ie, whether the merger will increase the ability of the parties to coordinate their behaviour with that of their competitors). In this regard, the authorities also consider whether mergers are likely to result in information sharing between competitors because of firms having common shareholding or ownership in competing firms.

In vertical mergers, the primary theory of harm is whether the merger is likely to result in the foreclosure of any competitors of the merging parties at any level of the supply chain and whether this is likely to result in the substantial lessening or prevention of competition. This theory of harm is typically of concern when one or both of the parties have high market shares in their respective market or markets, or is a large customer or supplier of third parties within the supply chain, such that the vertical integration of the merging parties would result in competitors being foreclosed from the relevant market. In the case of mergers involving firms in different product markets and no vertical relationship (conglomerate mergers), the authorities will consider whether the merger gives rise to any conglomerate or portfolio effects. This includes considering whether the merged entity could foreclose competitors through tying, bundling products, exclusive arrangements or otherwise give the merged entity market power.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

When determining whether a merger can or cannot be justified, the Act prescribes that the authorities must consider certain public interest issues. Public interest issues are therefore a critical part of the merger review process.

The Commission's Guidelines on the Assessment of Public Interest Provisions in Merger Regulation sets out the general approach that the Commission will follow, and the information the Commission is likely to require in respect of each of the public interest factors listed in the substantive test. In terms of the Guidelines, the Commission will assess the effect of the merger on each of the relevant public interest factors with reference to whether: the effect is merger specific; substantial; and there are any remedies or conditions to address the negative public interest effect.

The effect of mergers on employment is a key concern for the competition authorities. Most mergers resulting in job losses (often even in cases where job losses are not substantial) are approved subject to one or more conditions relating to employment. For example, moratoriums on the number of job losses, commitments to train or reskill staff, commitments to redeploy staff in other areas of the parties' businesses or providing counselling and assistance in finding alternative employment.

Generally, public interest issues arising from a merger are addressed by way of conditions. Other conditions imposed by the Tribunal to address public interest concerns include:

- commitments by the merging parties to maintain local production facilities, arrangements with local manufacturers, local head offices and local supply or sourcing relationships;
- establishing supplier development funds for technical and financial support and assistance for small and medium-sized businesses or businesses owned by historically disadvantaged groups;
- commitments to develop communities where the merger parties conduct business activities;
- establishing skills development and training programmes;
- commitments to make a specified investment within a certain period of time post-merger;
- commitments to increase broad-based black economic empowerment ownership levels; and
- the establishment of employee share ownership schemes.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

To the extent that a merger is likely to substantially prevent or lessen competition, the Act requires the authorities to consider whether there are any technological, efficiency or other pro-competitive gains resulting (or likely to result) from the merger; which outweigh the negative effect of the merger on competition; and which would not likely be achieved without the merger. In terms of approach, given that efficiencies are only relevant in transactions that are likely to result in a substantial lessening or prevention of competition, efficiency arguments need not be raised upfront, and parties often wait until the Commission has expressed a view as to the effect on competition before raising any efficiency arguments.

In the *Trident Steel/Dorbyl* transaction, the Tribunal adopted the following two-pronged approach to assessing efficiencies: where efficiencies can be qualitatively and quantitatively verified, it need not be shown that consumers will benefit from a merger (ie, evidence of consumer benefit will be less compelling); and, where efficiencies are not clearly verifiable, pass-through or benefit to consumers must be illustrated.

The most recent Tribunal decision dealing with efficiencies is the *Pioneer Hi-Bred/Pannar Seed* transaction. The merger was taken on appeal to the Competition Appeal Court (CAC) by the parties after initially being prohibited by the Tribunal (it was considered a three-to-two merger). On appeal, the CAC found that without the merger the business of the South African-based Pannar Seed would decline and ultimately fail. This would result in a loss of significant and important resources. The CAC also found that the merger would result in the market leader being constrained and will ultimately result in long-term dynamic efficiency improvements, improvements in the quality of seed produced and ensure competitive pricing. The merger was ultimately approved by the CAC, subject to various conditions, some of which were aimed at achieving these efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Commission (the Commission), in the case of small and intermediate mergers, or Competition Tribunal (the Tribunal), in the case of large mergers, can approve, approve subject to conditions, or prohibit a merger. Parties to an intermediate merger can ask the Tribunal to reconsider a decision by the Commission to prohibit or approve a transaction subject to conditions, whereas a decision by the Tribunal can be appealed to the Competition Appeal Court.

In terms of the Competition Amendment Act No. 18 of 2018 (the Amendment Act), the Commission or Tribunal may make any appropriate decision regarding any condition relating to their prior approval of a merger.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy competition issues with divestment undertakings or behavioural remedies. The remedies are typically prepared by the merger parties with input from the Commission and both the Commission and Tribunal prefer the remedies to be tested with market participants before issuing a decision.

Over the past three years, some examples of mergers approved with divestment undertakings include the *Thabong Coal/South32, BASF/Bayer, Elanco/Bayer* and *Bayer/Monsanto* mergers.

Over the same period, a number of mergers were approved subject to a range of behavioural remedies, primarily relating to information exchange and cross-directorships or shareholdings. In these instances, the mergers were approved subject to undertakings not to exchange competitively sensitive information and limitations on the appointment of common directors. Over the past few years, there have been noticeable increases in the number of mergers approved subject to these types of conditions, which are primarily aimed at preventing coordinated conduct between competitors, and other potentially collusive activities.

Other common behavioural remedies include the obligation to amend restraint of trade clauses, notify composite acquisitions within specified time periods, notify acquisitions that do not meet the prescribed thresholds, implement competition compliance policies, and continue existing supply arrangements.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The time periods relating to the implementation of remedies are usually agreed between the parties and the Commission, but the Commission typically requires that the remedies be implemented within a short period of time following approval (eg, 12 to 18 months).

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The competition authorities do not have a different approach in assessing foreign-to-foreign mergers compared to mergers involving local firms. However, the Amendment Act will introduce provisions that allow the president of South Africa to intervene in mergers where the acquiring firm is foreign and where the merger may adversely affect South Africa's national security interests. The intervention by the president will take place via a committee, which is to be appointed by the president and which will comprise cabinet members and other public officials. At the time of writing, this provision is not yet in effect.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is not uncommon for the competition authorities to impose behavioural conditions that cover ancillary restrictions such as restraints of trade. For example, the scope or duration of the restraint could be limited. Generally, the competition authorities require that restraints of trade be reduced to three years, depending on the circumstances of each case.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The customers and competitors of the merger parties are typically contacted by the Competition Commission (the Commission) as part of its investigation of a merger. Depending on the complexity of the matter, the Commission may issue detailed information requests and ask customers and competitors to respond thereto.

Customers and competitors may also contact the Commission during the investigation period and make submissions on a voluntary basis and without being approached or asked to do so by the Commission.

Large mergers are adjudicated by the Competition Tribunal (the Tribunal) after a public hearing is held. The hearing represents a further opportunity for third parties to make submissions in circumstances where they do not agree with the Commission's recommendation. However, only the Minister of Trade, Industry and Competition and trade unions or employee representatives of the parties have an automatic right of participation in merger proceedings. Other third parties will need to make a formal application to intervene and demonstrate that they have a material interest in the matter and can assist the Tribunal (by providing relevant information through discovery of documents, oral submissions or witnesses) in its adjudication of the matter. In practice, this is a low threshold.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Parties can claim information as being confidential if the information comprises 'trade, business or industrial information that belongs [to the party], has a particular economic value, and is not generally available to or known to third parties'. The Commission may not disclose information over which a confidentiality claim has been filed. Third parties seeking access to information that has been claimed as confidential must apply to the Tribunal for an order granting them access to such information. The Tribunal will consider whether the information is confidential and make an appropriate order.

The Commission does publish a list of mergers filed, although this list is not always up to date, and there is some publicity around the adjudication of mergers. The Commission issues weekly media statements wherein it identifies which intermediate mergers have been approved or prohibited by providing a concise summary of each adjudicated merger. The Commission is also required to publish in the government gazette a notice of its decisions and will make available to the merger parties a confidential version of its reasons for decision. In respect of large mergers, the Commission will in its media statement also indicate whether it has recommended that a particular merger be approved or prohibited.

The Tribunal issues weekly media statements indicating which large mergers will be heard by it in the coming week. The Tribunal's decision and reasons for decision are published on its website, but its reasons do not contain confidential information. The confidential version of its reasons for decision is only made available to the merger parties.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission has concluded memorandums of understanding (MOUs) with several competition authorities, but there is no formal requirement for the competition authorities to cooperate. Irrespective of whether MOUs have been signed, the Commission does cooperate with other competition authorities where multi-jurisdictional mergers have been filed and in particular when there is a high-profile merger. In this regard, the authorities will exchange information relating to market definition, theories of harm and conditions to remedy competition or public interest concerns.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The merger parties can ask the Competition Tribunal (the Tribunal) to reconsider a decision by the Competition Commission (the Commission), whereas decisions by the Tribunal can be appealed to the Competition Appeal Court (CAC). In terms of the Competition Amendment Act No. 18 of 2018, merger decisions of the Tribunal can now not only be taken on appeal by the merger parties, but also by the Commission and the Minister of Trade, Industry and Competition.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Appeal or review proceedings can take up to six months to complete from the date on which the appeal or review application is filed. The Tribunal and the CAC rules prescribe the time periods within which such applications must be brought and the various answering and replying pleadings filed. Once pleadings have closed, the Tribunal or CAC will set down a date for the hearing of the appeal or review. Matters of an urgent nature can be expedited depending on the reasons for the urgency and the availability of the relevant decision-making body.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

During the 2019/2020 financial year (ending March 2020), the Competition Commission (the Commission) finalised 318 merger investigations, 278 mergers were approved without conditions, 33 with conditions and seven were prohibited.

The Commission has identified certain sectors that it considers priority sectors. In the context of mergers, these are sectors that the Commission views as having high levels of concentration. These sectors include food and agro-processing, infrastructure and construction, energy, banking and financial services, information and communication technology, healthcare, transport, and intermediate industrial input products. In terms of the Competition Amendment Act No. 18 of 2018 (the Amendment Act), the competition authorities are mandated to address economic concentration and to promote economic transformation. Therefore, going forward, the competition authorities, in the context of mergers, will focus particularly on addressing concentration levels in these sectors as well as the participation by small, medium and micro-sized businesses in the economy and ownership or control of businesses by historically disadvantaged groups.

The Commission is also finalising a number of market inquiries in different sectors. These include private healthcare, public passenger transport and the grocery retail sector. In early 2021, the Commission launched a new market inquiry into online intermediation platforms. Although these inquiries are distinct from the Commission's merger investigations, mergers in these sectors are likely to attract closer scrutiny.

Reform proposals

35 | Are there current proposals to change the legislation?

The Competition Amendment Act No. 18 of 2018 (the Amendment Act) was signed into law on 14 February 2019 and, excluding certain provisions, is mostly now in effect. The Amendment Act provides, inter alia, for changes to the merger control rules and the introduction of national security clearance for certain deals involving foreign purchasers. The Amendment Act introduces additional factors to be considered by the authorities in assessing the competition and public interest factors.

The national security clearance provision provides for the president to constitute a Committee with powers to intervene in respect of mergers involving foreign acquiring firms, and which may adversely affect the country's national security interests. The president is required to publish a list of national security interests, taking into account factors such as the potential impact on defence capabilities, sensitive technology, infrastructure security, supply of critical goods and services, foreign surveillance risks, foreign relations, terrorism and national stability. A foreign firm filing a merger would be required to file a notice with the Committee. At the time of writing, this provision is not yet in effect.

The amendments are aimed at achieving the government's objectives of dealing with the high levels of economic concentration in South African markets, and the lack of transformation of the ownership (by historically disadvantaged groups) demographics of South African businesses. This is likely to result in the authorities seeking various conditions or undertakings from parties aimed at achieving these objectives.

In May 2021, the Commission invited public comment on proposed amendments to its Small Merger Guidelines (the Guidelines). Significantly, the Guidelines propose that, if certain criteria are met, the Commission must be informed of all small mergers and acquisitions where the merger parties operate in digital markets. The approach to all other small mergers is likely to remain the same. At the time of writing, these Guidelines have not yet been finalised.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In March 2021, the Minister of Trade, Industry and Competition published an invitation for public comment on proposed amendments to the forms, rules and regulations of the Competition Commission (the Commission). Significantly, comprehensive amendments have been proposed to the merger filing forms for the first time in many years. These amendments will make the preparation of merger notifications substantially more onerous and time-consuming for merger parties. Firms will have to provide extensive information relating to the effect of the merger on public interest considerations, as well as more detailed information on their proposed transactions. For instance, Merger Notice Form CC4(1) will now require merger parties to provide additional detailed information on each of the public interest considerations outlined in section 12A(3) of the Competition Act 89 of 1998 (the Act). This will, among other things, include information relating to the ability of small, medium and micro-sized enterprises (SMMEs) and firms owned and controlled by historically disadvantaged persons (HDPs) to effectively enter into, participate in or expand within the market, and the promotion of a greater spread of ownership, in particular whether the merger increases levels of ownership by HDPs and workers in firms in the market. At the time of writing, these amendments have not yet been finalised.

In May 2021, the Commission invited public comment on proposed amendments to its Small Merger Guidelines (the Guidelines). Significantly, the Guidelines propose that, if certain criteria are met, the Commission must be informed of all small mergers and acquisitions where the merger parties operate in digital markets. The approach to all other small mergers is likely to remain the same. At the time of writing, these Guidelines have not been finalised.

A number of key merger-related decisions have been handed down over the past year:

- In September 2020, the Competition Tribunal (the Tribunal) approved the merger between JSE Ltd and Link Market Services South Africa (Pty) Ltd (LMS). In December 2019, after the Commission prohibited the merger due to competition concerns, the merger parties contended that the merger will not result in any conglomerate effects and filed a request for reconsideration at the Tribunal. Computershare, a competitor of LMS, was allowed to intervene in the consideration process. In September 2020, the Tribunal conditionally approved the merger subject to an extensive range of conditions relating to interactions with issuers and sponsors, information sharing, and the selection of service providers.
- The Commission called for the notification of the small merger between Google LLC (US) and Fitbit Inc (US). This is one of the first mergers involving a large technology firm in the digital space that the authority has had to consider. The transaction was approved subject to several stringent conditions (for 10 years) including continued access by third parties to Fitbit's data, and access to the Android Operating System for all competing manufacturers of wrist-worn wearable devices.
- Mergers involving failing firms or firms in distress were also common. Employment and local procurement-related conditions were imposed in several mergers. For instance, 422 jobs were saved as a result of the merger where Blue Falcon 188 Trading (Pty) Ltd acquired portions and assets of the 'John Craig' Business, a Division of Pepkor Speciality (Pty) Ltd. The Tribunal also approved the proposed merger whereby Foschini Retail Group (Pty) Ltd will acquire Edcon's Jet Division, namely the assets and business conducted by Edcon Ltd as a going concern. As one of the conditions imposed in this merger, the merged entity committed to ensuring that Jet stores maintain at least the same ratio of procurement of apparel products from South African manufacturers and suppliers.
- A few firms also applied to the Tribunal to amend certain merger conditions as a result of the covid-19 pandemic. For example, Coca-Cola Beverages South Africa (Pty) Ltd brought a variation application before the Tribunal to amend certain merger conditions imposed in two previous mergers. These amendments related to increasing broad-based black economic empowerment ownership in the merger entity and the introduction of an employee share ownership scheme.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The relevant legislation principally consists of the Monopoly Regulation and Fair Trade Act (MRFTA), which was first enacted in 1980. Additional legal authority is found in the Enforcement Decree promulgated pursuant to the MRFTA, as well as the guidelines and standards issued by the Korea Fair Trade Commission (KFTC). The KFTC is the regulatory authority that overseas and enforces antitrust and competition laws in Korea.

Scope of legislation

2 What kinds of mergers are caught?

The following types of transactions are notifiable under article 12(1) of the MRFTA, provided that they meet the jurisdictional thresholds:

- the acquisition of 20 per cent (15 per cent in the case of a company publicly listed in Korea) or more of the voting shares of another company;
- the acquisition of additional voting shares of another company by a shareholder who already owns 20 per cent (15 per cent in the case of a company publicly listed in Korea) or more of the voting shares of a company, which results in such shareholder becoming the largest shareholder of such company;
- the acquisition of all or a substantial part of the business or assets of another company (provided that such business or assets are at least 5 billion won or 10 per cent of such company's total assets);
- the statutory merger of one company with another company;
- the establishment of a new joint venture company; and
- an interlocking directorate, which refers to the arrangement where a director, an officer or an employee of a company concurrently serves as a registered director of another company (excluding the case where the interlocking directorate is between affiliated companies).

3 What types of joint ventures are caught?

The establishment of a new joint venture company by two or more parties will be notifiable if it meets the jurisdictional thresholds.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Control is not one of the factors considered in determining whether a particular business combination is notifiable. There are cases where a business combination may still be notifiable even if the acquiring party does not acquire control of the target company, as long as the acquiring party acquires 20 per cent (15 per cent when the target company is a publicly listed company in Korea) or more of shares of the target company. Thus, a business combination that does not result in the acquisition of control may still be caught where a transaction meets the jurisdictional thresholds.

The concept of control is important when the KFTC reviews the business combination for any anticompetitive effect. That is, if the business combination does not give rise to the acquiring party's obtaining control of the target company, such a business combination is generally presumed to have no anticompetitive effect.

In the case of a stock deal or establishment of a joint venture company, an ownership ratio of 50 per cent or more will be regarded as control. In addition, even if the acquiring party's ownership ratio in the target company is below 50 per cent, the acquiring party will be regarded as having control over the target company if the acquiring party can wield substantial influence over the general management of the target company considering various factors, including the status of interlocking directorate, degree of stock ownership dispersion, relationship among shareholders and business relationship between the acquiring party and the target company. In the case of an interlocking directorate, control is recognised if the number of interlocking directors is a third or more of the total number of directors of the target company, or one or more of the interlocking directors is appointed as a representative director who can wield substantial influence over the general management of the target company. In the case of the establishment of a new company, control is assumed to have been acquired if (1) two or more of the companies participating in the establishment of a new company jointly own 50 per cent or more of the shares of the newly established company and (2) any of the other control factors for stock deals described above is met. On the other hand, control is always recognised in asset deals and statutory mergers.

In addition, the KFTC's Merger Review Guidelines introduces the concept of 'joint control'. That is, even if the acquiring party cannot exercise sole control over the target company, if it has the ability to exert material influence over the target company together with a co-acquiring company or an existing shareholder, the acquiring party is deemed to have control over the target company. According to the KFTC's Merger Review Guidelines, the KFTC determines whether there is joint control by considering various factors, including ownership stake, power to designate directors and officers, power to veto key business decisions, contractual commitment to jointly exercise voting rights, and administrative power to operate the business.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The general jurisdictional thresholds for notification are as follows:

- a party (including its affiliates that are affiliates both before and after the completion of the business combination) to the business

combination should have total worldwide assets or annual worldwide turnover of 300 billion won or more as of the most recent fiscal year end; and
- the other party (including its affiliates that are affiliates both before and after the completion of the business combination) to the business combination should have total worldwide assets or annual worldwide turnover of 30 billion won or more as of the most recent fiscal year end.

In the case of an asset deal (ie, the acquisition of all or substantial part of the business or assets of the target company), the same thresholds apply other than respect to the asset or business transferring company whose total assets and turnover are determined instead on a stand-alone basis without adding those of its affiliates.

Further, the newly amended MRFTA, which will take effect as of 30 December 2021, introduces a 'size-of-transaction test' to impose a filing obligation even if the target company's turnover or total assets do not meet the foregoing thresholds. Based on this new standard, a transaction that previously may not have been caught by the jurisdictional thresholds will be notifiable if (1) the transaction value (ie, the total consideration to be paid in the transaction) exceeds a certain level and (2) the target company has a significant presence in the relevant market in Korea. Details of the size-of-transaction test including the transaction value threshold amount will be prescribed in the upcoming amendment to the Enforcement Decree of the MRFTA.

If in addition to the above thresholds having been satisfied, any party to the business combination has total worldwide assets or annual worldwide turnover of 2 trillion won or more, the notification is a pre-closing obligation and the business combination cannot be consummated until clearance is provided by the KFTC. Otherwise, the notification is a post-closing requirement.

Even if the jurisdictional thresholds are not met, the KFTC may, at its own initiative, conduct a review of any business combination that it determines may potentially restrict competition in any relevant market.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing with the KFTC is a mandatory requirement as long as the parties meet the above-mentioned requirements. Notification may be pre-closing or post-closing, depending on the type of business combination and amount of the respective parties' total assets or turnover. The parties can opt to make a voluntary request for a preliminary review of the transaction even before a triggering event takes place.

However, there are some exceptions to the mandatory filing requirement. For example, if a company acquires shares of an 'investment company' under the Financial Investment Services and Capital Markets Act, such company will not be subject to merger notification requirements under the MRFTA. Also, there will be no notification requirement if the head of the concerned central administrative agency has consulted in advance with the KFTC regarding the business combination under the provisions of a different legislation.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

For foreign-to-foreign mergers, in addition to the general jurisdictional thresholds, a local nexus requirement must also be satisfied to trigger the notification obligation. A foreign-to-foreign merger is deemed to satisfy the local nexus requirement if the foreign acquiring company and the foreign target company each has annual turnover in Korea of 30 billion won or more during the most recently ended fiscal year.

If only the target company is foreign, while the acquiring party is domestic, only the foreign target company needs to meet the local nexus requirement. In contrast, if only the acquiring party is foreign, and the target company is domestic, the business combination is regarded as a domestic business combination and the local nexus requirement does not apply. In the case of an establishment of a joint venture company in Korea, the local nexus requirement does not apply, even if the companies participating in the establishment of the joint venture company are foreign companies.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In principle, all business combination notifications need to be filed with the KFTC. However, the relevant sector regulators in cooperation with the KFTC may have the authority to review and approve certain types of business combinations. The following represents some of the regulators having such authority:
- the Ministry of Science and ICT (pursuant to the Telecommunications Business Act);
- the Financial Supervisory Commission (pursuant to the Act on the Structural Improvement of the Financial Industry);
- the Financial Supervisory Commission (pursuant to the Financial Holding Companies Act); and
- the Ministry of Science and ICT and the Korea Communications Commission (pursuant to the Broadcasting Act).

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

In principle, a filing needs to be made by the acquiring party within 30 days after the consummation of the underlying transactions (such as a merger or the acquisition of shares). However, if a large company (with total assets or annual turnover of 2 trillion won or more on a consolidated basis) is involved in the business combination (except for the case of an interlocking directorate), the notification becomes a pre-closing obligation, in which case, the filing must be made after the date of signing of the transaction agreement and before the closing date, meaning that the transaction for the business combination cannot be consummated until clearance is received from the Korea Fair Trade Commission (KFTC).

Under the Monopoly Regulation and Fair Trade Act (MRFTA), a failure to file a business combination report may result in the imposition of an administrative fine of up to 100 million won. In 2020, the KFTC imposed administrative fines totalling 110 million won in 12 cases for failure to file.

10 Which parties are responsible for filing and are filing fees required?

The acquiring company is responsible for reporting the business combination to the KFTC. In the case of a joint venture company establishment, the party having the largest shareholding in the company is responsible for filing. There are no filing fees in Korea.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

All notifications (both pre-merger and post-merger notifications) are subject to a 30-day initial review period after the filing date. The 30-day initial review period may, at the discretion of the KFTC, be extended by up to an additional 90 days in which case the total review period may last up to 120 days. However, the actual review period may be longer than 120 days as the time between the date of issuance of a request for information by the KFTC and the date of submission of a response to such request is excluded from the calculation of the review period.

In the case of a transaction subject to the pre-closing notification obligation, the parties are prohibited from closing the transaction until the KFTC provides clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

In cases that require pre-closing clearance, the KFTC may file a legal action against companies that close their transactions before receiving clearance. For example, in a merger or new joint venture establishment case, the KFTC may initiate court action to nullify such business combination that closed without clearance. In practice, the KFTC usually imposes an administrative fine of up to 100 million won on the company responsible for filing. This sanction is enforced without fail as long as the violation is detected.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In foreign-to-foreign mergers that require pre-closing clearance, the KFTC may impose sanctions on foreign-to-foreign mergers that close without clearance. The KFTC imposed sanctions on five foreign companies in 2012 for violation of the merger control rules (including failure to file, delay in filing as well as closing before clearance). Recent data on such sanctions are not open to the public.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The KFTC has never accepted any solutions (such as 'hold separate' arrangements) in a foreign-to-foreign merger subject to pre-closing clearance that would permit closing before clearance.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

In the case of public takeover bids, the notification must be filed within 30 days of the date on which the acquisition of shares takes place even if a large company is involved in the transaction (ie, the usual pre-closing 2 trillion won threshold does not apply in this case).

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The reporting party must provide the KFTC with sufficient information to allow the KFTC to review the underlying transactions. Full details of transactions are required, and various forms must be completed and submitted together with supporting documents. The KFTC provides a list of the necessary documentation relating to the proposed transaction to enable it to determine whether there will be any anticompetitive impact on the market. Under this general rule, data or information on the financial statements of the parties, identities of the shareholders of the parties, financial statements of affiliated companies (including organisation charts, etc), as well as market information in the relevant sector are required. If the KFTC deems it necessary, it may request additional data or information.

If the KFTC case handler discovers any incomplete or incorrect information, a request for supplementary information may be issued. In this case, the clock stops on the date the request is issued and restarts once the requested information is received in full. The KFTC may impose an administrative fine of up to 100 million won for misleading information. Also, fraudulently providing information in response to a request for information by the KFTC may be subject to criminal penalty including a fine of up to 150 million won.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

There is no distinction of review phases such as Phase I and Phase II in Korea and there is also no official process for a pre-notification consultation with the authority. To expedite the review process, the notification may be filed on a voluntary basis before the definitive agreement is signed. However, for this voluntary review request, the same set of documents as those required for the official notification need to be submitted. If the KFTC case handler concludes that there are no substantive competition issues arising from the proposed transaction, clearance may be given without having to go through the deliberation procedures of the Commissioners.

However, if the KFTC case handler identifies serious anticompetitive concerns during the merger review process and determines that remedies are required, an examiner's report with proposed remedies (ie, a document similar to the statement of objections issued by the European Commission) will be issued. The notifying party will be given a chance to submit its rebuttal brief after receiving the examiner's report and there will be a hearing held by the Commission to deliberate on the matter. After the hearing, the KFTC will determine whether remedies are required, and if so, what types of remedies will be appropriate, and will render its final decision with the written decision being posted on the KFTC's website.

18 What is the statutory timetable for clearance? Can it be speeded up?

The KFTC has 30 days after the filing to issue its decision on whether to grant clearance under the MRFTA. However, the 30-day period may, at the discretion of the KFTC, be shortened or extended by up to additional 90 days. The common reasons for an extension include the complexity of the potential transaction and the KFTC's requests for additional information (whether owing to the incomplete nature of the information filed with the KFTC in the initial report or because the KFTC deems that the complexity of its investigation requires further data to enable it to reach a determination based on sufficient research on the question of clearance). In such a case, the period required by the KFTC to obtain supplementary documents will not be included in the review period.

In general, whether the review period can be shortened is entirely at the discretion of the KFTC. However, in case of mergers that qualify for a 'simplified review', a shorter review period of 15 days will apply. A simplified review process applies if the merger falls under any of the following:

- a merger between affiliates;
- a merger that does not result in the acquisition of control;
- a conglomerate merger that does not involve a large company (ie, a company, together with its affiliates worldwide, that has total worldwide assets or worldwide annual turnover of 2 trillion won or more);

- a conglomerate merger that does not involve overlapping or supplemental products between the merging parties;
- a merger previously reviewed by the KFTC through the voluntary preliminary review process that did not result in any finding of anticompetitive impact; or
- a merger involving the establishment of an overseas joint venture company that does not impact the domestic market.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance has no clear contours, but the essence of the test is the question of whether a proposed business combination has an anticompetitive effect on the relevant markets. In this regard, the definition of the relevant markets and the market concentration after the business combination are important starting points in determining whether there is any such effect. If the combined market share of the parties meets all the elements stated below, the business combination is presumed to have an anticompetitive effect on the relevant market:

- the merging companies have a combined market share of at least 50 per cent in the relevant market or the top three companies in the market, including the merging companies, have a combined market share of at least 75 per cent in the relevant market;
- the combined market share of the merging companies is the largest in the relevant market; and
- the combined market share of the merging companies exceeds the market share of the second-ranking company in the market by more than 25 percent.

Other than the market share, factors to be comprehensively considered include unilateral anticompetitive effect, coordinated anticompetitive effect, level of foreign competition, possibility of new entry and existence of similar products and adjacent markets.

A business combination, which is an otherwise prescribed one, can be permitted when the target company is a 'failing company'. According to the Monopoly Regulation and Fair Trade Act (MRFTA), an allegedly failing company can qualify for the failing company exemption if the company meets the statutory test including, without limitation, experiencing capital erosion for a substantial period.

20 | Is there a special substantive test for joint ventures?

No. Normal review procedures for the business combination would also apply to joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Generally, the Korea Fair Trade Commission (KFTC) may consider various theories of harm depending upon the nature of the transaction involved.

- Horizontal mergers: the degree of market concentration, unilateral effect, coordinated effect, overseas competition, barriers to entry, substitutable goods, and the existence of an adjacent market.
- Vertical mergers: vertical foreclosure and coordinated effect in the market.
- Conglomerate mergers: exclusion of potential competitors and increase in barriers to entry.

Along with the above, other factors may also be considered depending on the transaction. The Merger Review Guidelines adopted in February 2019 provides that the KFTC may also consider the following factors when reviewing a merger involving 'information assets' (usually for companies in R&D-intensive industries):

- whether the information assets obtained through the merger are difficult to replace;
- whether the merger will increase the incentive and ability of the merging companies to restrict competitors' access to the information assets;
- whether the restriction on access to the information assets resulting from the merger is expected to have an anticompetitive effect; and
- whether the merger is likely to result in weakening non-price competition, such as quality of services related to the information assets.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

In principle, the KFTC does not take into account any non-competition issues such as national security in its review process. However, the MRFTA provides an exception by allowing the consideration of efficiency-enhancing factors such as contribution to employment, regional economic development, stable supply of energy and improvements to the environment.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is one of the two exceptions that permits the KFTC to clear a merger transaction even though a certain degree of anticompetitive impact is anticipated. In Korea, the efficiency argument is often presented, but has been accepted only in a few cases.

When considering the efficiency argument, the KFTC normally tries to determine whether a merger transaction will result in economies of scale, cost reduction, contribution to employment and regional economic development, etc. In addition, for an efficiency argument to be successful, not only should the claimed economic efficiency be merger-specific (ie, the claimed economic efficiency may not be achieved through any measures other than the business combination in question), but also such merger transaction must be the last resort (ie, there must be no substitute measures that could be used to achieve the same result).

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Korea Fair Trade Commission (KFTC) may issue corrective orders on parties of a business combination having an anticompetitive impact on the relevant market. These corrective orders include structural remedies such as divestiture of all or part of the shares acquired or transfer of business and may also include behavioural remedies. If the parties do not comply with a corrective order, the KFTC may induce compliance by imposing fines calculated based on the number of days of non-compliance.

In the Merger Remedy Guidelines, the KFTC makes clear that, in principle, it will first consider structural remedies and consider behavioural remedies only as a means to support the structural remedies.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The KFTC may impose remedies to the extent they can rectify anticipated anticompetitive effects. Such remedies have included in the past divestment undertakings and various forms of behavioural remedies, including limits on price increases for a specified period. The KFTC's corrective order to remedy competition concerns may include prohibiting a merger, requiring the disposition of all or part of the shares acquired, resignation of an officer, transfer of business, cancellation of debt guarantees, public announcement of the fact that certain corrective measures have been imposed, restrictions on business practices that may produce anticompetitive effects, and any other corrective measures necessary to remedy violations of competition law.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Although the KFTC does not operate an official programme for merger parties to voluntarily present a remedy proposal or a pre-consultation programme as part of the merger review process, the parties may contact the case handler and discuss possible remedies.

Typically, to draft a proposed remedy section of the examiner's report, the case handler issues requests for information on the market situation and also makes verbal inquiries to the parties' counsel from time to time. The case handler may also contact the parties' major customers and competitors to gain a better understanding of the market situation and the feasibility of possible remedies, including behavioural remedies in particular. The parties' counsel may also request a face-to-face meeting with the case handler and his or her team if necessary to discuss remedy proposals. For transactions that are also notifiable in other jurisdictions with which the KFTC has a close relationship, such as the United States and the European Commission, the case team usually discusses the remedy issue directly with the competition authorities in such jurisdictions.

If a divestiture remedy is decided upon at the hearing, in a typical case, the parties will be required to formulate a divestiture plan, seek a potential purchaser, and regularly report to the KFTC case handler the progress being made in implementing the remedy within a certain time frame, which is usually three to six months but could be extended once upon the parties' request.

Once the parties find a buyer, the KFTC will review the feasibility of the buyer before providing its approval. During this process, the KFTC may conduct facilities visits to conduct its own due diligence. Once the KFTC approves the divestiture and the closing of the divestiture is reported to the KFTC, the parties' obligation in connection with the divestiture remedy will be considered to have been fulfilled.

The specifics of each divestiture remedy will be governed by the language of the decision and may vary depending on the facts and circumstances of each case.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In the past, there have been instances where the KFTC has only imposed administrative fines against foreign companies that did not file at all or failed to file by the prescribed deadline. However, in 2007, the KFTC issued its first corrective measure in connection with a foreign-to-foreign merger. Further, in 2008 and 2010, despite the review process not having been completed, the parties in a foreign-to-foreign merger decided to abandon the transaction after anticompetitive concerns were raised by various competition authorities including the KFTC.

In 2011, the KFTC imposed structural remedies on a proposed foreign-to-foreign merger in the computer hard disk drive industry. In 2013, the KFTC imposed remedies on two foreign-to-foreign mergers, one involving the semiconductor manufacturing equipment industry and another involving the TV SOC (system on chip, an integrated circuit that integrates all components of an electronic system) industry. In 2017, in a merger between two foreign chemical companies, the KFTC imposed a structural remedy requiring the divestment of certain assets that one of the parties owned within six months of the closing. Also, in a share acquisition of a foreign ocean shipping company, the KFTC ordered the parties to withdraw from a consortium involving a specific sea lane. In January 2018, the KFTC imposed structural remedies on a foreign-to-foreign merger in the mobile semiconductor industry (including near-field communication (NFC) technology). Finally, in February 2020, the KFTC imposed a structural remedy requiring the divestment of assets in a merger case involving Danaher's acquisition of General Electric's biopharma unit.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The KFTC may or may not review ancillary restrictions in its review of the main transaction. However, even if the KFTC reviewed certain ancillary restrictions (for example, non-compete provisions of a joint venture agreement) for a particular business combination that was cleared, this does not mean that the KFTC also approved such ancillary restrictions and thus the KFTC may conduct a review as to the legality of such ancillary restrictions after clearance of the transaction.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Yes, depending upon the case and the circumstances. In particular, where market conditions could be affected by a merger, the Korea Fair Trade Commission (KFTC) may ask competitors or customers to provide information or data to assist in determining whether there is any direct impact on market competition. However, there is no general procedure as regards to asking the customers or competitors to provide their views on the merger. Any interested party to a merger may nevertheless file its opinion with the KFTC during the review process.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Monopoly Regulation and Fair Trade Act (MRFTA) prohibits the KFTC and its personnel from revealing, publishing or otherwise using information acquired while carrying out their duties other than for the purpose of enforcing the MRFTA. The KFTC does not disclose the fact that a notification has been filed. Usually, if there are no significant competition issues, no information relating to the filing will be disclosed to the public. In cases where there are competition concerns and the KFTC issues a decision to impose remedies, the KFTC will usually issue a press release and the final decision will be posted on the KFTC's website. The KFTC will also issue a press release summarising its decision in high-profile cases even if no remedies are imposed.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The KFTC has played a major role in the International Competition Network for merger control issues. Furthermore, the KFTC also actively participates in many forums on competition issues in the Doha Development Agenda of the World Trade Organization and the Organisation for Economic Cooperation and Development. In addition, the KFTC has been involved in many bilateral discussions with other antitrust authorities in other jurisdictions including China, Germany, Japan, Russia and the United States.

The KFTC will usually be willing to cooperate with antitrust authorities in foreign jurisdictions in its anticompetitive review of a particular business combination. Especially in a foreign-to-foreign business combination, the KFTC cooperates with antitrust authorities in foreign jurisdictions that have similar anticompetitive concerns in designing effective corrective measures. For example, the KFTC cooperated with antitrust authorities in the United States and the European Union at the initial stage of review in the business combination involving Western Digital's acquisition of Hitachi GST.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The parties may appeal the Korea Fair Trade Commission (KFTC)'s decision to the Seoul High Court or to the KFTC for reconsideration within 30 days after the decision is issued. If the Seoul High Court or the KFTC upholds the parties' appeal, the original KFTC's decision will be reversed.

Time frame

33 What is the usual time frame for appeal or judicial review?

Any party to a merger that wishes to challenge the decision of the KFTC may file an appeal with the KFTC or the Seoul High Court within 30 days of receipt of the KFTC's decision. In the case of an appeal made to the KFTC, a decision must be rendered by the KFTC within 60 days of the appeal. If the appealing party remains dissatisfied with the KFTC's decision on appeal, it may seek judicial review. An appeal to the Seoul High Court must be filed within 30 days of receipt of the KFTC's decision on appeal. The Seoul High Court, an appellate court, has exclusive jurisdiction over any appeal arising from the decisions of the KFTC. Also, a merging party may choose to forgo the KFTC appeals procedure and file an appeal directly with the Seoul High Court within 30 days of receipt of the KFTC's original decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, 865 business combinations were notified to the Korea Fair Trade Commission (KFTC), 133 of which were foreign-to-foreign mergers. In the same year, the KFTC imposed remedies in three cases and imposed administrative fines in 12 cases for reporting violations under the Monopoly Regulation and Fair Trade Act (MRFTA).

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Reform proposals

35 Are there current proposals to change the legislation?

In December 2020, a bill was passed to substantially overhaul the MRFTA, which includes the introduction of 'a size-of-transaction test' as part of the jurisdictional thresholds for mergers. The new amendments to the MRFTA will take effect as of 30 December 2021.

Under the current MRFTA, a large company's acquisition of a small company or start-up will not be captured by the existing jurisdictional thresholds owing to the small total assets and turnover of the target company, even if the target company has significant growth potential and such merger could, potentially, result in a monopoly or oligopoly in the relevant market or create future barriers to entry.

To close this loophole, the newly amended MRFTA introduces a 'size-of-transaction test' to trigger a filing obligation when (1) the acquisition price is above a certain level and (2) the target company has significant presence in the Korean market, even if the target company's turnover (or total assets) is less than the current jurisdictional threshold (ie, 30 billion won). The specific criteria to determine whether a filing obligation is triggered under this new test will be prescribed in the upcoming amendment to the Enforcement Decree of the MRFTA and other subordinate rules and regulations.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Danaher Corporation's acquisition of General Electric's BioPharma Unit

In February 2020, the Korea Fair Trade Commission (KFTC) imposed structural remedies on a merger involving Danaher's acquisition of General Electric's Healthcare Life Sciences' biopharmaceutical unit, requiring that either of the merging companies divest assets relevant to eight overlapping bioprocessing products. This is the first case in which the KFTC imposed remedies on a proposed merger in the bioprocessing market. During its review of the proposed merger, the KFTC collected comments and opinions from various interested parties and closely cooperated with the European Commission in reviewing the case.

Jeju Air's acquisition of Eastar Jet

On 1 April 2020, the chair of the KFTC publicly stated that, to assist companies seriously impacted by the covid-19 to engage in restructuring and reorganisation efforts, the KFTC will institute a more expedited merger review process for transactions intended for such purpose. In line with such statement, the KFTC provided clearance of a major transaction involving Jeju Air's acquisition of Eastar Jet on 23 April 2020, a little over a month after the merger notification was filed. The KFTC quickly cleared the transaction under the 'failing firm' argument, taking into account the extreme difficulties faced by Easter Jet and the overall aviation industry owing to the covid-19 crisis.

The KFTC reasoned that Easter Jet, which was already in serious financial difficulty, having operated with impaired capital since 2013, would not be able to survive the covid-19 crisis without clearance of the merger transaction. In light of this new development, it is anticipated that the KFTC will likely be more willing to accept the failing firm argument with respect to transactions prompted by the covid-19 crisis.

Delivery Hero's acquisition of Woowa Brothers

In December 2020, the KFTC approved Delivery Hero's acquisition of around 88 per cent of the shares in Woowa Brothers Corp (Woowa) subject to certain conditions.

Delivery Hero SE (DH), headquartered in Germany, operates a global food ordering app platform with the Korean subsidiaries of Delivery Hero Korea (DHK, operating Korea's second-biggest food ordering app Yogiyo) and Baedaltong (operating Korea's third-biggest food ordering app Baedaltong). Woowa operates Korea's top food ordering app Baedal Minjok (Baemin). This transaction is presumed to be anticompetitive, because the merging parties have a combined market share of 99.2 per cent in the relevant market, and the market share gap between the merging parties and the second-largest market player far exceeds 25 per cent.

The KFTC eventually concluded that there would be a high risk of anticompetitive effects, such as a reduction in consumer benefits and increase in restaurant fees if head-to-head competition between the number-one and number-two players in the food ordering app industry is removed as a result of the merger. In an effort to address such anticompetitive concerns, the KFTC ordered DH to divest all shares in DHK and maintain the competitiveness of Yogiyo until the completion of the divestiture.

Spain

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Spanish competition legislation is contained in Law No. 15/2007 on the Defence of Competition (the Competition Act), which came into force in September 2007. The Competition Act regulates restrictive practices and abuses of dominant position (closely modelled on articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) as well as merger control and state aid. In February 2008, the government adopted Royal Decree No. 261/2008 (the Royal Decree), which implements the Competition Act.

After entry into force of Law No. 3/2013 setting up the National Markets and Competition Commission (the CNMC Act and the CNMC respectively), the authority entrusted with the enforcement of the Competition Act is the CNMC. The start of operations of the CNMC and the subsequent ceasing of operations of the former National Competition Commission (CNC) took place on 7 October 2013. The CNMC is the entity resulting from the merger of the Spanish competition, energy, telecoms, railways, audiovisual, airports and postal regulators.

The CNMC is led by a board of 10 members entrusted with decision-making powers (the Council), which is divided into a competition chamber and a regulatory chamber. The CNMC has four sector-specific directorates: Competition, Telecommunications and Audiovisual, Energy, and Transport and Post. In August 2013, the government adopted Royal Decree No. 657/2013, approving the CNMC's statute, which further specifies its organisation and modus operandi. The Competition Directorate is entrusted with investigative powers for merger control.

Under the Competition Act, the CNMC has the final decision on merger control proceedings in the majority of cases, and the government has only some limited decision-making powers in merger control matters if it decides to intervene on the basis of non-competition grounds.

Although the Competition Act reinforced the role of the regional competition authorities of the different Spanish autonomous communities, merger control proceedings remain outside the scope of their jurisdiction.

The Sustainable Economy Act (Law No. 2/2011, of 4 March, of Sustainable Economy) entered into force on 6 March 2011. It brought about the first amendment in the Competition Act since its adoption in 2007 by introducing a de minimis exception to the mandatory merger filing obligation. In addition, Law No. 3/2013 amended the relevant filing fees, and Law No. 11/2020, of 30 December, of the Annual Budget of the State for 2021, amended the relevant filing fee for simplified procedure cases.

In November 2015, the CNMC issued a new version of the guidelines on simplified proceedings to adapt it to the new institutional framework brought about by the creation of the CNMC. The guidelines reflected the nature of the CNMC (which resulted from the merger of the Spanish competition, energy, telecoms, railways, audiovisual, airports and postal regulators). Consequently, since then mergers taking place in regulated sectors under supervision of the CNMC have benefited from short-form notifications, something that was explicitly excluded by the guidelines in the past as reports from the relevant regulatory authorities had to be obtained beforehand.

In late 2016, a new act on administrative proceedings came into force (Law No. 39/2015 on the standard administrative proceeding of public administrations), which, among other things, modifies the concept of working days. Under the aforesaid act, Saturdays are no longer working days as regards administrative deadlines, including those applicable to merger control proceedings.

In July 2020, and following the adoption of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive), the Spanish government published a draft bill to reform the Competition Act. While this draft aimed at implementing the ECN+ Directive, it also included more ambitious reforms than those in the Directive. By way of illustration, the draft bill included, among others, amended merger filing thresholds and amended review periods for short-form notifications and phase II proceedings.

In late April 2021, the Council of Ministers passed the Royal Decree 7/2021, of 27 April, implementing into Spanish law the ECN+ Directive and reforming the Competition Act accordingly. However, it did not include the ambitious proposals included in the draft bill and amends the Competition Act merely to implement the Directive. Key measures concerning merger control include enhanced cooperation powers enabling effective exchange of information with other national competition authorities and the European Commission, as well as higher fines for infringements in the context of merger control. It is yet to be seen whether the more far-reaching reforms included in the draft bill will be taken up in the future.

Scope of legislation

2 | What kinds of mergers are caught?

The Competition Act provides that transactions capable of being caught are 'any project or transaction involving a concentration of undertakings'. The concept of concentration is aligned with the EU Merger Regulation (EUMR) and includes those transactions affecting on a lasting basis the structure of control of the undertakings concerned, normally through a merger between two or more formerly independent companies, the acquisition of control of the whole or parts of one or more undertakings, or the creation of a joint venture and the acquisition of joint control of an undertaking that performs on a lasting basis all the functions of an autonomous economic entity.

3 What types of joint ventures are caught?

The Competition Act states that full-function joint ventures are caught by the merger control rules. Spanish merger control provisions are aligned with EU competition rules in this respect.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Act provides for a definition of 'control' that is modelled on the definition under the EUMR. Under the Competition Act, control means the possibility of exercising decisive influence on an undertaking.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Competition Act provides two alternative thresholds based on market share and turnover. It applies where:

- a share of 30 per cent or more of the national market or a 'defined' geographic market within it, of a given product or service, is acquired or increased unless the turnover in Spain in the preceding accounting period of the target (or of the assets being acquired) does not exceed €10 million and the individual or combined market share of the parties does not amount to 50 per cent or more in any 'affected market' in Spain or in any 'defined' geographical market within Spain; or
- the aggregate turnover in Spain of the companies involved exceeded €240 million during the last financial year provided that the turnover in Spain of each of at least two parties exceeded €60 million. The market share threshold can be satisfied by the target company only.

As provided for in the EUMR, the Royal Decree provides that the turnover is deemed to be the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year in Spain, and must be considered for the acquirer on a group basis (the turnover of the target company should only include the amount derived from the sale of products or the provision of services attributable to the target company). In addition, there are sector-specific rules for turnover calculation, in particular for banks and other financial institutions and insurance undertakings.

To the best of our knowledge, the CNMC has not referred to the Commission any cases below the thresholds set forth in the Spanish Competition Act.

The Competition Act will not apply to any transaction caught by the provisions of the EUMR (with exceptions, provided for in the EUMR).

The Competition Act provides for a consultation procedure so that the merging parties may, before notification, consult the CNMC as to whether their transaction amounts to a concentration or whether it exceeds the thresholds. Under the consultation procedure, the CNMC has a three-month deadline to issue a decision.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for those transactions exceeding either of the two thresholds for notification. There are no exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified provided that they meet one of the two thresholds for notification. Indeed, foreign-to-foreign mergers are notified to the Spanish competition authorities on a regular basis. There is no local effects or nexus test (apart from the two thresholds).

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Spain has traditionally had separate rules on foreign investment that may be relevant to certain acquisitions and require specific notifications or prior approvals depending on the sectors involved.

However, on 18 March 2020, Royal Decree-Law 8/2020 on urgent extraordinary measures to deal with the economic and social impact of covid-19 (the State of Emergency Royal Decree-Law) was published and entered into force, declaring a state of emergency in Spain. These rules were further amended by Royal Decree-Law 8/2020 of 17 March as amended by Royal Decree-Law 11/2020 of 31 March, Royal Decree-Law 34/2020 of 17 November and Royal Decree-Law 12/2021 of 24 June.

These included revised rules imposing restrictions on foreign investments in Spain, in line with EU Regulation 2019/452, establishing a framework for the screening of foreign direct investments into the European Union (the EU FDI Regulation), which entered into force on 11 October 2020. Nevertheless, while the rules of Royal Decree-Law 8/2020 (as amended by Royal Decree-Law 11/2020 and Royal Decree-Law 34/2020) were initially of an extraordinary nature and aimed at dealing with the covid-19 crisis, the new regime has become permanent and will not be automatically repealed at the end of the covid-19 crisis. Although adopted during the pandemic, the current legal instruments are the first step in the process of implementing the EU FDI Regulation that has inspired them. Further developments are expected in the near future.

Under the new regime, investors from outside the European Union or EFTA are not allowed to acquire, directly or indirectly, control or a stake equal to or greater than 10 per cent of the share capital of a Spanish company active in a 'strategic sector' without prior authorisation. These sectors comprise:

- critical infrastructure;
- critical technologies and dual-use items;
- supply of critical inputs (in particular, energy), strategic connectivity services, as well as raw materials and resources related to food safety;
- sectors with access to sensitive information (in particular, personal data); and
- communication media.

Most notably, the concept of control applicable to the aforesaid test is drawn from merger control rules and is therefore understood as the possibility of exercising decisive influence on the Spanish company. This includes, inter alia, veto rights over strategic decisions, which may trigger a foreign investment filing requirement regardless of the shareholding actually acquired.

Authorisation is also necessary if:

- the foreign investor is directly or indirectly controlled by the government of a third country;
- the foreign investor has made investments or participated in activities in sectors affecting security, public policy and public health in another member state; or
- there is a serious risk that the foreign investor will engage in illegal or criminal activities affecting public security, public order or public health in Spain.

Further, from 19 November 2020, the restrictions on foreign investments also apply to certain investments in Spanish companies carried out by residents of other EU/EFTA countries. This regime is temporary and was meant to end on 30 June 2021. However, this temporary regime has recently been extended until 31 December 2021.

Direct or indirect investments in Spanish companies by EU/EFTA investors trigger a filing requirement in Spain provided that the target company is:

- either a listed company, or a private company and the investment is worth more than €500 million; and
- active in a strategic sector in Spain.

Filing is mandatory in Spain. Transactions executed without the required authorisation will be invalid and without any legal effect until approval has been obtained. Fines may also be imposed up to the transaction's financial value.

As regards the Competition Act, there are no special rules for specific sectors, except for specific turnover calculation rules for the financial and insurance sectors.

In terms of internal organisation within the CNMC, the roles formerly played by the National Energy Commission and the Telecommunications Market Commission are now mainly played by the CNMC.

To achieve internal coordination, in the case of merger control, the different sectoral directorates of the CNMC may notify the Competition Directorate of any merger within their respective sectors if they believe it might be caught by the merger control provisions of the Competition Act.

In the energy sector, certain acquisitions of interests or assets in the electricity and gas sectors need to be communicated to the CNMC. The CNMC is entitled to impose conditions on the acquisition: if the acquirer is not a European Union or European Economic Area country and in case of a real and sufficiently serious threat to the supply of electricity, gas or hydrocarbons.

Certain acquisitions in the Spanish banking, insurance, defence and media sectors may also require specific approvals from the relevant authorities in these sectors.

Likewise, in Phase II investigations of transactions that may have a significant impact in a specific Spanish region, a non-binding (but compulsory) opinion is requested from the relevant authorities of the affected region.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Any project or transaction involving an economic concentration of undertakings caught by the Competition Act must be notified to the National Markets and Competition Commission (CNMC) prior to completion (ie, prior to putting the transaction into effect). There are no specific deadlines for filing as long as the transaction has not been put into effect. However, as regards Spanish public takeover bids (ie, those subject to authorisation by the Spanish Securities Market Commission (CNMV)), filings must be made before, or up to five days after submitting the bid to the CNMV. Failure to notify within the five-day deadline may give rise to the imposition of fines of up to 1 per cent of the worldwide annual turnover of the undertakings concerned.

In addition, a 20-day deadline for filing is applicable only in cases where the CNMC requests parties for filing a transaction ex officio. Failure to notify within the said deadline may give rise to the imposition of fines of up to 1 per cent of the annual worldwide turnover of the undertakings concerned. In addition, such filings do not benefit from the legal deadlines to which the CNMC is bound.

10 Which parties are responsible for filing and are filing fees required?

The offeror or acquirer is responsible for filing in the case of an acquisition. For mergers, or in the case of the acquisition of joint control (ie, joint ventures), the filing must be made jointly by the merging parties or by the parties acquiring joint control respectively.

The following filing fees for merger control proceedings are payable:

- €5,502.15 if the Spanish turnover of all the companies involved in the transaction does not exceed €240 million;
- €11,004.31 if the Spanish turnover of all the companies involved in the transaction exceeds €240 million but not €480 million;
- €22,008.62 if the Spanish turnover of all the companies involved in the transaction is higher than €480 million and does not exceed €3 billion; and
- a fixed amount of €43,944 if the Spanish turnover of all the companies involved in the transaction exceeds €3 billion, plus an additional €11,004.31 for each €3 billion exceeding the aforesaid turnover, up to a maximum of €109,860.

The filing fee for mergers notified under the abbreviated form procedure is €1,560.90. The fee must be paid in advance and the notification form must have evidence of payment attached.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As a general rule, the notified transaction may not be put into effect before clearance from the CNMC has been obtained. However, the Competition Act provides for the possibility for the parties to request a derogation from this duty from the CNMC, which may allow implementation of the transaction before clearance. In these cases, the transaction cannot benefit from the short-form notification and must be notified using the regular notification form. The CNMC will decide whether to grant the requested derogation in light of the specific circumstances of each case and the potential consequences of waiving the obligation to suspend. The derogation can be made subject to certain obligations and conditions to guarantee the effectiveness of the CNMC's final decision. If the transaction is purely foreign-to-foreign, where one of the parties does not make sales in Spain, this could be regarded as a reason to allow the early implementation of the transaction before clearance. To date, such derogation has been granted in exceptional circumstances (see for instance, the *COPE/Vocento/Punto Radio* case (C/0493/13), where the CNMC conditionally allowed the parties, a week after a formal filing was carried out, to implement a temporary agreement on non-exclusive assignment of sports radio content – the transaction was subsequently cleared in Phase I with remedies). In November 2016, in the *Daimler/Hailo/MYTAXI/Negocio Hailo* case (C/0802/16), the CNMC allowed the parties to carve out Spain (by partially lifting the suspension obligation), that is, to close the deal on a global basis as long as the transaction was not implemented in Spain. This derogation was granted in exchange for a number of commitments submitted by Daimler and Hailo, which, prior to clearance of the transaction by the CNMC, guaranteed the commercial autonomy of the Spanish subsidiary of the target company.

Similarly to the EU Merger Regulation (EUMR), the Competition Act states that public takeover bids are not subject to the general suspension obligation provided that certain conditions are met.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Competition Act provides for a fine of up to 5 per cent of the worldwide turnover of the notifying party or parties in the financial year in which the merger took place if the transaction is put into effect before clearance. The amount of the fines imposed by the CNMC can vary depending on the particular features of the transaction.

The CNMC has taken action against a number of non-filed mergers and has imposed several fines in this regard over the past years. For example, in late 2019, the CNMC fined Grupo Nufri €12,800 for failure to notify the acquisition of Grupo Indulleida. The CNMC noted that the purchase agreement did not contain a condition precedent by which closing of the transaction was made conditional upon clearance (or tacit approval) of the transaction. However, in assessing the infringement, the CNMC took into account that:

- Grupo Nufri voluntarily notified the transaction as soon as they were aware of the breach of the standstill obligation (ie, only three months after closing);
- the breach of that obligation had no adverse effects and did not create an illicit benefit for Grupo Nufri; and
- the transaction posed no competition concerns, given that once the transaction was notified it was unconditionally cleared in Phase I.

Lastly, the infringing company benefited from a reduction of the proposed fine based on both the voluntary acknowledgement of the infringement and early payment of the fine.

While there were no fines for gun jumping during 2020, the CNMC has been actively pursuing potential infringements in this regard. In September 2020, and, to our knowledge, for the first time ever in the context of the review of a notified transaction, the CNMC carried out dawn raids at the premises of various funeral services undertakings for the alleged breach of the suspension obligation in connection with previous transactions, as well as the provision of misleading information.

In February 2021, the CNMC opened an investigation against Funespaña for allegedly having implemented the acquisition of Alianza Canaria without prior approval. The CNMC concluded that it had breached the standstill obligation and fined Funespaña €100,000. Similarly, in April 2021, the CNMC opened an investigation against Albia for allegedly having implemented the acquisition of Tanatorios Móstoles and fined Albia €300,000.

In May 2021, the CNMC opened another formal investigation in the context of the *DGTF/Parpública/TAP* transaction for potential breach of the suspension obligation. The CNMC determined that DGTF (a public entity of the Republic of Portugal) had breached the standstill obligation when acquiring sole control over TAP airlines and fined DGTF €30,000. However, the infringing company benefited from a 40 per cent reduction of the proposed fine (€50,000) based on both the acknowledgement of the infringement and voluntary payment of the fine.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes. The former National Competition Commission (CNC) initiated in 2011 for the first time an investigation for alleged gun jumping in the context of a foreign-to-foreign merger (ie, the parties did not have any relevant corporate presence in Spain). The acquisition by Dorf Ketal Chemicals (India) Private Limited of the titanates and zirconates business of EI Du Pont De Nemours & Company was allegedly put into effect before it was authorised by the former CNC. The CNC fined Dorf Ketal Chemicals (India) Private Limited €35,400 (3 per cent of the parties' turnover in Spain). In the same vein, on 31 July 2014, the CNMC fined Essilor International SA €5,065 for gun jumping in the context of the foreign-to-foreign acquisition of Polycore Optical Ltd. In addition, on 31 July 2014, the CNMC fined Essilor International SA €5,065 for gun jumping in the context of the foreign-to-foreign acquisition of Polycore Optical Ltd. This amount represented 0.0001 per cent of Essilor's worldwide turnover in 2013. The CNMC decided to impose a symbolic fine because there was an absence of bad faith; the company eventually notified the transaction and it was cleared in Phase I unconditionally as no possible harm to competition law was identified.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In principle, there should be no reason for the Spanish authorities to object to a 'hold-separate' arrangement if it means that the implemented transaction has no impact on the Spanish market. In 2016, in the *Daimler/Hailo/MYTAXI/Negocio Hailo* case (C/0802/16), the CNMC allowed the parties to carve out Spain (by partially lifting the suspension obligation), that is, to close the deal on a global basis as long as the transaction was not implemented in Spain. This derogation was granted in exchange for a number of commitments submitted by Daimler and Hailo that, prior to clearance of the transaction by the CNMC, guaranteed the commercial autonomy of the Spanish subsidiary of the target company.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

For public takeover bids under Spanish law, filings must be made before, or up to five days after, submitting the bid to the Spanish Securities Market Commission (CNMV) and the bid will be conditional upon the outcome of the national merger control procedure. However, the Competition Act, in line with the EUMR, provides for the possibility to implement the public bid and acquire the shares before clearance has been obtained, provided that the transaction is filed with the CNMC within five days of submitting the bid to the CNMV and that the acquirer does not exercise the voting rights attached to the securities acquired or does so only to maintain the full value of those investments and on the basis of a derogation granted by the CNMC.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Notification is made to the CNMC using an official form (which is attached as Annex II to the Royal Decree). For straightforward cases raising no issues, which are specifically listed in article 57 of the Royal Decree (see below), a short form is available (Annex III to the Royal Decree). Notifications must be submitted in Spanish. The notifying party should indicate in its notification which data are business secrets in order for such data to be treated as strictly confidential and provide a non-confidential version of the notification form.

Notification form

The information required is similar to the information to be provided on Form CO under the EUMR (information on the parties, their turnover and business sectors, basic features of the transaction, details of ownership and control provisions, detailed market information, and the existence of cooperative and vertical aspects). Notification is a time-consuming and cumbersome exercise. It has to be complete and the Competition

Act does not provide for the possibility of obtaining waivers of any of the information requirements. The CNMC can reject notifications for incompleteness, or require more detailed information to be provided during the investigation. It sometimes requires the clock to be stopped pending receipt of the information, which can significantly increase the length of the review period.

Short-form notification

The Competition Act introduced the possibility of short-form notification for straightforward cases that are unlikely to raise competition issues (similar to the Short Form CO under the EUMR). The short-form notification applies to concentrations when, inter alia:

- there are no vertical or horizontal overlaps between the parties' activities;
- the activities carried out by the parties in the markets affected by the transaction, because of their minor importance, are not capable of significantly affecting competition;
- there is a change from joint to sole control; or
- two or more undertakings acquire joint control over a joint venture, provided that the joint venture has no or minimal activity in Spain.

The 2012–2013 Annual Report of the former CNC stated that approximately 26 per cent of the merger control filings made in Spain during that period were short form. The proportion has since risen significantly, accounting for nearly 66 per cent of filings cleared during 2020.

There is no shorter timetable for clearance for notifications made under short form; however, in practice, in straightforward cases, the CNMC tends to issue a decision prior to the expiry of the one-month deadline for Phase I.

Finally, submitting incomplete, incorrect, misleading or false information is subject to fines of up to 5 per cent of the total worldwide turnover of the infringing undertaking.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Phase I investigations

One month after filing, the CNMC must reach a Phase I decision, extendible by 10 working days if the parties submit commitments. Within this one-month period, the CNMC will carry out Phase I investigations, which will end with a non-binding report produced by the Competition Directorate. On the basis of the report, the Council will decide whether to clear the transaction, to clear the transaction subject to the commitments presented by the parties, to shelve the file, or to open a Phase II investigation if the transaction could impede effective competition.

During Phase I investigations, if the CNMC considers the notification incomplete and requires additional information, the one-month period may be interrupted and will start running again when the additional information is submitted. Experience shows that it is very useful (and customary in practice) to enter into pre-notification discussions and agree a draft notification form with the CNMC prior to formal submission to avoid unnecessary delays and tackle any technical discussions from day one. In practice, while straightforward transactions (mainly short-form notifications) may be (and in practice are generally) cleared prior to the expiry of the one-month deadline for Phase I, the increased scrutiny of the authority is also leading to protracted review periods in transactions subject to the ordinary form. The possibility to stop the clock to request further information from either the merging parties or third parties extends the actual review period beyond the statutory one-month deadline for Phase I. Recent examples include the *Nomar/Argenta y Cifre* transaction, *Henry Schein/Casa Schmidt – Activos*, *Flutter/Stars* and *Six/BME*.

There is a possibility of clearing the transaction during Phase I through commitments or undertakings presented by the parties. Recent precedents show the positive impact upon the timing of choosing to offer Phase I remedies where potentially required. In 2018, the *ServiRed/Sistema 4B/EURO 6000*, *BP/Petrocorner* and *Talleres Alegría/Duro Felguera Rail* transactions, where Phase I remedies were offered, were cleared in approximately two months from formal filing. More recently, in 2019, the *MIH Food Delivery Holdings/Just Eat* transaction, also subject to remedies, was cleared in Phase I in less than one month from formal filing. Likewise, in 2020, the *Areas/Autogrill* transaction was cleared in Phase I with remedies about one month after formal filing. However, it is reasonable to assume that some of these deals entailed lengthy pre-notification contacts. On the other hand, the possibility to stop the clock to request information from third parties may also affect the actual duration of the review period, which may be extended well beyond the statutory deadline. Recent examples include *Pigments/Negocio Ferro* and *Grupo Bimbo/Fábrica de Paterna de Siro*, both cleared approximately six months from formal filing.

Phase II investigations

The basic period for Phase II investigations is two months, extendible by 15 working days where the parties submit commitments. In Phase II, the CNMC normally requests comments from 'interested third parties' (although the CNMC has recently also conducted such requests in Phase I investigations). The merging parties may also request a hearing with the CNMC.

If the CNMC decides to clear the transaction unconditionally, such decision puts an end to the Phase II investigation, and thus the government cannot further intervene in the merger review process regarding such transaction.

Despite the statutory periods mentioned above, in practice, Phase II cases have taken much longer for clearance because of the possibility to stop the clock in case additional information is required. For instance, and as examples of Phase II case duration, the *Schibsted/Milanuncios* case was cleared in seven months, the *Telefónica/DTS* case was cleared in six months and the *JCDecaux/Cemusa* case was cleared in five months (time periods calculated from filing). More recent examples show longer review periods in practice. In 2019, the *Quirón/Clínica Santa Cristina* case was cleared in approximately nine months from filing. Further, in September 2019, the CNMC cleared the *Cimsa/Activos Cemex* transaction subject to commitments almost 15 months after filing.

Similarly, in February 2020 and December 2020, the CNMC initiated Phase II proceedings in *Santa Lucía/Funespaña* and *Mooring Port Services SL/Cemesa Amarres Barcelona SA*, respectively. The latter was recently cleared subject to remedies after almost nine months from filing. The outcome of the review in *Santa Lucía/Funespaña* is still pending.

Phase III investigations

However, in those cases where the CNMC decides either to prohibit the transaction or to clear it subject to commitments or conditions, the Ministry of the Economy may ask the government to decide whether to confirm the CNMC's decision or clear it, subject or not to commitments or conditions. In the second case, the government's decision must be based on certain specified public interest criteria other than competition. In such cases, the Ministry of the Economy has 15 days to decide whether to ask the government to intervene. If it does, the government has one month to decide on the transaction. The intervention of the government in merger control proceedings is informally known as 'Phase III'.

In practice, the government tends not to intervene in merger control proceedings. The *Antena 3/La Sexta* case (2012) is the only 'Phase III case' in Spain to date. The transaction was notified after the *Telecinco/*

Cuatro merger, which had already reduced the number of private free-to-air television broadcaster from four to three; the *Antena 3/La Sexta* merger would leave only two such operators. The former CNC imposed conditions that were more severe than the remedies the former CNC had accepted in *Telecinco/Cuatro*. The Ministry of the Economy decided to refer the case to the government, arguing that the decision concerned 'reasons of general interest related to the guarantee of an adequate maintenance of sector-based regulation and the promotion of research and technological development'. The government softened the conditions originally imposed by the former CNC and declared that the conditions should be in 'line with those [conditions applied to other operators] in the sector'. The merger was finally approved eight months after the first notification to the former CNC.

18 | What is the statutory timetable for clearance? Can it be speeded up?

During Phase I, the CNMC must reach a decision within one month of formal filing, extendible by 10 working days if commitments are submitted. However, during this phase of the investigation, there is scope for contact with the authorities, particularly if they require additional information, either formally (which 'stops the clock') or informally. Although not statutorily provided and institutionalised as in an EUMR context, the Competition Directorate can also request information from third parties as a sort of 'market test'. This market testing is occurring increasingly frequently by the CNMC in recent times. Given the statutory deadlines provided for in the Competition Act for third parties to respond, if a market test takes place, the review period is extended in practice up to approximately two-and-a-half months from formal filing. Recent examples include the *Just Eat/Canary* transaction and *Memora/Montero* in 2019, and the *Nomar/Argenta y Cifre* transaction, *Henry Schein/Casa Schmidt – Activos*, *Flutter/Stars* and *Six/BME* in 2020. For straightforward cases raising no issues, the CNMC tends to issue a decision prior to the expiry of the one-month deadline for Phase I. In fact, the average timeline for a decision to be delivered by the CNMC is approximately 20 days, provided that no market test takes place and there are no commitments submitted by notifying parties that need to be assessed. Recent experience shows that in short-form cases, clearance can be obtained in 10 working days (although this ultimately depends on the CNMC's workload at the time of filing).

Phase II investigations can last between two (basic period) and more than four months (due to the possibility to 'stop the clock' if additional information is required). During the Phase II investigation, the law provides for requests for information to 'interested third parties' (although the CNMC has recently also made such requests in Phase I investigations) and the possibility for the merging parties to request a hearing before the CNMC.

As indicated previously, while there is no possibility to speed up the review process, engaging early on in pre-notification discussions with the CNMC and offering commitments at an early stage of the process, if required, can ultimately have a positive impact on timing.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance is whether the transaction 'may prevent the maintenance of effective competition in whole or in part of the national market'. The test is set out in the Competition Act together with additional criteria that the National Markets and Competition Commission (CNMC) may consider when adopting its decision on a proposed transaction such as structure of the relevant markets, competitive position and economic strength of the parties involved in the transaction, actual and potential level of competition, suppliers and consumers' available choices, existence of barriers to entry, supply trends, countervailing demand power, and efficiencies.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures and, therefore, joint ventures (either cooperative or concentrative) are assessed under the same substantive test provided for in the Competition Act (ie, whether they 'may prevent the maintenance of effective competition in the market').

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Spanish substantive test (ie, whether the deal prevents the maintenance of effective competition in whole or in part of the national market) is aligned with the present substantive test provided for in the EU Merger Regulation. The Spanish antitrust authorities may examine market dominance, unilateral effects, coordinated effects, conglomerate effects and vertical foreclosure when assessing mergers.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

In theory, the main criteria should be competition-related. The analysis by the CNMC should be strictly on competition grounds, although at the level of Phase II investigation, the relevant consumers' associations may be consulted.

However, if the government intervenes in the merger control review at Phase III, the Competition Act expressly states that such decision must be based on certain public interest criteria different from competition criteria:

- national defence and security;
- the protection of public security and public health;
- free movement of goods and services within the national territory;
- protection of the environment;
- the promotion of technical research and development; and
- the maintenance of the sector regulation objectives.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Competition Act allows the authorities in practice to take into account efficiencies in the review process. It explicitly mentions 'efficiencies' as one of the substantive criteria for assessing mergers. According to the Competition Act, the CNMC will only take into account efficiencies that are of direct benefit to consumers, merger-specific, substantial, timely and verifiable. In practice, this means that significant evidence will need to be adduced by the parties. To this effect, there is a specific section in the notification form dealing with efficiencies. The CNMC enjoys certain discretion in considering any efficiency claim.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The National Markets and Competition Commission (CNMC) and the government may order any appropriate measures to restore effective competition, including divestments or the unwinding of the transaction. Fines of up to 5 per cent of the average worldwide turnover of the infringing undertaking in the last financial year may be imposed per day if the parties have been required to unwind the transaction and have delayed doing so or if the parties do not comply with the undertakings imposed by the CNMC or the government. Further, failure to comply with a decision issued by the CNMC in the context of merger control proceedings is a very serious infringement under the Competition Act. Fines foreseen for these types of infringements amount to 10 per cent of the infringing company's worldwide turnover in the last financial year.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Act allows the parties to offer commitments during Phase I and Phase II investigations. Such commitments are amendments to the transaction or other appropriate remedies to restore competition. The CNMC may market test such commitments with third parties to assess their effectiveness in addressing the competition concerns arising from the transaction.

Divestiture is certainly one of the options available to the parties, as well as any other appropriate measures to restore competition. However, the CNMC is keener to accept behavioural remedies than the European Commission is.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The CNMC may authorise structural remedies presented by the parties such as divestments. The parties to the transaction must submit a detailed plan to the CNMC setting out the steps they will follow to comply with these remedies. With respect to behavioural remedies, the CNMC is likely to impose an obligation upon the parties to submit information periodically to the CNMC to allow effective monitoring of the implementation of the remedies.

To date, the CNMC has closed 32 merger investigations subject to commitments in Phase I. More than half of these took place in the last four years (recent examples are the *ServiRed/Sistema 4B/EURO 6000*, *BP/Petrocorner*, *Talleres Alegría/Duro Felguera Rail* and *Naviera Armas/Trasmediterranea* cases in 2018, the *Lyntia/Negocio Iberdrola*, *Cirsa/GGSO*, *Cofares/Cofarta* and *MIH Food Delivery Holdings/Just Eat* cases in 2019 and the *Areas/Autogrill*, *Pigments/Negocio Ferro* and the *Grupo Bimbo/Fábrica de Paterna de Siro* cases in 2020), showing that the CNMC and parties are becoming more ready to remedy competition concerns up front and proceed with early closing of transactions. Likewise, the parties can offer remedies in Phase II cases (as was the case in *Quirón/Clínica Santa Cristina* in 2019 and *Cimsa/Activos Cemex* in 2020) and, if the transaction is subject to Phase III, the government can impose on the parties any kind of remedies, including divestments, to clear the transaction. However, the government's decision will be based on public interest criteria that are different from competition criteria.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, there are no precedents of remedies imposed by the CNMC on pure foreign-to-foreign transactions (ie, those where the parties involved did not have any corporate presence in Spain). In the *Integra/Codman Neurosurgery Business* transaction where Integra was active in Spain only through an independent distributor, the CNMC accepted remedies in Phase I consisting of the divestiture of a viable business in the market where competition concerns had been identified. The remedy ensured that the divested business would have the necessary means (eg, portfolio of products, brand licences, know-how, stocks, production facilities and supply agreements) required to sell the products and services concerned in Spain.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Act expressly states that ancillary restraints that are directly linked to and essential for implementing the concentration will be covered by the clearance decision. Contrary to the current 'self-assessment approach' followed by the European Commission, the Spanish competition authorities expressly deal with ancillary restraints in their clearance decisions. The notification form and short form contain a specific section on ancillary restraints, where the merging parties must provide detailed information on ancillary restrictions.

The CNMC will analyse carefully the validity of ancillary restraints under the principles provided for in the European Commission's Notice on restrictions directly related and necessary to concentrations. However, the Spanish competition authorities have sometimes followed a more restrictive approach than the European Commission on this matter.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties (ie, customers or competitors) have a different role in merger control proceedings than in proceedings relating to restrictive practices and abuses of dominant position. Normal merger control procedure can only be initiated by the notifying party or parties. However, a third party may initiate proceedings by filing a complaint making the National Markets and Competition Commission (CNMC) aware of a notifiable transaction that has not been notified.

As to customers' and competitors' rights in the review process, while they are very limited in a Phase I investigation (ie. complainants may informally approach the authority), they are greater in a Phase II investigation (if opened), where they can become involved in the procedure as 'interested third parties' if they ask to intervene. Moreover, the Spanish competition authorities usually contact and send questionnaires to customers, suppliers and competitors of the notifying parties and relevant consumer associations in Phase II merger control cases and, sometimes, also in Phase I merger control cases. This is a trend observed during 2019 where the CNMC has increasingly done market testing in Phase I, in cases such as *Cartamundi/Jarden*, *Just Eat/Canary* and *Mémora/Montero*. This trend has continued during 2020, where the CNMC engaged with third parties in Phase I in cases such as *Nomar/Argenta y Cifre*, *Flutter/Stars* and *Six/BME*.

The CNMC usually pays close attention to any feedback received from the market while carrying out its assessment.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The procedure before the competition authorities is reasonably transparent. The fact of the notification is made public on the CNMC's website within one to three days after the transaction has been filed. Likewise, if the transaction is made subject to a Phase II investigation, a short notice of this event is made public on the CNMC's website. The purpose is that potentially interested parties may become aware of the starting of Phase II proceedings if they want to request leave to intervene and submit comments on the transaction. Finally, once the final decision regarding the transaction is adopted, a non-confidential version is published on the CNMC's website.

To avoid any possible concerns, the notifying party should indicate in its notification which data are business secrets to have them treated as strictly confidential, and it must provide a non-confidential version of the notification form.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Yes, mainly with the EU authorities. In this regard, the recent reform of the Competition Act provides for enhanced cooperation powers for the CNMC with respect to its merger control activity and transactions subject (or potentially subject) to merger control in other EU member states or the European Commission. In practice, the CNMC, subject to prior waiver from the notifying parties, may exchange with the European Commission and other EU member states' national competition authorities any factual or legal elements, including confidential information, and use such elements as evidence.

The CNMC also cooperates with other antitrust authorities in the context of the OECD and the ICN. In addition, it interacts with Latin American authorities in the Latin American, Caribbean and Ibero-American competition fora.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Decisions of the Competition Directorate can be appealed to the National Markets and Competition Commission (CNMC) Council (provided that certain conditions are met), and decisions of the Council can be challenged before the Audiencia Nacional (a Spanish tribunal with national jurisdiction). The government's final decision on merger control proceedings in Phase III investigations may be subject to judicial review by the Spanish Supreme Court. Experience shows limited appeal activity with regard to merger control decisions and unsuccessful outcomes.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Although it is difficult to give a time frame, experience has shown that the Spanish Supreme Court's judicial review of government decisions may take between two and four years.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, 59 transactions were cleared by the National Markets and Competition Commission (CNMC), as opposed to the 88 transactions cleared in 2019. Most of them were unconditionally cleared in Phase I. Three cases were cleared subject to remedies in Phase I (*Areas/Autogrill*, *Pigments/Negocio Ferro* and *Grupo Bimbo/Fábrica de Paterna de Siro*, all of which included behavioural remedies). No transaction was prohibited and only one was subject to an in-depth Phase II analysis and cleared with remedies in September 2020 (*Çimsa/Activos Cemex*, almost 15 months after filing). During 2020, the CNMC also initiated Phase II proceedings in two instances, *Santa Lucía/Funespaña* and *Mooring Port Services SL/Cemesa Amarres Barcelona SA*. The number of notified transactions shows a decrease in merger control activity compared with previous years, which may be explained by the covid-19 crisis.

It is particularly interesting to note that the Phase I remedies offered in all the aforesaid three transactions included behavioural remedies, in line with precedents from previous years, which shows a clear trend towards the use of behavioural remedies in Phase I, whereas the European Commission favours divestments. It is also worth noting that, following what was learned from the *Bimbo/Panrico II* case, in *BP/Petrocorner*, the authority accepted a fix-it-first remedy.

Enforcement action shows that the CNMC has a clear willingness to monitor remedies, and this has been a traditional enforcement priority. Back in 2013, the former National Competition Commission fined Telecinco €15.6 million (the highest fine to date in the context of merger control proceedings) for having failed to implement the remedies that were accepted by Telecinco in the *Telecinco/Cuatro* merger. In the same case, in 2015 and 2016, the CNMC fined Telecinco €3 million each year regarding further failure to implement the remedies. During 2017 and early 2018, the CNMC has continued to closely monitor compliance with remedies as shown by cases *Telecinco/Cuatro*, *Verifone/Hypercom*, *Redsys/Redy*, *Integra/Codman Neurosurgery Business* or *Día/Eroski Activos*, where the CNMC has confirmed with a decision to that effect that the parties had complied with the remedies. Then, in 2018, the CNMC opened an investigation in relation to an alleged failure to comply with the commitments undertaken by Repsol when it acquired Petrocat in 2014. Further, in 2019, the CNMC fined Telefónica €1.5 million for breaching the commitments undertaken in the context of the acquisition of DTS in 2015. In late 2020, the CNMC continued closely monitoring compliance with remedies and identified a potential breach of the commitments that Disa Corporación Petrolífera SA undertook in the context of the *DISA/Shell/SAE/JV* transaction. In this respect, in March 2021, the CNMC opened formal proceedings against the aforesaid company for an alleged breach of commitments. Further, in April 2021, the CNMC fined Repsol Comercial de Productos Petrolíferos SA €850,000 for breaching the commitments undertaken in the context of the acquisition of Petrocat back in 2014.

In addition, the CNMC has continued to actively prosecute companies for breach of the suspensory obligation applicable to merger control proceedings (ie, closing the relevant transaction prior to clearance).

Although the CNMC investigated eight potential gun-jumping cases in 2016, more recently, gun-jumping cases have decreased. By way of illustration, in 2018 only one formal investigation (*Consenur/Activos Cathisa*), took place, resulting in a fine of €20,000 on Consenur for gun jumping in the acquisition of the waste management services business of Cathisa. Similarly, in 2019, the CNMC only pursued one gun-jumping case, by which it fined Grupo Nufri (a fruit producer) €12,800 for breaching the suspensory obligation in its acquisition of Indulleida. In late 2020, the CNMC required Funespaña to notify the acquisition of Alianza Canaria, since the transaction satisfied the market share threshold provided for in the Competition Act. In February 2021, the CNMC opened a formal investigation in the context of the aforesaid transaction, and ultimately fined Funespaña €100,000 for gun jumping.

Similarly, in January 2021, the CNMC required Albia (a subsidiary of the Santa Lucía Group) to notify the acquisition of Tanatorios Móstoles, since the transaction satisfied the market share threshold provided for in the Competition Act. Following a formal investigation against Albia in the context of the aforesaid transaction, the CNMC ultimately fined Albia €300,000 for gun jumping in late July 2021.

In the CNMC's Action Plan for 2021–22, which was subject to public consultation, the authority explained that some of its key priorities for the period 2021–22 with respect to merger control include fostering an agile review of unproblematic transactions, ensuring the protection of the incentives to innovate and analysing the actual effects in the market of transactions subject to remedies aiming at enhancing the design of future remedies.

Reform proposals

35 | Are there current proposals to change the legislation?

Following the reform of the Spanish competition rules that entered into force from September 2007 to March 2008, Spain's competition law has been in line with the EU rules and has streamlined the authorities responsible for competition enforcement in Spain. However, the competition authority can adopt 'soft law' (guidelines, notices, etc) to assist in the interpretation of key issues relating to Spanish merger control provisions and in fact did so in October 2011 with regard to simplified proceedings.

The Competition Act was amended in April 2021 to implement the ECN+ Directive on the enforcement powers and resources of competition authorities of the member states (Directive (EU) 2019/1). It remains to be seen whether additional reforms, present in the draft bill published by the Spanish government in the summer of 2020, will be taken up in the future.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The number of merger filings (68 notifications) made in Spain in 2020 shows a relevant decrease in activity compared to previous years, which may be explained by the impact of the covid-19 pandemic on economic activity at a worldwide level. In March 2020, the deadlines for administrative proceedings were suspended as a result of the State of Alarm declared in Spain in order to cope with the pandemic. However, the National Markets and Competition Commission (CNMC) resumed, at the request of the notifying parties, the review of ongoing merger transactions. This was the case, for instance, in *Grupo Bimbo/Fabrica de Siro de Paterna* and *Xfera/Lyca*. In fact, 11 cases were cleared during the period that the deadlines for administrative proceedings were suspended. Further, reference to timing for review during 2020 may be distorted by the effects of the pandemic.

The enforcement track record shows a mature and consistent approach to merger control scrutiny as most transactions were unconditionally cleared in Phase I and only three cases were cleared subject to remedies in Phase I. No transaction was prohibited and one was subject to an in-depth Phase II analysis, which was cleared subject to remedies in late 2020 (*Cimsa/Activos Cemex*).

Recent enforcement shows a stricter approach to Phase I reviews (where market testing and Phase I reviews with remedies have increased) and a willingness to accept behavioural remedies in both Phase I and Phase II. All three cases cleared in 2020 subject to remedies in Phase I included behavioural remedies, which shows the CNMC also making use of behavioural remedies in Phase I, contrary to the practice of the European Commission, which favours divestments. The remedies offered by the parties in those transactions also show that the regulator is willing to address proportionality concerns by accepting behavioural remedies.

Sweden

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Swedish merger control is governed by the Swedish Competition Act (the Act), which entered into force in November 2008. As compared with the previous legislation, the changes on merger control were largely intended to bring the Act even further into line with the EU Merger Regulation.

The Swedish Competition Authority (the Competition Authority) has primary responsibility for the administration of the Act. In January 2018, the Competition Authority gained the power to block a transaction, when previously it had been necessary to take such a case to court. Now, a prohibition decision from the Competition Authority can be appealed to the Patent and Market Court, with further appeal to the Patent and Market Court of Appeal.

The Patent and Market Court and the Patent and Market Court of Appeal were both established in September 2016. Previously, orders concerning prohibitions and other sanctions were made by the Stockholm District Court and on appeal by the Market Court (as a result, older case law will reference the previous court system).

Scope of legislation

2 | What kinds of mergers are caught?

The Act's merger control rules are based on the concept of 'concentration', which is intended to correspond completely to the concept of a concentration under the EU Merger Regulation. This concept is defined in a general way to allow a dynamic interpretation in line with EU law, including existing, as well as future, case law of the European Court of Justice. More precisely, the Act prescribes that a concentration within the meaning of the Act arises if there is a change of control on a lasting basis when:

- two or more previously independent undertakings merge; or
- one or more persons, already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

The Competition Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on the concept of concentration under the EU Merger Regulation.

3 | What types of joint ventures are caught?

The Act is applicable to all joint ventures constituting a concentration within the meaning of the Act, that is, all full-function joint ventures. The Competition Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on the concept of full-function joint ventures.

To the extent the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, that coordination shall be appraised in accordance with the criteria of the provisions on anticompetitive cooperation between undertakings.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act's definition of a concentration follows the relevant rules of the EU Merger Regulation. In short, acquisitions of minority interests are only caught by the merger rules if they involve a de facto acquisition of control.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Act provides for mandatory notification where:

- the undertakings concerned by the concentration attain a combined turnover in Sweden of more than 1 billion kronor; and
- each of at least two of the undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

If the first but not second threshold is met:

- the Competition Authority has jurisdiction to order the concentration to be notified, even post-closing, where particular grounds exist to do so (ie, risk of substantive competition concerns, see *Easypark/Inteleon* from 2019); and
- parties can make voluntary notification.

When calculating the turnover of the undertakings concerned, two or more transactions that have taken place within a two-year period between the same persons or undertakings are treated as one and the same concentration.

The Competition Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on calculation of turnover and on the concept of undertakings concerned.

If a concentration has a Community dimension (ie, meets the turnover thresholds in article 1 of the EU Merger Regulation), the concentration should instead be notified to the European Commission.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Provided the transaction falls within the scope of the Act and the turnover thresholds are met, filing is mandatory. There are no exceptions to this rule.

The parties may also notify a transaction voluntarily where the first but not second threshold is met. As the Competition Authority also has the power to order a notification in this context, a voluntary filing may be advisable where the transaction leads to or augments already high market shares in the Swedish market or a substantial part thereof, or where the parties have vertically overlapping activities and either of the parties has a strong position upstream or downstream. In 2019, four transactions were notified to the Competition Authority on a voluntary basis (though all were in fact cleared unconditionally in Phase 1). This number dropped to one in 2020.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are, in the view of the Competition Authority, caught by the Act and have to be notified when the turnover thresholds are met. In practice, this means, for instance, that the creation of a full-function joint venture with no, or limited, foreseen activities in Sweden can still be caught by the Act's merger rules if the parent companies meet the thresholds. As long as the thresholds are met, the transaction is presumed to have local effects in Sweden.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act contains no special merger rules relating to particular areas of the economy. However, such rules are sometimes contained in sector-specific legislation.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A notification of a concentration must be made before it is implemented. There are no pecuniary sanctions for not notifying a transaction to the Competition Authority. However, should the Competition Authority become aware of a qualifying but unnotified transaction, it may order the parties to notify, subject to a fine.

Should the Competition Authority find that a completed transaction was not permitted under the Swedish Competition Act (the Act), it retains the right to prohibit the transaction up to two years after the transfer of control bringing about the transaction. Failure to notify brings with it the risk of the transaction being annulled ex post.

Filing under the Act can be made as soon as the undertakings concerned can demonstrate to the Competition Authority a good faith intention to implement the concentration. This means that an unsigned copy of the agreement or a letter of intent is normally sufficient as a basis for notification. There are practical advantages to pre-notification contacts with the Competition Authority.

10 Which parties are responsible for filing and are filing fees required?

A transaction should be notified by the merging parties together or the party or parties acquiring control. There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

From the date of receipt of a complete notification, the Competition Authority has a preliminary period of 25 working days (Phase I) in which to take a decision either stating that there are no grounds for action or that it will initiate a special investigation (Phase II). However, if an undertaking offers commitments to remedy concerns during Phase I, the preliminary investigation period is increased to 35 working days.

After a decision to carry out a special investigation (Phase II), the Competition Authority has an additional three months in which to decide whether the transaction should be prohibited or cleared. The three-month period may be extended provided the notifying parties agree to it or there are compelling reasons for doing so. The decision of the Competition Authority to extend the period can be appealed to the Patent and Market Court.

On average in 2020, Phase I cases were resolved by the Competition Authority within 16 working days and Phase II cases within 88 working days.

Before clearance, no party to the concentration may take any steps to complete the transaction. This standstill requirement can be waived by the Competition Authority under exceptional circumstances. The Competition Authority also has the power to order the parties to the transaction to respect the standstill requirement, subject to a fine. If the Competition Authority clears the transaction before the deadline, the parties to the concentration may complete the transaction.

The Competition Authority has the power to suspend the time limit (stop the clock) if, for example, the parties do not provide requested information in due time. During the preliminary investigation period, the parties may also request that the Competition Authority suspends the time limit for as many days as the Competition Authority deems appropriate. This possibility is available if the parties need additional time to address a competition concern.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Before the Competition Authority has taken a decision to clear a transaction, parties are prohibited, in the absence of express permission, from taking measures to implement the concentration fully or partly. Where necessary to uphold this rule, the Competition Authority can order the parties to respect the standstill period subject to a fine. Without this active step by the Competition Authority, there are no pecuniary sanctions but there is nonetheless the risk of the Competition Authority subsequently deciding not to clear the transaction. In such cases, divestiture of the company or purchased assets (or similar) will be required.

In 2014, a completed, voluntarily notified transaction in the online real estate advertisement sector was blocked (*Swedbank/Svensk Fastighetsförmedling*). In 2019, the Competition Authority ordered a transaction to be notified that had been completed over two months earlier (it was later cleared unconditionally in Phase II – *Easypark/Inteleon*).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Before the Competition Authority has taken a decision to clear a transaction, parties are prohibited, in the absence of express permission, from taking measures to implement the concentration fully or partly. Where necessary to uphold this rule, the Competition Authority can order the parties to respect the standstill period subject to a fine. Without this active step by the Competition Authority, there are no pecuniary sanctions but there is nonetheless the risk of the Competition Authority subsequently deciding not to clear the transaction. In such cases, divestiture of the company or purchased assets (or similar) will be required.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act does provide for an exemption from the standstill requirement on a case-by-case basis. However, this is a general provision, not specific to foreign-to-foreign transactions, and there must be particular reasons to justify such a departure from normal procedure.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Act does not include any special rules applicable to public takeover bids. However, it provides that the prohibition of a transaction will have no effect on the validity of acquisitions made on a Swedish or foreign stock exchange, on another authorised marketplace or at a public auction. In those cases, the buyer may instead be required to divest what has been acquired.

The Act does not contain any explicit rule similar to that found in the EU Merger Regulation to the effect that the standstill rule does not prevent formal implementation of a public bid, in the sense that the acquirer may formally take over the shares as long as they are not voted on. However, the Competition Authority takes the view that the same principle applies under Swedish competition law. In addition, the parties may apply for an exception to the standstill rule so that the acquirer may vote for the shares if it is necessary to maintain the full value of the investment, provided it would not harm competition.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filing under the Act requires the use of a specific form. The form must be filled out in Swedish. A convenience translation of the form is available on the Competition Authority's website. The form includes questions on the parties, competitors, market conditions, etc, similar to Form CO requirements for notifications under the EU Merger Regulation.

The information required by the form is relatively extensive. The time necessary for the preparation of the form varies widely from case to case, as does its size, depending mainly on whether the transaction involves any 'affected markets'.

It is sometimes possible to secure, on an informal basis, waivers from the Competition Authority for information confirmed as unnecessary in a specific case. Discussions on waivers may be held during pre-notification meetings. There is no formalised equivalent to the simplified notification form available at EU level for uncomplicated transactions.

A notifying party must formally declare in the filing that all information provided is true, correct and complete. If the Competition Authority considers that the information provided is misleading or deficient in some way, the filing will not be considered to be complete and time will not start to run. During the review process itself, the Competition Authority can request additional information from the parties under penalty of a fine. If necessary, the Competition Authority can stop the clock until the required information is provided.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Upon receipt of a complete notification, the Competition Authority has 25 working days to conduct a preliminary investigation (Phase I). However, if an undertaking offers commitments, Phase I is increased to 35 working days. Before the end of the preliminary investigation, the Competition Authority either has to clear the transaction or decide to initiate a special investigation (Phase II).

If Phase II is launched, the Competition Authority must decide within three months whether the transaction should be prohibited or cleared. The Competition Authority may extend the three-month period by a maximum of one month at a time with the parties' consent, or if there are other compelling reasons.

The Competition Authority has the power to suspend the time limit if, for example, the parties do not provide requested information in due time (ie, to 'stop the clock'). During Phase I, the parties may also ask the Competition Authority to suspend the time limit for as many days as the Competition Authority deems appropriate. This possibility is available if the parties need additional time to address a competition concern.

A prohibition decision or conditional clearance from the Competition Authority can be appealed to the Patent and Market Court and must be ruled upon within six months of receipt (subject to extension). An appeal against a judgment by the Patent and Market Court can be made to the Patent and Market Court of Appeal, which must pass final judgment within three months of expiry of the period for appeal.

No measures may be taken in respect of a transaction, notified or not, when more than two years have passed since the concentration occurred.

Pre-notification contacts are advised and recommended by the Competition Authority, especially for more complex transactions with 'affected markets'. There are practical advantages to pre-notification contacts with the Competition Authority.

18 What is the statutory timetable for clearance? Can it be speeded up?

Upon receipt of a complete notification, the Competition Authority has 25 working days to conduct a preliminary investigation (Phase I). However, if an undertaking offers commitments, Phase I is increased to 35 working days.

If Phase II is launched, the Competition Authority must decide within three months whether the transaction should be prohibited or cleared. The Competition Authority may extend the three-month period by a maximum of one month at a time with the parties' consent, or if there are other compelling reasons.

The Competition Authority has the power to suspend the time limit if, for example, the parties do not provide requested information in due time (ie, to 'stop the clock'). During Phase I, the parties may also ask the Competition Authority to suspend the time limit for as many days as the Competition Authority deems appropriate. This possibility is available if the parties need additional time to address a competition concern.

There are no set timetables for hearings, requests for information or other measures during the investigation. The Competition Authority may, from time to time, in the course of the investigation send questions to the parties and request additional information, typically coupled with a deadline.

When the notification has been filed, the Competition Authority will normally contact competitors and other third parties listed in the notification and invite comments on the proposed transaction. There is no formal distinction between different categories of third parties.

No companies other than the undertakings concerned are treated as parties to the procedure.

The length of time required to obtain a decision varies considerably from case to case, depending mainly on whether the transaction involves any 'affected markets'. However, the Competition Authority seeks to clear uncomplicated cases (those clearly involving no affected markets) before the expiry of Phase I. The Competition Authority has published a goal to clear such cases within 15 working days. On average, in 2020, Phase I cases were resolved within 16 working days and Phase II cases within 88 working days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Under the Swedish Competition Act (the Act), a transaction shall be prohibited if it would significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. The test is harmonised with the EU Merger Regulation.

The Competition Authority's assessment will take account of all relevant factors including, for example, market shares, barriers to entry, buyer power and potential countervailing efficiencies. Where relevant, a 'failing firm' defence would be considered by the Competition Authority.

A transaction may be prohibited only if it does not involve 'the setting aside of essential national interests of security or resources'. This exclusion applies only in very special circumstances.

20 | Is there a special substantive test for joint ventures?

In addition to the substantive test for clearance, the Act provides that, to the extent the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, that coordination shall be appraised in accordance with the rules on anticompetitive cooperation between undertakings.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Competition Authority will typically consider possible unilateral, coordinated, vertical and conglomerate effects of a concentration when evaluating whether it would significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not part of the review process of the Competition Authority, with the exception that a transaction cannot be prohibited if doing so would jeopardise important national interests of security or resources (a rare exception).

In 2019, the Directors of the Nordic Competition Authorities published a joint article promoting a strict merger control regime, free of political interference, and a critique of the so-called Franco-German proposal to relax merger control rules to facilitate the creation of 'European Champions'.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Act does not explicitly mention economic efficiencies. However, the Competition Authority's 2018 merger control guidance specifies that the parties must at an early stage provide the Competition Authority with verifiable information on potential efficiency gains and counterfactuals to enable it to take economic efficiencies into account.

The Competition Authority refers to the European Commission's Guidelines on the assessment of horizontal mergers and its guidance on the assessment of economic efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the substantive test is met, the Competition Authority can either prohibit the transaction or accept and make binding appropriate commitments from the parties to remedy the concerns identified. Remedies could include an order to divest or to take other pro-competitive action. Any commitments given by the parties may be linked to a fine.

Acquisitions made on a stock exchange or any other recognised market or at an auction may not be prohibited; instead, the disposal of the assets acquired may be ordered.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

As an alternative to prohibiting a transaction, the Competition Authority can accept commitments for the disposal of an undertaking or a business activity in whole or in part or some other measure to address the competition concern identified.

Those commitments may be proposed at any stage during the procedure. The companies concerned normally present such solutions in the form of an undertaking to the Competition Authority. Structural undertakings as well as behavioural undertakings are accepted by the Competition Authority. Compliance with undertakings is often ensured through a fine to be imposed in the event of a breach of the undertaking.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Commitments may be proposed by the parties at any stage during the procedure. In Phase I, if commitments are offered, this initial period is extended to 35 days. In Phase II, an application to extend the time limit is required if a remedy is offered later than three weeks before the end of this in-depth period. The basic conditions applicable to a divestment or any other remedy are, in short, that they are sufficient to eliminate the adverse effects of the concentration.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

This is rare but the Competition Authority has in the past (for example, the mid 1990s) obliged the parties to a foreign-to-foreign transaction to divest assets located outside Sweden to remedy competition issues on the Swedish market.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A decision by the Competition Authority to clear a transaction also covers restrictions directly related and necessary to the implementation of the notified concentration. There are no specific guidelines published by the Competition Authority on ancillary restraints, but the preparatory works and Competition Authority's other guidelines indicate that the European Commission's Notice on ancillary restraints shall give guidance in matters concerning such restraints under the Swedish Competition Act.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Customers and competitors (and suppliers in some instances) will be invited to comment on the proposed transaction. No companies other than the undertakings concerned are treated as parties to the procedure.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

All notifications are mentioned together with a brief summary in the Competition Authority's case list, which is publicly available on its website. The Competition Authority also publishes the final decision in each case.

As for confidentiality, whereas the general rule in Sweden is that all documents held by a public authority are in the public domain, rules on confidentiality and business secrets are contained in the Public Access to Information and Secrecy Act, which provides that information shall be secret if it relates to a party's business, innovations or research and development, insofar as disclosure could cause the party to suffer injury. There must, however, be particularly strong reasons for refusing full access to the file to a party to the proceedings.

Information provided by the parties during pre-notification contact is covered by absolute secrecy, that is, without the requirement that disclosure could cause injury.

Where the granting of confidentiality has been an issue, the Competition Authority has generally adopted a cooperative attitude in relation to the party requesting confidentiality.

In certain circumstances, the Competition Authority can give a party access to confidential information through a 'data room procedure'. During that process, certain information contained in the Competition Authority's investigation file will be held available at its premises (the data room) to which only a restricted group will have access during a limited period.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Authority may, where appropriate, contact the European Commission or any national competition authority formally or informally. Since 2004, Sweden has had an agreement with Denmark, Norway and Iceland on cooperation on competition issues. This was revised and extended in September 2017 to include Finland and Greenland. As a result of the agreement, information exchange between the national competition authorities concerned is facilitated, including in the area of merger control. The national competition authorities hold conference calls and yearly meetings within the framework of the agreement to update each other on current trends and ongoing investigations.

The Best Practices on Cooperation between EU National Competition Authorities in Merger Review were adopted in November 2011 by the EU Merger Working Group.

Under EU merger control rules, the Competition Authority cooperates with the European Commission and the other member states' competition authorities concerning referral cases.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Prohibition and conditional clearance decisions of the Competition Authority can be appealed to the Patent and Market Court. Decisions and orders of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal, but leave to appeal is required. There is also a possibility, subsequent to a decision by any of the above courts, of reviewing the decision, on application of the Competition Authority, where the decision has been based on false information provided by a party. This application must occur within one year of the date of the decision.

The *Arla/Klassiska Ostar* case is the only transaction to have been prohibited by the Competition Authority since the authority acquired the power in 2018 to take such decisions itself.

Time frame

33 What is the usual time frame for appeal or judicial review?

A prohibition or conditional clearance decision can be appealed to the Patent and Market Court. The court has six months from receipt of the appeal to make a ruling. If an appeal is made against the judgment of the Patent and Market Court, the Patent and Market Court of Appeal shall give a ruling within three months of expiry of the period of appeal.

The time limits may be extended by the court if the parties to the transaction agree to it or where there are special reasons for an extension.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since 1993, the Competition Authority has taken action to prohibit 14 mergers. This somewhat underestimates the degree of regularity with which the Competition Authority may have reached negative conclusions, as other transactions have simply been abandoned on receipt of the draft summons (or, after the 2018 reform, a statement of objections in the form of a draft decision), without the Competition Authority needing to take formal action.

There have also been cases resolved via commitments, avoiding the need for prohibition altogether. Previously rare, a slowly growing number of cases are being cleared with commitments already in Phase I (with one such decision in each of 2018, 2019 and in 2020).

Reform proposals

35 Are there current proposals to change the legislation?

The Competition Authority received increased powers in January 2018 and can now prohibit a transaction without taking action in court to do so. This power was exercised for the first time in 2019.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the number of transactions notified to the Competition Authority remained largely stable, with 80 notifications (compared to 74 in 2019 and 80 in 2018). The first months of 2021 have indicated a strong start to the year, with 41 merger filings submitted by early May (10 more than in 2020, and around 15 more than the preceding years). The covid-19 pandemic has thus not had an immediate effect on the number of notified transactions. Furthermore, the Competition Authority noted in its report for 2020 that the pandemic did not result in any problematic transactions in terms of failing firms. It did, however, add that long-term effects, or effects on transactions not reviewed by the Competition Authority, cannot be excluded.

Looking more closely at the main cases behind the numbers in 2020, there was one unconditional clearance in Phase II (*EasyPark/Inteleon*), and one conditional clearance in Phase I (*Gasum/Linde*). By early to mid 2021, there has been one conditional clearance in Phase II (*Altia/Arcus*).

In terms of the review period, the Competition Authority continues to be successful in dealing efficiently with Phase I cases, averaging 16 working days in 2020 (a small increase from 15 in 2019). Typically, cases involving no horizontal or vertical overlaps are almost always dealt with by the Competition Authority in under 15 working days.

On procedural developments, it has become increasingly common in recent years for the Competition Authority to make use of its stop-the-clock powers (either on its own initiative or at the request of the parties). Examples in 2020 to early 2021 include *Gasum/Linde*, *Easypark/Inteleon* and *Altia/Arcus*. The *Gasum/Linde* case is particularly interesting in that the clock was stopped for 20 days on the last day of Phase I.

This case concerned Gasum Oy's acquisition of Lidingö Clean Gas Solutions and Nauticor, with initial concerns identified in imports and supply of liquefied natural gas to industrial customers, and more specifically on Gasum gaining greater control of important infrastructure (terminals). To address this, Gasum offered in Phase I to commit to allowing access by third parties to 380,000 MWh at the target terminal for a period of 10 years on FRAND (fair, reasonable, and non-discriminatory) terms, at a throughput fee and service fee. The clock was stopped not owing to a failure by the parties to provide requested information, but rather on agreement as a way to allow more robust testing of the remedies proposed without going into Phase II. A report was prepared by an impartial expert with specific experience from the industry on the commitments offered, giving the Competition Authority the comfort needed to clear the case conditionally in Phase I in March 2020. This was an unusual and flexible format.

The number of voluntarily notified transactions dropped to one in 2020, from four in 2019. Nonetheless, the higher than usual level in 2019 shows that this aspect of the Competition Authority's jurisdiction, where it can accept or order a filing in cases where only the first of the two mandatory thresholds is met, means that transacting parties involved in competitively sensitive deals need to think carefully about whether to proceed without filing, or file voluntarily to pre-empt potential interest from the Competition Authority.

This was an issue in the 2019 *Easypark/Inteleon* deal involving mobile payment solutions for car parks. Based on information picked up in a press release issued by the parties, the Competition Authority ordered that the transaction be notified more than two months after closing. The deal was a three-to-two merger with combined market shares in the range of 40 to 60 per cent but it was ultimately cleared unconditionally in Phase II in March 2020 (around seven months after closing). Vertical entry and expansion was deemed likely, timely and sufficient, with some public and private parking operators already creating their own mobile payment solutions.

Of particular note in the last year is the conditional Phase II clearance of the *Altia/Arcus* transaction, involving the merger between Finnish Altia Plc and Norwegian Arcus ASA. Both parties produced, imported, exported and distributed both their own and other producers' alcoholic drinks, especially wine and spirits. The Competition Authority found that the merger would entail a risk of significant anticompetitive effects on the markets for sales of flavoured spirits, cognac, and unflavoured spirits, especially through the creation or strengthening of a dominant position, as the combined market shares on the markets were estimated to be between 80 to 100 per cent, 55 to 75 per cent and 50 to 70 per cent. The parties offered commitments, meaning that Altia and Arcus had to divest a number of the most famous and sold spirits and vodka brands, as well as either divesting a cognac brand or sublicense it to an independent company. These commitments cleared the way for the conditional clearance in April 2021.

The *Altia/Arcus* case is the only conditional clearance, as well as the only Phase II case, from April 2020 to mid 2021. The past year has thus been relatively calm in comparison with previous years in terms of the apparent complexity as regards notified transactions, perhaps owing to the fact that companies did not want to add further complexity and uncertainty to an already uncertain year.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Swiss merger control is mainly governed by the Federal Act on Cartels and Other Restrictions of Competition (CartA) as well as the Ordinance on the Control of Concentrations of Undertakings (together, the Competition Law). The Competition Law came into effect on 1 July 1996 and was revised in 2004. Further minor amendments have since been made. On 12 February 2020, the Federal Council requested the Federal Department of Economic Affairs, Education and Research to prepare a partial revision of the CartA, notably to modernise the Swiss merger control procedures.

Merger control is enforced by the Competition Commission (ComCo). The ComCo consists of between 11 and 15 members (currently 12), the majority of whom must be independent experts. It is based in Berne. The cases are prepared and processed by the Secretariat of the ComCo (the Secretariat). The Secretariat is divided into four departments responsible for product markets, infrastructure, services and construction respectively.

Scope of legislation

2 | What kinds of mergers are caught?

Transactions that are subject to merger control are:

- statutory mergers of previously independent enterprises;
- acquisition of control over a previously independent enterprise or parts thereof, including through the acquisition of equity interests or the conclusion of agreements. Acquisitions of minority shareholdings are not subject to merger control, except for any contractual arrangements or factual circumstances conferring factual control on the minority shareholder. However, the ComCo has decided that the acquisition of a minority interest may qualify as an anticompetitive agreement if the enterprises concerned intend to cooperate; and
- acquisition of joint control over an enterprise (joint venture).

3 | What types of joint ventures are caught?

There are three different types of joint ventures caught by merger control:

- acquisition of joint control over an existing enterprise;
- acquisition of joint control over an existing joint venture if the joint venture performs all the functions of an autonomous economic entity on a lasting basis; and
- creation of a new joint venture 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 enterprises are transferred to the joint venture.

Joint ventures for a transitional period are generally not caught by the Competition Law unless the period envisaged is sufficiently long or the term is renewable.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law defines control as the ability to exercise a decisive influence on the activity of another enterprise by acquiring its shares, or in any other manner. In particular, this ability is deemed to exist if an enterprise is in a position to determine the production, the prices, the investments, the supply, the sales or the distribution of the profits of the other enterprise. Control is also assumed if major aspects of a company's business activity or its general business policy may be decisively influenced. Whether control is actually or potentially, directly or indirectly, de jure or de facto exercised is irrelevant. However, the mere acquisition of a non-controlling minority interest or a representation in executive bodies is not notifiable. In contrast, a board or management representation could confer control if associated with veto rights concerning strategic decisions. Similarly, other rights or contractual arrangements could confer control if they decisively influence the composition, the deliberations or decisions of the executive bodies, needing to be assessed on a case-by-case basis.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The test applied to mergers is based on turnover. Two turnover thresholds must be reached cumulatively: for the last business year prior to the merger, the enterprises concerned must have reported an aggregate turnover of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs, and at least two of the enterprises involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million Swiss francs. These monetary amounts are relatively high compared to other jurisdictions. Turnover is calculated on a consolidated basis, but excluding intra-group business.

In the case of insurance companies, the gross annual insurance premiums are taken into account for the purpose of determining the relevant thresholds.

The turnover calculation for banks and financial intermediaries is based on gross income. With respect to the geographical allocation of turnover, the notification form of the ComCo provides that the Swiss turnover of a bank or financial intermediary is calculated based on the income received by the branch or division established in Switzerland.

In general, the test for the geographical allocation of the turnover is the contractual delivery place of a product (place of performance) and the place where competition with other alternative suppliers takes place, respectively. The billing address is not relevant.

In addition, once the ComCo has established that a specific enterprise holds a dominant market position, every merger transaction, even if the turnover thresholds are not met, involving that enterprise in the market in which it holds a dominant position or in an adjacent market or in a market upstream or downstream thereof is subject to the notification requirement, irrespective of any thresholds. The ComCo does not publish a list of enterprises held to be dominant. In 2014, the Federal Administrative Court held that this provision of the Cartel Act had to be interpreted narrowly. However, in a subsequent recommendation, the ComCo widened the scope of application of article 9, paragraph 4 of the Cartel Act and held that a single economic entity between the joint venture and its mother companies had to be assumed. Hence, to determine whether a notification obligation is triggered, the joint venture and the companies controlling the joint venture are to be considered. However, only if the binding part of a final and non-appealable decision states a market dominant position respectively the abuse of a market dominant position, a notification obligation for future concentrations is triggered. In contrast, no such obligation arises if only the reasoning of a decision holds an undertaking to be market dominant.

Parliament may adjust the turnover thresholds taking account of any change in circumstances and may establish special criteria for the notification of concentrations in certain sectors of the economy. Until now, no such federal decree has been passed.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory prior to completion of the transaction, provided the turnover thresholds are reached or a market dominant position in the meaning of article 9, paragraph 4 of the Cartel Act has been established in a final non-appealable-decision. There are no exceptions to this principle.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Law is applicable to foreign-to-foreign mergers provided the relevant thresholds are reached with respect to Switzerland. According to the Federal Supreme Court, whenever the turnover thresholds of the Competition Law are met, an effect on the Swiss market is presumed, thus triggering a mandatory pre-merger filing.

In practice, given the relatively high thresholds, it is unlikely that a foreign-to-foreign merger would become subject to Swiss merger control without, at the same time, being subject to the relevant foreign merger control.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In March 2020, the Swiss Federal Council was commissioned by the parliament to prepare an act on Investment Control. No draft proposal of such act on Investment Control has been presented yet.

Currently, there are therefore no generally applicable Swiss acts (such as catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest, regardless of the industry sector. However, foreign investments in companies engaged in certain regulated industries and sectors in Switzerland might require government permission or approval. For example, special authorisations are required if the merger transaction involves banks or Swiss real estate companies.

In particular, if a bank incorporated under the laws of Switzerland becomes foreign-controlled or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change, then a new special licence for foreign-controlled banks must be obtained prior to such event. The competent authority is the Swiss Financial Market Supervisory Authority (FINMA). When a concentration of banks is deemed necessary for reasons related to creditor protection, namely rescue mergers, FINMA replaces the ComCo, which is given a right of consultation only. However, the notification must still be addressed to the ComCo if the jurisdictional thresholds for notification are met.

As a further example, any acquisition or actions that qualify as an acquisition of residential real estate assets in Switzerland are subject to the Federal Act on the Acquisition of Real Estate by Foreign Persons (Lex Koller) if the acquiring person qualifies as a 'person abroad' under the Lex Koller. Accordingly, the parties of a merger involving a foreign enterprise and a Swiss real estate company (ie, a company whose principal purpose is the holding of real estate in Switzerland and whose assets include a significant portfolio of residential properties in Switzerland) may need to obtain a special permit from the competent cantonal (local) authorities.

Furthermore, special authorisation requirements apply to enterprises holding special rights, such as broadcasting, telecommunication, nuclear energy and air transport licences.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A filing must be made prior to the completion of the merger. Typically, therefore, a filing will be made after the relevant agreements have been signed, but prior to completion. If a notifiable merger is not filed, the enterprise that was required to file may face a fine of up to 1 million Swiss francs. In addition, the management (individuals) may also be personally fined up to 20,000 Swiss francs. To date, the Competition Commission (ComCo) has imposed several fines on enterprises that did not file or filed a notification too late. In contrast, the managers of such enterprises have not been fined so far. Fines are calculated based on the following objective criteria:

- whether the notification requirement was breached intentionally or negligently;
- importance of the enterprises involved in the relevant market, measured by turnover realised in Switzerland;
- whether prima facie the concentration represents a threat to competition. Such a threat is presumed if the total aggregate market share of the enterprises involved in the concentration is 20 per cent or more (or, if no market shares are combined, the market share of one of these companies is 30 per cent or more); and
- whether the concentration adversely affects effective competition; that is, whether it creates or enhances a dominant market position that eliminates effective competition (without enhancing competition in another market in a way that outweighs the negative effects of the dominant market position).

10 Which parties are responsible for filing and are filing fees required?

In the case of a statutory merger, notification must be made jointly by the companies involved. Where control over an enterprise is acquired, the filing must be made by the enterprise or enterprises acquiring control. If a joint notification is made, the enterprises are required to designate at least one common representative to the ComCo. For a Phase I investigation, there is a lump-sum filing fee of 5,000 Swiss francs. In a Phase II investigation, the Secretariat of the ComCo charges an hourly rate of 100 to 400 Swiss francs depending on the urgency of the case and the seniority of the case handler.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Once notification is complete, there is a first waiting period of a maximum of one month in which the enterprises are not allowed to complete the concentration (provisional ban). The ComCo informs the enterprises concerned of the opening of an investigation within this one month period. If no such notice is given within that time frame, the concentration may be implemented without reservation. The provisional ban does not apply if the ComCo prior to the expiry of the period of one month notifies the enterprises that it regards the concentration to comply with the Competition Law (comfort letter). If the ComCo decides to open an investigation the provisional ban is automatically extended until the end of the investigation. Alternatively, the ComCo at the request of the undertakings, at any stage of the procedure, may provide authorisation to implement the merger for good cause, in particular if the merger otherwise could not be completed or the enterprises would suffer great financial loss.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If an enterprise fails to comply with the provisional ban on closing the merger after notification to the ComCo, the enterprise may face a fine of up to 1 million Swiss francs. In addition, the enterprise may be required to take measures to reinstate effective competition, either by unwinding the transaction, by ceasing to exercise effective control, or by any other appropriate action such as the termination of personnel ties or contractual guarantees to competitors or counterparties. Unlike the breach of the notification requirement, there are no individual sanctions for the management.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As merger control is applicable to foreign-to-foreign mergers, they are also subject to the ordinary sanctions regime. In fact, the ComCo has already fined enterprises of foreign-to-foreign mergers for breaching the notification requirement (*Rhône-Poulenc SA/Merck* and *Banque Nationale de Paris (BNP)/Paribas*).

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Competition Law does not provide for any specific solutions to remedy Swiss antitrust issues in a foreign-to-foreign merger. Instead, the general remedies outlined below are applicable. To our knowledge, 'hold-separate' arrangements have never been put into practice or accepted by the ComCo in relation to a foreign-to-foreign merger. However, arrangements regarding the voting rights of the shares of a party to the merger have been accepted and practised. If the antitrust issue is merely a local one and therefore does not arise at a European level, it may often be remedied on the basis of competitive arguments submitted in the filing.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Competition Law does not contain any specific rules regarding public takeover bids. In these cases, the ComCo should be contacted in advance so that it can coordinate its course of action with the Swiss Takeover Board. This is particularly important for hostile bids. Past practice has shown that in most cases the ComCo will substantially follow the rules of the EU Merger Regulation on public takeover bids. Also, it is possible to request provisional completion specifically in public takeover bids.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The ComCo issues a standard notification form. The notification form basically requires enterprises to provide the following information and materials:

- company name, registered office and description of business activity of parties to the merger;
- a description of the proposed merger, including objectives to be achieved by it;
- turnovers, gross premium revenues or gross income, as the case may be, of the enterprises involved for Switzerland and worldwide;
- information on the relevant product and geographic markets affected, as well as information on the main competitors and respective market shares;
- data regarding new market entries over the past five years in the relevant markets as well as barriers to entry and, in particular, estimates of market entry costs;
- copies of the latest annual accounts and business reports of the enterprises involved; and
- copies of the relevant agreements relating to the merger.

For public tenders, copies of the public tender offer and copies of reports, assessments and business plans made in connection with the merger, to the extent they contain information relevant for the assessment of the merger for competition purposes, must also be supplied.

Depending on the complexity of the case, the preparation of a typical filing may take anywhere between two to six weeks. A filing can be made in any one of the official languages of Switzerland (French, German or Italian). Accompanying documents may also be submitted in English.

For foreign-to-foreign mergers that do not significantly affect the Swiss market but meet the threshold requirements, a simplified notification procedure is available upon application. The ComCo may, for valid reasons, release the applicant from the obligation to provide certain information and materials.

According to article 40 of the Cartel Act, undertakings concerned in concentrations and affected third parties shall generally provide the competition authorities with all the information required for their investigations and produce the necessary documents. Failure to fulfil or incorrect fulfilment of the duty to provide information is subject to fines of up to 100,000 Swiss francs against the defaulting company pursuant to article 52 of the Cartel Act or by fines of up to 20,000 Swiss francs against the defaulting natural person pursuant to article 55 of the Cartel Act. In both cases, it is inter alia required that the competent competition authority has issued a binding decision on the duty to provide information, which has not been fulfilled or has not been fulfilled correctly by the addressee of the decision.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

In the first step of an investigation (which is normally the pre-notification phase during which the Secretariat of the ComCo (the Secretariat) reviews a draft notification), the Secretariat usually requests further information from the parties. The enterprises involved in the merger must furnish the ComCo with any additional information that it may request. In the second step, unless the filing obviously raises no concerns, the Secretariat sends out questionnaires to competitors, suppliers and customers of the enterprises involved. The answers received will usually have an important bearing on the position taken by the ComCo.

If the ComCo decides to open a Phase II investigation, this is published. Usually, in a Phase II investigation, hearings take place and the parties may file further documents and information. Also, the ComCo sends out additional questionnaires to customers, suppliers and competitors in order to deepen the market research and analysis. Finally, when it comes to remedies, close contact is established between the Secretariat and the enterprises involved to define the scope of any remedies.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The ComCo must notify the enterprises within one month of receiving the complete notification whether it intends to initiate an investigation (Phase I of the procedure). If, within this period, no notification is made by the ComCo, the merger may be completed. In practice, the one-month period can be shortened in less complex filings if, prior to the formal notification, the draft filing is submitted to the ComCo for review, thus enabling the ComCo to communicate its position shortly after formal notification is made.

If the ComCo decides to initiate an investigation (Phase II of the procedure), it must be completed within four months, unless the process has been delayed by the enterprises concerned. The ComCo has no possibilities to prolong Phase I without initiating a Phase II procedure.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The currently applicable substantive test is the CSDP test (creation or strengthening of dominant position). On this basis, a merger is to be cleared based on one of the following two criteria:

- the enterprises involved do not create or strengthen a dominant position eliminating effective competition in the relevant market; or
- competition in another market is enhanced by the merger and such improvement outweighs the harmful effects resulting from the creation or strengthening of the dominant position in the relevant market.

The substantive test as such is not directly affected by special circumstances. For example, a failing company defence is taken into account by the Competition Commission (ComCo) as part of the causality test (ie, the concentration must be causal to the creation or strengthening of the dominant position). According to ComCo's past practice, a failing company defence is possible if one or more parties to the concentration would disappear from the market within a short time without external support, the other parties would absorb most or all of the market shares of the disappearing company, and there is no solution that is less harmful to competition than the proposed concentration.

For compelling public reasons (employment or regional development), a concentration of enterprises that has been prohibited by the ComCo may be authorised by the Federal Council at the request of the enterprises.

20 | Is there a special substantive test for joint ventures?

The Competition Law does not provide for any specific substantive rules with respect to joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The substantive test for clearance in Switzerland is that of market dominance. Applying this test, the ComCo also investigates coordinated effects in cases of oligopolies and unilateral effects. In addition, the ComCo examines conglomerate effects and vertical foreclosure.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

As a rule, the ComCo does not take into consideration non-competition issues in reviewing a merger. However, as the collapse of Swissair and decisions in agricultural markets in particular have shown, political considerations may have some impact on how (swiftly) the ComCo takes its decisions.

In connection with a merger involving banks, the Swiss Financial Market Supervisory Authority (FINMA) has the power to clear a merger that it deems necessary for reasons of creditor protection, which take precedence over competition issues. In such cases, FINMA replaces the ComCo, which is given a right of consultation only.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The ComCo takes – to a certain extent – economic efficiencies into account. The ComCo assesses whether and to what extent efficiency gains may positively affect competition and whether such gains are passed on to the consumers. Also, economic efficiency gains in one market may outweigh certain deficiencies of the merger in another.

As an example, (input) foreclosure effects of a transaction could lead to higher consumer prices if a vertically integrated company ceases to supply the downstream markets. However, according to the ComCo, possible efficiency gains of the transaction should be balanced against (input) foreclosure effects, as they could lead to lower consumer prices (see *Goldman Sachs/Altor/Hamlet*).

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

To the extent the enterprises involved do not comply with the order of the Competition Commission (ComCo) prohibiting a merger, the ComCo can take all appropriate measures in order to reinstate effective competition. Those measures include the cancelling of the merger transaction and the termination of control by the acquiring enterprise over the target.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The clearance of a proposed merger may be subject to certain conditions or obligations designed to safeguard effective competition. The law does not specify the types of conditions or obligations that may be attached. Recent cases have shown that conditions and other remedies will generally be discussed by the enterprises concerned with the ComCo. Those remedies could involve divestments or certain behavioural undertakings.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The divestment has to eliminate all material objections of the ComCo to the proposed merger. According to the ComCo, the divestment must be completed within a fixed period. It is not sufficient for the parties to commit to divest 'at the earliest possible stage'. A specific deadline must be offered. In international filings, it is important to coordinate the divestments to be proposed to other merger control authorities involved, namely the European Commission. So far, proposals for remedies have only rarely been offered by the parties in a Phase I investigation.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Remedies have been required in relatively few foreign mergers. In parallel filings with the European Commission, the remedies offered to the European Union were also recognised and accepted by the ComCo.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In general, the ComCo only deals with ancillary restraints, in particular non-compete obligations that are directly related and necessary to the merger. The case practice of the ComCo, by and large, is in line with the European Commission's Notice on Ancillary Restraints. Other arrangements related to the merger are in most cases explicitly excluded from the clearance decision. If the parties have doubts about the legality of the arrangements not covered by the clearance decision, they have the option to submit the arrangement to the competition authorities for a formal or informal ruling.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

In most cases, the Competition Commission (ComCo) will send out questionnaires to customers and competitors soliciting their opinion on a filed merger. However, customers and competitors have no formal procedural rights and the ComCo is neither required to issue questionnaires nor bound by any answers submitted.

If the ComCo decides to open an investigation proceeding (Phase II of the procedure), it publishes the principal terms of the merger and gives third parties the right to state their position with respect to the proposed merger within a certain time limit. Third parties must submit their statements in writing. Since 2008, the ComCo has changed its previous practice so that third-party hearings (of competitors in particular) are in principle held in the presence of the participating enterprises. Third parties also have the right to access the file. On appeal, however, third parties have no such rights. In particular, according to the case law of the Federal Supreme Court, third parties are not entitled to any remedies against the decision of the ComCo to permit or prohibit a merger.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The mere filing of a notification is not made public. However, the decision to open an investigation proceeding (Phase II) as well as the final decision of the ComCo authorising or prohibiting a merger are published both in the Official Federal Journal and the Official Commercial Gazette. As the involvement of third parties in the investigation procedure is limited, there are no specific Competition Law provisions regarding the protection of business secrets. The merging parties are advised to specifically identify sensitive business information and ask the ComCo to keep such information strictly confidential. The ComCo is bound not to disclose any business secrets.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The agreement between Switzerland and the European Union concerning the cooperation on the application of their competition laws provides a framework for a closer coordination of their respective enforcement activities. With regard to merger control, the scope of the agreement includes in particular mutual notifications of merger investigations, the coordination of merger enforcement activities such as aligning the conditions and obligations for the approval of a merger and the exchange of information obtained in merger investigations. The implementation of the agreement was accompanied by an amendment to the Competition Law by which the parties will be informed about and have the right to comment on the ComCo's decision to share the parties' information with a foreign competition authority.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Decisions of the Competition Commission (ComCo) are subject to appeal to the Federal Administrative Court. The decision of the Federal Administrative Court is in turn subject to review by the Federal Supreme Court. However, third parties have no right of appeal against merger decisions.

According to the Federal Supreme Court, parties to a joint venture are not obliged to jointly appeal against a prohibition decision of ComCo. Hence, the appeal by just one party is sufficient.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An appeal against decisions of the ComCo must be filed with the Federal Administrative Court within 30 days of the formal notification of the decision. The duration of this appeal procedure varies, but may well be more than one year.

Decisions of the Federal Administrative Court may be appealed to the Federal Supreme Court within 30 days of the formal notification of the decision. According to recent practice, these proceedings generally take more than one year.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Competition Commission (ComCo) consistently enforces the Competition Law with respect to foreign-to-foreign mergers and has stated that it will more severely penalise companies that fail to notify. The ComCo considers that the sanctions imposed in the past have not been sufficiently effective to deter large international groups.

The ComCo typically focuses in its enforcement policy on domestic mergers. Whereas in international cases, it very often follows the European Commission both in terms of timing and of substance.

Reform proposals

35 Are there current proposals to change the legislation?

On 12 February 2020, the Swiss government requested the Federal Department of Economic Affairs, Education and Research to draft a partial revision of the the Federal Act on Cartels and Other Restrictions of Competition and to submit it to the Swiss parliament. This draft revision and the consultation of interested parties is still pending. With this revision, Switzerland would switch from the currently applied CSDP (creation or strengthening of dominant position) to the SIEC (significant impediment of effective competition) test.

This change will notably allow the ComCo to prohibit or take appropriate measures not only for concentrations that eliminate effective competition in the relevant market but also for concentrations that would significantly impede effective competition.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the Competition Commission (ComCo) had two important mergers.

On 23 March 2020, the Competition Commission approved the participation of Planzer and Camion-Transport in SBB Cargo (Swiss Federal Railways) after having examined the merger in depth. Planzer and Camion-Transport acquired a 35 per cent stake in SBB Cargo through their joint subsidiary Swiss Combi. With the merger, Planzer and Camion-Transport intend to contribute their logistics expertise to SBB Cargo to optimise existing products and develop new ones. In this way, SBB and the logistics companies intend to improve the cost-effectiveness and competitiveness of SBB Cargo. The merger will lead to a dominant position in the market for combined transport services in the Gossau and St Gallen area. However, according to the ComCo, it does not give the companies involved the possibility of eliminating effective competition. Consequently, the ComCo allowed the merger.

In the case of *Liberty Global/Sunrise*, the ComCo approved the purchase of Sunrise by UPC (Liberty Global) without conditions or remedies. The ComCo concluded that it could not be assumed that *UPC/Sunrise* and their main competitor Swisscom would coordinate in the future. There was, therefore, no collective dominant position and no threat of effective competition being eliminated. The two companies had already intended to merge the year before, with Sunrise taking over UPC. Then, ComCo had conducted an in-depth investigation of the takeover, but finally approved it. However, the takeover failed owing to commercial reasons. In the case of the current merger, the ComCo again investigated the market conditions, which remained more or less unchanged.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The principal legislation concerning mergers and acquisitions, unfair competition and monopoly in Taiwan consists of:

- the Fair Trade Law of 1991 (FTL), the most recent amendments to which were promulgated in June 2017;
- the Enforcement Rules to the FTL, last revised in July 2015; and
- the Fair Trade Commission Guidelines on Handling Merger Filings, first promulgated in July 2006 (the Guidelines), with the most recent amendment in July 2016.

Article 10 of the FTL places mergers and acquisitions in the broader category of 'combinations of enterprises'. The 2002 amendments to the FTL and its related Enforcement Rules changed the filing process for combinations from an approval system to a notification system, and the Guidelines introduced a two-tier review system by classifying combination filings into 'simplified' and 'general' filings. The 2017 amendments to the FTL brought two further changes:

- the waiting period was changed from number of calendar days to number of working days; and
- the Fair Trade Commission (FTC) has been given the power to solicit opinions from the public and, if necessary, enlist academic research institutions to provide opinions, but, in the event that one of the participating parties to the combination does not agree to such combination (ie, a hostile takeover), the FTC must inform the said objecting party of the justification for the combination filing and seek the opinion of the said objecting party on such combination filing.

At the national level, the FTC is the government authority overseeing mergers and other types of combinations. The FTC is empowered to examine and investigate possible violations of the FTL and to take action against those who breach the FTL by imposing fines and other penalties. The FTC can also order the dissolution of any combinations that breach the provisions of the FTL. The FTC will investigate complaints against combinations effected without the consent of the FTC, but may also investigate matters on its own initiative.

Scope of legislation

2 | What kinds of mergers are caught?

Transactions that fall under the broad category of 'enterprise combinations' under article 10 of the FTL and meet one of the jurisdictional thresholds set out below must be reported to the FTC in advance. A combination under the FTL occurs when an enterprise:

- merges with another enterprise;
- holds or acquires one-third or more of the total voting shares or capital stock of another enterprise;
- accepts the transfer of or leases the whole or a major part of the business or assets of another enterprise;
- operates jointly with another enterprise on a regular basis or is entrusted by another enterprise with the operation of its business on its behalf; or
- directly or indirectly gains control over the business operations or the employment and dismissal of the personnel of another enterprise.

In calculating the shares or capital contributions to determine whether there is a combination, the shares or capital contributions held or acquired by those enterprises that have a controlling or subordinate relationship with the participating enterprise shall be aggregated with those held or acquired by the participating enterprise.

The Guidelines further categorise combinations into three different types, including horizontal (where the combining enterprises engage in horizontal competition), vertical (where the combining enterprises have an upstream-downstream relationship), and conglomerate (where the combining enterprises do not engage in horizontal competition and do not have an upstream-downstream relationship).

3 | What types of joint ventures are caught?

The establishment of a joint venture company by two or more enterprises is considered an enterprise combination subject to the FTL, regardless of the type of joint venture. Hence, the jurisdictional thresholds discussed below would apply.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Article 6 of the Enforcement Rules to the FTL prescribes that the following conditions constitute 'controlling and subordinate relationships':

- where an enterprise holds or acquires more than half of the total number of voting shares of, or contributes more than half of the total capital of, another enterprise;
- where an enterprise directly or indirectly controls the personnel, finances or business operations of another enterprise, and thus has controlling power over that other enterprise;
- where an enterprise is assigned by or leases from another enterprise the whole or a major part of the business or assets of such other enterprise, or where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business and thus where the assigned or leased enterprise has controlling power over such other enterprise; or

- where a person or a group and their related persons hold a majority of the total number of outstanding voting shares of, or contributes more than half of the total capital of, another enterprise.

In addition, the following relationships between enterprises would be presumed to be controlling and subordinate relationships:
- where at least half or more of the executive shareholders or directors of an enterprise concurrently act as executive shareholders or directors of another enterprise; or
- where the same shareholders hold at least 50 per cent or more of the total number of outstanding voting shares of another enterprise, or contribute at least 50 per cent or more of the total capital stock of another enterprise.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Article 11 of the FTL sets forth the following three criteria, any one of which (subject to certain exceptions) triggers a requirement to notify the FTC before completion of a combination:
- if one of the participating enterprises to the combination has a market share of at least one-quarter;
- if, post-combination, the resulting enterprise will have a market share of at least one-third; or
- if the sales revenue during the previous fiscal year of any enterprise that is a party to the combination exceeds a figure set by the FTC.

The current sales thresholds promulgated by the FTC for parties in a combination are for total sales during the previous fiscal year in Taiwan to be at least:
- NT$15 billion, where one party is not a financial institution (eg, bank, securities company, insurance company or financial holding company); or
- NT$30 billion, where all parties are financial institutions; and
- NT$2 billion, for one other party.

The FTC is authorised by the FTL to establish other new thresholds of sales revenue for certain industries as the need arises. On 2 December 2016, the FTC adopted a turnover threshold that further provided that a merger control filing is required if the combined global sales volume in the immediately preceding fiscal year of all parties to a combination exceeds NT$40 billion and at least two of the parties each have Taiwan sales volume for the same year of at least NT$2 billion.

According to the Guidelines, a general filing is required to be made to the FTC (under the foregoing thresholds) unless special thresholds are met, in which case, a simplified filing can be made. A simplified filing generally requires a shorter waiting period and the submission of less information in the notification, such as fewer major products, competitors and customers covered and fewer years of market and economic information covered. Articles 7 and 8 of the Guidelines provide special thresholds and exceptions relating to simplified filings. A simplified filing is permissible where:
- sales for the preceding fiscal year of the combining enterprises in the combination exceed the revenue threshold (article 11, paragraph i, subparagraph 3 of the FTA); and
    - the combined market share in any market in Taiwan of the enterprises participating in a horizontal combination is less than 20 per cent; or
    - the combined market share in any market in Taiwan of the enterprises participating in a horizontal combination is less than 25 per cent; and
    - one of these enterprises has no more than a 5 per cent market share in such markets;
- the individual combined market share in any market in Taiwan of the enterprise participating in a vertical combination is less than 25 per cent;
- after taking into account major competition factors, the proposed conglomerate combination would not have a substantial negative effect on competition in the relevant markets of participating enterprises; or
- an enterprise participating in the combination directly holds not less than one-third, but less than half of the total voting shares or total capital of, and subsequently combines with, the other enterprise.

However, general filing may become applicable if the FTC determines that:
- the combined market share of the top two enterprises in a relevant market reaches two-thirds of that market; or
- the combined market share of the top three enterprises in a relevant market reaches 75 per cent of that market (except for where the combined market share of the enterprises participating in a combination is less than 10 per cent); and
    - the combination involves major public interest;
    - one of the parties to the combination is a holding company as defined in either the Financial Holding Company Act or the Taiwan Stock Exchange Corporation Regulations for the Review of Stock Exchange Listing Applications by Investment Holding Companies;
    - the scope of the relevant market or the market shares of the combining enterprises is difficult to determine; or
    - the relevant market of the combining enterprises shows high barriers to entry, high market concentration, any other major disadvantages, etc.

For the purpose of calculating the sales revenue thresholds noted above, the sales revenue of the participating enterprises to the combination shall be aggregated with the sales revenue of all enterprises that have control over the participating enterprise, enterprises that the participating enterprises have control over, and all enterprises that are controlled by the ultimate parent enterprises of the participating enterprises.

The FTL prescribes that an individual or a group, along with certain related parties of such individual or group, that holds more than half of the voting shares or total capital of any of the participating enterprises to the combination would be deemed an 'enterprise' with respect to the combination under the FTL. For the purposes of calculating the shareholdings or capital contributions of the above individual or group, the shareholdings or contributions of the following related parties shall be included:
- the above individual, and the individual's spouse, and the individual's blood relatives within the second degree of kinship (related natural persons);
- an enterprise in which the related natural persons hold more than one-half of the total number of outstanding voting shares or total capital;
- an enterprise in which the related natural persons act as its chair, president, or a director representing a majority of directors;
- the above group and its representative, manager, or any other person with representing authority, his or her spouse, and his or her blood relatives within the second degree of kinship (related persons in the group); and
- the above group and an enterprise in which a group or the related persons in the group hold more than one-half of the total number of outstanding voting shares or total capital.

It is unlikely that a transaction not reaching these thresholds would be investigated for not filing a notification for combination.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once any of the jurisdictional thresholds set out above are met, notification of the combination to the FTC is mandatory, unless the combination falls under one of the exceptions enumerated under article 12 of the FTL.

According to article 12 of the FTL, a combination is exempt from the requirement to notify where:

- one of the enterprises or its wholly owned subsidiaries already holds 50 per cent or more of the enterprise with which it plans to combine;
- the same parent company holds 50 per cent or more of the shares in each of the enterprises that plan to combine;
- an enterprise plans to sell a distinct division to a newly established and wholly owned enterprise;
- an enterprise plans to engage in a qualified stock redemption plan;
- an enterprise plans to invest in and establish a subsidiary in which it will hold all of the shares or contribute all of the capital; or
- other types of combinations promulgated by the FTC from time to time.

According to a ruling issued by the FTC in July 2016, notification of the combination to the FTC is not required for the following types of combinations:

- a combination between enterprises that already have a controlling and subordinate relationship;
- a combination between enterprises that are controlled by the same controlling company;
- an enterprise surrenders part or all of its voting shares or capital contribution in a third company to an enterprise with which it has a controlling and subordinate relationship; or
- an enterprise surrenders part or all of its voting shares or capital contribution in a third company to an enterprise that is also controlled by the same controlling company.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes. When the thresholds are met, a notification is required. However, in the process of reviewing the notification, the FTC may decide not to exercise jurisdiction pursuant to the Principles for Handling Applications of Extraterritorial Combinations (the Principles), the last amendment of which was promulgated in December 2016. The Principles apply not only to combinations involving foreign enterprises with no subsidiaries or branch offices in Taiwan, but also to combinations involving Taiwanese enterprises and foreign enterprises, and Taiwanese enterprises and Taiwanese subsidiaries, branches or affiliated enterprises of foreign enterprises.

The Principles define an 'extraterritorial combination' under article 10 of the FTL as an enterprise combination involving two or more foreign enterprises that occur outside Taiwan. An extraterritorial combination must file a notification with the FTC if one of the jurisdictional thresholds are satisfied.

Once an extraterritorial combination meets jurisdictional thresholds, the Principles require the FTC to weigh certain factors based on international comity in determining whether to exercise jurisdiction. These factors include:

- whether the result of the combination has 'a direct, substantial, and reasonably foreseeable effect' on the Taiwanese market or not;
- the relative importance of the effects of the combination on Taiwan and foreign markets;
- the locations and principal places of business of the combining enterprises;
- the explicitness and foreseeability of impact on the market competition in Taiwan;
- the degree of conflict with the law or policy of the country of the combining enterprises;
- the possibility of administrative sanctions or compulsory execution;
- the effect of compulsory execution on the foreign enterprise or enterprises;
- international conventions and treaties, or provisions of international organisations;
- whether the combining enterprises have equipment for the production of goods or provision of services, engage distributors or agents, or have other substantial sales channels, within the territory of Taiwan; and
- other factors considered important by the FTC.

A commissioners' meeting of the FTC was convened and resolved on 2 June 2021 to repeal the Principles, meaning that the Principles will likely no longer exist once a formal determination is proclaimed. The FTC will be amending relevant rules (eg, the FTC Guidelines on Handling Merger Filings) to include the review of foreign-to-foreign merger filings and to formally announce its repeal of the Principles in the near future.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Although Taiwan has joined the World Trade Organization and generally moved towards the liberalisation of restrictions on foreign investment, it still prohibits or restricts foreign investment in a number of industries. According to the Negative List for Investment by Overseas Chinese and Foreign Nationals issued by the Industrial Development and Investment Centre of the Ministry of Economic Affairs, foreign investors should particularly be aware of investment caps or barriers to investment in sectors such as telecommunications, public transportation, military supplies and accounting services.

According to the Enterprises Merger and Acquisition Law, foreign companies may merge with or assume all of the assets and liabilities of Taiwan companies subject to the Negative List for Investment by Overseas Chinese and Foreign Nationals.

According to the Financial Institution Merger Law, foreign financial institutions may merge with or assume all the assets and liabilities of financial institutions incorporated in Taiwan. Under the Financial Holding Company Law, foreign financial holding companies may obtain controlling ownership interests (up to 100 per cent) in financial subsidiaries of financial holding companies.

Investment in Taiwan funded from mainland Chinese sources was previously strictly prohibited. However, the Taiwan Ministry of Economic Affairs promulgated new regulations on 30 June 2009, with the recent amendment in December 2020, with respect to investments from mainland China and the establishment of mainland Chinese companies' branch offices or agencies in Taiwan. So far, a considerable number of industries (including textiles, certain kinds of infrastructure or manufacturing industries, banks, securities firms, insurance companies and certain type II services (non-facility based) telecommunication services) are currently allowed to receive investment from mainland China.

In addition, the Taiwanese currency, the New Taiwan dollar, is not freely convertible. If a combination were to involve the inward remittance of more than US$50 million or its equivalent by any company involved in the transaction, that company would be required to seek approval from Taiwan's central bank, on this and any other currency-related issue.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no specific rules on filing deadlines. However, the notification must be filed at least 30 working days prior to the consummation of the combination. Sanctions for not filing include fines ranging from NT$200,000 to NT$50 million for each violation of the Fair Trade Law of 1991 (FTL) (the 2015 FTL amendments increased the lower limit up from NT$100,000 to NT$200,000) and orders to cease or unwind the combination. Fines have long been imposed for failure to file.

10 Which parties are responsible for filing and are filing fees required?

The following are responsible for filing:

- all enterprises participating in a combination where the combination consists of a merger, transfer or lease of the operations or assets of another enterprise or enterprises, regular joint operation of enterprises, or operation of another enterprise by agreement;
- the holding or acquiring enterprise, where it holds or acquires at least one-third of the shares or capital of another enterprise (however, if there are control or subordinate relations between the holding or acquiring enterprises, or the holding or acquiring enterprises are controlled by the same enterprise or a group of enterprises, then it shall be the enterprise with ultimate control);
- the controlling enterprise, where it directly or indirectly controls the operations or employment and termination of personnel of another enterprise; and
- an individual or a group holding more than half the voting shares or contributing capital of the ultimate parent enterprise of the participating enterprise may be required to file a notification.

If the enterprises that are responsible for filing have not been incorporated, other enterprises participating in such combination must file.

Most commonly, the ultimate foreign parent companies of foreign enterprises involved in an extraterritorial combination are the parties that file the notification. For a foreign enterprise that has a branch or subsidiary in Taiwan, filing may be made by the Taiwan branch or subsidiary. However, the FTC may request information from the ultimate foreign parent enterprise as it deems necessary.

There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A combination cannot take effect until 30 working days after the FTC receives the complete notification materials; however, the FTC may shorten or extend the 30-working-day waiting period by providing written notification to the notifying enterprise of such change. This extension period cannot exceed 60 working days. If no extension is granted to the original 30-working-day period and no objection to the combination is issued by the FTC by the end of the original 30-working-day period, the enterprises may combine 30 working days after the FTC receives the complete notification. The FTC may shorten the original 30-working-day period if it determines that it has no objection to the combination. However, if the notifying enterprise agrees to the combination being further reviewed upon the expiry of the said extension period, the combination cannot take place.

Where the FTC extends the deadline, the enterprises may combine at the end of this extended deadline, or the parties may combine before the deadline if the FTC issues a decision allowing them to do so. The parties may not combine if the FTC issues an objection to the combination, or if false or misleading statements are found in the enterprises' notification.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

A combination that is required to be notified to the FTC may not legally be implemented if the FTC objects to the combination. If the combination is implemented anyway, the enterprises may be punished. In practice, in cases where a combination occurred without the requisite notification, the FTC imposed a fine on the participating enterprise that would have been responsible for the filing and required that the participating enterprises supplement the filings. If there is no FTC objection after the waiting period has ended, the combination may take place.

One unresolved legal issue is whether a combination is void per se if it is not notified, or if it is to be deemed valid unless and until the FTC declares it to be illegal and thus void ab initio. One district court held that a combination that triggered the application requirement was void because no prior approval was obtained from the FTC. It should, however, be noted that this opinion was issued by a district court, and that this holding is without precedent. There continues to be a lack of consensus on this issue.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As far as we know, there has been no such case where sanctions were applied.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no such solutions.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No special rules apply to public takeover bids. As discussed above, if the takeover falls within the definition of 'combination' and any of the jurisdictional thresholds are met, notification to the FTC is mandatory.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The FTC requires the following information in a notification of an enterprise combination:

- a form describing the combination and the parties involved, the target closing date of the combination, contact information and domicile of the combining enterprises, and the name of the attorney and power of attorney, if applicable;
- basic information about each enterprise involved, including incorporation documents, business items, employment statistics, turnover for the previous fiscal year and total capital, as well as the turnover for the previous fiscal year of the controlling and subordinate enterprises of the enterprise involved;
- the balance sheet and income statement of the preceding year for each enterprise involved;

- transaction-related statement, agreements, or other documents that are issued or entered into for the purpose of combination;
- a report detailing each combining enterprise's production or operating costs and the value and sales of the top five goods and the overlapping goods each sells in Taiwan for the three years prior to the date of the notification filing;
- an explanation of the benefits of the combination to the overall economy of Taiwan, including information on the relevant markets of the participating enterprises in terms of market shares, major competitors, level of competitiveness and difficulty of entry into the markets, as well as the impact of the combination on the relevant markets;
- a business plan for each combining enterprise;
- the status of the investment of each combining enterprise;
- the latest financial report and prospectus or annual report of combining enterprises that are listed on the Taiwan Stock Exchange or the Taiwan over-the-counter market;
- market structure information related to horizontal and vertical businesses in the relevant markets of the combining enterprises (this may also include information regarding competitors' market information (market share, etc);
- any other documents that may be required by the FTC; and
- in the case of the establishment of a financial holding company by way of combination, contract documents.

Additionally, for any enterprise that proceeds with a merger where any false or misleading information was contained in the filing, according to the Fair Trade Law of 1991 (FTL), the FTC may prohibit such merger, prescribe a period for such enterprise to unwind, to dispose of all or a part of the shares, to transfer a part of the operations, or to remove certain persons from certain positions, or make any other necessary dispositions, and may impose an administrative penalty of no less than NT$100,000, and no more than NT$1 million, upon such enterprise. Further, for any enterprise violating such a disposition order from the FTC, the FTC may order a dissolution, suspension, or termination of the business' operations.

In addition to the fines stipulated in the FTL, the Administrative Penalty Act (APA) can also be applied if an enterprise is found to be in violation of the FTL. According to the APA, if an enterprise is determined to have gained a benefit that exceeds the maximum statutory amount of the fine, the fine may be increased to represent the scope of the benefit gained. Further, if there has been a breach of duty because of an act of a director of an enterprise or of any other individual with the authority to represent an enterprise, the APA allows such director or individual to be separately fined if it is found that he or she has acted with intent or gross negligence.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Under the FTC's internal rules and procedures, notifications of combinations are first submitted for initial review to the department within the FTC that deals with combinations. During the initial review, the department will examine whether the combination falls within the jurisdiction thresholds and whether all required documents have been submitted. If such combination does not fall within the jurisdiction thresholds, the FTC will issue a letter to indicate this fact. If all the required documents have not been submitted, the FTC will issue a letter requesting supplementary information. After all required documents have been provided, the department will submit the case to the Commissioners' Meeting of the FTC, which will make the final decision on whether or not to reject the combination, or whether to extend or shorten the clearance period.

Also, pursuant to article 27 of the FTL, the FTC may require that the parties or related third parties provide statements, or may require that relevant organisations or individuals submit records, documents or any other necessary materials. The FTC may consult with other Taiwan government authorities that regulate the industries of the parties to the combination. The FTC is also authorised to dispatch personnel to inspect the offices, places of business or other locations of the relevant organisations. The 2015 amendments to the FTL authorised the FTC to seize evidence found during an investigation.

The commissioners may also ask the participants to appear in person at hearings or interviews. In addition, the FTC passed an internal rule in April 2002 to the effect that any combination notification filed with the FTC will be published on the FTC's website accompanied by a public request for opinions concerning the combination. However, the FTC will not respond or make any statement regarding such opinions. The FTC may choose to not make a combination case public if doing so would be contrary to any other existing laws.

18 What is the statutory timetable for clearance? Can it be speeded up?

Clearance takes 30 working days or less from the time the FTC receives the complete notification materials or at the end of any extension period that may or may not be granted by the FTC. The FTC may shorten the clearance period when it has determined that it has no objection to the combination. The clearance period for a combination can vary significantly based on the complexity of the combination.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The three jurisdictional thresholds relate to market share and revenue of sales for the previous fiscal year in the relevant product and geographic markets. Revenue of sales generally refers to the total sales of an enterprise. Market share, on the other hand, is a more complex matter. To calculate the market share of an enterprise, the Fair Trade Commission (FTC) must first identify the relevant market. To do this, the FTC will consider the following factors under the Principles for Deciding the Scope of the Relevant Market, enacted and promulgated in March 2015 (the Instructions):

- demand substitutability, meaning the ease with which a purchaser can obtain substitute products or services as the prices of the purchasers' prior selections increase; and
- supply substitutability, meaning the ability of competing suppliers of products or services to provide substitutes when the original supplier raises its prices.

The Instructions suggest that the FTC will focus more on demand substitutability than supply substitutability.

According to the Instructions (article 3), the relevant market shall be determined by both the product market and the geographical market.

The product market means 'the scope of goods or services that, in terms of functionality, characteristics, purposes or prices, have a high degree of demand or supply substitution'. In applying demand substitutability and supply substitutability to determine the product market, pursuant to the Instructions, the FTC may take the following factors into account:

- changes in prices of products or services;
- characteristics and uses of products or services;
- previous records showing that substitution between products or services has occurred;

- costs incurred by purchasers for turning to substituted products or services;
- the degree to which purchasers turn to other products or services because of changes in prices of certain products or services;
- points of view of purchasers and competitors;
- relevant laws and regulations; and
- other relevant facts.

The geographical market means 'a region or scope in which the combining enterprises supply particular goods or services, and the trading counterpart can select or switch easily to other suppliers'. In applying demand substitutability and supply substitutability to determine the geographical market, pursuant to the Instructions, the FTC may take the following factors into account:

- changes in prices of products or services in different areas and transportation costs;
- characteristics and uses of products or services;
- different transaction costs borne by purchasers in different areas;
- availability of products or services to purchasers;
- how purchasers decide to purchase products or services in different areas in response to changes in the prices of products or services;
- points of view of purchasers or competitors with respect to substitution of products or services in different areas;
- relevant laws and regulations; and
- other relevant facts.

In addition to the consideration of the product market and geographical market, the FTC may, depending on the case, examine how time influences the scope of the relevant market. The Instructions further provide examples of three approaches for determining the relevant market, which the FTC may use, on non-binding and non-priority bases: reasonable interchangeability of use analysis, cross-elasticity analysis and hypothetical monopoly test.

After the relevant market is identified, market share is calculated by considering the production, sales, stock, and import and export turnover of the enterprise in relation to the total market. Article 11 of the Fair Trade Law of 1991 (FTL) states that combinations in which one of the parties has a 'one-quarter market share' require notification to the FTC. In many jurisdictions, such market share tests apply only to markets in which the parties to a transaction have overlapping markets. This, however, is not the case under the FTL. Further, the FTC's position in its examination of notification filings is that the market share thresholds do not apply only to markets in which there is overlap.

It is the FTC's task to weigh the advantages of a possible combination against any negative effects it might have on the economy. If a combination would result in more positive than negative effects on the economy, the FTC cannot object to the proposed combination. For a combination notification with antitrust concerns, according to the Guidelines, the notifying party may present the following factors regarding the overall economic benefit in response to the FTC:

- economic efficiency;
- consumer benefits;
- one of the notifying parties is in a weak position in the proposed transaction;
- one of the notifying parties is a 'failing firm'; or
- other factors that could influence the economic benefits.

However, where the FTC needs to make a decision on a notified combination, it may attach conditions or burdens so as to ensure that the overall economic benefit of the combination will be greater than the negative effects on competition.

A number of combinations that were approved by the FTC in recent years under the earlier version of the FTL involved combinations of enterprises whose markets had little overlap. This type of transaction is likely to have little impact on the enterprises' relevant markets and the FTC is generally well disposed to approving such combinations.

The Guidelines present more specific substantive tests for clearance relating to simplified and general filing cases.

For simplified filings, the FTC may determine that the overall economic benefit of the combination outweighs the disadvantages resulting from competition restraint in the absence of exceptions leading to the application of a general filing.

For general filings, the FTC may determine that the overall economic benefit of the combination outweighs the disadvantages resulting from competition restraint if there are no obvious concerns of competition restraint, after taking into account the factors relating to horizontal, vertical and conglomerate combinations contained in the Guidelines. In the event of obvious concerns of competition restraint, the FTC shall further assess the overall economic benefits to determine whether they outweigh the disadvantages resulting from competition restraint.

When a filing raises obvious concerns of competition restraint, the FTC will review the following considerations submitted by the filing enterprise regarding overall economic benefit from the combination:

1. economic efficiency (this means that the overall economic benefit can be achieved in a relatively short period of time, the combination of the enterprises would be the only way and the economic benefits can be passed on to consumers);
2. consumer benefits;
3. the combining enterprises have been in a disadvantaged position in trade;
4. one of the combining enterprises is in extreme operational difficulties; and
5. other concrete results relating to overall economic benefits (for (4), this includes the enterprise being unable to repay its debts in the short term; except through combination, the enterprise is unable to use other methods less restrictive to competition to remain in the market; if unable to merge with another enterprise, the enterprise will have to withdraw from the market).

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

For each category of combination, the Guidelines further set forth the following specific competition assessment factors that are used to determine whether there will be any harmful restraining effects on competition in the market.

Horizontal combinations

The FTC may take into consideration the following factors to assess the restraint on competition resulting from the combination.

Unilateral effects

After the combination, the combining enterprises can increase product prices or remuneration for services without being restrained by market competition (in such event, the FTC may assess the combination based on factors such as the market shares of the combining enterprises, homogeny of the products or services, production capacity and import competition).

Coordinated effects
After the combination, the combining enterprises and their competitors restrict each other's business activities, or despite the absence of such restriction, the enterprises and their competitors take uniform actions, thus causing the market to be actually void of competition (if this occurs, the FTC may assess the combination based on factors including whether the market situation would be beneficial to concerted actions from enterprises, the degree of difficulty in monitoring violations and the effectiveness of punitive measures).

Degree of market participation
Including the possibility and timing of entry of potential competitors, and whether such entry would result in competition pressure on existing market players.

Countervailing power
The ability of trading counterparts or potential trading counterparts to restrict increases in product prices or remuneration for services by the combining enterprises.

Other factors that restrain competition
Further, the FTC will consider competition restraint to be obvious and shall further assess the overall economic benefits where:
1 the combined market share of the combining enterprises reaches half of the market;
2 the combined market share of the top two enterprises in a relevant market reaches two-thirds of the market; or
3 the combined market share of the top three enterprises in a relevant market reaches three-quarters of the market (for (2) or (3), the combined market share of the combining enterprises should reach 20 per cent).

Vertical combinations
The FTC may take into consideration the following factors to assess the restraint on competition resulting from the combination (such as vertical foreclosure):
- the possibility for other competitors to select trading counterparts after the combination;
- the degree of difficulty for enterprises not participating in the combination to enter the relevant market;
- the possibility for the combined enterprises to abuse their market power in the relevant market and other factors that may contribute to market blockage;
- the possibility of increased costs for competitors; and
- the possibility to implement concerted actions.

Conglomerate combinations
The factors used to assess restraint on competition resulting from horizontal or vertical combinations shall become applicable if the relevant market of the enterprises in a conglomerate combination (ie, a combination that does not involve vertical or horizontal factors) possesses significant potentiality for competition that will cause a situation similar to a horizontal or vertical combination. The FTC may take into account the following factors to assess the significant potentiality for competition (eg, possible conglomerate effects):
- the impact of the elimination of legal restrictions on the combining enterprises operating businesses across industries;
- the possibility of the combining enterprises operating business across industries as a result of technological advancements;
- the original plans of the combining enterprises to develop business across industries outside the combination; and
- other factors that affect the significant potentiality for competition.

Under the Guidelines, factors such as harm to innovation and common ownership concerns have not been clearly defined. However, when making a decision regarding a combination, the FTC can impose burdens on a clearance if allowing such a combination may harm innovation. For example, the FTC imposed certain burdens in the combination between Nokia and Microsoft in which it required Nokia to authorise its standard-essential patent based on fair, reasonable and non-discriminatory (FRAND).

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the review process in principle. In reviewing a notification of a combination, the FTC considers first and foremost whether the benefits of the combination for the overall economy are likely to outweigh the negative effects. According to the Guidelines, in cases where the combination filing is reviewed by simplified procedure or where the FTC believes that there are no obvious competition restraints, the FTC may decide that the overall economic benefits outweigh the disadvantages.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The operative principle is whether the overall benefit of the combination outweighs the disadvantages of restraining competition. The FTC will, however, examine economic efficiency issues more closely when there are strong disadvantages resulting from the proposed combination. Additionally, the FTC assigns less weight to efficiency benefits that accrue as an indirect result of a combination, or if the combination is not the only (or most important) way to achieve the efficiency benefit. The FTC may consider the following factors in conducting its analysis: increased efficiency with regard to the use of assets, lowered production and transport costs, economies of scale and diversification of services, whether there is a practical and effective savings plan, whether the combination lowers the variable costs of doing business, and the general impact of the combination on prices or services to consumers. The FTC only considers efficiency benefits that have been passed down to consumers in one form or another. The Guidelines added a provision that requires the FTC to consider the overall economic benefit of the combination even when obvious concerns arise regarding restraint on competition. The Guidelines state that when a filing raises obvious concerns of competition restraint, the FTC will review the following considerations submitted by the filing enterprise regarding overall economic benefit from the combination.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a combination occurs without the requisite notification or is disallowed by the Fair Trade Commission (FTC), the Commission may, in addition to imposing fines ranging from NT$200,000 to NT$50 million for each violation of the Fair Trade Law of 1991 (FTL), issue orders prohibiting the combination, set a deadline within which the enterprises must separate, require the disposal of acquired shares, require that business activities be transferred, or require that certain company officers or employees resign from their positions. Also, the FTC may order the dissolution of the enterprise or suspension of its operations if that enterprise fails to comply with its orders. The FTC may also pursue remedies beyond those enumerated above where warranted under the circumstances.

In addition to the fines stipulated in the FTL, the Administrative Penalty Act (APA) can also be applied if an enterprise is found to be in violation of the FTL. According to the APA, if an enterprise is determined to have gained a benefit that exceeds the maximum statutory amount of the fine, the fine may be increased to represent the scope of the benefit gained. Further, if there has been a breach of duty because of an act of a director of an enterprise or of any other individual with the authority to represent an enterprise, the APA allows such director or individual to be separately fined if it is found that he or she has acted with intent or gross negligence. This fine can also be applied to the director or individual if the breach of duty is attributable to an act of a staff member, employee, or any other person with the authority to act on behalf of the director or individual.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The February 2002 amendments to the FTL give the FTC the right to order additional conditions or burdens so as to ensure that the overall economic benefit of the combination will be greater than the disadvantages of restraining competition. For example, the FTC allowed one company to enter into a combination but forbade it from using its monopoly status to its advantage in the local market. While the FTC has the requisite power, it has yet to order a divesture undertaking. Also note that the FTC is authorised to order the dissolution of the enterprise or the suspension of its operations if that enterprise fails to comply with its orders.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestments or other remedies are enforced when enterprises combine without undergoing the mandatory waiting period, combine despite prohibition by the FTC, or fail to abide by conditions set by the FTC. The FTC can prohibit a combination or prescribe a period for such enterprise or enterprises to split, dispose of all or a part of the shares, transfer a part of the operations, remove certain persons from positions or make any other necessary dispositions. Enterprises that violate a disposition by the FTC within the prescribed period may be further ordered to dissolve, suspend or terminate their operations.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The FTC has imposed conditions and 'burdens' (a form of continuing obligations that may be imposed on a party to an administrative disposition under Taiwan Administrative Procedure Law) in a number of foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The FTC will consider related arrangements to the extent that such arrangements restrict competition. Non-compete agreements, obligations to license industrial property, purchase and supply obligations, and other obligations, where known to the parties at the time of filing, must be disclosed and will be considered as relevant factors in the FTC's decision-making process. However, there are no specific provisions in law that address ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In the event that one of the participating parties to the combination does not agree to such combination (ie, a hostile takeover), the Fair Trade Commission (FTC) must inform the said objecting party of the justification for the combination filing and seek the opinion of the said objecting party on such combination filing. Further, the FTC is allowed to solicit opinions from the public. Therefore, if customers or competitors are aware of a notification to the FTC, they may submit their views, but the FTC is under no statutory obligation to accept or take such views into account.

Additionally, the FTC may require related third parties to make statements or require relevant organisations or individuals to submit records, documents and other necessary materials. The FTC is also authorised to dispatch personnel to inspect the offices, place of business, or other locations of relevant organisations.

Under the Fair Trade Law of 1991 (FTL), if a party is injured by the actions of an enterprise that is acting in violation of the FTL, the injured party may seek injunctive relief as well as damages. A court may award treble damages. However, a party's ability to recover damages for injuries resulting from merger and acquisition activities is largely theoretical.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Any combination report filed with the FTC will be publicised on the FTC's website with a request for opinions from the public on the combination. The published information is general in nature, taking the form of a relatively brief announcement of the planned combination. The filings made to the FTC by the parties to the combination are not public. Similarly, opinions submitted by interested parties may only be reviewed by the FTC.

Beyond this, the review of a notification of a combination is an internal process kept within the FTC, except that the notifying enterprise or a related person may, as required for the advocacy or defence of legal rights and interests, request to read, transcribe, photocopy or photograph relevant materials or files, with some exceptions limited under the Taiwan Administrative Procedure Law and the internal rules enacted by the FTC.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The FTL does not explicitly authorise cooperation with antitrust authorities in other jurisdictions; however, the FTC has communicated with antitrust authorities in other jurisdictions while conducting investigations in the past. Also, the FTC has entered into cooperative treaties with the antitrust authorities in Australia, Canada, France, Japan, Mongolia, Hungary, New Zealand and Panama.

FTC policy statements note that in recent years there has been a trend toward large combinations between multinational corporations, the parent companies of which are located in advanced industrialised countries. It is noted that while such combinations may improve the competitiveness of the parties in their respective home countries, because of the market power of such companies in other countries, it is necessary that the competition authorities coordinate and scrutinise the competitive impact of such transactions. Accordingly, it is the policy of the FTC to broadly interpret its jurisdiction in offshore transactions that may have a competitive impact in Taiwan.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The 2015 amendments to the Fair Trade Law of 1991 (FTL) allow an enterprise or person dissatisfied with a Fair Trade Commission (FTC) decision to appeal the decision directly to the Taipei High Administrative Court and finally to the Supreme Administrative Court without first submitting to a review procedure by the Appeals Committee of the Executive Yuan, as previously required. This change was instigated after Taiwan's Grand Justice Council opined that decisions by an independent agency are exempt from review by its direct superior authority.

Time frame

33 | What is the usual time frame for appeal or judicial review?

According to the Taiwan Code of Administrative Procedure, if the requirement to first appeal to the superior authority is waived by laws, parties dissatisfied with administrative decisions may file for judicial review within two months of receiving such decisions. Thus, after the FTL's 2015 amendments, parties dissatisfied with FTC decisions may file for judicial review directly within two months of receiving such decisions. Judicial review could take anywhere from eight months to one-and-a-half years to reach a final resolution.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the publicly accessible database maintained by the Fair Trade Commission (FTC), between October 2013 and April 2021, there were 12 cases of a party being penalised with an administrative fine of between NT$50,000 and NT$5 million for failing to file with the FTC. In many other cases, the FTC approved the combinations but set several conditions on the approvals. Those conditions varied depending on the type of combination, but included restrictions on the appointment of directors, supervisors and general managers for a certain period of time, restrictions on certain types of actions that could have the potential to harm competition, restrictions on certain types of actions that could constitute abuses of market power, and the provision of certain business information, such as pricing arrangements, to the FTC for a certain period of time.

According to a report issued by the Chair of the FTC in the Legislative Yuan, the FTC will be 'looking closely to the progress of investigations of international antitrust cases and will use those as references when enforcing the [Fair Trade Law of 1991]' and will 'maintain open communication with other foreign agencies in charge of competition law in order to thwart international cartels and anti-competition activity'. In the future, decisions made by foreign agencies may be more likely to be scrutinised by the FTC.

Reform proposals

35 | Are there current proposals to change the legislation?

No.

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UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Key policy

A commissioners' meeting of the Fair Trade Commission (FTC) was convened and resolved on 2 June 2021 to repeal the Principles for Handling Applications of Extraterritorial Combinations, which are the Principles currently governing the review of foreign-to-foreign merger filings. The Principles will likely no longer exist once a formal determination is proclaimed in the near future. The FTC will be amending relevant rules (eg, the FTC Guidelines on Handling Merger Filings) to include the review of foreign-to-foreign merger filing and to formally announce the repeal of the Principles in the near future.

One notable case

An entity that operates a wholesaler business in Taiwan (the buyer) filed a merger proposal to acquire another entity that controls two wholesaler brands in Taiwan (the seller) in June 2020 (the proposed acquisition). On 10 December 2020, the FTC decided to conditionally grant the proposed acquisition so as to ensure that the overall economic benefits outweighed the potential competition restraints.

The FTC assumed that the proposed acquisition would be of benefit to consumers because the participating parties would be able to offer consumers cheaper prices and better services. However, the FTC was concerned that the proposed acquisition might lead to small and medium-sized suppliers (as competitors) being removed from the relevant markets. The FTC, therefore, chose to attach the following conditions to the proposed acquisition:

- In situations where minority shareholders of the buyer happen to be its actual or potential suppliers, the buyer shall not give preferential treatment to such shareholder suppliers.
- For a period of three years after the completion of the proposed acquisition, the buyer shall not alter its current specific project for its small- and medium-sized suppliers. Any changes made shall not be harmful to those suppliers.

- For a period of three years after the completion of the proposed acquisition, the buyer shall not remove any of its then-current small- and medium-sized suppliers from its supplier list without sufficient justification and without reasonable notice being given. If so, such suppliers shall be allowed to petition the senior managers of the buyer to review the decision.
- For a period of three years after completion of the proposed acquisition, the buyer shall submit the following information to the FTC for its reference before 1 April of each year:
  - current supply agreements between the buyer and its minority shareholders (or their successors) and the commercial terms between the buyer and its minority shareholders (or their successors); and
  - an annual report on the number of small- and medium-sized suppliers of the buyer and the total value of procurements by the buyer from these small- and medium-sized suppliers.

This conditional decision is to ensure that there will be no unfair competition in the form of discrimination against other competitors.

Thailand

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control in Thailand is generally governed by the Trade Competition Act BE 2560 (2017) (TCA) and relevant regulations.

The Trade Competition Commission (TCC) is in charge of issuing regulations on merger control, reviewing and making decisions on pre-merger filings and post-merger notifications, as well as imposing fines and sanctions, such as suspension, cessation or variation of mergers.

The Office of the Trade Competition Commission (OTCC) is in charge of the administrative functions of the TCC, monitoring business operators for violations of the TCA, receiving complaints in respect of alleged violations of the TCA and making recommendations to the TCC.

Disputes relating to an alleged offence under the TCA, civil claims for damages or appeals of administrative orders issued by the TCC are subject to the jurisdiction of the Intellectual Property and International Trade Court and the Administrative Court.

The application of the TCA also covers state-owned enterprises and public organisations, but exemptions have been provided for duties specified by law or cabinet resolutions for the enhancement of national security, the public benefit or the provision of utilities. However, the TCA does not apply to certain industries where merger control is already regulated by specific legislation for that industry (currently, the telecommunications, broadcasting and television, insurance, financial and energy sectors).

Scope of legislation

2 | What kinds of mergers are caught?

Mergers subject to the jurisdiction of the TCA include:

- amalgamations;
- acquisitions of shares:
    - the acquisition of shares, warrants or other convertibles of 25 per cent, or more of the total voting rights of a listed public company at the end of any day; or
    - the acquisition of more than 50 per cent of the total voting rights of a private company or an unlisted public company at the end of any day:
        - shares acquired by the spouse of a natural person are included in the number of shares being acquired;
        - shares acquired by a natural person or a juristic person that hold more than 30 per cent of the voting rights of that juristic person and by a business operator belonging to the single economic entity are included in the number of shares being acquired;
    - the acquisition of more than 50 per cent of the total value of tangible assets or intangible assets (eg, leasehold rights or intellectual property rights) of another business operator relating or connected to the ordinary business operations of that other business operator in the preceding financial year.

Exemptions

Mergers for the purpose of internal restructuring or reorganisation between business operators in the same business group that are recognised as a single economic entity are exempt from merger control (ie, pre-merger filing and post-merger notification).

A 'single economic entity' refers to the case where business operators have a relationship in policy or directive power, where:

- 'relationship in policy' means a relationship between two or more business operators whose guidelines, policies or procedures on management, administration or business operations are under the directive power of the same business operator; and
- 'directive power' means the power to control by any of the following means:
    1. holding shares with voting rights in a business operator of more than 50 per cent of the total voting rights in such business operator;
    2. having the power to control the majority of votes in a meeting of shareholders of a business operator, either directly or indirectly;
    3. having the power to control the appointment or removal of at least half of all directors of a business operator, either directly or indirectly; or
    4. having the directive power under (1) or (2) at every hierarchical level, starting from the directive power under (1) or (2) the business operator who is at the ultimate level of command.

3 | What types of joint ventures are caught?

The formation of a joint venture company is not currently regulated by the merger control provisions of the TCA. However, the creation of a joint venture by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company, which is caught by the TCA.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The TCC issued a notification stating that a transaction is considered to be an acquisition in order to control if the following requirements are met:

- more than 50 per cent of assets;
- in case of an unlisted company, more than 50 per cent of shares; and
- in the case of a listed company, 25 per cent of the shares.

Acquisitions of smaller amounts are not caught under the TCA.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Thresholds for pre-merger filing

Pre-merger filing is required for any merger that results in the creation of either:

- a monopoly, a situation where there is only one business operator in any given market:
  - possessing absolute power over the determination of the price and supply of its products or services; and
  - having a sales turnover of at least 1 billion Thai baht; or
- a business operator having dominant market power:
  - any single business operator having a market share in the previous year of 50 per cent or more and a sales turnover of at least 1 billion Thai baht; or
  - any top-three business operators together having a market share in the previous year of 75 per cent or more and a sales turnover of at least 1 billion Thai baht each (excluding any business operator having a market share in the previous year of less than 10 per cent).

Thresholds for post-merger notification

Post-merger notification is required for any merger in which the sales turnover of any one business operator, or the aggregate turnover of all business operators conducting a merger, amounts to 1 billion Thai baht or more and that does not cause a monopoly or result in a business operator having dominant market power.

There are no circumstances where pre-merger filing or post-merger notification, as applicable, is required if the relevant thresholds are not met.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Pre-merger filing and post-merger notification are mandatory. The only exceptions to mandatory filing are mergers for the purpose of internal restructuring and reorganisation between business operators that are part of a 'single economic entity'; or mergers that do not fall within the scope of application of the TCA.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The merger control provisions apply to all economic activity having an effect within Thailand. Currently, albeit unofficially, the OTCC is of the view that the merger control provisions are applicable to foreign-to-foreign mergers if the relevant business operators have revenues in Thailand.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Foreign Business Act BE 2542 (1999) (FBA) is the principal legislation that regulates foreign investment in Thailand and specifies that foreigners may not engage in certain types of business without the relevant approval from the competent Thai authority. Therefore, foreign investors will also need to comply with the provisions of the FBA, as well as those of the TCA.

Special sectors, such as telecommunications, broadcasting and television, insurance, financial and energy have specific legislation governing mergers. The TCA does not apply to mergers in special sectors, provided that the specific legislation governing mergers in the relevant sector addresses competition concerns.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Pre-merger filings

If a pre-merger filing is required the business operator must receive approval from the Trade Competition Commission (TCC) before the completion of the merger. If the business operator fails to do so, the business operator will be subject to:

- an administrative sanction – a fine not exceeding 0.5 per cent of the total value of the merger transaction; and
- a civil claim – any person who suffers damage from a violation of pre-merger filing regulations by a business operator may claim for damages.

If a company is subject to an administrative fine as set out above, a director, manager or any person responsible for ensuring that the company complies with the merger control legislation is also subject to the same fine.

In addition, the TCC may order a business operator to suspend, cease or vary the merger if it has sufficient evidence to believe that the business operator is in violation of the pre-merger filing requirement.

Post-merger notifications

The merging parties must notify the TCC within seven days after the completion of the merger.

If a business operator fails to do so, the business operator will be subject to an administrative sanction, which is a fine not exceeding 200,000 Thai baht and a daily fine not exceeding 10,000 Thai baht throughout the period of the violation.

If a company is subject to an administrative fine as set out above, a director, manager or any person responsible for ensuring that the company complies with merger control legislation is also subject to the same fine.

Precedent cases

There are currently no precedent cases where the TCC held business operators to be in violation of the pre-merger filing obligations. There have been two cases where the TCC held that business operators had failed to comply with the post-merger notification requirements. The business operators, as well as their management, were fined.

10 Which parties are responsible for filing and are filing fees required?

In an amalgamation, the merging entities are jointly responsible for any pre-merger filing, and the new entity resulting from the merger is responsible for any post-merger notification. In an asset acquisition, the acquirer of the assets will be responsible, and in a share acquisition, the acquirer of the shares will be responsible.

There is a filing fee of 250,000 Thai baht for pre-merger filings. There is no filing fee for post-merger notifications.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

For pre-merger filing, the TCC must consider an application for clearance of the merger within 90 days of the submission of the complete application. If a decision cannot reasonably be made within 90 days, the TCC may extend the period by up to 15 days. A transaction cannot be closed until clearance has been obtained.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a business operator is required to obtain permission from the TCC before conducting a merger and fails to do so, the business operator will be subject to:

- an administrative sanction – a fine not exceeding 0.5 per cent of the total value of the merger transaction; and
- a civil claim – any person who suffers damage from a violation of pre-merger filing regulations by a business operator may claim for damages.

If a company is subject to an administrative fine as set out above, a director, manager or any person responsible for ensuring that the company complies with the merger control legislation is subject to the same.

In addition, the TCC may order a business operator to suspend, cease or vary the merger if it has sufficient evidence to believe that the business operator is in violation of the pre-merger filing requirement.

There are no precedent cases.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions would apply to foreign-to-foreign mergers that fall within the jurisdiction of the Trade Competition Act BE 2560 (2017) (TCA). There are no precedents for the imposition of sanctions.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

While the authorities have not provided an official statement in support of this, we think that it is possible to put in place either hold-separate or ring-fencing arrangements, or both, to allow merging parties to close a transaction outside Thailand, if this can be done without implementing the merger in Thailand. The Office of the Trade Competition Commission (OTCC) should be consulted in advance.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules applicable to public takeover bids. Where public takeovers fall within the TCA's definition of a 'merger', the parties have to comply with the merger control provisions; the parties can, however, provide that merger control clearance is a condition precedent to the public takeover bid.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Pre-merger filings

The documents to be submitted are:

- the application form;
- the merger plan and implementation timeline;
- details of the merging parties and the target company, which must at a minimum include the shareholding structure, voting rights, sales turnover and market shares of the parties and the target company;
- studies and analyses in respect of the merger transaction, which must comprise:
  - analysis of the shareholding structure and controlling power of the merging parties, for the purpose of ascertaining the relationship in policy or directive power before and after the merger; and
  - analysis of the markets for the products or services relevant to the merging parties, for the purpose of ascertaining the effects arising from the merger, which must at a minimum include:
    - market structure before and after the merger transaction;
    - market scope;
    - market share of each of the merging parties before and after the merger transaction;
    - the sales turnover of each of the merging parties before and after the merger transaction;
    - the effect of the merger transaction in respect of:
      - market concentration, market entry and expansion (taking into consideration relevant factors, such as government laws and regulations, logistical costs, access to patent rights of existing technologies, or access to raw materials or other resources necessary for production);
      - non-coordinated effects (meaning effects as a result of each of the merged entities gaining profit by increasing prices or a reducing the quality of the product as a result of a reduction in competition); and
      - coordinated effects (meaning effects as a result of business operators' tendency to jointly increase prices after a merger transaction);
    - the effect on the economy or consumers as a whole and other effects on competition in the market (if any);
    - efficiencies in the market after the merger transaction; and
  - studies and analyses relating to business-related necessity and benefit in the promotion of business, damage to the economy and consumer benefits as a whole.

Post-merger notifications

The documents to be submitted are:

- the notification form;
- a copy of the documents submitted to the Ministry of Commerce, in the case of an amalgamation;
- a copy of the documents submitted to the Securities and Exchange Commission, in the case of a share acquisition by tender offer;
- a copy of the definitive documents relating to the share or asset acquisition (eg, share purchase agreement and appraisal report);
- a copy of the minutes of the executive committee meeting or shareholders' meeting at which the merger transaction is approved of each of the merging parties, or documents evidencing the parties' intention to enter into the merger transaction;
- other particulars in respect of the merger transaction;
- annual meeting reports and audited financial statements for the previous three years of each of the merging parties;
- a copy of the list of shareholders of each of the merging parties before and after the merger transaction; and
- power of attorney (if any) authorising agents (eg, lawyers) to handle the filing.

All information and documents submitted to the TCC must be in hard copy in the Thai language (or translated into the Thai language).

Business operators that intentionally provide false or misleading information to the TCC may be subject to criminal penalties under the Criminal Code for the submission of false information to government officials.

In addition, approval of a pre-merger filing can be revoked by the TCC if it becomes aware of such false or misleading information. Furthermore, any person whose rights or interests are adversely affected by the approval of the TCC may file a case with the Administrative Court for revocation of the approval.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

For pre-merger filing, the process starts when the relevant business operators submit an application to the OTCC. The OTCC will verify the completeness of the application and forward the completed application to the TCC within seven days from the date of receipt of the application. The TCC may require additional information from business operators conducting a merger by issuing a letter requesting information or inviting the applicant to offer clarification; the TCC may also serve notices of invitation on relevant business operators or third parties to offer opinions and information to assist the consideration of the transaction.

For post-merger notification, there is no description of how the TCC and the OTCC investigate a post-merger notification. However, they have the authority to request additional information and clarification. They may also serve notices of invitation on relevant business operators or third parties to offer opinions and information to assist the consideration of the transaction.

Pre-consultation is not required before the submission of an application for a pre-merger filing or post-merger notification. However, the OTCC recommends that the parties do carry out pre-consultation with officers of the OTCC for a pre-merger filing. There is no formal process for pre-consultation.

18 | What is the statutory timetable for clearance? Can it be speeded up?

For pre-merger filing, the TCC must complete the consideration of a pre-merger filing within 90 days of submission. When a decision cannot reasonably be made within 90 days, the TCC may extend the period of consideration by up to 15 additional days. There is no provision in the TCA that allows the pre-merger approval process to be expedited, however, in some cases, the TCC has issued decisions before the end of the statutory period.

For post-merger notification, there is no statutory timetable for the TCC to verify the notification.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Trade Competition Commission (TCC) must consider whether the merger:

- is reasonably necessary for the business of the relevant parties;
- assists the promotion of the business of the relevant parties;
- poses no serious harm to the Thai economy; and
- has no material effect on the due interest of consumers in general.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The TCC will consider factors such as the market concentration, potential for coordinated effects, non-coordinated effects, barriers to market entry for newcomers.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The TCC must consider whether the merger:

- is reasonably necessary for the business of the relevant parties;
- assist the promotion of the business of the relevant parties;
- poses no serious harm to the Thai economy; and
- has no material effect on the due interest of consumers in general.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Only a few cases of merger control have been considered by the TCC. In those cases, economic efficiency was considered along with other factors in determining whether to allow the merger.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a business operator fails to comply with merger control requirements, the Trade Competition Commission (TCC) is empowered to impose fines. In the case where pre-merger filing is required, the TCC may, in addition, suspend, cease, rectify or vary the merger.

The TCC is also empowered to set any conditions for approval of the merger.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy competition issues, and, in granting approval for a merger, the TCC is empowered to specify the time period and any conditions for compliance, including divestment and behavioural remedies.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no specific provisions, notifications, guidelines or sufficient precedents on this matter.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There are currently no precedents where the authority has required remedies in foreign-to-foreign mergers.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There are currently no specific provisions, notifications, guidelines or sufficient precedents on this matter.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

In considering a pre-merger filing, the Trade Competition Commission (TCC) requests the applicant to provide information about its customers and competitors. The TCC is further empowered to invite any person to provide facts, explanations, advice or opinions. Therefore, customers and competitors may be invited to provide information. In addition, any person suffering damage due to a violation of the Trade Competition Act BE 2560 (2017) (TCA) can initiate an action for compensation from the offender. Therefore, any persons (including customers and competitors) who suffer damage as a result of the violation are entitled to file complaints. Furthermore, the TCA specifically allows the Consumer Protection Board, or organisations or foundations recognised by the Consumer Protection Board, to initiate actions for compensation on behalf of consumers or members of those organisations or foundations, as applicable.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The TCA does not require any public disclosure of the process.

Confidential information is protected under the TCA. Any person who reveals restricted or confidential information concerning a business or operations of a business operator may be subject to imprisonment of not exceeding one year, or a fine not exceeding 100,000 Thai baht, or both, if the information was acquired or known as a result of compliance with the TCA. Information may, however, be disclosed in the course of performance of a government service or for the purpose of an inquiry or trial. In addition, if the disclosed information is regarded as a trade secret under the Trade Secrets Act BE 2544 (2001), the offender may be subject to a penalty under the Trade Secrets Act, and required to pay compensation for its misconduct and the injury suffered by the injured party.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Thailand has signed economic partnership agreements with certain countries and those agreements establish collaboration on antitrust issues. Thailand is also a member of the International Competition Network (ICN) for mergers and other competition issues. However, the ICN does not facilitate cooperation in enforcement, only in establishing best practices for enforcement of competition rules.

In May 2021, the chair of the TCC gave an interview in which it was stated that the OTCC is developing relationships with competition authorities within ASEAN in order to harmonise the enforcement of competition law.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The Trade Competition Commission (TCC)'s orders to suspend, cease, rectify or modify a merger that has not obtained approval; and orders to grant (with conditions) or deny approval of a merger are subject to judicial review. A business operator may file a case with the Administrative Court. Any appeal of a decision of the Administrative Court may be submitted to the Supreme Administrative Court and the determination of the Supreme Administrative Court will be final. The Administrative Courts can only overturn the decision of the TCC on the basis of illegality, undue process or abuse of discretion.

There is currently only one example. Following the Trade Competition Commission approval of the *Charoen Pokphand Group/Tesco* acquisition in 2020, 37 consumer advocacy groups filed a case with the Central Administrative Court, seeking the revocation of the approval, or alternatively, the imposition of conditions on Charoen Pokphand; and the issue of an injunction, until the Court rendered its judgment or ordered otherwise. The Court refused to issue an injunction, ruling that the merger had been approved in accordance with the rules and procedures of the Trade Competition Act BE 2560 (2017). The plaintiffs are preparing an appeal.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Business operators to whom orders to suspend, cease, rectify or vary a merger, or grant or deny approval of a merger are directed, must file an appeal with the Administrative Court of First Instance within 60 days following receipt of the TCC's decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Based on the published records as of May 2021, four cases have been cleared, with only one case (*Charoen Pokphand Group/Tesco*) requiring remedial measures. Three of the cleared cases are foreign to foreign mergers. In addition, there have been two cases where the Trade Competition Commission (TCC) held business operators in violation of merger control provisions. Both cases concerned failures to submit post-merger notifications within the prescribed time.

Reform proposals

35 | Are there current proposals to change the legislation?

There is currently no proposal to amend the Trade Competition Act BE 2560 (2017) itself. However, the Office of the Trade Competition Commission is considering the amendment of TCC notifications in relation to merger control to provide clearer provisions.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In November 2020, the Trade Competition Commission (TCC) announced that the majority of the TCC board had approved Charoen Pokphand Group's (CP) acquisition of Tesco's Thailand operations, worth 338,445 million Thai baht, reasoning that while the transaction may increase the market power of CP, it would not result in significant damage to the economy, nor would it affect the overall benefits available to consumers. The TCC imposed measures to ensure that the potential impact on other modern wholesale and retail businesses would either be remedied or minimised after the acquisition.

The decision has attracted considerable criticism from the public, not only because of the deal's value, but also because CP is a key manufacturer of agricultural products, processed agricultural products, and consumer products, ranging from upstream to downstream operations, and it already operates nearly 12,000 branches of the 7-Eleven convenience store and 134 branches of the Siam Makro wholesale chain in Thailand. The acquisition has added approximately 2,000 of Tesco's combined hypermarket and smaller stores to its growing empire.

In March 2021, 37 consumer advocacy groups filed a case with the Central Administrative Court, seeking the revocation of the approval, or, alternatively, the imposition of conditions on Charoen Pokphand, and the issuing of an injunction, until the Court rendered its judgment or ordered otherwise. In May 2021, the Court refused to issue an injunction, ruling that the merger had been approved in accordance with the rules and procedures of the Trade Competition Act BE 2560 (2017). The plaintiffs are preparing an appeal.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation on merger control is the Law on Protection of Competition No. 4054, dated 13 December 1994 (the Competition Law) and the communiqué published by the Turkish Competition Authority. In particular, article 7 of the Competition Law governs mergers and acquisitions. Recently, Law No. 7246 on the Amendment to Law No. 4054 on the Protection of Competition was published in the Official Gazette and entered into force on 24 June 2020 (the Amendment Law).

Article 7 authorises the Turkish Competition Board (the Board or the Competition Board) to regulate, through communiqués, which mergers and acquisitions should be notified to the Authority to gain validity. Further to this provision, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) was published on 7 October 2010, replaced Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 1997/1) as of 1 January 2011. The Communiqué No. 2010/4 is now the primary instrument for assessing merger cases in Turkey and sets forth the types of mergers and acquisitions that are subject to the Board's review and approval, bringing about some significant changes to the Turkish merger control regime. The secondary legislation has not been revised and new secondary legislation has not been introduced in view of the Amendment Law at the time of writing.

The national competition authority for enforcing the Competition Law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. The Competition Authority consists of the board, presidency and service departments including six divisions with sector-specific work distribution that handle competition law enforcement work through approximately 160 case handlers. A research and economic analysis department, a leniency unit, a decisions unit, an information-technologies unit, an external-relations unit, a management services unit, a strategy development unit, an internal audit unit, a consultancy unit, a media and public relations unit, a human resources unit and a cartel and on-site investigation support unit assist the six technical divisions and the presidency in the completion of their tasks.

Scope of legislation

2 | What kinds of mergers are caught?

The Amendment Law amends article 7 of Law No. 4054 and introduces the significant impediment of effective competition (SIEC) test, similar to the approach under the EC Merger Regulation. Under this amendment, the Authority may prohibit transactions that could significantly impede competition along with those that may create a dominant position or strengthen an existing dominant position in the market. Communiqué No. 2010/4 defines the scope of the notifiable transactions in article 5 as follows:

- a merger of two or more undertakings; or
- acquisition of or direct or indirect control 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.

Pursuant to article 6 of Communiqué No. 2010/4, the following transactions do not fall within the scope of article 7 of the Competition Law and therefore will not be subject to the approval of the Board:

- intra-group transactions and other transactions that do not lead to change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with those 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 undertaking issuing the securities;
- acquisitions by public institutions or organisations further to the order of law, for reasons such as liquidation, winding up, insolvency, cessation of payments, concordat or for privatisation purposes; and
- acquisition by inheritance as provided for in article 5 of Communiqué No. 2010/4.

In addition to the above, the Competition Authority has also introduced Communiqué No. 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board. One of the amendments introduced to Communiqué No. 2010/4 is that article 1 of Communiqué No. 2017/2 abolished article 7(2) of Communiqué No. 2010/4 propounding that 'The thresholds . . . are re-determined by the Board biannually'. Through the mentioned amendment, the Board no longer bears the duty to re-establish turnover thresholds for concentrations every two years. To that end, there is no specific timeline for the review of the jurisdictional turnover thresholds set forth by article 7(1) of Communiqué No. 2010/4. In addition, article 2 of Communiqué No. 2017/2 modified article 8(5) of Communiqué No. 2010/4. Together with this amendment, the Board would now be in a position to evaluate the transactions realised by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three-year period. Lastly, article 3 of Communiqué No. 2017/2 introduced a new paragraph to be included to article 10 of Communiqué No. 2010/4. This newly introduced provision by article 3 of Communiqué No. 2017/2 is similar to article 7(2) of the European Commission Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, the case law of the Board shed some light on this matter.

3 What types of joint ventures are caught?

According to article 5(3) of Communiqué No. 2010/4, joint ventures are also subject to notification to, and approval of, the Board. The provision of article 5(3) stipulates that joint ventures that permanently meet all functions of an independent economic entity (ie, full function) are deemed notifiable. Article 13/III 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.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Communiqué No. 2010/4 provides a definition of 'control' that does not fall far from the definition of this term 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 which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.*

Pursuant to the presumption regulated under article 5(2) of Communiqué No. 2010/4, control shall be deemed acquired by persons or undertakings that are the holders of the rights, or entitled to the rights under the agreements concerned, or while not being the holders of the said rights or entitled to rights under those agreements, have de facto power to exercise these rights.

In short, much like the EU regime, under the Competition Law, mergers and acquisitions resulting in a change of control are subject to the approval of the Board. Control is understood to be the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions, and it can be exercised de jure or de facto. Therefore, minority and other interests that do not lead to a change of control do not trigger the filing requirement. However, if minority interests acquired are granted certain veto rights that may influence management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (such as a change from sole to joint control) and the transaction could be subject to filing.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Communiqué No. 2012/3 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2012/3), amends the turnover thresholds that a given merger or acquisition must exceed before becoming subject to notification for the purposes of the Turkish merger control regime. After the enactment of the amendments, the new thresholds are as follows:

- article 7(a) of the Communiqué No. 2010/4**:** the aggregate Turkish turnovers of the transacting parties exceeding 100 million liras and the Turkish turnovers of at least two of the transacting parties each exceeding 30 million liras;
- article 7(b)(i) of the Communiqué No. 2010/4**:** the Turkish turnover of the transferred assets or businesses in acquisitions exceeding 30 million liras; or
- article 7(b)(ii) of the Communiqué No. 2010/4**:** the Turkish turnover of any of the merging parties exceeding 30 million liras and the worldwide turnover of at least one of the other parties to the transaction exceeding 500 million liras.

As seen above, the tests provided under article 7(b) are two separate tests; article 7(b)(i) is applicable only in cases of acquisition transactions (as well as joint ventures) while article 7(b)(ii) is applicable only in cases of merger transactions.

Where the transaction does not meet the thresholds set out above, the transaction would not be deemed notifiable. Furthermore, Communiqué No. 2010/4 does not seek the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once the thresholds are exceeded, there is no exception for filing a notification cited in the Competition Law or its secondary legislation. There is no de minimis exception or other exceptions under the Turkish merger control regime, except for a certain type of merger in the banking sector.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are caught under the Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey. Sales into Turkey may trigger the notification requirement to the extent the thresholds are met. Article 2 of the Competition Law provides the 'effects criteria', pursuant to which the criterion to apply is whether the undertakings concerned affect the goods and services markets in Turkey. Even if the undertakings concerned do not have local subsidiaries, branches, sales outlets, etc, in Turkey, the transaction could still be subject to the provisions of the Turkish competition legislation if the goods or services of such undertakings are sold in Turkey and thus have effects on the relevant Turkish market.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Article 9 of Communiqué No. 2010/4, along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, sets forth specific methods of turnover calculation for financial institutions. Those special methods of calculation apply to banks, financial leasing companies, factoring companies and insurance companies, etc.

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The competition legislation provides no special regulation applicable to foreign investments.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Deadlines for filing

The Law on Protection of Competition No. 4054, dated 13 December 1994 (the Competition Law) provides no specific deadline for filing but based on ELIG Gürkaynak Attorneys-at-Law's experience in over 300 merger control filings so far, in light of the 30-calendar-day review period, it is advisable to file the transaction at least 40 to 45 calendar days before closing. Due to the 30-day review period under Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) a rather complex notification form is required to be used in merger filings, therefore the time frame required for preparation of a notification form may take rather long. It is important that the transaction is not closed prior to the approval of the Turkish Competition Board (the Board).

Penalties for not filing

If that the parties to a merger or acquisition that requires the approval of the Board realise the transaction without obtaining the approval of the Board, a monetary fine of 0.1 per cent 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 taken into account) shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Board's review of the transaction. The minimum fine for 2021 is 34,809 liras and the minimum fine is revised annually through a communiqué published each year.

Invalidity of the transaction

Another very important sanction, which is more of a legal character than economic, is set out under article 7 of the Turkish Competition Law and article 10 of Communiqué No. 2010/4: a notifiable merger or acquisition that is not notified to and approved by the Board shall be deemed as legally invalid with all its legal consequences.

Termination of infringement and interim measures

The Amendment Law – article 9(1) of the Competition Law – now states that, should the Board find any infringement of article 7, it shall order the parties concerned, by a resolution, of the suitable behaviour that should be followed or avoided to establish competition and of structural remedies, such as the transfer of certain activities, shareholdings or assets. However, the relevant amendment introduces a 'first behavioural, then structural remedy' rule for article 7 violations; therefore, where the behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings must comply with the structural remedies ordered by the Board in a minimum of six months.

Termination of the transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Board decides that the transaction falls within the prohibition of article 7 (in other words, the transaction significantly impedes effective competition), the undertakings shall be subject to fines of up to 10 per cent of their 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 taken into account). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party. In determining the monetary fines on the parties, the Board shall take into consideration repetition of the infringement, its duration, the market power of the undertakings, their decisive influence in the realisation of the infringement, whether they comply with the commitments given, whether they assisted the examination, and the severity of the damage that occurred or is likely to occur.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the transaction, remove all de facto legal consequences of every action that has been unlawfully taken, return all shares and assets if possible to the entities that owned these shares or assets before the transaction or, if such measure is not possible, assign these to third parties, and meanwhile forbid participation in control of these undertakings until this assignment takes place and to take all other necessary measures in this regard.

Failure to notify correctly

If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Board's subsequent request for further data. In addition, the Competition Authority will impose a turnover-based monetary fine of 0.1 per cent 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 taken into account) on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of these associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for exemption, negative clearance or the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force.

10 Which parties are responsible for filing and are filing fees required?

In principle, under the merger control regime, a filing can be made by either one of the parties to the transaction, or jointly. In case of filing by one of the parties, the filing party should notify the other party of the fact of filing.

There is no filing fee required under Turkish merger control proceedings.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Board, upon its preliminary review (Phase I) of the notification will decide either to approve, or to investigate the transaction further (Phase II). It notifies the parties of the outcome within 30 days of a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval', through an implied approval mechanism introduced with article 10(2) of the Competition Law. While the timing in the Competition Law gives the impression that the decision to proceed with Phase II should be formed within 15 days, the Board generally uses more than 15 days to form their opinion concerning the substance of a notification, and it is more sensitive about the 30-day deadline on announcement. Moreover, any written request by the Board for missing information will restart the 30-day period.

If a notification leads to an investigation (Phase II), it changes into a fully fledged investigation. Under Turkish law, the investigation takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months, by the Board.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a merger or acquisition is closed before clearance, the substantive test is the main important issue for determination of the consequences. If the Board reaches the conclusion that the transaction significantly impedes effective competition in any relevant product market the undertakings concerned as well as their employees and directors will be subject to monetary fines and sanctions. In any case, a notifiable merger or acquisition not notified to and approved by the Board shall be deemed as legally invalid with all its legal consequences.

The wording of article 16 of the Competition Law envisages imposing a monetary penalty if merger or acquisition transactions subject to approval are realised without the approval of the Board. The monetary fine is 0.1 per cent 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 taken into account) in Turkey. The liability for fines is on firms that are the acquirers in the case of an acquisition, and on both merging parties in the case of a merger. The minimum fine is 34,809 liras for 2021.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The foreign-to-foreign nature of the transaction does not prevent imposition of any administrative monetary fine (either for suspension requirement or for violation of article 7) in and of itself. In case of failure to notify (ie, closing before clearance), foreign-to-foreign mergers are caught under the Turkish Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey.

As an example, in the *Simsmetal/Fairless* decision (16 September 2009, No. 09-42/1057-269), where both parties were only exporters into Turkey, the Board imposed an administrative monetary fine on Simsmetal East LLC (ie, the acquirer) subsequent to first paragraph of article 16 of Law No. 4054, totalling 0.1 per cent of Simsmetal East LLC's gross revenue generated in the fiscal year 2009, because of closing the transaction before obtaining the approval of the Board. Similarly, the Board's *Longsheng* (dated 2 June 2011, No. 11-33/723-226), *Flir Systems Holding/Raymarine PLC* (17 June 2010, No. 10-44/762-246) and *CVRD Canada Inc* (8 July 2010, No. 10-49/949-332) decisions are examples whereby the Board imposed a turnover-based monetary fine based on the violation of the suspension requirement in a foreign-to-foreign transaction.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under article 10 of Communiqué No. 2010/4, a transaction is deemed to be 'realised' (ie, closed) on the date when the change in control occurs. It remains to be seen whether this provision will be interpreted by the Competition Authority in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement. This has been rejected by the Board so far (eg, the Board's *Total SA* decision dated 20 December 2006 No. 06-92/1186-355, and *CVR Inc-Inco Limited* decision dated 1 February 2007 No. 07-11/71-23), the Board arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The notification process differs for privatisation tenders. With regard to privatisation tenders, Communiqué No. 1998/4 of the Competition Board was replaced with a new communiqué entitled Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2). According to Communiqué No. 2013/2, it is mandatory to file a pre-notification before the public announcement of tender and receive the opinion of the Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds 30 million liras. Further to that, the Communiqué promulgates that in order for the acquisitions to become legally valid through privatisation, which requires pre-notification to the Competition Authority, it is also mandatory to get approval from the Board. The application should be filed by all winning bidders after the tender but before the Privatisation Administration's decision on the final acquisition.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Communiqué No. 2010/4 requires a complex notification form, which is similar to the Form CO of the European Commission. One hard copy and one electronic copy of the merger notification form shall be submitted to the Board. The notification form itself is revised from Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board; in parallel with the new notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified anyway, there has been an increase in the information requested, including data with respect to supply and demand structure, imports, potential competition and expected efficiencies, etc. Some additional documents such as the executed or current copies and sworn Turkish translations of some of the transaction documents, annual reports including balance sheets of the parties, and, if available, market research reports for the relevant market are also required. Bearing in mind that each subsequent request by the Board for incorrect or incomplete information will prolong the waiting period, detailed and justified answers and information to be provided in the notification form is to the advantage of the parties.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The Board, upon its preliminary review of the notification (ie, Phase I), will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. Moreover, any written request by the Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of that information.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish competition law, Phase II investigations take about six months. If necessary, the Board may extend this period once by up to six months.

In practice, only exceptional cases require a Phase II review, and based on our firm's experience in over 300 merger control filings so far, most notifications obtain a decision within 40 to 45 days of the original date of notification. Neither Law No. 4054 nor Communiqué No. 2010/4 foresees a 'fast-track' procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Pursuant to article 10 of the Competition Law, if the Board, upon its preliminary review of the notification, decides to further investigate the transaction, it shall notify the parties within 30 days (from the filing) and the transaction will be suspended and additional precautionary actions deemed appropriate by the Board may be taken until the final decision is rendered. Article 13(4) of Communiqué No. 2010/4 states that if the investigation is decided to be further investigated, provisions of articles 40 to 59 of the Competition Law shall be applied to the extent they are compatible with the relevant situation. Regarding the procedure and steps of such an investigation, article 10 makes reference to sections IV (articles 40 to 55) and V (articles 56 to 59) of the Competition Law, which govern the investigation procedures and legal consequences of restriction of competition, respectively.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test is a significant impediment of effective competition (SIEC) test under the new Law No. 7246 on the Amendment to Law No. 4054 on the Protection of Competition (the Amendment Law) (article 9(1) of the Law on Protection of Competition No. 4054, dated 13 December 1994 (the Competition Law)), similar to the approach under ECMR. With this new test, the Competition Authority 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. Although the Board has started to apply the relevant test in its decisions, it has not published detailed assessments pertaining to the implementation of the SIEC test. However, as the guidelines and secondary legislation has not been revised or new guidelines has not been introduced as a result of the changes in the primary legislation, how the SIEC test will be incorporated remains unclear. Having said that, in terms of creating or strengthening a dominant position, article 3 of the Competition Law defines 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 per cent 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.

20 | Is there a special substantive test for joint ventures?

The Turkish Competition Board (the Board) evaluates joint-venture notifications according to two criteria: existence of joint control in the joint venture, and the joint venture being an independent economic entity (ie, having adequate capital, labour and an indefinite duration). In recent years, the Board has consistently applied the test of 'full-functioning' while determining whether the joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in view of the two criteria mentioned above, the SIEC test will be applied. Additionally, under the merger control regime, a specific section in the notification form aims to collect information to assess whether the joint venture will lead to coordination. Article 13/III of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board provides that the Board will 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 allows for such a review as well.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Unilateral effects have been the predominant criteria in the Competition Authority's assessment of mergers and acquisitions in Turkey. That said, in recent years, there have been a couple of exceptional cases where the Board discussed the coordinated effects under a 'joint dominance test', and rejected the transaction on those grounds (eg, the Board's *Ladik* decision, dated 20 December 2005 No. 05-86/1188-340). These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that the transactions would lead to joint dominance in the relevant market. The Board took note of factors such as 'structural links between the undertakings in the market' and 'past coordinative behaviour', in addition to 'entry barriers', 'transparency of the market' and the 'structure of demand'. It concluded that certain factory sales would result in the establishment of joint dominance by certain players in the market whereby competition would be significantly lessened. Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, inter alia, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Board, which was based on collective dominance. No transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet. A few decisions discuss those theories of harm.

Although no transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet, in *Toyota/Vive* decision (dated 6 April 2017, No. 17-12/143-63), the Board provided an assessment on the main factors that should be considered for the evaluation of the conglomerate concentrations. This decision is significant because the Board did not focus on conglomerate effects of transactions before, though conglomerate effects have been an important issue for EC in 2017 (eg, *Qualcomm/NXP* and *Bayer/Monsanto*). The transaction concerns the acquisition of sole control over Vive BV by Toyota. While the parties to the transaction submitted that there would not be an affected market since their activities did not horizontally or vertically overlap in Turkey, the Board decided that the transaction would lead to a conglomerate concentration, given that the activities of the parties are complementary and substitute to each other. Accordingly, the Board asserted that foreclosing the market to competitors is realised through unilateral conducts in the form of tying, bundling and other exclusionary behaviours, and in addition to the market shares of the parties, the incentive and the ability to foreclose a market should be considered while assessing the existence of conglomerate effects. Upon its review process, the Board ultimately decided that the market shares of the transaction parties and the market structures of the two relevant product markets would not give transaction parties the market power and ability to foreclose the market and granted an unconditional approval to the transaction. Conglomerate effects were also analysed in scope of the *Luxottica/Essilor* decision (dated 1 October 2018, No. 18-36/585-286) where the Board examined the possible leveraging effect of Luxottica's market power in the market for sunglasses and optical frames for the market for ophthalmic lenses. At the end of its review, the Board conditionally cleared the transaction based on certain structural commitments.

Further to the Amendment Law (article 9(1) of the Competition Law), the new SIEC test allows a more reliable assessment for the unilateral and cooperation effects that might arise as a result of mergers or acquisitions as it focuses more on whether and how much the competition is impeded as a result of a transaction.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Mergers and acquisitions are assessed on the basis of competition criteria rather than public interest or industrial policies. In view of that, the Competition Authority has financial and administrative autonomy and is independent in carrying out its duties. Pursuant to article 20 of the Competition Law, no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Efficiencies that result from a concentration may play a more important role in cases where the combined market share of the parties exceeds 20 per cent for horizontal overlaps and the market share of both parties exceeds 25 per cent for vertical overlaps. In cases where the market share remains below these thresholds, the parties are at liberty to skip the relevant sections of the notification form on efficiencies. The Board may take into account efficiencies in reviewing a concentration to the extent they operate as a beneficial factor in terms of better quality production or cost savings such as reduced product development costs through the integration and reduced procurement and production costs, etc.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the Turkish Competition Board (the Board) during the investigation stage are very broad.

Article 9 of the Law on Protection of Competition No. 4054, dated 13 December 1994 (the Competition Law) provides that if the Board establishes that article 4, 6 or 7 of the Competition Law is infringed, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided so as to establish competition and maintain the situation before infringement and forward its opinion concerning how to terminate such infringement or the behavioural or structural measures. The new amendment to the Competition Law introduces 'first behavioural, then structural remedy' rule for article 7 violations.

Mergers and acquisitions prohibited by the Board are not legally valid and the transaction documents are not binding and enforceable even if the 'closing' is done prior to the clearance.

Pursuant to article 13(5) of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4), authorisation granted by the Board concerning the merger and acquisition shall also cover the limitations that are directly related and necessary to the implementation of the transaction. The principle is that parties to the transaction should determine whether the limitations introduced by the merger or acquisition exceed this framework. Furthermore, article 13(4) and article 14(2) of Communiqué No. 2010/4 stipulate that in its authorisation decision, the Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled.

The Board may at any time re-examine a clearance decision and decide on prohibition and application of other sanctions for a merger or acquisition if clearance was granted based on incorrect or misleading information from one of the undertakings or the obligations foreseen in the decision are not complied with. In this case, the transaction shall be re-examined by the Board, which may decide on prohibition and application of pecuniary sanctions.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Board may grant conditional approvals to mergers and acquisitions, and those transactions may be implemented provided that measures deemed appropriate by the Board are taken, and the parties comply with certain obligations. In addition, the parties may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Board. These commitments are increasing in practice and may either be foreseen in the transaction documents or may be given during the review process or an investigation. The parties can complete the merger before the remedies have been complied with. However, the merger gains legal validity after the remedies have been complied with.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Article 14 of Communiqué No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under article 7 of the Competition Law. The parties may submit to the Board proposals for possible remedies either during the preliminary review or the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed only on the date of the submission of the commitment. The commitment can be also served together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

Strategic thinking at the time of filing is somewhat discouraged through language confirming expressly that the review periods would start only after the filing is made. This is already the current situation in practice, but now it is explicitly stated. The Board is now expressly given the right in Communiqué No. 2010/4 to secure certain conditions and obligations to ensure the proper performance of commitments.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been several cases where the Board has accepted the remedies or commitments (such as divestments) proposed to, or imposed by, the European Commission as long as these remedies or commitments ease competition law concerns in Turkey (see, for example, *Agilent-Varian* decision No. 10-18/212-82 of 18 February 2010, *Cookson/Foseco* decision No. 08-25/254-83 of 20 March 2008, *Bayer/Monstanto* decision No. 18-14/261-126 of 8 May 2018 and *Synthomer* decision No. 20-08/90-55 of 6 February 2020).

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The conditions for successfully qualifying a restriction as an ancillary restraint are exactly the same as those applied in EU competition law. Therefore, a restriction such as a non-competition obligation should be directly related and necessary to the concentration, should be restrictive only for the parties and proportionate. As a result, for instance, it may be said that a restriction will be viewed as ancillary as long as its nature, geographic scope, subject matter and duration is limited to what is necessary to protect the legitimate interests of the parties entering into the notified transaction. The Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment, and the Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. If the ancillary restrictions are not compliant, the parties may face article 4, 5 and 6 examinations.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Pursuant to article 15 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4), the Turkish Competition Board (the Board) may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to article 11(2) of Communiqué No. 2010/4, if the Competition Authority is required by legislation to ask for another public authority's opinion, this would cut the review period and restart it anew from day one.

Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition may participate in a hearing held by the Board during the investigation, provided that they prove their legitimate interest.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Communiqué No. 2010/4 introduced a mechanism in which the Competition Authority publishes the notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Therefore, once notified to the Competition Authority, the existence of a transaction is no longer a confidential matter.

If the Board decides to have a hearing during the investigation, hearings at the Competition Authority are, in principle, open to the public. The Board may, on the grounds of protection of public morality or trade secrets, decide that the hearing shall be held in camera.

The main legislation that regulates the protection of commercial information is article 25(4) of the Law on Protection of Competition No. 4054, dated 13 December 1994 and Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3), which was enacted in April 2010. Communiqué No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets to the undertakings. Therefore, undertakings must request confidentiality from the Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing. While the Board can also ex officio evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential.

Lastly, the final decisions of the Board are published on the website of the Competition Authority after confidential business information is taken out.

Under article 15(2) of Communiqué 2010/3, the Competition Authority may not take into account confidentiality requests related to information and documents that are indispensable to be used as evidence for proving the infringement of competition. In such cases, the Competition Authority can disclose such information and documents that could be considered as trade secrets, by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Article 43 of Decision No. 1/95 of the EC Turkey Association Council (Decision No. 1/95) authorises the Competition Authority to notify and request the European 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 European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

The Commission has been reluctant to share any evidence or arguments with the Competition Authority, in the few cases where the Competition Authority has explicitly asked for them.

Apart from that, the Competition Authority has international cooperation with several antitrust authorities in other jurisdictions. Additionally, the Competition Authority develops training programmes for cooperation purposes. In recent years, programmes have been organised for the board members of the Pakistani Competition Authority, top managers of the National Agency of the Kyrgyz Republic for Anti-Monopoly Policy and Development of Competition, members of the Mongolian Agency for Fair Competition and Consumer Protection, and board members of the Turkish Republic of Northern Cyprus's Competition Authority. Similar programmes have also been developed in cooperation with the Azerbaijan State Service for Antimonopoly Policy and Consumers' Rights Protection, the State Committee of the Republic of Uzbekistan on De-monopolisation and the Ukrainian Anti-Monopoly Committee. These programmes were held according to the bilateral cooperation agreements. The Competition Authority's cooperation agreements can be found on its website. In April 2018, it entered into cooperation agreements with Kosovo, Macedonia and Serbia. Furthermore, the Turkish Competition Authority signed a cooperation protocol with the competition authorities of Azerbaijan in February 2020 and Morocco on 12 January 2021.

The Competition Authority has also organised the Istanbul Competition Forum in collaboration with UNCTAD (the United Nations Conference on Trade and Development) since 2019 to discuss debate a wide range of key and emerging competition law issues.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

As per Law No. 6352, which took effect on 5 July 2012, the administrative sanction decisions of the Turkish Competition Board (the Board) can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Board. Decisions of the Board are considered as administrative acts, and thus legal actions against them shall be taken in accordance with the Administrative Procedural Law. As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution if the execution of the decision is likely to cause irreparable damages and the decision is highly likely to be against the law.

A significant development in competition law enforcement was the change in the competent body for appeals against the Board's decisions. The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds and investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The time frame for appeal to the Council of State against final decisions of the Board is 60 days starting from the receipt of the reasoned decision. The judicial review period before the Administrative Court usually takes about eight to 12 months. After exhausting the litigation process before the Administrative Courts of Ankara, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the administrative courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the administrative court.

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.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the Merger and Acquisition Status Report of the Competition Authority (for the year of 2019), the Turkish Competition Board (the Board) reviewed a total of 208 transactions; these transactions included 204 merger and acquisition transactions and one privatisation, three cases beyond 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 lack of change in control) and two information notes. Among these transactions, two concentrations were taken into Phase II review in 2019, whereas three transactions were granted clearance after the submission of remedies.

With regard to 2020, the Competition Board reviewed 220 transactions in total, including 190 mergers and acquisitions that were approved unconditionally, one decision that was approved conditionally and one decision that was not approved. Twenty-eight 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).

In 2019, 115 transactions notified to the Board were foreign-to-foreign transactions, which constitute more than half of the concentrations notified in 2019.

Generally, the Competition Authority pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors such as automotive, construction, telecommunications and energy, etc, are under particular scrutiny. The consolidated statistics regarding merger cases in 2020 show that the transactions in the chemical and mining sector took the lead with 39 notifications, followed by the vehicle and transportation sector with 28 notifications. The sector reports published annually by the Competition Authority also indicate concentration trends. The last three sector reports were regarding the expo, nut and television broadcasting sectors.

The Competition Authority handles transactions and possible concentrations in the Turkish cement and aviation sectors with special scrutiny. There are a number of ongoing investigations in this sector. It would also be accurate to report that the Competition Authority has a special sensitivity to markets for construction materials. In addition to cement, markets for construction iron, aerated concrete blocks and ready-mixed blocks were investigated and the offenders were fined by the Competition Authority.

To the extent that these decisions were also supported by worries over high levels of concentration, it would be prudent to anticipate that the Competition Authority will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

Additionally, the Competition Authority published a sector inquiry in 2018 for the hazelnut sector and in 2019 for the fair organisation and hosting sector. On 5 February 2021, the Competition Authority published its preliminary report on its sector inquiry on FMCG sector. Also, on 7 May 2021, the Competition Authority published its preliminary report on its sector inquiry on e-marketplace platforms.

Reform proposals

35 | Are there current proposals to change the legislation?

The newly introduced Law No. 7246 on the Amendment to Law No. 4054 on the Protection of Competition (the Amendment Law) (article 9(1) of the Law on Protection of Competition No. 4054, dated 13 December 1994) aims to embody the Competition Authority's more than 20 years of enforcement experience and bring Turkish competition law closer to EU competition law. It is designed to be more compatible with how the law is being applied in practice and aims to further comply with EU competition law. The most prominent changes introduced by the Amendment Law are:

- the SIEC test for mergers and acquisitions
- behavioural and structural remedies for anticompetitive conduct;
- the de minimis principle for agreements, concerted practices or decisions of association of undertakings;
- commitments or settlement mechanisms;
- clarification on the powers of the authority in on-site inspections; and
- clarification on the self-assessment procedure in individual exemption mechanism.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Competition Authority published its Guidelines on Examination of Digital Data during On-Site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in the electronic media and information systems during on-site inspections. Furthermore, the secondary legislation regarding the commitment mechanism and the de minimis mechanism (Communiqué No. 2021/2 on Remedies for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position; and Communiqué No. 2021/3 on De Minimis Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings) came into force on 16 March 2021. On 18 March 2021, the Competition Authority started the public consultation process on the Settlement Regulation, which ended on 19 April 2021. There have been two cases where the commitment mechanism was implemented (see, Havaş-MNG Investigation and Arslan Nakliyat Investigation).

In 2020, major merger control decisions concerning high-value transactions were taken by the Competition Authority.

A notable transaction concluded in 2020 was the Board's *Fiat/Peugeot* transaction concerning the combination of two automotive companies, Fiat Chrysler Automobiles NV and Peugeot SA, through the merger of Peugeot SA with and into Fiat Chrysler Automobiles NV (Fiat) being taken to Phase II (17 July 2020). The short-form decision indicates that the notified transaction would not result in the significant impediment of effective competition in the market for manufacturing and sales of passenger cars and the market for manufacturing and sales of light commercial vehicles between the gross weight of three-and-a-half to six tons. However, pursuant to article 7 of Law No. 4054, the notified transaction would result in the significant impediment of effective competition in the market for manufacturing and sales of light commercial vehicles up to the gross weight of three-and-a-half tons. Accordingly, the transaction has been approved within the scope of the commitments submitted to the Competition Authority by Fiat and Koç Holding AŞ (30 December 2020). The decision has not yet been published.

In another Phase II decision related to the transaction concerning the acquisition of sole control of Embraco, the compressor manufacturing business of Whirlpool Corporation by Nidec Corporation (18 April 2019) over Gülçiçek Kimya ve Uçan Yağlar Sanayi ve Ticaret AŞ by Fragar (Europe) SA, the unconditional approval decision rendered in this regard is prominent in the sense that, even though the combination of the undertakings in question would give rise to a significant market power in Turkey, the Board cleared the transaction by taking into account the parties' and their competitors' Turkish and global market shares and the competitive dynamics of the market both globally and in Turkey (25 June 2020). The Board determined that the parties' activities (1) horizontally overlap with respect to the sales and production of fragrance, and (2) vertically overlap with respect to the sales and production of fragrance and aromatic chemicals. In terms of the assessment on other players within the market, the Board found that there are many global competitors who are active in the Turkish markets via imports. Therefore, the Board decided that these players and the global market conditions should also be taken into consideration for the assessment of the transaction. Thereby, upon its assessment of the parties' Turkish and global market shares and the global market dynamics, the Board found that the parties' competitors hold a significant market power in Turkey. The Board has also assessed that the 'aroma chemicals' product, used as an input for the perfume market where Gülçiçek operates globally and in Turkey, is sold to customers in Turkey by Firmenich through its affiliate. Ultimately, the Board decided that the transaction would not give rise to anticompetitive effects owing to (1) the dynamic nature of the market; (2) the homogenous structure of the retail level; (3) the lack of or very limited entry barriers; (4) the existence of and the switching ease between local and global suppliers; and (5) the level of countervailing buyer power. Therefore, the Board unconditionally cleared the transaction within the scope of a Phase II review.

Furthermore, in 2020, in relation to the acquisition of sole control over business solutions branch of Johnson Controls International plc by Brookfield Asset Management Inc (Brookfield) (30 April 2020), the Board has imposed two separate administrative fines on Brookfield Asset Management Inc owing to the findings that (1) Brookfield closed the acquisition of the power solutions business of Johnson Controls International without notifying the Board and waiting for its approval, and (2) Brookfield submitted false and misleading information regarding its Turkish turnover. In its assessment of violation of suspension requirement, the Board compared the closing and the notification dates; and consequently found that Brookfield notified the transaction approximately five months after the closing. The Board also acknowledged that the contemplated transaction was notified before the Commission and was unconditionally approved on 14 February 2019. As a result of the Phase I review, while the Board ultimately approved the transaction into Phase II review, it imposed administrative monetary fine of 0.1 per cent of the annual turnover of Brookfield for gun-jumping. Furthermore, the Board imposed separate monetary fine owing to the potential competition law concerns arising from misleading information, since Brookfield provided its Turkish turnover without the turnover of one of its subsidiaries that it recently acquired.

Another recent gun-jumping decision is the *BMW/Daimler/Ford/Porsche/Ionity* decision (28 July 2020), where the transaction concerned the establishment of a full-function joint venture in 2017, which had no presence or activities in Turkey among four joint venture partners. The Competition Authority became aware of that transaction within the scope of a notification made in 2020, with regard to another transaction that concerned the acquisition of joint control by a fifth joint venture partner alongside the existing joint venture partners. Eventually, although the Board approved both transactions unconditionally, it imposed administrative monetary fines on each of the four existing joint venture partners corresponding to 0.1 per cent of their annual Turkish turnovers generated in the 2019 financial year, for the violation of the suspension requirement.

Finally, in *TIL/Marport*, the Board refused to grant approval to the transaction, concerning Terminal Investment Limited Sàrl (TIL)'s acquisition of sole control over Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi (Marport), which was under the joint control of TIL before the transaction, on the grounds that the notified transaction was likely to cause a significant impediment of effective competition pursuant to the commitment package submitted to the EU Commission about the divestment of Nidec's own light commercial compressor and household compressor businesses under article 7 of Law No. 4054. The Board found, inter alia, that:

- relevant commitments would lead to a horizontal overlap in the relevant product market for the 'port management for container handling services' and a vertical overlap in Turkey in the relevant product market for the 'container line transportation';
- TIL has significant market power in the 'port management for container handling services' and its subsegments;
- the parent of TIL (Mediterranean Shipping Company (MSC)) (ie, holding joint control over TIL) is the biggest customer of TIL, and another joint venture of MSC (Asyaport Liman AŞ (Asyaport)) also almost entirely serves to the MSC regarding the sales of

household type reciprocating hermetic cooling compressors, reciprocating hermetic light commercial cooling compressors and sales of condenser units, transit and local loads, and, in terms of local loads, MSC is the major customer of Marport;

- in the port management for container handling services market for local loads in the North-West Marmara Region, Marport is the biggest player and Asyaport is third; therefore, the market share of the TIL's parent group would significantly increase post-transaction;
- the Herfindahl-Hirschman Index level in the relevant product market was already high and would increase to 4,573 by a rise of 1,187; and
- because MSC is one of the biggest line operators on a global scale, when evaluated together with its significant presence in the area of line transportation, the fact that MSC would operate a significant part of the container handling capacity of the North-West Marmara Region is likely to build a disadvantage for other line operators that use the ports in the Northern Marmara Region.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Ukrainian merger control legislation includes:

- the Law of Ukraine on Protection of Economic Competition 2001 (the Competition Law);
- the Law on the Antimonopoly Committee of Ukraine 1993 (the Law on the AMC);
- the Resolution Approving the Regulation on the Procedure for Filing Applications with the Antimonopoly Committee of Ukraine for Obtaining its Prior Approval of the Concentration of Undertakings 2002 (the Concentrations Regulation);
- the Methodology for Establishment of the Monopoly (Dominant) Position of the Undertakings on the Market 2002;
- Guidelines on Calculation of Fines for Violation of Ukrainian Competition Law 2016 (the Guidelines on Fines);
- Guidelines on the Assessment of Horizontal Mergers 2016;
- Guidelines on the Assessment of Non-Horizontal Mergers 2018;
- Guidelines on Definition of Control 2018;
- Guidelines on the Assessment of Joint Ventures 2019; and
- Guidelines on the Application of SSNIP Test 2020.

The Antimonopoly Committee of Ukraine (AMC) is the primary state authority entrusted with ensuring protection of competition; it has powers to investigate and grant or refuse clearances for mergers (concentrations) as well as to investigate and penalise violations of the merger control regime. If the AMC refuses to approve a concentration, the Cabinet of Ministers of Ukraine may overrule the decision.

Scope of legislation

2 | What kinds of mergers are caught?

The Competition Law refers to the term 'concentration', which is defined quite broadly to cover the following transactions:

1. the merger of two or more previously independent undertakings, or the takeover of one undertaking by another;
2. the acquisition of direct or indirect control over an undertaking, including through:
   - acquisition or lease of the assets of an undertaking (including in the process of its liquidation); or
   - appointments to certain positions (eg, chairperson, deputy chairperson or more than half the members of decision-making or supervisory corporate bodies), etc, if the same persons already hold those positions in other undertakings (ie, cross-directorship);
3. the establishment by two or more undertakings of a new undertaking that will independently pursue business activity on a lasting basis, while its establishment does not result in coordination of competitive behaviour either of its parents or of the new undertaking, on the one hand, and its parents, on the other; and
4. the direct or indirect acquisition of participation interests (shares, equity) whereby certain thresholds (25 per cent or 50 per cent of the votes in the highest governing body of the undertaking concerned) are reached or exceeded.

With regard to (2), although it provides only a couple of examples of notifiable transactions, it is in fact a catch-all provision intended to cover acquisitions with respect to any kind of control.

The Ukrainian approach to qualification of transactions is quite formalistic and the AMC usually concentrates on the form of a transaction rather than its substance. For instance, in the case of multiple acquisitions, the AMC requires each acquisition formally qualifying as a concentration to be notified separately. For example, acquisitions of shares in a number of entities from the same seller shall technically be cleared by the AMC through issuing respective number of separate clearance decisions.

The Competition Law also provides for a number of exemptions from the filing obligation; in particular, the following transactions do not qualify as concentrations, meaning that no merger clearance is required irrespective of parties' turnover or asset value figures:

- the establishment of a new undertaking that aims at, or results in, coordination of competitive behaviour either of its parents or of the new undertaking, on the one hand, and its parents on the other (such establishment is generally regarded as concerted practices and may require antitrust clearance);
- the acquisition of participation interests (shares or equity) qualifying as a financial buyer transaction (ie, the shares are acquired by a financial institution for the purposes of further resale within one year (may be extended), provided that the acquirer does not exercise voting rights attached to the acquired shares);
- the acquisition of control over an undertaking or part thereof by a receiver or a representative of a state authority (eg, in an insolvency procedure);
- intra-group transactions, provided that control relations within the group were established in compliance with the Ukrainian merger control rules; and
- acquisition by the bank or other financial institution of shares or assets of an undertaking, if such acquisition is made in recovery proceeding and is provided by the restructuring plan approved in accordance with the Law On Financial Restructuring, assuming those shares or assets will be further resold to third party within the next two years.

3 What types of joint ventures are caught?

Under the Competition Law, establishment by two or more undertakings of a new undertaking that will independently pursue business activity on a lasting basis qualifies as a concentration, unless such establishment results in coordination of competitive behaviour either of its parents or of the new undertaking on the one hand and its parents on the other.

For a long time, the AMC interpreted the above definition quite broadly and almost all joint ventures were regarded as concentrations. However, in September 2019, the AMC published Guidelines on the Assessment of Joint Ventures, which further clarified applicability of merger control rules to joint ventures. The document further addresses the criteria containing in the Competition law (establishment as a new undertaking, operations on lasting basis, absence of coordination), as well as introduces the full-functionality criterion (ie, the ability to perform all functions of an autonomous economic entity) for joint ventures to be considered a concentration.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law provides for a very broad definition of control, referring to the ability to exercise decisive influence (including via blocking rights) on the strategic decisions related to the business activity of an undertaking. In particular, control is deemed to exist if an undertaking:

- directly or indirectly holds or manages more than 50 per cent of shares, participation interest, votes, or is entitled to receive at least 50 per cent of the profits of another undertaking;
- ownership to or right to use (eg, lease) of all (or major part of) assets of another undertaking;
- is authorised to appoint the CEO, vice CEO or more than 50 per cent of the members of the supervisory board (the board of directors), the management board or the audit committee (or if the same persons hold positions of CEO, vice CEO, the chair, the vice chair or more than 50 per cent of the members of said boards or committee, etc, in two undertakings); or
- otherwise controls another undertaking (eg, through contractual (management) arrangements).

In 2018, the AMC introduced Guidelines on Definition of Control. This document provides further guidance as to the concept of control, in particular:

- distinguishes between negative and positive sole control. Negative control arises where a shareholder has veto rights with respect to strategic decisions, but cannot adopt those decisions independently;
- recognises the difference between de jure and de facto types of sole control. It is explained that, in contrast to de jure control, de facto control may arise because of specific case-by-case circumstances (for instance, a minority shareholder may have decisive influence at the general meeting level, relying on prospective assessment of past shareholder participation and voting patterns); and
- clarifies that veto rights over budget, business plan, strategic investments, appointment of senior management, or activity on certain markets will generally be regarded as control.

The Guidelines further clarify that change in the quality of control occurs in situations where there is a change from sole to joint control or vice versa; or an increase in the number or a change in the identity of controlling shareholders. No changes in the quality of control arise in the case of a switch from negative to positive sole control, or changes in the level of shareholdings of the same controlling shareholders, provided powers they have remain the same.

Standard minority shareholder protection rights (such as veto rights on changes in the statute, an increase or decrease in the capital or liquidation) are generally not regarded as conferring control over the undertaking.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A transaction qualifying as a concentration requires merger clearance by the AMC if it satisfies the following criteria:

- the combined worldwide value of assets or turnover of the parties to the concentration exceeds €30 million and the value of Ukrainian assets or turnover of each of at least two parties exceeds €4 million; or
- the Ukrainian value of assets or turnover in Ukraine of the target or of at least one of the founders of a new entity exceeds €8 million and worldwide turnover of at least one other party exceeds €150 million.

All figures shall be taken for the last financial year immediately preceding the year of the concentration.

In either case, the parties to a concentration should be considered at their group level. That means that the assets or turnover of the controlling shareholder or controlling seller should still be counted towards the target.

The concentrations falling below these thresholds do not require merger clearance by the AMC. However, the parties may voluntarily file such concentrations, for instance where the thresholds cannot be checked comprehensively or the check requires appreciable efforts.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory. Apart from transactions that do not qualify as concentrations, there are no other exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

An obligation to notify arises if the parties hit the Ukrainian filing thresholds irrespective of the overall effect of the transaction in Ukraine. Thus, even foreign-to-foreign deals having no reasonable nexus to Ukraine and its competitive environment may be caught.

However, pursuant to general provisions of the Competition Law, an argument can be made that application of the turnover or asset thresholds should be qualified by the effects doctrine. Under this interpretation, it may be argued that foreign-to-foreign mergers do not require clearance, if they lack reasonable local nexus and cannot have any anticompetitive effect. Still, this argument runs contrary to the current and past approaches of the AMC in application of merger control rules. The AMC claims that such transactions are subject to clearance as the AMC has exclusive authority to determine whether a particular transaction may or may not impact competition in Ukraine, and verification of such impact is in fact conducted while reviewing a merger case and granting the clearance.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In connection with the conflict with Russia, Ukraine introduced sanctions against certain companies. The list includes companies mainly from Russia and Ukraine, including Crimea, as well as several companies from other jurisdictions. The AMC will reject merger control notifications or drop their review (if such notifications have already progressed into Phase I or II) if (1) any of the parties to the concentration (or any individuals or entities connected to them by relations of control) is on the Ukrainian sanctions list, and (2) a particular type of sanctions applies to a given individual or entity (eg, prohibition on disposal of assets, equity).

Also, foreign companies are subject to certain restrictions (for example, they are restricted from owning agricultural land; also, companies and individuals from Russia and offshore jurisdictions are restricted from owning a stake in Ukrainian television and broadcasting companies) and limitations (eg, a Ukrainian air carrier cannot obtain the Ukrainian air transportation licence if a foreign entity owns 50 per cent or more of carrier's share capital).

In addition, special rules apply to review of the notifications that concern capitalisation and reorganisation of Ukrainian banks – the AMC will review them and grant clearances within 10 days after receipt of the complete set of documents.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing a notification in Ukraine. The only requirement is that the Antimonopoly Committee of Ukraine (AMC) clearance is obtained before the implementation of the concentration. It is possible to notify transactions at their early stages where no definitive agreement is reached.

Failure to notify can lead to a fine of up to 5 per cent of the consolidated turnover in the year immediately preceding the year when the fine is imposed, but in practice, the fines in merger cases are considerably lower. The Guidelines on Fines (last revised in 2016) sets basic amounts of fines for violation of competition laws, including for merger cases. Under the Guidelines on Fines, the basic amounts in merger cases are:

- 10 per cent of the turnover on the relevant (and adjacent) Ukrainian markets – for failure to notify a concentration that results in monopolisation or substantial restriction of competition;
- between 510,000 hryvnas (approximately €17,500) and 5 per cent of the turnover on the relevant (and adjacent) Ukrainian markets – for failure to notify a concentration that does not lead to monopolisation or significant restriction of competition or have impact on Ukrainian product markets; and
- between 170,000 hryvnas (approximately €5,800) and 510,000 hryvnas (approximately €17,500) for failure to notify a concentration in case the parties are active on non-overlapping and non-adjacent markets in Ukraine.

When defining the basic fine, the AMC may apply coefficients depending on the effect of violation on competition, social importance of the products, profitability of economic activity connected with violation, which may increase or decrease the fine. Also, in each case, the above basic amounts are subject to possible further adjustment for aggravating or mitigating circumstances.

Although the statutory ceiling for a fine (5 per cent of the turnover in the year preceding the fining decision) remains in force, the authority clarified that the maximum theoretical fine can be imposed only in exceptional circumstances to ensure deterrence. The Guidelines on Fines have a recommendatory nature and are non-binding. However, the AMC has publicly committed to follow its rules on setting fines strictly.

The fine may be imposed on the entire corporate group of the offender whose actions or omissions have led to violation of the Competition Law (in practice, on the acquiring party, the founding partners in the case of establishment of a joint venture or the merging entities).

The fining decisions are publicly available from mid July 2015. Since then the AMC has imposed more than 100 fines for failure to notify, closing or integrating activities before clearance. In most cases, the amount of fine did not exceed 510,000 hryvnas (approximately €17,500) and these were likely imposed for implementing non-problematic transactions. The authority publishes only redacted versions of decisions on its website and it is not possible to comprehensively analyse the reasons behind the calculation of a fine.

In terms of trends, the largest fines were imposed in 2019 (two fines: one amounting to €1.9 million and the other one to €1.8 million) and in 2021 (one fine that amounted to €1.9 million). These cases demonstrate significant change in the AMCs approach; before 2019, the highest fines were €500,000 and less.

In addition to the financial penalties, the other drawbacks of non-compliance are:

- potential third-party damages claims (double the amount of actual damages sustained);
- reputational issues (information about the imposed fine, identity of the parties and non-confidential version of decision are published by the AMC on its website);
- possible complications with Ukrainian clearance of future transactions, as the AMC sometimes may scrutinise these more actively; or
- hypothetically, invalidation of the transaction.

10 Which parties are responsible for filing and are filing fees required?

The filing is a joint obligation of the participating undertakings, which can mean the acquirer and the target. The controlling seller can also be the applicant on the target's side in a share deal or generally in an assets deal, the founding partners with respect to joint ventures or the merging entities.

The filing fee is 20,400 hryvnas (approximately €610) per one notifiable event (a transaction may require multiple notifications depending on its structure).

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The parties are subject to a standstill obligation. Closing prior to clearance constitutes a violation of Ukrainian merger control rules. The suspension requirement applies globally and Ukrainian merger control rules do not provide for any possibilities to obtain individual derogation or avoid sanctions by carving out Ukraine.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The same sanctions apply in case of closing or integrating the activities of the merging businesses (even partly) before clearance, as in case of not filing at all. In practice, closing a non-problematic transaction before the clearance, but after the filing was made, is likely to receive a more favourable treatment by the AMC than an omission to notify completely.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no such solutions. Still, a hold-separate or carveout arrangement is likely to be treated by the AMC as a mitigating factor when deciding on the amount of a fine.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The requirements differ depending on the procedure and include:

- For the simplified procedure:
  - description of the transaction structure, indicating transaction stages, and the timeline for their implementation along with the draft or copy of transactional documents; information if the clearance is sought or granted in other jurisdictions;
  - description of the source of financing, indicating terms and conditions and submitting documents to confirm availability of own funds (eg, balance sheet, excerpt from bank account) or to evidence that a financial institution lending funds does not acquire control over the borrower in the result of the financing arrangement (eg, loan agreement);
  - parties' asset and turnover data – globally and in Ukraine for the previous financial year;
  - for all markets – general outline of the parties' activities globally and in Ukraine, indicating Ukrainian subsidiaries and companies active in Ukraine; and
  - for the relevant markets – value and volume-based sales and market share data; indicating competitors and their estimated market shares on overlapping markets.
- For the standard procedure (in addition to the above simplified procedure list):
  - detailed economic analysis of the transaction's effect on the Ukrainian market;
  - information regarding membership in associations; and
  - parties' excerpts from the trade register or similar (notarised and apostilled or legalised).

Furthermore, along with the hard copy of the notification, parties are required to provide a flash drive with an electronic version (PDF, Word document, etc) of the notification and all documents attached to it.

Documents to be submitted to the AMC should be duly certified and translated into Ukrainian. Confidential information should be properly marked in the notification so that the AMC treats it accordingly.

As regards the missing information in the notification, there may be the following scenarios:

- If the required information is missing from the start: the authority may either request it during the review or issue a declaration of incompleteness within the 15-day preview period and the parties will have to file anew, adding the missing information. In such scenario no sanctions are applied.
- If the parties fail to submit information upon request within Phase II review: the authority may close a merger case without ruling on the essence. The parties, however, may submit a repetitive application.

Also, failure to provide information to the AMC within the specified period or provision of wrong, incomplete or untrue information may result in a fine in the amount of up to 1 per cent of the respective party's turnover in the year immediately preceding the year when the fine is imposed. However, the Guidelines on Fines clarify that the fine for such violation is capped at 136,000 hryvnas (approximately €4,600). This amount is also subject to possible adjustment for aggravating or attenuating circumstances.

Finally, the AMC may reconsider its decision if it was based on materially incomplete or inauthentic information.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The law does not provide for formal consultations with the authority before notifying a merger, although informal consultations are usually possible. After notifying a merger, the standard review process will include the following steps:

- Preview period. The AMC has 15 calendar days to decide whether the notification is complete and can be accepted for the substantive review (Phase I). If the AMC considers the notification as incomplete, it can be rejected without review on the substance. In such case, the parties would need to file a supplemented notification anew, restarting the process.
- Phase I review. This stage involves a substantive review and assessment by the AMC of whether the concentration can be approved or whether there are potential grounds to prohibit the concentration, in which case Phase II is initiated. The Phase I review period is up to 30 calendar days during which the AMC will either grant clearance or initiate Phase II.
- Phase II review. In case the AMC sees any grounds to prohibit the concentration, it can initiate Phase II review, which involves a close analysis of the transaction and the associated competition concerns, examination of expert opinions and other additional information. The recommended Phase II review period is up to 135 calendar days, which starts on the day Phase II notice is sent to the parties. The parties, however, can request extension of the review period, if necessary, while the AMCs requests also stop the clock.

A fast-track simplified 25-day review procedure is available for transactions where only one party is active in Ukraine or parties' combined shares do not exceed 15 per cent on the overlapping markets or 20 per cent on vertically related markets. The AMC tends to interpret the 15 or 20 per cent threshold quite restrictively and irrespective of whether an overlap occurs on a relevant or non-relevant market.

18 What is the statutory timetable for clearance? Can it be speeded up?

A standard merger review timetable is as follows:

- Preview period: 15 calendar days;
- Phase I review period: up to 30 calendar days; no prolongation is possible; and
- Phase II review period: three months after receipt by the authority of all requested data (extendable, if additional documents, information or expert opinion are required), but, in practice, shall not

exceed 135 calendar days starting from the day that Phase II notice is sent to the parties.

Also, a fast-track, simplified 25-day review procedure is available for transactions reasonably raising no competition concerns.

The authority usually takes the whole of the Phase I review period for review of transactions and adopts the relevant decisions during the last week before the respective deadline. In practice, it is possible to request a faster review, although there is no formal procedure for this.

If prior to or on the date when the Phase I or Phase II period expires the AMC has failed to adopt any decision on the concentration, clearance by tacit consent is deemed to have been granted, although in practice the AMC tends to issue formal clearances.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Pursuant to the Competition Law, the Antimonopoly Committee of Ukraine (AMC) approves the concentration if it does not lead to monopolisation (achievement or strengthening of a dominant position in the market) or a substantial restriction of competition in the Ukrainian market or a significant part of it. Otherwise, the transaction will be prohibited unless the parties offer sufficient remedies.

The test for dominance is as follows:

- above 35 per cent market share if held individually;
- above 50 per cent if held collectively by two or three undertakings with the largest market shares; and
- above 70 per cent if held collectively by four or five undertakings with the largest market shares.

Under the Guidelines on the Assessment of Horizontal Mergers and Guidelines on the Assessment of Non-Horizontal Mergers, the following countervailing factors can be considered while reviewing the concentrations:

- likelihood that buyer power would act as a countervailing factor;
- likelihood that entry would maintain effective competition on the relevant markets; and
- 'failing firm' defence.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

As a general rule, the AMC approves the concentration if it does not lead to monopolisation (achievement or strengthening of a dominant position in the market) or a substantial restriction of competition in the Ukrainian market or a significant part of it.

Under the Guidelines on the Assessment of Horizontal Mergers, the authority is also required to assess whether the concentration would result in any of the following effects:

- unilateral or non-coordinated effects – whether the merger will eliminate important competitive constraints on one or more firms, which consequently would have increased market power; and
- coordinated effects – whether the merger will change the nature of competition such that firms that previously were not coordinating their behaviour, would have been significantly more likely to coordinate and raise prices or otherwise harm effective competition.

Also, under the Guidelines on the Assessment of Non-Horizontal Mergers, the AMC is required to consider the following potential effects:

- non-coordinated effects:
  - upstream foreclosure (vertical mergers): raising costs of rivals by restricting their access to an important input;
  - downstream foreclosure (vertical mergers): raising costs and reducing revenue streams of rivals by integrating with an important customer in a downstream market to foreclose access to an important customer base; and
  - foreclosure in related markets (conglomerate mergers): reducing rivals' ability or incentive to compete by combination of products in closely related markets to leverage a strong market position from one market to another by means of tying or bundling practices; and
- coordinated effects – possibility that non-horizontal mergers could increase the likelihood of tacit coordination.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The AMC would predominantly consider competition issues. Other considerations may still be used as supporting arguments, although they are unlikely to be decisive.

However, the Cabinet of Ministers of Ukraine may overrule the AMC's prohibition decision when the positive effects of the transaction on the public interest outweigh the negative impact of the restriction of competition caused by the transaction.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The AMC may take into account economic efficiencies when reviewing the notification, although such arguments are unlikely to be decisive. In cases posing serious competition concerns, adequate remedies would nevertheless be required.

However, economic or other efficiencies will be taken into account by the Cabinet of Ministers of Ukraine, which may still authorise a transaction that has been prohibited by the AMC. Such a decision is possible if the positive effects of the transaction on the public interest outweigh the negative impact of the restriction of competition caused by the transaction, unless this restriction is not necessary for attaining the purpose of the concentration or jeopardises the market economy system.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Antimonopoly Committee of Ukraine (AMC) can prohibit a concentration if it leads to monopolisation or a substantial restriction of competition in the Ukrainian market or a significant part of it.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The AMC clearance decision can be made conditional on the parties undertaking to perform, or refrain from performing, certain actions aiming at removing or mitigating the negative impact of the concentration on the market competition, which may be either structural (for example, divestitures) or behavioural (for example, restrictions on use or management of certain assets or price increases).

Under the Competition Law, if during the Phase II review the AMC sees any grounds for a merger to be prohibited, it shall inform the parties of these grounds and the parties, in turn, can propose remedies to the AMC within a 30-day period (extendable upon the parties' request). Practically, this means that discussions on remedies start at Phase II. Still, offering remedies at Phase I is not prohibited; however, it will most probably automatically bring the case to Phase II, as Phase I review implies the absence of any substantive competition concerns. So, initiation of discussions on remedies with the authority is very unlikely to help avoid Phase II investigation.

In practice, remedies in most cases are behavioural and conditional clearances often include reporting requirements allowing the authority to monitor compliance.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no uniform conditions. The only relevant requirements are that remedies should alleviate competition concerns, be proportionate and supervision of their implementation should be reasonable.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

During the past five years or so, the AMC cleared transactions subject to binding commitments in approximately 2 per cent of cases.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Ancillary restraints are not covered by merger clearance and may require a separate clearance; for example, antitrust clearance with respect to non-compete clauses.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Antimonopoly Committee of Ukraine (AMC) may involve third parties (competitors, suppliers and consumers, experts, etc) in the merger case review process if the AMC's decision on the notified transaction may significantly affect rights and interests in competition. Third parties may be involved during Phase II. The AMC acts in its full discretion when deciding on the issue; the respective decision is then communicated to the notifying parties.

Third parties can submit their observations, in particular, relating to the notified transaction and its impact on the market. Such observations are then attached to the case as evidence and must be taken into account when the AMC decides on the case. The AMC may request information, documents or opinions from the third parties if it considers such data relevant and necessary for the case assessment. Normally, when issuing such an information or documents request, the authority will indicate the deadlines for provision of the requested data. Non-compliance with a request may result in sanctions for a third party.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Automatic confidentiality does not apply to any information. Confidentiality may be available to the parties on their request. The parties shall provide a grounded justification when applying for the confidentiality, as well as a non-confidential version of the information. If not satisfactorily justified, the parties' confidentiality request will be rejected by the AMC.

The AMC is required to publish short notices regarding its resolutions on the initiation of Phase II review, non-confidential versions of its decisions in merger and concerted practice applications or cases, as well as decisions in cases on competition law violations within 10 working days of the adoption of the resolution or decision.

Currently, the AMC also publishes on its website a short note of the resolution or decision made (with the identity of the parties and the essence of the resolution or decision); notes on decisions are then followed by publication of their non-confidential versions.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Cooperation of the AMC with other competition authorities is usually based on bilateral treaties. Ukraine has entered into such cooperation agreements, among others, with the EU, Bulgaria, Hungary, Latvia, Lithuania and Slovakia.

The AMC also cooperates with international organisations, such as the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development and the International Competition Network.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

If the Antimonopoly Committee of Ukraine (AMC) prohibits the concentration, the Cabinet of Ministers of Ukraine may still grant a clearance if positive effects for the public interest outweigh the negative impact of the restriction of competition, unless that restriction is not necessary for achieving the purpose of the concentration or it jeopardises the market economy system. Still, there are no publicly available cases of the Cabinet granting clearance for the concentration that was prohibited by the AMC.

The AMC's decisions can also be challenged in commercial courts. The relevant statement of claim indicating the grounds for invalidation of the AMC decision should be filed to a commercial court within two months from the date of receipt of the decision.

Courts' decisions may further be appealed to the competent appellate instance within a 20-day period. Further, if the appeal is unsuccessful, the claimant may go to a higher cassation court – the Supreme Court of Ukraine (the cassation commercial court).

Because there have been very few AMC prohibition decisions and in each of these cases the authority has thoroughly and deliberately assessed the facts and the potential impact of the transaction on the relevant markets, there have been no instances of successful appeals in merger cases (although not all court decisions are publicly available). Further, there is no public record of successful appeals against the AMC clearance decisions.

Nevertheless, there have been several notable appeal cases (including with respect to the AMC clearance decision in the *Procter &*

Gamble/*Olvia Beta Cleaning Products* assets case) with the definition of the relevant product market as the central and most disputable issue.

Time frame

33 What is the usual time frame for appeal or judicial review?

Decisions of the AMC can be appealed to the commercial courts within two months upon the receipt of the decision. The new procedural rules governing the review of the case in commercial courts entered into force in late 2017. Now, the consideration of cases in the first instance may last:

- up to 135 calendar days;
- in the appeal – up to 75 calendar days; and
- in cassation – up to 80 calendar days.

However, those terms are not always met because of the courts' heavy workload, insufficient personnel, the necessity of conducting additional investigations, collection of documents and information, etc.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the Antimonopoly Committee of Ukraine (AMC)'s statistics, in 2020, the AMC reviewed 579 merger notifications.

Of these applications, 477 were cleared, 102 were rejected by the AMC or withdrawn by the parties. The vast majority of applications did not raise competition concerns and were cleared within Phase I; Phase II investigations were initiated in 18 cases.

Reform proposals

35 Are there current proposals to change the legislation?

In 2021, the draft of the amendment to the Competition Law and related regulations was submitted to the Ukrainian parliament. It suggest, among other things, the following changes to the current merger control regime:

- Notifiable events: only establishment of a full-functional joint venture may be considered a concentration and may require merger clearance. Also, acquisitions of minority shareholdings (25 per cent or more) are no longer regarded as notifiable events, unless they result in acquisition of control.
- Remodelling of notification thresholds: the draft law suggests applying different thresholds to different types of transactions. More specifically:
    1. mergers and takeovers, creations of full functional joint ventures, and acquisitions of control through creation of cross-directorship situations would require clearance if in the last fiscal year:
        - the combined parties' worldwide value of assets or worldwide turnover exceeds €30 million and the value of assets in Ukraine or the Ukrainian turnover of each of at least two parties exceeds €4 million; or
        - the value of assets in Ukraine or the Ukrainian turnover of at least one party exceeds €8 million and the worldwide turnover of at least one other party exceeds €150 million.
    2. acquisitions of control through other means (except cross-directorship situations) would require clearance if, in the last fiscal year:
        - the combined parties' value of assets in Ukraine or the Ukrainian turnover exceeds €30 million and the value of assets in Ukraine or the Ukrainian turnover of the target exceeds €2 million; or
        - the value of assets in Ukraine or the Ukrainian turnover of the target exceeds €2 million and the worldwide turnover of at least one other party exceeds €150 million.
- Calculation of the target assets and turnover: currently, the assets and turnover of the controlling shareholder or controlling seller need to be counted towards the target, although the control link may be lost after closing. Thus, the local filing threshold is often met only formally, for example, by the exiting seller rather than by the target. The drafts aim to resolve this issue and exclude figures of the seller or shareholder that will cease to control target from the thresholds calculation exercise.
- Increasing filing fees: the Drafts suggest increasing the filing fees for submission of the notification, from 20,400 hryvnas (approximately €610) to 42,500 hryvnas (approximately €1,250).

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UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Large fine for merger control violation

In April 2021, the Antimonopoly Committee of Ukraine (AMC) imposed a large fine (approximately €1.9 million) for merger control violation. Interestingly, the fine was imposed regarding a seemingly unproblematic transaction.

Guidelines on the Application of SSNIP Test

In July 2020, the AMC adopted Guidelines on the Application of test of small but significant and non-transitory increase in price (SSNIP). It may be used, among others, to define the relevant markets in merger control cases. The SSNIP test involves interviewing customers regarding their purchasing decisions and determining whether a hypothetical monopolist could profit from a price increase of 5 to 10 per cent for a particular product for at least one year. If yes, then such product is defined as a relevant market. If no, then the market should be defined wider.

United Arab Emirates

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The relevant legislation consists of Federal Law No. 4 of 2012, which concerns the Regulation of Competition (the Competition Law) and its implementing regulations, issued under Cabinet Resolution No. 37 of 2014 (the Regulations). Two more recent Cabinet Resolutions have further clarified the scope of the legislation: Cabinet Resolution No. 13 of 2016, which in particular defines 'dominance' and sets the relevant merger filing thresholds by reference to an at least 40 per cent market share – and Cabinet Resolution No. 22 of 2016, which defines small and medium enterprises (that are exempt from the Competition Law) by reference to number of employees and revenue, and which vary by sector.

The Competition Law and the Regulations establish a comprehensive regime of both merger control and prohibitions on anticompetitive agreements and abuse of a dominant position. Responsibility for enforcement lies with the Competition Department of the Ministry of Economy, supported by a Competition Committee, chaired by the Undersecretary of the Ministry of Economy.

The Competition Law is still in its early stages. Although the Law was originally published (and officially came into force) in February 2013, the applicable merger filing thresholds, however, only came into force in August 2016 and there remain certain gaps in the legislation, to be addressed separately through further Cabinet Resolutions. At this stage, there is no guidance on how the Competition Law may be interpreted and applied in future. The Competition Law and the Regulations are largely based on EU competition law and reflect many elements of EU and international norms. Pending practical experience and further clarification from the authorities, it may be expected therefore that the Competition Law will seek to follow EU precedent.

Scope of legislation

2 What kinds of mergers are caught?

Merger control clearance is required for transactions that result in the acquisition of direct or indirect control through total or partial transfer (through merger or acquisition) of ownership or benefit in assets, equity, shares or obligations from one entity to another.

3 What types of joint ventures are caught?

The Competition Law does not deal explicitly with joint ventures. However, the definition of 'economic concentration' for the purposes of merger control review is very broad and may apply to a broad range of joint ventures. It is not clear whether, in implementing its new merger control regime, the UAE will seek to follow EU precedent in distinguishing between 'full-function' joint ventures (which are notifiable) and 'non-full-function' joint ventures (which fall to be assessed under the provisions relating to restrictive agreements). This is an area that may receive further clarification as the Competition Law is brought into force and applied in practice.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law defines a notifiable economic concentration as 'a total or partial' transfer of ownership rights, resulting in the 'direct or indirect control' of one entity over another, and where the relevant market share thresholds are met. Under certain circumstances, it is possible therefore that acquisitions of minority interests will also be caught. However, there is no set threshold for such partial transfers of ownership rights, and the Competition Law and Regulations also do not contain any definition of 'control'. Consequently, it remains to be seen how this will be applied in practice, and in particular the extent to which the Competition Law will follow EU precedent in this regard.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

According to the Competition Law and the recently published merger filing thresholds, merger control clearance is required for transactions resulting in an at least 40 per cent market share and that may affect competition in the relevant market, in particular by creating or enhancing a dominant position.

The first criterion (ie, the reference to a 40 per cent market share) is in line with neighbouring countries in the region that follow a similar model (noting that the Competition Law also provides that the Cabinet may increase or decrease the applicable market share thresholds in accordance with the evolution of the market). With respect to the second criterion, however (ie, the requirement that the transaction 'may affect competition'), this is more unusual in that it appears to require a substantive competition assessment at the initial stage of deciding whether the deal needs to be notified, and it remains to be seen how this will be applied. It is also not clear whether any increment in market share is required, or whether the threshold may be met by one party alone, even in the absence of any competitive overlap. At this stage it is unclear whether it may be possible to engage informally with the Competition Committee ahead of a transaction, to determine whether or not a filing would be required. Absent further guidance on this issue, it is likely that, in practice, companies exceeding the relevant market share thresholds would need to notify their deal, irrespective of this additional substantive assessment.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

For transactions that meet the notification thresholds, filing is mandatory and suspensory. However, the Competition Law currently excludes from its application a number of economic sectors, in particular telecommunications, financial services, cultural activities, oil and gas, pharmaceutical production and distribution, postal services including express delivery, electricity and water production and distribution, sewage and waste disposal, and land, sea, air and rail transport. Transactions involving companies in these sectors would not trigger a merger notification to the Ministry, although other considerations relating to separate sector-specific regulatory regimes may apply. Transactions involving small and medium-sized enterprises (as defined under Cabinet Resolution No. 22 of 2016), and entities that are either owned or controlled by the government, are also not subject to notification.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Law and Regulations apply to all entities operating in the UAE, as well as to activities that take place abroad and have an effect on competition in the UAE.

Foreign-to-foreign mergers are therefore captured in the UAE where the jurisdictional thresholds are met, regardless of the location or nationality of the parties, subject to the local effects test (ie, the parties must operate in UAE markets or engage in activities abroad that have harmful effects on competition in the UAE).

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In general, foreign ownership of UAE onshore companies is limited to a 49 per cent shareholding. These restrictions on foreign ownership require all UAE companies to have a minimum of 51 per cent ownership by UAE nationals at all times. In certain industry sectors, different foreign ownership restrictions, which further reduce the permitted level of foreign ownership, may be applicable. This general rule is subject to certain exceptions in connection with investors who are nationals of states that are members of the Gulf Cooperation Council. Aside from these shareholding restrictions, there is no separate approvals process for foreign investment in the UAE.

However, sector regulators and other government authorities in the UAE retain a certain degree of discretion to approve or reject proposed transactions affecting the UAE. Sector-specific regulation plays an important role with respect to many industry sectors in the UAE. Thus, 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 company'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 in relation to national security or public policy.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

For transactions that trigger the notification obligation, the Regulations provide that filing must be made at least 30 days prior to the conclusion of the draft contract or agreement bringing about the economic concentration.

It is not entirely clear how this provision relating to a 'draft contract or agreement' will operate in practice, and whether the sale and purchase agreement may in fact be signed, with closing conditional on receipt of competition clearance. Parties may be reluctant to approach the Competition Committee until they have a firm deal, evidenced by a legally binding agreement.

Failure to notify a notifiable transaction may result in fines of between 2 and 5 per cent of the infringing company's annual revenue deriving from the sale of the relevant goods and services in the UAE. Alternatively, where this cannot be assessed, a fine of between 500,000 and 5 million UAE dirhams may be imposed.

The Competition Law also provides that a court may order the closing down of an infringing establishment for a period of three to six months, with the infringement decision published in daily newspapers.

Further, third parties who have been harmed by an infringement may also seek damages.

The Competition Law is still in its early stages, and there have not been any enforcement cases to date.

10 Which parties are responsible for filing and are filing fees required?

The Competition Law and Regulations require that the 'concerned entities' submit a notification for approval of the transaction. Notification is to be made by one entity, authorised to make the filing by the other concerned entities by power of attorney. While the term 'concerned entity' would obviously include the entity or entities acquiring control, and information is also required of the target, it is not clear to what extent responsibility for filing (and any liability for failing to file) may also fall on the business being acquired. This may be clarified in due course through the issuance of further Cabinet Resolutions. The Competition Law and Regulations do not currently mention any filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Once a notification has been received and all the formal requirements fulfilled, the Ministry will issue a notice to the notifying party confirming that the notification is complete and starting the timetable for review.

From then, the Minister must issue a decision on the concentration within 90 days, which may be extended by an additional 45 days. If no decision is issued during this period, the concentration will be deemed approved.

Notification under UAE merger control law is suspensory, meaning that the parties cannot close prior to clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing before clearance, or any other form of integration before clearance (gun jumping), may result in a fixed fine of between 50,000 and

500,000 dirhams. Other penalties, including the temporary closing down of the establishment for three to six months, or damages claims by affected third parties, may also be applicable. The Competition Law is still in its early stages and there have been no enforcement cases to date for failing to notify, or for closing before clearance.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The Competition Law and Regulations do not distinguish between mergers involving local or foreign entities. While there has not been any enforcement practice to date, in the future, it cannot be excluded that sanctions would apply in the context of foreign transactions, where these meet the notification thresholds in the UAE.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Competition Law and Regulations do not distinguish between mergers involving UAE-based or foreign entities, and a transaction that triggers the notification requirement in the UAE should, therefore, not be closed prior to obtaining clearance, regardless of the location or nationality of the parties.

As there is currently no enforcement practice of the new Competition Law in the UAE, it is not clear whether and to what extent 'hold-separate' or other arrangements, by which the UAE business alone might be made subject to merger clearance in the UAE, may be deemed acceptable by the UAE authorities. These and other possible solutions will need to be tested with the Ministry as competition law and practice develop in the future.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

Mergers and takeover bids relating to public companies listed on the Abu Dhabi Securities Exchange or Dubai Financial Market are subject to discretionary prior approval from the Emirates' Securities and Commodities Authority and to filing with the relevant stock exchange and potentially with other local regulators in the relevant emirate. Stake building in public companies is also subject to discretionary approval.

The Competition Law, however, does not deal specifically with the issue of public takeover bids, and there are therefore no special merger control rules applicable in this context.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The procedural requirements for a merger control filing are set out in the Regulations. Notification must be made in Arabic using the official form from the Ministry, and three copies submitted. The following documents must also be appended to the filing, for both the acquirer and the target (including a certified translation of each document that is not originally in Arabic):

- memorandum or articles of association;
- draft share or asset purchase agreement;
- audited financial statements for the past two financial years; and
- details of shareholders and their levels of shareholding.

The notifying parties must also submit a report on the economic dimensions and the competition effects of the concentration. This includes, in particular, a requirement to identify upfront any potential competition issues resulting from the transaction, and to suggest possible remedies.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The timetable for review is 90 days from receipt of a complete notification, which may be extended by a further 45 days. The Competition Law and Regulations do not currently provide for an expedited review process. This may in part be explained by the fact that the merger control regime is intended to apply only to those transactions that, prima facie, are likely to raise competition concerns, therefore making an expedited review less likely. It remains to be seen, however, whether in practice, faster clearances may be obtained.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Once a notification has been received, a review of the transaction will be undertaken by the Competition Committee, which may hold meetings with the notifying parties and with other stakeholders. The Committee may also seek the views of third parties and other authorities in the UAE.

After it has completed its review (within a maximum 135 days from receipt of the notification), the Competition Committee will submit a report on the transaction to the Minister of Economy, with a recommendation on the appropriate resolution to be issued. As in other jurisdictions, the transaction may be either approved or prohibited, or alternatively approved subject to conditions.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance is set out in the Competition Law and the Regulations, which provide that a notifiable transaction will be approved if it shall not affect competition negatively or if its positive economic impact would outweigh any negative effect on competition. The first test is phrased in rather general terms, and for now there is no guidance on how it will be applied in practice; while the second test appears to pave the way for the consideration of efficiencies.

The Regulations further specify the list of criteria according to which the Competition Committee will evaluate the anticipated effects of a transaction on competition. These include factors that are commonly found in other jurisdictions, such as the level of actual and potential competition, the likely impact of the transaction on market concentration (with, specifically, reference being made to the likelihood of the emergence of a 'dominant position' on the relevant market), price levels and barriers to entry. The impact of the transaction on 'innovation, creativity and technical efficiency', as well as its impact on consumers' interests, are also explicitly stated to be taken into account in the merger control assessment.

In addition to the above, other non-competition-related factors may also be taken into account in the merger control assessment. Of particular note is the Regulations' explicit reference, in the merger control assessment, to the extent to which the transaction will 'contribute to the promotion of investment, exportation or supporting the capacity of national entities to international competition'. Such a clear 'national champions' policy is unusual in the context of existing competition law frameworks, and it remains to be seen how this will be applied in practice - and particularly how this policy factor may interplay with the UAE's other international obligations, for example in the context of its accession to the WTO.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. Unlawful coordination between independent parents may be assessed under the provisions relating to restrictive agreements and practices (article 5 of the Competition Law).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The factors set out in the Regulations for the assessment of a notified concentration suggest that the Competition Committee will look beyond the sole question of market shares and dominance, and will take into account a wide range of factors to carry out an economic analysis of the anticipated effects of the merger on competition.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Regulations specifically envisage that industrial policy, and in particular 'the promotion of investment, exportation or supporting the capacity of national entities to international competition' will be a relevant consideration in the assessment of a notified concentration, where the merger might otherwise lead to a lessening of competition.

Pending application of these rules in practice, however, it is not clear how the Competition Committee will balance such public interest considerations against the potential detriment to competition resulting from the notified transaction.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Where a transaction is likely to lead to a lessening of competition, the Competition Law explicitly paves the way for the taking into account of efficiencies, by requiring the Competition Committee to consider whether any positive impact from the transaction may exceed its detriment to competition. Further, the Regulations explicitly provide that 'the potential impact on innovation, creativity and technical efficiency' should be part of this assessment.

However, as there is as yet no practical experience of the Competition Law, the extent to which the Committee is likely to be willing to take these and other efficiencies into account, as well as the related burden of proof on the notifying parties, remains to be determined.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Following the review of a notified concentration, the Competition Committee has the power to either prohibit the transaction, or alternatively to approve it subject to conditions. In the latter case, the Competition Law and Regulations further provide that the Minister of Economy may revoke the approval of a concentration (1) if it is found that the circumstances under which the approval has been granted no longer exist, (2) if the parties fail to comply with any commitment on the basis of which conditional approval was granted or (3) if information provided during the review process is shown to have been misleading or incorrect.

While the ability to revoke a competition clearance is common to most other competition law regimes, where the parties either fail to observe agreed commitments or are otherwise shown to have provided false or misleading information, the reference in (1) to a potentially wider change in circumstances is unusual and may warrant further clarification from the authorities.

Further, during the duration of the review process (which can last up to 135 days), the suspension obligation applies, and parties may not take any step towards consummation of the transaction pending clearance.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Approval of a transaction may be conditioned on the fulfilment of certain pre-approved remedies. The Competition Law and Regulations do not currently detail whether the Competition Committee is likely to favour only structural remedies, or whether behavioural remedies may also be considered. In addition, the parties are required at the outset, in the notification form, to provide suggested remedies to counter any competition concerns.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Neither the Competition Law nor the Regulations specify conditions or the timing relating to the implementation of remedies.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Not applicable, as there is currently no public record of enforcement practice under the Competition Law, although the Competition Committee is now accepting notifications.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Law and Regulations do not specifically cover the topic of ancillary restrictions, and so there is currently no guidance on this issue, pending enforcement practice of the Competition Law.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Yes. The Regulations provide that the Competition Committee may seek the views of parties that may be affected by the transaction and other stakeholders, to assist with its review of the transaction. In particular, the Committee may send information requests to such parties (to which they must respond within 15 days), as well as hold meetings with them to seek their views and recommendations on the transaction.

With respect to complainants, the Competition Law and Regulations provide that any concerned person may submit a complaint to the competent authority concerning any violation of the Law. The complaint shall be made in writing, using a form prepared by the Ministry for that purpose, and identifying, in particular, the name of the complainant and respondents, the provisions of the Law claimed to have been violated, as well as relevant facts and evidence to support the complaint. The

Committee, on accepting the complaint, shall notify the defendant and all interested parties within 10 days. It is not clear from the Competition Law and Regulations, however, what the time frame is within which complaints may be submitted, in the context of a transaction.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Regulations provide that the Competition Committee will keep a special register of notifications. Where information is to be treated confidentially, the parties must submit a non-confidential summary of the notification, sufficient to clarify the content of the confidential data. It remains to be seen in practice how much detail will be expected in relation to this non-confidential summary.

In addition, the Competition Law explicitly makes it a duty for the Ministry to ensure the confidentiality of information received and reviewed in the context of notifications. Breaches of confidentiality by Ministry personnel are punishable by a fine of 50,000 to 200,000 dirhams.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

As there has been as yet no enforcement practice of the Competition Law, there is no track record of the Competition Committee cooperating with antitrust authorities in other jurisdictions.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Resolutions issued by the Minister, including merger control decisions, may be appealed within 60 days of the decision. The Competition Law and Regulations do not contain further details in relation to the appeals process.

Time frame

33 What is the usual time frame for appeal or judicial review?

Resolutions issued by the Minister, including merger control decisions, may be appealed within 60 days of the decision. The Competition Law and Regulations do not contain further details in relation to the appeals process.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Competition Law is still in its early stages. However, given the relatively long list of current exclusions from the Law, it is to be expected that, in its initial enforcement phase, the Competition Committee will focus on a much more limited number of sectors. Businesses operating in sectors that are not excluded may therefore be particularly at risk.

Reform proposals

35 Are there current proposals to change the legislation?

There are currently no proposals to change the legislation, although further clarity is still expected to be provided with respect to a number of practical aspects relating to the implementation of the Competition Law.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

A limited number of notifications have been submitted and cleared by the Competition Committee. There is currently, however, no public record to access the notifications made and clearances issued.

United Kingdom

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The primary legal basis for merger control in the United Kingdom is the Enterprise Act 2002, which came into force on 20 June 2003. In April 2014, the Enterprise Act 2002 was significantly amended by the Enterprise and Regulatory Reform Act 2013. In particular, the Office of Fair Trading and Competition Commission were merged into a single authority, the Competition and Markets Authority (CMA). The CMA's primary duty is to seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers. Published guidance explains how the provisions work in practice and secondary legislation implements some of the provisions.

The Enterprise Act 2002 establishes an administrative procedure for merger control, which is now solely implemented by the CMA. In limited cases, raising defined public interest issues, the secretaries of state for Business, Energy and Industrial Strategy (BEIS) or Digital, Culture, Media and Sport (DCMS) may also be involved in decision-making processes. Under the general Enterprise Act 2002 merger regime:

- The CMA has a duty to refer mergers (anticipated or completed) for a Phase II review where it believes that there is, or could be, a relevant merger situation that has resulted, or may be expected to result, in a substantial lessening of competition in the UK. Exceptions to the duty to refer exist in certain circumstances (see below).
- Following a reference for a Phase II investigation, the CMA conducts a more detailed analysis to decide whether a relevant merger situation has been or will be created and, if so, whether the situation results or is expected to result in a substantial lessening of competition within any markets within the UK. If the CMA decides that there is a substantial lessening of competition, it must determine how to remedy, mitigate or prevent the adverse effect.
- Different rules are in place for public interest, special public interest and water merger cases.

As mentioned above, in certain circumstances, the CMA has the discretion to not make a referral, despite there being a realistic prospect that the merger will lead to a substantial lessening of competition in a market or markets within the United Kingdom. These exceptions are:

- when the markets concerned are not of sufficient importance to justify a reference (the de minimis exception);
- in the case of anticipated mergers, when the arrangements concerned are insufficiently far advanced, or insufficiently likely to proceed, to justify a reference; or
- when any relevant customer benefits arising from the merger outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.

A document giving more information about these exceptions is available on the CMA's website.

In November 2020, the UK government published a draft of the new National Security and Investment Bill 2021. The National Security and Investment Act received Royal Assent in 2021, and, when the Act enters into force early next year (this is scheduled for 4 January 2022), it will introduce a new regime for reviewing certain investments on national security grounds. The new regime will introduce for the first time a mandatory pre-screening regime for deals involving certain sensitive sectors and a voluntary regime for other deals giving rise to potential national security concerns, and five-year retrospective powers for the government to 'call in' transactions deemed to raise national security concerns. This new regime will replace the national security aspects of the Enterprise Act 2002's current public interest regime, but will not otherwise affect the Enterprise Act 2002's regime. Information relating to the introduction of the National Security and Investment Act can be found on the UK government's website.

Scope of legislation

2 | What kinds of mergers are caught?

The Enterprise Act 2002 applies to any 'relevant merger situation', which may be a completed or anticipated merger. The CMA must make a reference for a Phase II review where it believes that there is or there could be a relevant merger situation that has resulted in or may be expected to result in a substantial lessening of competition. An 'anticipated merger' may be a merger that has been signed but not yet completed or a merger in contemplation. Where these conditions are met, a reference for a Phase II review must be made, unless one of the exceptions to the duty to refer applies or, where appropriate, it may seek and accept undertakings in lieu of a reference from the merging parties.

A relevant merger situation will arise when the following conditions are satisfied:

- Two or more enterprises cease to be distinct, that is, are brought under common ownership or control or there are arrangements in progress or in contemplation that will lead to enterprises ceasing to be distinct. 'Control' is not limited to legal control.
- The merger has not yet taken place or took place no more than four months before the reference being made, unless the merger took place without having been made public and without the CMA being informed of it, in which case, the four-month period starts from the announcement or at the time the CMA is informed of it.
- The transaction meets certain jurisdictional thresholds (the share of supply or turnover tests).

The Enterprise Act 2002 defines an 'enterprise' as the 'activities, or part of the activities, of a business' that could be carried out for gain or reward (it need not, therefore, be a separate legal entity). CMA Guidance (see Mergers: Guidance on the CMA's jurisdiction and procedure and the Merger Assessment Guidelines) indicates that an enterprise may comprise any number of components, most commonly including some combination of the assets and records needed to carry on the business and the employees working in the business, together with the benefit of existing contracts or goodwill, or both. A business need not currently be trading to constitute an enterprise and the Enterprise Act 2002 does not require that a business (or part thereof) be of any minimum scale or include any particular combination of components in order to constitute an enterprise. In June 2014, following a legal challenge, the CMA found that it did have jurisdiction over Groupe Eurotunnel's acquisition of three ferries and related assets previously belonging to the now liquidated SeaFrance. The CMA found considerable continuity between the former SeaFrance services and Groupe Eurotunnel's new services on the same route. The assets in question were considered to form a business that was already geared up to run a ferry service, therefore the situation was distinct from merely buying assets in the market. The Supreme Court upheld the CMA's decision regarding the definition of 'enterprise' for the purposes of UK merger control in December 2015.

3 What types of joint ventures are caught?

The creation of a new joint venture, or a shift in control or influence over an existing joint venture, may give rise to a relevant merger situation, provided that the share of supply test or the turnover test is met.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The CMA documents Mergers: Guidance on the CMA's jurisdiction and procedure (updated in December 2020) and Merger Assessment Guidelines (updated in March 2021), provide guidance on the meaning of control. Control can comprise any of the following.

Material influence

'Material influence' arises on the basis of an ability to materially influence another enterprise's policy. Although shareholdings of below 25 per cent will typically be less likely to confer material influence, the CMA may examine any shareholding to determine whether the holder might be able materially to influence the target's policy.

This can arise at relatively low levels of shareholding: the CMA's guidance notes that even shareholdings of less than 15 per cent might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present. In addition to the size of the shareholding and board representation, other factors such as industry standing and contractual relationships between the enterprises involved may also be taken into account. (The Court of Appeal upheld a finding that BSkyB's acquisition of a 17.9 per cent stake in ITV gave rise to material influence in the circumstances of the case.)

This concept can therefore clearly catch transactions that would not be caught by the European Union Merger Regulation (EUMR). For example, the Office of Fair Trading referred Ryanair's acquisition of a 29.82 per cent shareholding in Aer Lingus Group plc (the European Commission having concluded that it did not have the power to require Ryanair to divest itself of the minority stake under EU merger rules) to the Competition Commission. The Competition Commission reached its decision in July 2013, requiring Ryanair to reduce its shareholding in Aer Lingus to 5 per cent. Its conclusion that the 29.82 per cent shareholding gave material influence was based on a range of factors including, in particular, Ryanair's ability to block special resolutions and the sale of Heathrow slots under the articles of association. This conclusion was reiterated by the CMA in its final decision in June 2015 following an application by Ryanair to the CMA to reconsider its decision based on material changes to circumstances. Following the CMA's final decision, in October 2015, Ryanair withdrew its application before the Court of Appeal regarding the same issue.

In 2019, the CMA took jurisdiction over Amazon's intended acquisition of a minority stake (of undisclosed scale, but later announced as 16 per cent) in Deliveroo, which entitled Amazon to appoint one out of eight of Deliveroo's directors and certain other rights. In its Phase 1 decision to refer the case to an in-depth investigation, the CMA considered that Amazon would acquire material influence over Deliveroo as a result of a number of 'mutually reinforcing' factors, including Amazon's particular industry knowledge and expertise as a shareholder.

De facto control

This refers to the ability to control policy, which may arise on the acquisition of a higher level of shareholding, such as 30 per cent of voting rights.

Legal control

Also known as 'de jure control', legal control refers to a controlling interest that is unlikely to arise unless one enterprise holds more than 50 per cent of the shares carrying voting rights in the other. In some exceptional cases, acquisition of a shareholding in excess of 50 per cent may not give rise to legal control where an agreement with the other shareholders circumscribes the majority owner's rights (eg, *Coca-Cola Company/Fresh Trading Limited*, where a shareholding increase from around 20 per cent to above 50 per cent did not give rise to legal control, as the acquirer did not obtain additional voting rights, either during shareholders' or board meetings).

A change from material influence to de facto control or legal control, or from de facto control to legal control, can constitute a new relevant merger situation.

Assessing theories of harm

The CMA states in its updated Merger Assessment Guidelines that, in formulating theories of harm, it will generally assess a merger on the basis of the specific shareholding or influence that will result from the relevant merger situation in question. This means that a theory of harm with respect to a firm that is acquiring material influence over another may be different – and require different analyses – to that involving a firm acquiring full legal control over another. However, the CMA notes that in some 'rare cases' if it has evidence that if a buyer is contemplating another transaction that will further increase its shareholding or influence over the target despite it retaining the same overall level of control, the CMA may take this into account in its competitive assessment and consideration of remedy options.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Enterprise Act 2002 provides alternative thresholds based, respectively, on the share of supply and turnover.

Share of supply

The 'share of supply' test is satisfied only when the merger itself creates or enhances a 25 per cent share of supply or purchases of any goods or services in the United Kingdom (or in a substantial part of it). This is not a market share test and allows a wide discretion in describing the goods or services, which need not amount to relevant economic markets. In 2019, the CMA asserted jurisdiction over the Roche group's acquisition of Spark Therapeutics, even though Spark had generated no sales in the UK. Instead, the CMA's finding of jurisdiction was based on the parties' combined numbers of UK-based employees engaged in research and development activities, as well as the number of UK patents procured from an administrative patent authority.

Turnover

The turnover test is satisfied if the turnover in the UK of an enterprise of which control is being acquired exceeds £70 million. This is determined by aggregating the total value of the turnover in the UK of the enterprises that cease to be distinct and deducting:

- the turnover in the UK of any enterprise that continues to be carried on under the same ownership or control (eg, the acquiring enterprise); or
- if no enterprise continues to be carried on under the same ownership and control (eg, formation of a new joint venture), the turnover in the UK which, of all turnovers concerned, is the turnover of the highest value.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing in the United Kingdom is voluntary. However, a large number of deals are, in practice, notified prior to completion to give the parties legal certainty as, irrespective of a notification, the CMA may commence an investigation on its own initiative and subsequently refer the merger for a Phase II investigation. This carries the risk of remedies being imposed even if the transaction has already been completed. Further, the CMA monitors the market for transactions falling within its jurisdiction that it has not received voluntary notification of and has significant interim measures powers that enable it to prevent or unwind actions that might prejudice the outcome of a reference for a Phase II investigation or impede remedial action. The CMA document, Guidance on the CMA's mergers intelligence function (December 2020), describes the steps that the CMA can take before deciding whether to investigate an unnotified merger. The CMA can intervene as soon as it has reasonable grounds for suspecting that arrangements for a merger are in progress or are being contemplated, but it mainly uses interim orders in the context of completed mergers. In its 2018/19 Annual Plan, the CMA stated that to achieve a balanced and targeted approach to investigating non-notified mergers, it will welcome informal briefings from companies to advise on whether a potential merger is likely to come under CMA scrutiny.

A merger notice filing must be made using the form prescribed by statute or by a submission containing the same information.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There is no system of mandatory notification in the UK. It is implicit in the jurisdictional criteria that at least one of the enterprises will be active within the UK, although it need not be incorporated within the UK. These principles apply equally to non-UK companies that sell to (or acquire from) UK customers or suppliers. In assessing whether a firm is active in the UK, the CMA will have regard to whether sales are made directly or indirectly (via agents or traders) and the extent to which a firm is active at each level of trade. The CMA increasingly adopts a broad interpretation of the required local nexus with the UK, asserting jurisdiction in *Roche/Spark* despite the target not having any sales in the UK. (See also the CMA's decision in *Sabre/Farelogix*, in which the CMA found that the 25 per cent share of supply threshold was met, and therefore it had jurisdiction to review the merger, on the basis that Sabre's share of the relevant market exceeded 25 per cent alone, and that there was an increment based on Farelogix's provision of services to a single UK customer – British Airways.)

In June 2013, the Court of Appeal confirmed the Competition Commission's jurisdiction over the *AkzoNobel/Metlac* merger on the basis that AkzoNobel had significant influence over its UK subsidiaries carrying on business in the UK, including the setting of strategies and approval of operational decisions, and did not itself need to be carrying out commercial activities in the UK.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The UK does not currently have a domestic legal framework that specifically governs inward foreign direct investment. However, the Enterprise Act 2002's merger regime sets out special rules for mergers involving public interest issues and special public interest cases.

Previously, mergers giving rise to potential national security concerns were also governed by the Enterprise Act 2002's public interest regime. However, in November 2020, the UK government published the draft National Security and Investment Act. This law will introduce a new notification regime for mergers relevant to national security and critical infrastructure when it enters into force on 4 January 2022.

National Security and Investment Act

The National Security and Investment Act will introduce a new screening regime for investments in a wide range of sensitive and strategic sectors with – for the first time – mandatory filing and pre-approval requirements for deals involving targets active in specified sectors, and significant civil and criminal penalties for non-compliance.

Key features of the new regime are summarised below.

Mandatory and suspensory notification for investments in designated sectors

The government has identified 17 sectors that will fall under the scope of the mandatory notification regime, including advanced materials, artificial intelligence, communications, computing hardware, defence, military and dual-use technologies, quantum technologies, and synthetic biology. Acquisitions of certain shareholdings in businesses active in one of these designated sectors will be subject to a new mandatory notification system with statutory review timelines, and they will not be permitted to complete until clearance is given by the UK government. Transactions that complete before receiving clearance will be void.

Voluntary notification and call-in powers apply to a broader range of deals

Certain deals that are not caught by the mandatory regime, but which may give rise to national security concerns, may be called in for a national security review by the government up to six months after the secretary of state 'becomes aware' of the deal, within five years of the acquisition taking place. Parties are therefore encouraged to voluntarily provide notifications of deals that could lead to national security risks in order to start the 30-working-day period in which government must decide to carry out a full assessment or take no further action.

Timing

Following receiving a notification (mandatory or voluntary), the government will conduct an initial screening process of up to 30 working days before deciding whether to issue a call-in notice. Where a call-in notice is issued, the government will have a further 30 working days to decide whether to clear a transaction or to impose remedies. This 30 working day period may be extended by an additional 45 working days, or longer, by agreement with the acquirer. The clock will stop following a request for information, up until the time when that request has been complied with. The fixed statutory timelines are intended to offer more predictability and certainty to investors than the existing Enterprise Act 2002 regime, under which timelines are set by the government on a case-by-case basis, largely at the discretion of the relevant secretary of state.

Minority acquisitions and asset acquisitions are in scope
Acquisitions of stakes from 15 per cent or acquisitions of further stakes (eg, 25 to 50 per cent, 50 to 74 per cent, and 75 to 100 per cent) may be notifiable or called-in, although the government will need to conclude that any acquisitions below 25 per cent enable the acquirer to materially influence the policy of the target. (This is the same test as under the UK's merger control regime, where the shareholding is examined alongside other interests, including board representation and industry expertise.)

Acquisitions taking place from 12 November 2020 but prior to the regime coming into force
Once the regime comes into force (commencement), the government will be able to call in certain deals that completed after the Act was introduced in Parliament but before commencement, provided the government has not used its current powers to intervene on public interest grounds under the Enterprise Act 2002. Such deals will not be subject to mandatory notification, but could be subject to remedies if national security concerns arise. Deals that have not completed before commencement, and satisfy the requirements for mandatory notification, will need to be notified. Parties involved in these deals should therefore ensure that deal documents contain appropriate conditionality and should consider engaging with the government early in order to mitigate the length of a review period and reduce the formal notification requirements, to the extent possible.

Wide-ranging powers to impose conditions on (or block) deals
The government will be able to either clear, impose conditions upon or block deals where there is an unacceptable risk to national security. Typical conditions are expected to involve restricting the number of shares acquired and ring-fencing sensitive information or technology.

Information requests
The government will have wide-ranging powers to request information from parties to inform its decision making at every stage of the process, including powers to require individuals to provide evidence in person.

Timing implications for live deals
Acquisitions that close between 12 November 2020 and commencement of the new regime may be 'called in' for up to six months from commencement (if the secretary of state for BEIS was aware of the deal before commencement) or six months from when the secretary of state became aware of the transaction (if this was after commencement) where the transaction raises national security concerns. Acquisitions that have signed but not closed by commencement and which fall within the scope of the mandatory notification regime will trigger a mandatory notification requirement and will be prohibited from closing until clearance has been received.

Sanctions
Sanctions for non-compliance include fines of up to 5 per cent of worldwide turnover or £10 million (whichever is greater) and imprisonment of up to five years.

Thresholds and jurisdiction
- No financial or share of supply thresholds will apply.
- The regime will apply to investors from any country, including domestic UK investors.

When the new regime comes into force, the national security provisions in the current public interest regime will be removed from the Enterprise Act 2002. However, other public interest considerations (eg, media plurality, public health and financial stability) will remain within the scope of the current regime, which will operate alongside the new national security regime, together with the CMA's reviews of deals on competition grounds. The government will, however, be able to intervene where competition remedies run contrary to national security interests if this is considered necessary and proportionate.

Although the new regime will not be in force until 4 January 2022, any party considering investing in a business that falls within the scope of the regime should consider engaging in the debate on the regime's scope and assessing the risk of the deal being 'called in' for review or falling within the scope of the regime. Given the uncertainty around the regime and the retroactive application of the government's call-in powers, BEIS has stated its willingness to provide informal guidance to merging parties on what to expect from the regime for the purposes of business planning and is inviting merging parties to contact its new Investment Security Unit for informal advice.

Public interest regime
Upon commencement of the National Security and Investment Act, the national security provisions will be removed from the Enterprise Act 2002's public interest regime, but the public interest regime will otherwise continue as before.

Broadly, where the secretary of state intervenes in a merger that raises potential public interest concerns, that case is considered in light of both competition and public interest issues. Where the scretary of state intervenes in a special public interest case (ie, one in which the CMA does not have jurisdiction under its normal rules) the outcome of the case is only dependent on public interest issues. The public interest grounds on the basis of which the secretary of state may intervene are:
- national security (subject to the provisions of the new regime noted above);
- media plurality;
- the stability of the UK financial system;
- the need to maintain the capability to combat and mitigate the effects of public health emergencies in the UK (introduced in June 2020 in response to the covid-19 pandemic); and
- new public interest considerations that may be added by the secretary of state.

Where the secretary of state issues an intervention notice specifying a 'media public interest consideration', the Office of Communications (Ofcom) is required to report whether the merger will or may be expected to operate against the public interest, to assist the secretary of state in their decision as to whether there is a plurality concern requiring further investigation by the CMA. At the request of the secretary of state, Ofcom published a measurement framework for media plurality in November 2015. An example of such an intervention notice is that issued by the Secretary of State for DCMS in respect of DMG Media Limited's acquisition of JPIMedia Publications Limited in January 2020, before clearing the merger in March 2020. In 2019, the Secretary of State for BEIS intervened on grounds of national security in a number of cases, including in December 2019 in relation to two separate transactions in the aerospace industry, namely the proposed merger of Impcross Ltd and Gardner Aerospace Holdings (abandoned in September 2020, when the Secretary of State for BEIS announced that he had accepted undertakings from Gardner Aerospace confirming that it would not acquire Impcross), as well as the acquisition of Mettis Aerospace Limited by Aerostar (a Chinese-established fund) which was abandoned in February 2020). Two mergers are currently being considered under the public interest regime: the Secretary of State for DCMS issued a public interest intervention notice in April 2021 in respect of Nvidia Corporation's anticipated acquisition of Arm's Intellectual Property Group business; and the CMA brought the anticipated acquisition by Imprivata, Inc of Isosec Limited to the attention of the Secretary of State for BEIS in March 2021, as the CMA considered that the transaction may raise public interest considerations.

There is also a special regime for water (and sewerage) mergers. In some circumstances, water mergers are subject to mandatory reference to the CMA and are governed by the Water Industry Act 1991 (as amended by the Enterprise Act 2002 and Water Act 2003) and the Water Act 2014. There are currently no special provisions for other regulated utilities (such as electricity, gas, telecommunications or rail), which are subject to the Enterprise Act 2002 merger regime, although various regulatory approvals are required for the acquisition of certain regulated businesses and businesses operating in the financial or insurance sector. The Industry Act 1975 confers the secretary of state with the power to prohibit changes of control over important manufacturing undertakings, where the change of control would be contrary to the interests of the UK. This power has not been used in practice.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As there is currently no obligation to notify of a merger, there are no filing deadlines and no sanctions apply if notification is not made. Where parties do not notify, however, they take the risk that, whether or not third parties complain, the Competition and Markets Authority (CMA) may call in the merger for review and adopt a decision to refer for a Phase II review (within the prescribed period of four months following a completed transaction becoming public or the CMA being informed of it) and that divestment or other remedies could be ordered following an adverse report. In addition, the CMA has the power to take preemptive action to preclude conduct that might prejudice the appraisal of a merger.

10 Which parties are responsible for filing and are filing fees required?

Despite the voluntary nature of the regime, certain procedural considerations must be taken into account if a decision is taken to notify the transaction.

Filing is executed by providing a merger notice (or by a submission containing the same information). Any person carrying on an enterprise to which the notified arrangements relate may file a merger notice. It is not necessary for merger notices to be made jointly. A merger notice requires the CMA to decide within a statutory period whether to refer the merger for a Phase II review.

In certain limited circumstances, informal advice may be sought from the CMA prior to notification being submitted. The CMA stated in its 2018/19 Annual Plan that, to achieve a balanced and targeted approach to investigating non-notified mergers, it welcomes informal briefings from companies to advise on whether a potential merger is likely to come under CMA scrutiny. The CMA is willing to provide such guidance for good faith confidential transactions giving rise to genuine issues. The parties must be prepared to acknowledge to the CMA any theory of harm that could reasonably lead to a Phase II reference. The CMA will not offer informal advice where there is sufficient guidance already from case precedents, nor will it advise on structuring options for water mergers. As the CMA is unable to consult third parties, any advice given is qualified accordingly and based on the assumption that the information provided is accurate. The CMA is not legally bound by its initial response to informal briefing notes submitted by merging parties. Exceptionally, in 2020, it launched an investigation into Takeaway.com's acquisition of Just Eat after reconsidering its position regarding the transaction to consider, in particular, whether Takeaway.com would have re-entered the UK market were it not for the Just Eat acquisition.

Subject to certain exceptions, any merger that is investigated by the CMA is subject to a fee, which is payable either on the CMA's publication of a reference decision or a decision not to make a reference. The submission of a briefing note does not attract a merger fee, although a fee may be payable if the CMA subsequently opens an investigation. For further information, see CMA, Guidance on the CMA's merger intelligence function.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The main review periods in an Enterprise Act 2002 process are as follows:

- Phase I review: a binding 40-working-day period applies.
- Consideration of any undertakings in lieu of reference for a Phase II review: the parties have up to five working days from receiving a decision that the test for reference for a Phase II review is met (a substantial lessening of competition decision) to offer undertakings in lieu (although they can do so earlier). The CMA has up to 10 working days from the date of its substantial lessening of competition decision to provisionally decide whether to accept the undertakings in lieu, and a total of 50 working days from the date of its substantial lessening of competition decision formally to accept the undertakings in lieu. This deadline can be extended by 40 working days for 'special reasons', such as needing further consultation with third parties or if the case involves an up-front buyer.
- Phase II review: 24 weeks from the date of reference, with the possibility for the CMA to extend this by eight weeks.
- Implementation of Phase II remedies: the CMA has 12 weeks (extendable by six weeks for special reasons) to accept any final undertakings offered by the parties to obtain conditional clearance.

A fast-track reference procedure may be used following a request by the merging parties if there is sufficient evidence that the Phase II reference test is met at an early stage in the investigation. The merging parties must agree to waive their right to challenge that position during Phase I. The CMA takes into account its administrative resources and the efficient conduct of the case in deciding whether to agree to use the fast-track procedure. It has used this power in seven cases so far:

- BT's acquisition of EE in 2015;
- the *Ladbrokes/Coral* merger in 2016;
- the merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust in 2017;
- Tesco PLC's acquisition of Booker Group in 2017;
- the proposed merger between J Sainsbury Plc and Asda Group Ltd, which was blocked by the CMA in April 2019;
- the anticipated merger between Crowdcube Limited and Seedrs Limited, which was referred for a Phase II investigation under the fast track procedure in November 2020; and
- the proposed joint venture between Liberty Global plc and Telefonica SA to merge their UK operating businesses Virgin Media/Virgin Mobile and O2, which was referred for a Phase II investigation in December 2020.

Although the Enterprise Act 2002 regime allows parties to close transactions without notifying the CMA, there are, in practice, significant constraints on merging parties' freedom once the CMA starts to review a merger, whether following a notification or on its own initiative. The CMA has powers to impose initial enforcement orders to prevent further integration and also to unwind any integration that has already taken place.

Initial enforcement orders can be imposed as soon as the CMA has reasonable grounds for believing that it is or may be the case that arrangements are in progress or in contemplation. The CMA has previously indicated that it will rarely use such powers for anticipated mergers and that it will normally make initial enforcement orders in investigations of completed mergers, which will remain in force until clearance is granted or remedial action is taken. However, recent CMA practice has seen it imposing initial enforcement orders prior to closing, although in some cases these are caveated to specifically allow closing to occur (eg, *Google/Looker Data Sciences* and *Viagogo/StubHub*) or are designed to take effect upon closing, should the parties to decide to complete the transaction (eg, in *Roche/Spark*).

There are penalties for failing to comply with initial enforcement orders. Where the CMA considers that, without reasonable excuse, an initial enforcement order has not been complied with, it may impose a penalty of up to 5 per cent of the worldwide turnover of the addressee of the initial enforcement order. The CMA has a template initial enforcement order to which additional restrictions may be added and has released updated guidance on the use of initial enforcement orders and derogations in merger investigations (see CMA, Interim measures in merger investigations, June 2019). The CMA has imposed a number of fines for breaches of an initial enforcement order in 2018 and 2019, including:

- two separate fines of £100,000 and £200,000 in the *Electro Rent/Microlease* merger;
- a £120,000 fine in the *Vanilla/Washstation* merger;
- a £146,000 fine in the *Nicholls' (Fuel Oils)/DCC* merger;
- fines totalling £300,000 in the *Ausurus Group/Metal & Waste Recycling* merger; and
- a £250,000 fine in the *PayPal/iZettle* merger.

In August 2020, the CMA issued a £300,000 fine in *JD Sports/Footasylum*. This was the highest fine to date for a single breach of an initial enforcement order, although the CMA revoked the penalty in response to new information that came to light during JD Sport's appeal against the fine.

If a Phase II reference is made, the Enterprise Act 2002 prohibits, except with the consent of the CMA, any party to a completed merger from undertaking further integrations or any party to an anticipated merger from acquiring an 'interest in shares' in another. The CMA will rarely grant its consent. The Enterprise Act 2002 also provides the CMA with the power to accept undertakings or to make an order preventing the parties to a merger from taking action that might prejudice the eventual outcome of the merger reference. Any Phase I initial enforcement orders will usually continue in force for the duration of the Phase II inquiry and may be supplemented where appropriate with additional restrictions.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Merger notification is not compulsory, although constraints on integration may be imposed by the CMA. A person who has sustained loss as a consequence of a breach of a statutory restriction preventing the acquisition of interests in shares or further integration may bring an action for damages. The breach of such a provision is also enforceable by civil proceedings brought by the CMA for an injunction, interdiction or any other appropriate relief or remedy. Similar provisions apply in relation to any breach of an undertaking or order.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Merger notification is not compulsory in the UK, so sanctions cannot be imposed simply for closing before clearance is granted, unless this has involved breach of a statutory obligation, an undertaking or order.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Enterprise Act 2002 regime does not prevent closing prior to clearance. There are some limited restrictions on the powers of the CMA to take enforcement action in relation to foreign companies, but these are narrow and do not appear to have been an impediment to the Office of Fair Trading or Competition Commission previously.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

If the merger involves the purchase of a public company that is subject to the Takeover Code, the Code requires that the bid should lapse if the merger is referred to a Phase II investigation prior to the bid becoming unconditional in other respects. Upon such a lapse, the bidder and the shareholders of the target will no longer be bound by acceptances of the offer made prior to the reference. The bid may, however, be revived (within a certain time frame) if it is cleared unconditionally by the CMA or the CMA allows it to proceed subject to certain undertakings being given.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The company must provide, to the extent relevant, the information set out in the template merger notice, which covers the basic information that the CMA requires about the transaction and the markets involved. The company can either use the prescribed merger notice form or provide a bespoke submission containing the same information, along with a signed and annotated version of the merger notice, indicating where in the submission the relevant information can be found. Copies of the form and current procedures are available on the CMA's website. In addition to a full description of the transaction and proposed timetable, the merger notice requires information relating to the main products and services supplied by the merging enterprises and estimates of market shares in any UK market. Information on horizontal overlaps, vertical links, entry barriers, buyer power and customer benefits are also relevant. Financial information is also required.

In 2017, the CMA published a revised merger notice template following a consultation process. This new template is intended to clarify the interpretation of certain questions and guidance notes and to ensure that information provided is adequate and proportionate in the circumstances of the case (in many cases this took the form of clarifying in what circumstances certain granular data may be required of the parties). In practice, the core requirements of the merger notice have not been affected, and the proposed changes mostly reflect the CMA's existing practice.

The time required to complete a merger notice depends on the complexity of the case and the ability of the parties to collate the relevant information promptly. The CMA will not commence its 40-working-day review period until it is satisfied that the merger notice is complete and, in practice, a series of pre-notification discussions have been completed.

The CMA states that it will endeavour to review submissions and revert to the parties within a reasonable time frame, generally within five to 10 working days of receipt (although this can be longer depending on the complexity of the case).

The CMA has the power to impose penalties on merging parties for breach of procedural requirements, including the failure to comply with document requests or providing inaccurate information. For example, in 2019, the CMA imposed a fine of £15,000 on AL-KO for the late provision of certain responsive documents to two CMA document requests without reasonable excuse, and fines of £27,000 on Rentokil and £20,000 on Sabre Corporation for similar failures. In September 2020, the CMA imposed two penalties of £25,000 and £30,000 against Amazon in respect of the *Amazon/Deliveroo* merger for late provision of information. In total, Amazon provided 189 documents late to the CMA, with delays ranging from a few days to more than two months. The CMA found that the documents included a significant amount of information relevant to the CMA's merger investigation, and, although Amazon did ultimately provide all of the information required, Amazon's behaviour caused 'unnecessary delays' to the CMA's investigation. Under section 117 of the Enterprise Act 2021, it is a criminal offence to supply false or misleading information to the CMA, knowingly or recklessly.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The CMA follows a statutory, 40-working-day Phase I timetable.

The regulator has the power to 'stop the clock' (eg, in circumstances where the parties have not responded to an information request) and may use this power in relation to the four-month period that applies to completed mergers. This period may also be extended in certain circumstances.

The basic Phase II period is 24 weeks from the date of the Phase I reference and can be extended by eight weeks for 'special reasons'.

To increase the speed of Phase I and II reviews, the CMA's Annual Plan 2018/2019 set the targets of approving at least 70 per cent of less complex mergers within 35 working days and completing 80 per cent of Phase II cases without extending their 24-week statutory deadlines.

The CMA's Annual Plan 2018/2019 also set the target of implementing Phase II merger remedies without extending the statutory deadline in at least 80 per cent of cases. This statutory deadline is 12 weeks and can be extended by six weeks for 'special reasons'. The CMA concluded a review and consultation of its remedies guidance across Phase I and Phase II mergers, issuing a revised version of its guidance in December 2018 (see CMA, Merger remedies).

However, additional time should be factored in outside the statutory periods for pre-notification discussions with the CMA case team, prior to formal submission of a merger notice. The CMA states in its Guidance on the CMA's jurisdiction and procedure (updated in December 2020) that there will typically be a minimum of two weeks from the initial contact between the parties and the CMA before submission of a draft merger notice. Once the parties have submitted a draft merger notice, pre-notification discussions can begin. The duration of pre-notification will differ on a case-by-case basis: cases raising complex or prima facie competition concerns will typically entail longer pre-notification periods than straightforward cases.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Enterprise Act 2002 provides for two phases of investigation. First, the CMA carries out a preliminary (Phase I) investigation to decide whether there is or may be a relevant merger situation and there is a realistic prospect that the merger will result in a substantial lessening of competition, in which case, it has a duty to refer the merger for a Phase II investigation. Where a reference is made, the CMA then launches a detailed investigation by an Inquiry Group to consider whether the merger has resulted, or may be expected to result, in a substantial lessening of competition and, if so, how to remedy, mitigate or prevent such effects.

In making its Phase I assessment, the CMA will gather supplementary information from the merging parties and will seek to verify that information with third parties (eg, competitors, major customers or suppliers). The CMA will conduct a state of play meeting and, where competition issues are raised, it will generally meet with the parties to discuss their submissions (an issues meeting). To help the parties prepare for this meeting, the CMA sends an issues letter to the parties to the merger. This will set out the core arguments and evidence in favour of referring the case. Following the issues meeting, all of the evidence including the main parties' and any third parties' submissions will be considered by the CMA. Following an internal CMA case review meeting, there is a separate decision meeting at which the case is debated and scrutinised. The final decision is then communicated to the parties to the merger.

The major steps followed in a Phase II investigation are:

- gathering information;
- issuing questionnaires;
- hearing witnesses;
- verifying information;
- providing a statement of issues;
- considering responses to the statement of issues;
- notifying provisional findings;
- notifying, considering and implementing possible remedies; and
- considering exclusions from disclosure and publishing reports.

All decisions (ie, that a case is not a relevant merger situation or acceptances of undertakings in lieu of a reference), Phase II references and clearance or prohibition decisions are published on the CMA's website, subject to excision of business secrets. Decisions are also announced through the Regulatory News Service.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition and Markets Authority (CMA) updated its Merger Assessment Guidelines (the Revised MAGs) in March 2021. The Revised MAGs contain the CMA's latest guidance on the CMA's substantive approach when investigating mergers and supersede the CMA's previous guidelines from 2010. There are several areas in which the CMA has departed from its previous guidelines in favour of a more qualitative, case-by-case approach to merger assessment.

With regard to the substantive test for clearance, if the CMA finds that a relevant merger situation has been created (or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation), it must decide whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK. Although the CMA is required to determine whether a merger it investigates will lead to a substantial lessening of competition, and the concept of a substantial lessening of competition is a key legal test in the Enterprise Act 2002, the term 'substantial lessening of competition' is not defined in the Enterprise Act 2002. The Revised MAGs, however, provide guidance on the CMA's approach.

Under the UK's two-phase merger control regime, the CMA is required to apply different evidential thresholds when assessing whether a substantial lessening of competition is or is expected to be created.

At Phase I, the CMA applies a 'realistic prospect' threshold, under which it has a duty to refer for Phase II investigation any relevant merger situation where it believes, objectively justified on the evidence, that it is or may be the case that the relevant merger situation has resulted or may be expected to result in a substantial lessening of competition. If the CMA believes the likelihood of a substantial lessening of competition is 'greater than fanciful' but less than 50 per cent, it has a wide margin of appreciation in deciding whether to refer. At the end of its Phase I investigation, the CMA can clear a merger unconditionally, decide the test for reference is met and refer the merger for Phase II investigation, or accept undertakings in lieu of a reference to remedy the competition concerns.

At Phase II, the CMA applies a 'balance of probabilities' threshold. The 'realistic prospect' threshold is intentionally a lower and more cautious threshold for a substantial lessening of competition finding than that applied by the CMA at Phase II. In a Phase II investigation, the CMA inquiry group decides whether:

- there is a relevant merger situation falling within the UK merger control regime;
- that relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition; and
- it should take action to remedy any substantial lessening of competition identified.

The CMA will apply a 'balance of probabilities' threshold to its analysis (ie, is it more likely than not that a substantial lessening of competition will result?).

Under the CMA's Revised MAGs, the CMA considers that 'substantial' in the context of a substantial lessening of competition can have a range of meanings and will depend on the facts of the case. In addition, the guidelines provide that a lessening of competition can be substantial even where the relevant market (or segment) is small in total size or value. When deciding whether a lessening of competition is 'substantial', the CMA may also consider whether there is limited competition in the market to begin with (eg, because of regulation) or whether the market is 'large or otherwise important' to UK customers.

In making the assessment, the CMA will draw up theories of harm to provide a framework for its assessment. On the use of evidence in assessing whether there may be a substantial lessening of competition, the CMA's Revised MAGs state it does not have a prescriptive list of evidence that it will take into account. Instead, the CMA will, in each case, undertake reasonable evidence gathering, consider the evidence available, and decide what weight to place on that evidence. This will depend on factors including the theories of harm being investigated, the nature of competition in the marketplace and what evidence is available.

The CMA states it has a 'wide margin of appreciation' in its use of evidence and, given the case-specific nature of merger investigations, the CMA may apply different methodologies and approaches in different cases. In assessing evidence, the CMA states it is not required to make precise predictions about the future, such as whether any particular innovations will take place or whether a specific price rise or particular degrading of service quality will take place after a merger. Moreover, the Competition Appeal Tribunal confirmed in *Tobii AB v Competition and Markets Authority* [2020] CAT 1 that the CMA is not required to quantify the extent of a substantial lessening of competition (eg, the expected loss of competition or detriment to customers). In the context of sectors that are characterised by 'fast-moving technological and commercial developments or assessments of potential or dynamic effects that are particularly dependent on the evolution of competitive conditions', the types of evidence available to the CMA may be more restricted. In such cases, the CMA considers it may place particular weight on evidence such as internal documents, the expected number of competitors after the merger, and the views and expansion plans of market participants. The Revised MAGs also note that previous experience has shown that the evidence the CMA uses and the weights it attaches to different types of evidence have evolved over time with its decisional practice. For example, the CMA notes it has 'increasingly interrogated the merger firms' internal documents', and has more closely scrutinised evidence on deal valuation.

The CMA's substantive assessment will also require it to compare the prospect for competition with the merger against a counterfactual situation without the merger. At Phase I, where there is a realistic prospect of multiple potential counterfactuals, the CMA will choose the 'worst case' scenario (ie, where the merging parties exert the strongest competitive constraint on each other, and where third parties exert the weakest competitive constraints), provided this scenario is realistic. At Phase II, the CMA will select the 'most likely' conditions of competition as the counterfactual. Although the CMA has historically chosen pre-merger situations for counterfactuals, it has recently adopted a more expansive approach, particularly in cases involving digital markets. Recent examples include:

- *Facebook/Giphy* (April 2021): the CMA assessed the merger against two counterfactuals – the prevailing, pre-merger market conditions and an alternative under which Giphy might have been acquired by a third party. The CMA hypothesised that, were Giphy to expand successfully in digital advertising, and were Giphy's paid alignment opportunities to become a prominent channel for advertising, Facebook would potentially face stronger competitive constraints in display advertising which could threaten its market power and push it to compete more vigorously.
- *Amazon/Deliveroo* (December 2019): the CMA assessed the impact of the proposed transaction against a counterfactual in which Amazon re-entered the market for the supply of online food platforms in the UK. The CMA relied heavily on Amazon's internal documents (including emails).
- *PayPal/iZettle* (November 2018): based on PayPal's internal documents and a wide range of third party evidence, the CMA considered the most relevant counterfactual was one where PayPal would have improved its own capabilities internally and become a stronger player in the supply of offline payment services via mobile point of sale technology.

This reflects a general evolution in the CMA's substantive approach in relation to dynamic markets in particular, with an increasing focus on merging parties' internal documents, deal valuation materials and other evidence from third-party sources, such as third-party forecasts and analyst reports.

20 | Is there a special substantive test for joint ventures?

When a joint venture constitutes a relevant merger situation, the substantive test for clearance will be the same as for any other merger.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The CMA is concerned about horizontal (unilateral and coordinated), vertical and conglomerate effects of mergers.

In assessing horizontal mergers, the CMA is concerned with horizontal unilateral (or non-coordinated) effects, coordinated anticompetitive effects and the loss of potential and dynamic competition.

The CMA's latest approach to the assessment of horizontal unilateral effects is set out in the CMA's Revised MAGs. Key changes in its approach from previous guidelines include the following.

Closeness of competition

Merging parties do not need to be 'closest' competitors. Where the CMA finds evidence that competition mainly takes place among few firms in a given market, any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary. The smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors. The CMA does not specify how few the number of firms will need to be.

Measures of concentration

The Revised MAGs have removed certain thresholds, including the statement that the CMA will not usually be concerned with mergers that reduce the number of firms in the market from five to four, and references to the Herfindahl-Hirschman Index (HHI).

Two-sided platforms

The Revised MAGs provide more detail on factors the CMA will consider when examining two-sided platforms, such as media publishers or social media platforms (which serve consumers on one side and advertisers on the other), shopping centres (which serve retail tenants and shoppers) and online food delivery platforms (restaurants and consumers).

In deciding whether to examine each side separately or both sides together, the CMA will consider:

- how competition works: where competition primarily involves improvements to one side of the platform, the CMA may assess each side separately;
- competitive conditions: where these are different on each side, they may be assessed separately; and
- network effects: where these are strong in both directions, this will likely lead to a single overall assessment.

In addition, in the CMA's view, network effects mean that platform mergers are more likely to give rise to competition concerns.

The Revised MAGs note that unilateral effects may also arise from the elimination of potential or dynamic competition, signalling a move away from the CMA's previous framework of 'actual' versus 'perceived' potential competition in favour of a framework that focuses on the loss of future competition and the loss of dynamic competition.

Relevant evidence of a loss of future competition, where the loss arises because the merger involves a potential entrant or firm that would have expanded in the future absent the merger, will include the ability and incentives of the firm to enter a market, any well-developed plans or significant steps already taken regarding entry, steps incumbent firms are taking in anticipation of entry, and a past history of entry into related markets. The Revised MAGs provide the CMA can conclude that one of the merger firms would have entered absent the merger, 'without concluding on the precise characteristics of the product it would launch, or which particular assets [. . .] it might acquire in order to enter'.

A loss of dynamic competition (where existing and potential competitors interact in an ongoing dynamic competitive process (eg, by investing in innovation) affects customers in the present, rather than a future point in time when entry or expansion would have occurred. Examples of relevant efforts or investments include developing new products or improving existing ones, introducing more efficient or disruptive business models, introducing new features that benefit customers but also increase customer stickiness, or sacrificing short-run margins (or even operating at a loss) in order to attract users to a platform and so benefit from network efficiencies and achieve a minimum efficient scale, scale up a distribution network or establish a reputation. The CMA provides examples from digital markets and the pharmaceutical sector where dynamic competition may be considered particularly relevant.

With regard to coordinated effects, the Revised MAGs refer to concerns from some commentators that enforcement in this area should be strengthened. The three conditions for coordination remain unchanged (ie, ability to reach a common understanding of the terms of coordination; coordination is internally sustainable; and coordination is externally sustainable) but, while the CMA's previous guidance expressly provided that all three conditions had to be satisfied for coordination to be possible, this requirement has been removed from the Revised MAGs. The possibility of coordinated effects has been an issue in a number of merger cases, such as the following:

- *Knauf Insulation Ltd/Superglass Insulations Ltd* – the Competition Commission prohibited a merger that would remove an independent competitor in an already concentrated market;
- *James Budgett Sugars Ltd/Napier Brown Foods plc* – the Competition Commission concluded that, although it was likely that coordinated effects were present prior to the merger, the merger did not make coordination significantly more sustainable or effective so a substantial lessening of competition could not be expected;
- *Taminco NV/Air Products and Chemicals Inc* – the Competition Commission cleared a merger that would reduce the number of European players on the market from three to two on the basis that Air Products and Chemicals Inc would, in any event, withdraw from the market; and
- *DS Smith Plc/Linpac Containers Ltd* – the Competition Commission cleared the merger but, given the level of concern expressed by customers, recommended that further investigation by the Office of Fair Trading under the Competition Act 1998 and articles 101 or 102 of the Treaty on the Functioning of the European Union would be justified.

The CMA's guidelines indicate that, in its appraisal of mergers, it will also investigate vertical foreclosure effects, that is, mergers that might result in input foreclosure (limiting rivals' ability to compete by deteriorating terms of access to key inputs) or customer foreclosure (limiting access to important customers) leading to a substantial lessening of competition. In its Revised MAGs, the CMA has reframed its guidance on how it will assess merging parties' ability to foreclose rivals by restricting access to inputs. When assessing whether the merged entity will have the ability to engage in input foreclosure, the Revised MAGs state the CMA will typically focus on two issues: market power upstream – if downstream rivals can easily switch away from the upstream party to a range of effective alternative suppliers, then they will be less likely to suffer harm than if the merged entity occupies an important position upstream – and the importance of the input – the merged entity could only harm the competitiveness of its rivals if the input it supplies plays an important role in shaping downstream competition.

The starting point for an assessment regarding upstream market power is the structure of the upstream market.

In assessing the importance of input, the CMA will have regard to all foreclosure mechanisms. For example, it will not only consider the proportion of rivals' costs that the input accounts for, but also the role it plays as a determinant of product quality or the rate of innovation.

The CMA has frequently investigated vertical mergers, and in several cases found that these give rise to competition concerns, in particular when one of the merger firms had a degree of pre-existing market power which it would be able to use to foreclose its rivals. For instance, in 2019, the CMA concluded, following a Phase II investigation, that the acquisition of Smartbox by Tobii AA had resulted, or may be expected to result in, a substantial lessening of competition owing to horizontal competition concerns and vertical foreclosure concerns with regard to both input and customer foreclosure. Although Tobii challenged the substantial lessening of competition decision and the CMA's decision to require a full divestiture remedy of Smartbox, the Competition Appeal Tribunal largely upheld the CMA's decision, save that it quashed the final report with respect to the CMA's finding of competition concerns relating to partial input foreclosure, as it found that the regulator did not have a sufficient evidence base.

In the context of conglomerate mergers, adverse effects principally result from the fact that a merger may allow the merging firms to foreclose competition through tying or bundling or gain increased market power over a portfolio of products. The Revised MAGs indicate that, in assessing the feasibility of a combined offering, the CMA may have regard to how the market, products and business models may evolve in the feature. The CMA states that concerns about conglomerate effects 'may be greatest in nascent and digital markets', but that anticompetitive effects may not emerge in full until after the market has reached maturity. Therefore, assessment of nascent markets will 'likely be subject to a degree of uncertainty'. However, the CMA states that this will not in itself preclude it from concluding that the substantial lessening of the competition test is met on the basis of all the available evidence.

The CMA has not specifically investigated common ownership concerns as yet, but it will do so if this is relevant to a particular transaction. Recent cases suggest that the CMA is increasingly taking a long-term view of potential competition concerns and considering 'loss of innovation' theories of harm, in, for instance, *Ladbrokes/Coral, Thermo Fisher/Roper Technologies, Sabre/Farelogix* (which was blocked by the CMA in April 2020), and *Experian/Clearscore* and *Illumina/PacBio* (which were abandoned in February 2019 and January 2020 respectively, following the CMA issuing Provisional Findings indicating concerns regarding potential substantial lessenings of competition).

The CMA states which theories of harm are relevant will depend on:

- the levels of the supply chain at which the merger firms operate;
- the links between the merger firms and their rivals;
- the nature of competition and how firms go about winning customers from each other; and
- any long-run dynamics in the relevant sectors.

The relevant theories of harm may also depend on the level of control one merger firm is acquiring over the other, indicating that it may apply a different analysis to a firm acquiring material influence versus a firm acquiring full legal control.

The CMA states it will generally take a forward-looking approach to the assessment of any theories of harm, considering the effects of the merger both now and in the future.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Except for the cases where a special regime applies, the substantive test for clearance is a solely competition-based test.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The CMA may consider economic efficiencies both in Phase I and in Phase II investigations, although it has only rarely accepted that they would outweigh any substantial lessening of competition created by a merger.

When considering in Phase I whether the merger may be expected to lead to a substantial lessening of competition, the CMA may consider what efficiency gains are directly created by the merger and whether such efficiency gains would have a positive effect on rivalry in the market so that no substantial lessening of competition would result. In addition, the CMA may take efficiencies into account where they do not avert a substantial lessening of competition, but will nonetheless be passed on after the merger in the form of customer benefits. In this case, the exception to the duty to refer may apply. The CMA cleared the *University Hospitals Birmingham NHS FT/Heart of England NHS FT* merger in August 2017 at Phase I, despite finding substantial lessening of competitions in various elective specialties. The CMA placed significant weight on advice on probable benefits from the sector regulator, which considered that substantial improvements to patient care were expected.

At Phase II the CMA may also, when considering whether there is or will be a substantial lessening of competition, consider whether efficiency gains that are directly created by the merger would increase rivalry among the remaining firms in the market. In addition, if the CMA decides that the merger has resulted or will result in a substantial lessening of competition, it can consider relevant customer benefits when deciding on the question of remedies. The CMA cleared the *Central Manchester University Hospitals/University Hospital of South Manchester* merger in Phase II in August 2017 despite finding various substantial lessening of competitions, again drawing on views of the sector regulator relating to the expected benefits.

The Revised MAGs have further limited the extent to which countervailing factors will be found to alleviate competition concerns. In particular, countervailing buyer power has been removed as a standalone factor in the section on countervailing factors in the guidelines; and, on entry and expansion, the CMA has maintained its position that new entry must be timely, likely and sufficient but, with respect to timeliness, not only must the entry/expansion be timely, but 'the effectiveness of that entry or expansion on market outcomes must be timely'. In addition, the Revised MAGs state that small-scale entry that is not comparable to the constraint eliminated by the merger is unlikely to prevent a substantial lessening of competition.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If, following a Phase II review, the Competition and Markets Authority (CMA) concludes by a two-thirds majority of the investigating panel that the merger will have an anticompetitive outcome, it will take steps to remedy, mitigate or prevent the substantial lessening of competition and adverse effects resulting therefrom to the extent that such steps are reasonable and practicable. It may take remedial action itself to preserve or restore the status quo, to increase the competition for the merged firms or to prevent possible exploitative or anticompetitive behaviour on the part of the merged firm.

Given that mergers are able to complete prior to an investigation by the CMA, in some cases, the remedy imposed may involve unwinding the transaction. In 2019, for the first time, the CMA issued an unwinding order during an ongoing investigation (in relation to certain integration by the parties) prior to having reached a decision in the *Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd* merger inquiry. The CMA ultimately prohibited the merger and concluded that Tobii must dispose of Smartbox. Also in 2019, it imposed an unwinding order in relation to the completed acquisition by Bottomline Technologies of Experian Limited's Experian

Payments Gateway (EPG) business. The order, which was imposed by the CMA even prior to the formal launch of its Phase 1 investigation into the merger, required Bottomline to segregate any flow of confidential information between the two businesses and not to solicit any EPG customers in relation to any product or services competing with EPG. More recently in January 2021, in *TVS Europe Distribution Limited/3G Truck & Trailer Parts*, the CMA ordered TVS Europe Distribution to sell the entire 3G Truck & Trailers Parts business that it purchased in February 2020 to a buyer approved by the CMA.

The CMA may also recommend the taking of actions by others.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Undertakings may be offered to remedy any identified adverse competition concerns at both Phase I (to prevent a reference) and Phase II (to remedy any adverse findings the CMA identifies following a reference).

The CMA may only accept undertakings in lieu of reference for a Phase II review in cases where it has concluded that the merger should otherwise be referred for a Phase II review. It has published guidance on the criteria it applies when considering whether to accept undertakings in lieu (see CMA, Merger remedies). Broadly, it will only do so where it is confident that all potential competition concerns it identified would be resolved without the need for further investigation. Consequently, they are only likely to be appropriate where the competition concerns raised are remedied in a clear-cut way and the remedies proposed are capable of ready implementation. The CMA has stated in its guidance that it is unlikely to accept behavioural remedies at Phase I.

In June 2020, the CMA accepted behavioural remedies at Phase II in respect of various acquisitions by Bauer Media Group. The CMA sought views on possible remedy options, including full divestment, partial divestment and behavioural remedies. In the particular circumstances of the case, the CMA was concerned about the effectiveness of a full divestment remedy and instead decided a behavioural remedy would be more appropriate (the terms of which require Bauer to provide advertising representation to independent radio stations on the same terms the stations were receiving from First Radio Sales for 10 years).

Recent practice indicates that it is becoming more likely that the CMA will require an upfront buyer where the package does not relate to a stand-alone business or where there is only a small number of candidate purchasers. In the calendar year to the end of March 2021, the CMA accepted undertakings in lieu of a reference to Phase II in six cases.

Where a reference is made for a Phase II review, and the CMA finds an anticompetitive outcome, it must determine the appropriateness of taking remedial action and the action to take. In doing so, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any resulting adverse effects. In respect of its own actions, the CMA itself has the choice of seeking undertakings or imposing orders. The CMA's order-making power is broad but limited to the factors set out in the Enterprise Act 2002. The undertakings that can be agreed upon are not so limited and therefore provide greater flexibility. In each case, the CMA must consider the appropriateness of remedies, their cost and proportionality and effectiveness.

In the calendar year to the end of March 2021, the CMA accepted remedies in four cases out of a total of 11 closed Phase II cases (although in *TVS Europe Distribution/3G Truck & Trailer Parts* the remedy required the full divestment of the acquired business). Of the 11 closed Phase II cases, five were abandoned by the merging parties, and one – *Sabre/Farelogix* – was prohibited by the CMA. Only one Phase II case (*Amazon/Deliveroo*) was cleared without remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Under the Enterprise and Regulatory Reform Act 2013, parties have five working days to offer undertakings in lieu after receiving the CMA's Phase I reference decision. However, parties may propose undertakings in lieu at any stage during Phase I. The CMA has 10 working days from the substantial lessening of competition decision to accept any undertakings in lieu in principle, and a total of 50 working days from the decision to formally to accept undertakings in lieu (subject to one extension of up to 40 working days for special reasons).

At Phase II, there is a statutory deadline of 12 weeks (extendible once by up to six weeks for special reasons) following the CMA's final report to implement remedies. Within this period, the CMA consults with the main parties and then publishes a draft set of undertakings or an order for third-party comment. Once the undertakings or the order are finalised, the CMA publishes a 'notice of acceptance of undertakings' or 'notice of making an order'. After this point, any further implementation of remedies passes to a special committee or inquiry group.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CMA can require the same type of remedies in foreign-to-foreign mergers as in domestic mergers if a foreign-to-foreign merger falls within the CMA's jurisdiction.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Mergers and ancillary restrictions to the merger are generally excluded from the prohibitions of the Competition Act 1998, as amended by the Enterprise and Regulatory Reform Act 2013 under Schedule 1 of Competition Act 1998. This extends to any provision of the agreement that is directly related and necessary to the implementation of the merger provisions (ie, ancillary restraints), which are exempt from the Competition Act 1998 (see Schedule 1). The CMA's substantive and procedural approach to ancillary restraints generally follows that of the European Commission (in exceptional cases raising 'novel or unresolved questions', the CMA may agree to provide guidance on the ancillary nature of a restriction).

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition and Markets Authority (CMA) generally gives third parties the opportunity to intervene and frequently relies on the views of such parties for the verification of information.

At Phase I, the CMA will actively seek the views of relevant third parties (eg, competitors, major customers or suppliers) and will request views from third parties in all public merger situations by means of an invitation to comment notice published through the Regulatory News Service and on the CMA's website. Third parties also have the opportunity to comment on the purpose and effect of any proposed undertakings in lieu of a reference.

Similarly, where a merger has been referred for a Phase II review, the CMA requires information about the markets involved and invites evidence both from main parties and third parties likely to be affected by the merger. Particular third parties may be invited to attend an individual hearing with the case team or, if the CMA considers it appropriate, it may hold a public or joint hearing for third parties.

Third parties may also be able to bring judicial review proceedings to challenge any decision by which they are aggrieved.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CMA has stated its commitment to transparency while maintaining appropriate confidentiality. Its approach is set out in its statement on transparency and disclosure (see CMA, Transparency and disclosure: Statement of the CMA's policy and approach). The fact of a merger notification is published and third parties are given opportunities to comment. Although meetings and hearings in front of the CMA are generally conducted in private, the CMA may decide to convene at least one public hearing in mergers considered to be of particular public interest, at which third parties are invited to make their views known.

Further, the Enterprise Act 2002 provides for all decisions to be published (although it is the CMA's policy to give an opportunity to request the excision of confidential information from those decisions) and for details of all undertakings and orders that have been agreed and accepted or imposed under the Enterprise Act 2002 to be recorded in a public register of undertakings and orders that can be found on the CMA's website.

As regards protecting commercial information from disclosure, the CMA has confidentiality obligations under Part 9 of the Enterprise Act 2002. Account must also be taken of the Freedom of Information Act 2000, which confers a right for an applicant to be informed in writing of whether the public authority (which includes the CMA and sectoral regulators) holds information of the description specified in the request and, if so, to have that information disclosed. Some important exceptions to the duty on the authority to disclose information under the Freedom of Information Act exist that may protect information provided under the Act (eg, where disclosure would constitute an actionable breach of confidence or is otherwise prohibited under another piece of legislation). Personal data is also subject to the Data Protection Act 1998 (legislation) such as Part 9 of the Enterprise Act (Data Protection) and the General Data Protection Regulation that sets out rules for processing data relating to living individuals.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Cooperation with the European Commission and EU national competition authorities

Prior to the UK's formal departure from the European Union on 31 January 2020 (and, until the Transition Period came to an end on 31 December 2020, during which arrangements for the discharge of the CMA's functions were largely unaffected), if a merger had a European Community dimension under the EU Merger Regulation, the European Commission had exclusive competence to review that merger within the EU, including with respect to its effects on any UK market(s). In such a situation, the CMA did not have the competence to carry out its own competition assessment, save for where all or part of the case was transferred under the relevant referral provisions of the EU Merger Regulation.

Following the end of the Transition Period, the CMA has ceased to be a competent authority of a member state for the purposes of the EU Merger Regulation, and it is no longer a member of the European Competition Network. As a result, the European Commission's review of a merger will no longer cover the merger's effects within the UK. Instead, transactions may be subject to parallel merger reviews by both the CMA and the European Commission.

Where a merger is subject to parallel UK and EU reviews, the CMA has stated that it will continue to cooperate with the European Commission. Although the full extent and manner in which the CMA and European Commission will continue to cooperate are continuing to emerge, the CMA's guidance on its functions following the end of the Transition Period notes there can be 'substantial benefits' to the parties and to the authorities 'encouraging communication and cooperation between the competition authorities'. Moreover, the guidance states that, where possible and appropriate, the CMA will endeavour to coordinate merger reviews relating to the same or related cases with the European Commission as with other national competition authorities. Where national legislation prevents the exchange of confidential information, the CMA and other national competition authorities may seek permission from the parties to exchange such information (waivers may be provided by the parties for the CMA to discuss a case with competition authorities in other jurisdictions, if relevant).

The CMA's Annual Plan for 2021/22 also notes the CMA's desire to 'continue our close engagement and cooperation with the European Commission, other competition and consumer agencies of the Member States in the EU and globally'. Finally, the UK's Trade and Cooperation Agreement with the EU (which entered into force on 1 May 2021) includes a provision providing for negotiation of a separate agreement on cooperation with the European Commission and authorities of member states of the EU. On 11 May 2021, the European Commission adopted a Recommendation for a Council Decision to proceed with implementing this point of the Trade and Cooperation Agreement and to authorise negotiations for an agreement on competition matters between the EU and UK. The Commission has transmitted the Recommendation to the Council and the European Parliament. The Council will now consider whether to allow for the start of negotiations of an EU-UK competition cooperation agreement.

The European Commission continues to be competent for the monitoring and enforcement of any UK elements of commitments given in connection with decided EU merger cases. However, the Withdrawal Agreement provides an option to transfer responsibility for monitoring and enforcing the UK elements of the commitments to the CMA by mutual agreement between the European Commission and the CMA.

See CMA, Guidance on the functions of the CMA after the end of the Transition Period.

Cooperation with other national competition authorities

Prior to the end of the Transition Period, the CMA also signed a new framework in September 2020 with five of its international counterpart authorities.

The Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC) was signed by the CMA, the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, Competition Bureau Canada, the United States Department of Justice, and the United States Federal Trade Commission as a statement of the authorities' 'collective intent to deepen cooperation on competition enforcement'. The MMAC includes a memorandum of understanding focused on reinforcing and improving existing cooperation and coordination on investigations, as well as a model agreement to support the development of individual arrangements among participants that may include the exchange of case information and assistance in individual competition investigations, to the extent permitted by respective national laws.

More recently, in April 2021, the CMA issued a joint statement alongside Germany's Federal Cartel Office and the Australian Competition and Consumer Commission on the need for rigorous and effective merger enforcement, particularly in respect of 'dynamic and fast-paced markets'. According to the statement:

> *[The authorities] believe that in the world today there is a real need for strong merger enforcement from competition agencies globally to ensure that high concentration levels do not become the accepted norm, and to maintain and promote competition for the benefit of consumers.*

Finally, in addition to the above, the CMA's Annual Plan for 2021/22 notes the CMA remains an 'active and committed' participant in important forums such as the Organisation for Economic Co-operation and Development, the International Competition Network, the International Consumer Protection and Enforcement Network, and the United Nations Conference on Trade and Development.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The Enterprise Act 2002 provides the Competition Appeal Tribunal with the power to review decisions adopted in merger cases. Any person aggrieved by a decision of the Competition and Markets Authority (CMA), or a decision of the secretary of state, in connection with a reference or a possible reference can apply to the Tribunal for a review. The Enterprise Act 2002 provides that the Tribunal is to apply 'the same principles as [those] applied by a court on an application for judicial review'.

In a number of cases, a third-party competitor has challenged a decision not to make a merger reference (eg, *Unichem v Office of Fair Trading,* in which the Tribunal quashed, at the request of a third-party competitor, a decision by the Office of Fair Trading not to refer a merger to the Competition Commission on the grounds that the Office of Fair Trading had failed to test and verify key evidence sufficiently).

In *Somerfield/Morrison Supermarkets*, a challenge was made to the Competition Commission's decisions that the merger between the parties would result in a substantial lessening of competition and that Somerfield should divest itself of certain stores to approved buyers. The Competition Appeal Tribunal held that, in deciding what was reasonable action appropriate for remedying, mitigating or preventing a substantial lessening of competition, the Competition Commission had a clear margin of appreciation. However, in January 2010, the Tribunal quashed the decision of the Competition Commission in relation to *Ticketmaster/Live Nation.* This followed a concession by the Competition Commission that the appellant (CTS Eventim) had an arguable case that the Commission's procedure had not been fair. In May 2010, the Competition Commission cleared the transaction for a second time.

In November 2016, Intercontinental Exchange (ICE) appealed the CMA's finding of a substantial lessening of competition in *ICE/Trayport* and its direction to divest Trayport, arguing that the CMA erred in various ways in its assessment and that its direction was ultra vires, irrational and disproportionate. The Competition Appeal Tribunal rejected most of ICE's grounds, upholding only one aspect, that a subsidiary part of the decision was not sufficiently reasoned, and remitting that point to the CMA for reconsideration. The CMA subsequently confirmed its decision on that aspect of the case.

In *Groupe Eurotunnel/Sea France*, the parties appealed to the Competition Appeal Tribunal, which quashed the Competition Commission's decision imposing remedies and remitted the case to the Commission for reconsideration of whether two enterprises had ceased to be distinct. The CMA (succeeding the Commission) confirmed the original findings in June 2014 and the Supreme Court ultimately upheld the Commission's original remedies.

JD Sports successfully appealed the CMA's decision in May 2020 to prohibit the *JD Sports Fashion/Footasylum* merger. The CMA found that full divestiture of Footasylum by JD Sports was the only effective remedy to the substantial lessening of competitions identified. The Competition Appeal Tribunal handed down its judgment in November 2020, finding that the CMA acted irrationally in that it came to conclusions as to the likely effects of the covid-19 pandemic that were of material importance to its overall decision, without having the necessary evidence from which it could draw those conclusions. The Tribunal, therefore, quashed the CMA's final report on the merger, so far as its conclusions were based on the CMA's assessment of the likely effects of covid-19 on the relevant markets; on the merging parties and the merged entity; and on the competitive constraints likely to apply to the merging parties and the merged entity.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An application to the Competition Appeal Tribunal for judicial review of a merger control review under the Enterprise Act 2002 must be made within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the reasons for the decision, whichever is the earlier.

The cases that have been heard by the Tribunal under the Enterprise Act 2002 regime have generally been dealt with quickly, within two to five months, and in some cases within a month of the case being registered with the Tribunal (eg, in *IBA Health Ltd v Office of Fair Trading* and, following the Competition Commission's concession, *Ticketmaster/Live Nation*). In *J Sainsbury Plc and Asda Group Limited v CMA*, the parties' application, which challenged the lawfulness of the CMA's timetable to review the merger, was heard two days after being lodged with the Tribunal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Between 1 April 2020 and 31 March 2021, the Competition and Markets Authority (CMA) considered a total of 38 cases at Phase I, in which the CMA:
- gave unconditional clearances at Phase I to 21 mergers;
- accepted undertakings in lieu in six cases;
- referred nine cases to Phase II;
- refrained from referring one case to Phase II subject to appropriate assurances from the parties that the transaction had been abandoned (*Tronox Holdings/TiZir Titanium and Iron*); and
- the Secretary of State for Business, Energy and Industrial Strategy accepted an undertaking in one case, *Gardner Aerospace/Impcross* (however, the undertaking was for the parties to abandon the transaction).

Of the 11 Phase II reviews that were completed in the same period:
- one was unconditionally cleared;
- one was prohibited;
- four were cleared subject to remedies (although the remedy imposed in *TVS Europe Distribution/3G Truck & Trailer Parts* was the full divestment of the acquired business); and
- five were cancelled or abandoned.

Merger references considered by the CMA over the past few years have related to a broad range of sectors, including supermarkets, hospitals, platforms and consumer products.

Reform proposals

35 | Are there current proposals to change the legislation?

Published at the beginning of 2020, the CMA's plan for the 2020s aims to 'bring the CMA closer to consumers and their needs'. The three key goals of this plan are to: understand markets and consumers better; explain why competition matters, and the CMA's work and priorities; and advocate for consumers' interests, including via legislative reforms.

This plan and, in particular, the legislative reforms proposed to advocate for consumers' interests build upon proposals dating from February 2019 made by the CMA's then chair, Lord Tyrie, in a letter to the Department for Business, Energy and Industrial Strategy. The proposed reforms included proposals to shift to mandatory notification of mergers above a certain threshold and introduce a standstill obligation designed to prevent parties from proceeding with the transaction prior to the CMA's approval. The CMA also proposed that higher or full-cost recovery from merging parties be reconsidered (the CMA stating that it recovers around half the cost of its mergers work from fees paid by merging parties). Although these reforms have not yet been implemented, the CMA has reasserted in its Annual Plan for 2021/2022 that legislative reform is necessary to bring about stronger, swifter and more flexible competition and consumer regimes.

The CMA states that the reasoning for its reform proposals is that the 'system needs to be adapted to meet new challenges that are fundamentally changing the environment in which we operate', one of which is the accelerating digitalisation of the economy. Another challenge underlying the CMA's reform proposals is the concern 'felt by many, that the UK's competition and consumer protection system is currently too weak, and too cumbersome and slow, to tackle consumer harms effectively'.

In relation to digital markets more specifically, the CMA updated its Digital Markets Strategy in February 2021. This builds on proposals for reform in the March 2019 Furman report on unlocking digital competition, and the June 2019 Lear report on the evaluation of past merger decisions in the digital sector. Since the Digital Markets Strategy was first published in June 2019, the CMA has undertaken a variety of work in respect of digital markets, including:

- establishing a new Digital Markets Unit within the CMA – the CMA states the overarching aim of the Digital Markets Strategy is to 'build towards a proactive new pro-competition regulator for digital markets in the shape of the Digital Markets Unit';
- publishing the final report of its market study into online platforms and digital advertising assessing the effectiveness of competition in the digital advertising market, including the role of advertising revenue has in driving the business models of Google and Facebook, and making recommendations for a new regulatory framework;
- publishing the advice of the Digital Markets Taskforce, putting forward proposals to the Government on the design and implementation of a pro-competition regime for digital markets; and
- establishing the Digital Regulation Co-operation Forum with the Office of Communications (Ofcom) and the Information Commissioner's Office, to support cooperation and coordination on online regulatory matters, and enable 'coherent, informed and responsive regulation of the UK digital economy'.

Finally, the CMA states in its Annual Plan for 2021/22 that it welcomes the independent report from John Penrose MP on the competition and consumer regime that was published in February 2021. The report's proposals include:

- faster and 'more predictable' competition decisions;
- more competition in 'industries burdened by red tape';
- more competition in digital industries; and
- more competition in economically-regulated industries.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Fostering effective competition in dynamic markets

In its Annual Plan for 2019/2020, the Competition and Markets Authority (CMA) listed as one of its priorities the promotion of better competition in online markets. This is reasserted in the Annual Plan for 2021/22, with one of its strategic objectives being to foster effective competition in digital markets. In 2020 and 2021, the CMA has prioritised the review of tech-related mergers, as well as other fast-moving, dynamic industries, including pharmaceuticals. The review of such cases has led to several deals being prohibited or abandoned following the CMA's provisional indication that the CMA is likely to prohibit those transactions. These include the prohibited *Sabre/Farelogix*, *Tobii/Smartbox* and *Ecolab/Holchem* mergers, and the abandoned *Illumina/PacBio*, *ThermoFisher/Gatan*, *Experian/Clearscore*, *Topcashback/Quidco*, *Crowdcube/Seedrs* (abandoned in March 2021) and *Taboola/Outbrain* (abandoned in September 2020). The CMA is currently carrying out two Phase II investigations into mergers involving online platforms and digital markets (*Facebook/Giphy* and *FNZ/GBST*), and accepted undertakings in lieu of a reference to Phase II in respect of *Adevinta/eBay* on 2 June 2021.

The CMA's revised merger assessment guidelines (published in March 2021) also emphasise the CMA's keen interest in digital markets, noting that, as the UK economy and digital technologies have evolved, the CMA must consider carefully its approach to the assessment of mergers in digital markets, to ensure that it is 'delivering on its duties to promote competition for the benefit of consumers'.

The CMA's role post-Brexit

A second key theme in the CMA's Annual Plan for 2021/22 is how the CMA will take its place as a 'global competition and consumer protection authority' as it assumes its new responsibilities after Brexit.

Over the past few years, the CMA has committed significant resources to getting 'Brexit ready'. In its Annual Report and Accounts for 2019/20 (published in July 2020), the CMA noted it had filled an additional 180 posts in order to deal with the additional workload of an estimated 30 to 50 Phase I, five Phase II investigations and five to seven antitrust cases per year.

The CMA has also stated its ambition is to continue cooperating with the European Commission in relation to mergers requiring parallel review by both authorities, and it has entered into various agreements and statements with other national competition authorities. In particular, in September 2020, the CMA signed a new framework with its counterparts in Australia, Canada, New Zealand and the United States (the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities), and in April 2021 it issued a joint statement with the German and Australian authorities on the need for 'rigorous and effective merger enforcement'.

Recovery from the covid-19 pandemic

Another key theme for 2021/22 is the CMA's desire to protect consumers and drive recovery during and after the coronavirus pandemic. In particular, the CMA states it will have a particular focus on protecting the vulnerable from breaches of competition and consumer protection laws and poorly functioning markets, and supporting the UK economy by fostering competition to promote innovation, productivity and growth.

The CMA states it will help secure the recovery of the UK economy by, among other actions:

- punishing and deterring attempts to fix prices, exploit market power or dampen competition;

- remedying or prohibiting anticompetitive mergers;
- enforcing consumer protection law;
- putting forward measures to encourage competition on price, innovation and quality in markets that are 'not working in the interests of consumers'; and
- helping governments design and implement policy in a way that 'harnesses the benefits of competition, and protects and promotes the interests of consumers'.

National Security and Investment Act

Another major theme for 2021 and beyond will be the introduction of the National Security and Investment Act, which comes into force on 4 January 2022. This new regime, which will be operated by the Department of Business, Energy and Industrial Strategy's new Investment Security Unit, will:

- introduce mandatory notification requirements in respect of transactions in a wide range of sectors and activities;
- create a voluntary notification system to encourage notifications from parties that consider that their transaction may raise national security concerns;
- enable the secretary of state to call in certain transactions to undertake a national security assessment, whether or not the parties have notified government; and
- create powers to apply remedies to address risks to national security and sanctions for non-compliance.

United States

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Section 7 of the Clayton Act, enacted in 1914 and amended in 1950, is the principal US antitrust statute governing mergers and acquisitions. Section 7 prohibits acquisitions of assets or stock where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'. Transactions may also be challenged under section 1 or 2 of the Sherman Act as unreasonable restraints of trade or as attempts at monopolisation. The Federal Trade Commission (FTC) also has the authority under section 5 of the FTC Act to challenge a transaction as an 'unfair method of competition'.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) was enacted to give the federal agencies responsible for reviewing the antitrust implications of mergers and acquisitions – the FTC and the Antitrust Division of the Department of Justice (DOJ) (collectively, the antitrust agencies or the agencies) – the opportunity to review the antitrust issues presented by certain acquisitions of assets, non-corporate interests or voting securities before those acquisitions are completed. Pursuant to congressional authorisation, the FTC, with the agreement of the Antitrust Division, has promulgated detailed and complex rules (the Rules) governing pre-merger notification under the HSR Act. Both the HSR Act and the Rules were amended significantly in February 2001, and the Rules again underwent significant revision in 2005 and 2011. On 21 September 2020, the antitrust agencies published a Notice of Proposed Rulemaking that would alter associate reporting requirements and exempt the acquisition of 10 per cent or less of an issuer's voting securities unless the acquiring person already has a competitively significant relationship with the issuer. The comment period closed with respect to such proposed rules and it is not clear when or if the proposed changes will be enacted. The antitrust agencies also have jurisdiction to investigate and challenge transactions under the US antitrust laws noted above, whether or not they have been notified under the HSR Act and whether or not they have been consummated.

The Antitrust Division has exclusive federal responsibility for enforcing the Sherman Act; the FTC is an independent administrative agency and has exclusive responsibility for enforcing the FTC Act and joint authority (with the Antitrust Division) over enforcement of the Clayton Act. Although both agencies have jurisdiction to enforce the antitrust laws, any given merger or acquisition will be examined by only one of the two bodies. Which agency will concern itself with any particular transaction is decided by informal discussions between the two agencies and can often be predicted (but not with certainty) on the basis of the agency's relative familiarity with the industry or companies involved.

Mergers and acquisitions can, under some circumstances, also be challenged by private parties and by state attorneys general. The risk of a challenge by private parties has been reduced somewhat by court decisions requiring that such challengers demonstrate a threat that the private party challenger will be injured by the anticompetitive aspects of the transaction (rather than, for example, by the new firm's enhanced effectiveness as a competitor). In situations where a private party has standing to challenge a transaction, that party can seek the same remedies (including divestiture) that are available to the government, although a private party may be subject to certain equitable defences (such as laches and 'unclean hands'), which might protect a consummated transaction from attack.

Scope of legislation

2 | What kinds of mergers are caught?

The HSR Act requires parties to file a formal notification with the Antitrust Division and the FTC – and to wait a specified number of days (30 days in most transactions) while the designated agency reviews the filings – before consummating certain acquisitions of assets, non-corporate interests or voting securities. The HSR Act can apply to any kind of transaction (be it an acquisition of a majority or minority interest, a joint venture, a merger or any other transaction that involves an acquisition of assets, non-corporate interests or voting securities).

Although the term 'assets' is not defined in the HSR Act, the agencies have taken the position that it should be given a broad interpretation similar to that which it has been given by the courts in interpreting section 7 of the Clayton Act. Under these principles, it is clear that acquisitions of assets – within the meaning of the HSR Act – will include acquisitions of both tangible and intangible assets. The acquisition of exclusive patent licences, for example, may require notification.

The Rules define 'voting securities' broadly to include, generally speaking, any security in a corporate entity that either currently entitles the holder to vote for the election of directors, or is convertible into such a security. The acquisition of corporate securities that do not at present possess, or are not convertible into securities that will possess, such voting power is exempt from the HSR Act. Although they are defined as voting securities, the Rules exempt the acquisition of convertible securities, options and warrants at any time before they are converted or exercised. It may, however, be necessary to make a filing before such securities can be converted (provided that the relevant jurisdictional tests are met at the time of conversion).

An acquisition of interests in a non-corporate entity (eg, an LLC or partnership) that confers the right to either 50 per cent or more of the profits or, in the event of dissolution, 50 per cent or more of the assets of the entity is considered to be an acquisition of the underlying assets of the entity. In other words, the Rules do not treat non-corporate interests as 'voting securities', regardless of the voting rights that those interests may have.

3 What types of joint ventures are caught?

If it involves an acquisition of non-corporate interests or voting securities, the formation of a for-profit joint venture may be subject to the HSR Act. Generally, not-for-profit joint ventures are exempt, although in certain cases they may be reportable. The Rules contain a special provision governing the formation of new corporations and corporate joint ventures (new companies). As a general matter, where two or more persons contribute to form a new company, and as a result receive voting securities of this new company, the Rules treat the contributing parties as acquiring persons, and the new company as the acquired person. In these cases, the Rules provide a special jurisdictional test based on the size of all contributors and the size of the new company itself.

Additionally, if the acquisition is of interests in a joint venture that is formed as a non-corporate entity, only the acquiring person (if applicable) that will hold 50 per cent or more of the interests in the entity will be subject to HSR reporting obligations. If no acquiring person will hold 50 per cent or more following the acquisition, the formation of the non-corporate joint venture is not reportable.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The requirement to comply with the HSR Act is not limited to transactions that involve a change of control. As explained in greater detail below, any acquisition that results in the acquiring person holding voting securities of another company valued in excess of US$92 million (current threshold) may require a filing, even if that amount represents a very small percentage of the total outstanding voting securities of the target. (However, acquisitions of less than 50 per cent of a non-corporate entity are not reportable, and there is a limited exemption for up to 10 per cent of a corporation's voting securities.)

The HSR Rules do include a definition of 'control'. However, this definition is used primarily to determine which companies should be included within the 'acquiring' or 'acquired' persons. The basic principles used in determining if control exists are as follows:

- controlling a corporate entity means either holding 50 per cent or more of its outstanding voting securities, or having the contractual power presently to designate 50 per cent or more of its directors;
- controlling a partnership, LLC, or other non-corporate entity means having the right to either 50 per cent or more of its profits or, in the event of its dissolution, 50 per cent or more of its assets;
- a natural person will never be deemed to be controlled by any other entity or person; and
- controlling a trust means having the contractual power to remove and replace 50 per cent or more of the trustees.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The initial determination of whether the notification requirements of the HSR Act may be applicable to a particular acquisition of assets, non-corporate interests or voting securities focuses upon the following jurisdictional issues:

- whether either the acquiring or acquired persons are engaged in US commerce or in any activity affecting US commerce (the commerce test);
- the amount of assets, non-corporate interests or voting securities that will be held as a result of the acquisition (the size-of-the-transaction test);
- where the size of the transaction is US$368 million (as adjusted annually) or less but greater than US$92 million (as adjusted annually), the magnitude of the worldwide sales and assets of the acquiring and acquired persons (the size-of-the-parties test); and
- whether any exemptions apply to the transaction. The HSR dollar thresholds are adjusted annually to reflect changes in the GNP. The thresholds in this chapter will be in effect from 4 March 2021 until early 2022.

The commerce test

This requires that either the acquiring or acquired party be engaged in US commerce or in any activity affecting US commerce.

The size-of-the-transaction test

The size-of-the-transaction test looks at the assets or voting securities that will be held by the acquiring person as a result of a proposed acquisition. In other words, any voting securities or, in some cases, assets held by the acquiring person prior to the transaction, together with those assets or voting securities to be acquired in the acquisition in question, must be considered. Likewise, the acquisition of non-corporate interests of an entity must be aggregated with any interests currently held by the acquiring person in that same entity to determine whether or not the acquiring person holds 50 per cent or more of the entity, thus potentially requiring HSR notification.

An HSR filing is not required in connection with any particular acquisition unless it will result in the acquiring person holding assets or voting securities having an aggregate total value in excess of US$92 million (as adjusted annually). In most cases, this threshold is cumulative. For example, if an acquirer already owns US$50 million of voting securities of an issuer, and seeks to acquire US$45 million in voting securities of that same issuer, the US$45 million acquisition will result in the acquirer 'holding' voting securities of US$95 million.

However, while the acquisition of a 50 per cent or more interest in a non-corporate entity is considered an acquisition of the assets of the entity, the value of the interest is not the value of 100 per cent of the underlying assets, but rather only of the percentage interest held as a result of the acquisition.

The size-of-the-parties test

The size-of-the-parties test does not apply to transactions resulting in holdings valued in excess of US$368 million (as adjusted annually). For all smaller transactions, the test remains in effect.

The size-of-the-parties test looks at the size of both the acquiring and acquired person and, generally speaking, is satisfied if one party (including all entities in its corporate family) has worldwide sales or assets of US$18.4 million or more (as adjusted annually), and the other has worldwide sales or assets of US$184 million or more (as adjusted annually). Sales and assets, as a general rule, are defined as those set forth in a party's last regularly prepared income statement and balance sheet.

'Acquiring person' and 'acquired person' are terms of art under the HSR Act and the Rules. To summarise a complex definition, these terms include not only the entity making the acquisition and the entity being acquired, but also the entire corporate family of which each is a part. Thus, assuming that a corporate family's assets or sales, or both, are US$184 million or more, a purchase or sale of assets or voting securities by any subsidiary of that corporate family would satisfy the size-of-the-parties requirement under the HSR Act if the other party to the transaction was part of a corporate family that had assets or sales of US$18.4 million or more (as adjusted annually).

Exemptions

Once it is determined that a proposed transaction meets the jurisdictional tests described above, the next step in determining if a pre-merger notification filing is required is examining whether the transaction qualifies for any of the exemptions set forth in the HSR Act or the Rules.

There are a variety of such exemptions, each of which excuses certain categories of transactions from the notification and waiting requirements of the HSR Act. For example, the notification requirements do not apply to:

- the acquisition of non-voting securities;
- certain acquisitions of voting securities 'solely for the purpose of investment';
- the acquisition of goods or realty in the ordinary course of business;
- certain acquisitions that require the prior approval of another federal agency;
- stock dividends and splits;
- certain acquisitions by securities underwriters, creditors, insurers and institutional investors; and
- certain financing transactions where the acquiring person contributes only cash to a non-corporate entity and will no longer control the entity after it realises its preferred return.

The FTC has also adopted a specific set of exemptions applicable to transactions involving non-US companies in which the US sales or assets involved are both below certain thresholds (as adjusted annually).

The application of each of these exemptions will, of course, depend upon the particular circumstances of the transaction, and upon the limits and conditions to those exemptions set forth in the HSR Act and the Rules.

Finally, as noted above, transactions that fall below the HSR thresholds or are otherwise exempt from HSR reporting can still be investigated and challenged, even after they are consummated.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the threshold requirements described above are met and no exemption is available (such as those described above), filing under the HSR Act is mandatory, that is, the proposed transaction cannot be consummated until the filing is completed and applicable waiting periods, discussed below, have expired. There is no scheme for voluntary filings as such, but parties to non-reportable transactions can bring their transaction to the attention of the agencies.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

In certain circumstances, the acquisition of foreign assets or voting securities of a foreign company is exempt from the pre-merger notification requirements of the HSR Act. The Rules reflect the agencies' views that certain foreign acquisitions may affect competition in the United States, but that pre-merger notification should not be required if there is insufficient nexus with US commerce.

Acquisitions of foreign assets

The HSR Rules provide that acquisitions of foreign assets by US and non-US companies shall be exempt from the HSR Act unless the foreign assets that would be held as a result of the acquisition generated sales in or into the US exceeding US$92 million during the acquired person's most recent fiscal year. Even if the acquisition exceeds this threshold (as adjusted annually), the acquisition will nonetheless be exempt if:

- both the acquiring and acquired persons are foreign;
- the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than US$202.4 million; and
- the assets that will be held as a result of the transaction are valued at US$368 million or less.

Acquisitions of voting securities of a non-US issuer

With respect to acquisitions of a foreign issuer by a US person, the Rules provide that such an acquisition shall be exempt from the HSR Act unless the foreign issuer (together with any entities it controls) either holds assets in the US valued over US$92 million, or made aggregate sales in or into the US of over US$92 million in the most recent fiscal year.

The Rules also make clear that if interests in several foreign issuers are being acquired from a common parent company, the assets and sales of all the target companies must be aggregated to determine whether either of the US$92 million thresholds (as adjusted annually) is exceeded.

With respect to acquisitions of voting securities of a foreign issuer by a foreign person, the Rules provide that such an acquisition shall be exempt unless it confers on the acquiring person control of the target issuer (ie, it is an acquisition that will give the acquiring person 50 per cent or more of the voting stock of the target) and the target, again, either holds assets in the US valued at more than US$92 million, or made aggregate sales in or into the US of more than US$92 million in the most recent fiscal year. As with acquisitions by US persons, if controlling interests in multiple foreign companies are being acquired from the same parent company, the US assets and sales of all the target companies must be aggregated to determine whether either of the US$92 million thresholds (as adjusted annually) is exceeded. Even if either of the US$92 million thresholds described above (as adjusted annually) is exceeded, the transaction will nonetheless be exempt where:

- both the acquiring and the acquired persons are foreign;
- the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than US$202.4 million; and
- the value of the voting securities that will be held as a result of the transaction is US$368 million or less.

Finally, if both foreign assets and foreign voting securities are being acquired from the same acquired person, the US sales attributed to both the assets and to the foreign issuer must be aggregated to determine whether the US$92 million threshold (as adjusted annually) is exceeded.

The Rules also provide an exemption from the requirements of the HSR Act for acquisitions of foreign assets or voting securities where the parent of the buyer or seller is the government of that same foreign jurisdiction.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Certain industries (including banking, telecommunications and media, transport and energy) have special legislation governing mergers and acquisitions. In these industries, approval of other federal agencies may be required for certain transactions. Transactions in some industries may require review by both the antitrust agencies and the agency more specifically charged with overseeing the industry (for example, the Federal Communications Commission for telecommunications mergers). Other industries have certain restrictions on foreign ownership of US assets. Finally, transactions that have national security implications may also require special notification and approval by the Committee on Foreign Investment in the United States (organised within the US Department of Treasury).

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act). The parties can submit their filings at any time after the execution of a letter of intent (which can be non-binding) or a definitive agreement. However, if a transaction is covered by the HSR Act, it cannot be consummated until all required filings have been made and the applicable waiting periods have been observed. Additionally, even after filings are submitted, it is a violation of the HSR Act for an acquiring party to take steps that have the effect of transferring beneficial ownership of the target business to the acquirer prior to the expiry of the waiting period. Failure to comply with the HSR Act can result in a fine of up to US$43,792 per day (as adjusted) and the agencies may seek to unwind a transaction that has been consummated in violation of the HSR Act.

In general, the level of compliance with the HSR Act has been extremely high. In those instances in which a required filing has not been made, or the waiting period not observed, the agencies have not hesitated to seek significant penalties. The agencies have brought at least 20 failure to file cases in the past 13 fiscal years, and obtained fines ranging from US$180,000 to US$11 million. In 2016, the Department of Justice (DOJ) filed suit against ValueAct Capital for failure to make an HSR filing when purchasing over US$2.5 billion of Baker Hughes and Halliburton voting securities. In not making a filing, ValueAct relied on the investment-only exemption, but the DOJ argued that exemption was not applicable when ValueAct tried to influence the companies' business decisions during the course of their proposed merger. In June 2016, ValueAct agreed to pay a US$11 million fine. In 2017, Duke Energy Corporation was required to pay US$600,000 in civil penalties when it acquired Osprey Energy Center from Calpine Corporation before filing the required notification form and observing the required waiting period under the HSR Act. More specifically, the DOJ alleged that, pursuant to a tolling agreement, Duke Energy acquired beneficial ownership of Osprey's business before Duke Energy had fulfilled its obligations under the HSR Act.

In 2019, Canon Inc and Toshiba Corporation were fined US$2.5 million each in connection with the acquisition by Canon of Toshiba Medical Systems Corporation (TMSC) from Toshiba. The complaint filed by the DOJ on behalf of the Federal Trade Commission (FTC) alleged that Canon and Toshiba devised a scheme that 'had no purpose' other than to quickly complete the sale of TMSC and avoid the HSR Act's waiting period requirements. Also in 2019, the DOJ filed suit against Third Point LLC and three funds it manages for failure to file under the HSR Act when the shares of Dow Inc held by the three Third Point funds converted to shares of the newly formed DowDuPont Inc following the merger of Dow Inc and EI du Pont de Nemours & Company. The three Third Point funds were required to collectively pay US$609,810 in civil penalties, and they and Third Point LLC are barred from committing future violations of the HSR Act in connection with corporate consolidations. The three Third Point funds and Third Point LLC were at the time already under federal court order stemming from allegations that they violated the HSR Act in connection with their 2015 acquisitions of voting securities of Yahoo! Inc.

Individual investors are also at risk when not complying with the HSR Act. In January 2017, the FTC charged two individuals in two different cases with violating the HSR Act. In one of the cases, investor Mitchell Rales was fined for failure to file under the HSR Act for acquisitions of company stock post-IPO. The investor's pre-IPO ownership of Colfax Corporation was above 50 per cent, and therefore any subsequent purchase would have been exempt even though the original acquisition of these shares was also exempt from the HSR Act. However, because of the IPO, his holdings, which were valued in excess of the HSR Act threshold, decreased below the control level to approximately 20.8 per cent. Thus, Rales was required to file and observe the HSR waiting period prior to making any post-IPO purchase of Colfax Corporation voting securities. In the second case, the FTC fined Ahmet Okumus US$180,000 for failing to report his purchases of voting securities in the internet services company Web.com through his hedge fund. Although the Commission found his HSR violation to be inadvertent, it still sought penalties because this was Okumus's second HSR violation in two years. Similarly, in December 2018, the FTC fined James Dolan, the executive chair and a director of Madison Square Garden Company (MSG) US$609,810 for failing to report his receipt in September 2017 of MSG restricted stock units in connection with his compensation. Dolan had filed HSR in August 2016 for the US$50 million (as adjusted) HSR threshold and was thus permitted under the HSR Act to acquire additional MSG voting securities valued up to the US$100 million (as adjusted) threshold. The MSG shares received by Dolan in September 2017 resulted in Dolan holding MSG shares valued in excess of the US$100 million (as adjusted) threshold. This was Dolan's second HSR violation.

10 Which parties are responsible for filing and are filing fees required?

If a transaction is subject to the filing requirements of the HSR Act, buy-side and sell-side parties to the transaction must make separate filings with the antitrust agencies. All acquiring persons that are required to file must pay a filing fee that is calculated according to the total value of the securities or assets to be held as a result of the transaction. The parties may agree to split the fee or even have the acquired person pay the fee. Transactions valued at less than US$184 million are subject to a filing fee of US$45,000. Transactions valued at US$184 million or more but less than US$919.9 million are subject to a filing fee of US$125,000. Transactions valued at US$919.9 million or more are subject to a filing fee of US$280,000. This fee must be submitted at the time the notification form is filed, or the waiting period will not begin.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

If a transaction is subject to the HSR Act, and a filing is thus required, the acquisition must be delayed for a 30-day period (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), a 15-day period) while the agencies review it. If the agencies take no action, the transaction may be consummated when the waiting period has expired. The agencies do not issue a formal decision clearing a transaction.

To the extent that a merger is subject to the HSR Act, the initial waiting period generally begins as soon as both parties to the transaction have made the requisite filing with the antitrust agencies. In cases involving tender offers and other acquisitions of voting securities from third parties, the waiting period begins as soon as the acquiring person has made the requisite filing, although the acquired party must file within a prescribed time.

If any deadline for governmental action falls on a weekend or a legal public holiday, the deadline is automatically extended to 11:59pm Eastern Time the next business day.

Early termination of the waiting period

The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the agencies may, at their discretion, grant such requests. When early termination is granted, the agencies are required to publish notice of their action in the

Federal Register. This notification only identifies the acquiring person, the acquired person and the acquired entity. None of the confidential business information filed by the parties is disclosed. On 4 February 2021, the FTC announced that the agencies would temporarily suspend grants of early termination of the waiting period. At the time of writing, the suspension, which was anticipated to be 'brief', is still in place.

Extension of the waiting period

The agency responsible for reviewing a particular transaction may, before the end of the initial 30-day waiting period, issue what is generally referred to as a 'second request' seeking additional information from the parties to a transaction. The issuance of a second request extends the waiting period to the 30th day (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), the 10th day) after the date of substantial compliance with the request for additional information. In some cases, the parties may also withdraw and 'refile' under the HSR Act, which starts a new initial 30-day (or 15-day) waiting period. This voluntary process gives the agency additional time to review the deal and may avoid the need for a second request.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

A transaction subject to the HSR Act may not close prior to the expiry or early termination of the applicable waiting period. Failure to comply can result in a fine of up to US$43,792 per day (as adjusted) and the agencies may seek to unwind a transaction that has been consummated in violation of the Act. The agencies have imposed fines for failure to file and observe the waiting period.

In August 2015, the FTC filed a complaint against Third Point LLC and three affiliated hedge funds (collectively, Third Point) relating to their failure to make an HSR filing and observe the waiting period when acquiring Yahoo! Inc (Yahoo) shares in 2011. The complaint alleged that the investment-only exemption was inapplicable because Third Point took certain actions inconsistent with passivity, such as contacting potential Yahoo board members and making statements about proposing directors for Yahoo. Third Point settled with the FTC and the FTC did not seek civil penalties because the violation was inadvertent and it was Third Point's first HSR violation. In another case dealing with the investor-only exemption, in September 2015, Leucadia National Corporation (Leucadia) settled a complaint brought by the FTC, where the FTC argued the investment-only exemption did not apply when as a result of a transaction, Leucadia's ownership interest in Knight Capital Group, Inc converted into shares of a new entity (KCG Holdings) worth approximately US$173 million. The FTC argued that Leucadia should have made an HSR filing and observed the waiting period, because the investment-only exemption does not apply when an institutional investor acquires voting securities of the same type as any entity included within the acquiring person, and in this instance, both the acquiring and acquired persons were broker-dealers. This was Leucadia's second HSR violation, and it agreed to pay civil penalties of US$240,000.

In October 2015, Len Blavatnik, an investor, agreed to pay civil penalties of US$656,000, settling a complaint brought by the FTC for his failure to make an HSR filing relating to his August 2014 acquisition of TangoMe shares worth approximately US$228 million. Blavatnik previously violated the HSR Act in 2010, and did not consult HSR counsel prior to acquiring TangoMe's shares.

Merging parties may also be fined for 'gun jumping' – taking steps that have the effect of transferring beneficial ownership of the target business prior to the expiry or early termination of the applicable waiting period or periods. In the most recent example of such an enforcement action, in November 2014, a federal court ordered Flakeboard America Limited and SierraPine, both makers of MDF particle board, to pay to the DOJ fines of almost US$5 million for pre-closing actions that allegedly violated HSR gun jumping and Sherman Act laws under a settlement agreement. Additionally, the Antitrust Division, in January 2010, fined Smithfield Foods and Premium Standard Farms for an alleged gun-jumping violation where Smithfield entered into a merger agreement with Premium Standard and reserved for itself the right to review certain contracts of Premium Standard. The Antitrust Division claimed that the parties violated the HSR Act when Premium Standard submitted three large, multi-year contracts to Smithfield for approval, alleging that this action was sufficient to show that the acquirer had taken 'operational control' of the target prior to the expiry of the HSR Act waiting period. The parties agreed to pay a US$900,000 fine.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Unless an exemption applies, sanctions are applied in cases involving closing before clearance in foreign-to-foreign mergers in the same manner as the sanctions are applied to domestic transactions. For example, in 1997, Mahle GmbH (Mahle), a German piston manufacturer, and Metal Leve, SA (Metal Leve), a Brazilian competitor, were each fined US$2.8 million for failure to file and observe the HSR waiting period prior to closing an acquisition by Mahle of 50.1 per cent of Metal Leve. Both companies manufactured diesel engine parts through US subsidiaries. In 2019, two companies headquartered in Japan, Canon Inc and Toshiba Corporation, were fined US$2.5 million each in connection with the acquisition by Canon of a Toshiba subsidiary, Toshiba Medical Systems Corporation (TMSC), a company with operations in the US. The complaint filed by the DOJ on behalf of the FTC alleged that Canon and Toshiba devised a scheme that 'had no purpose' other than to quickly complete the sale of TMSC and avoid the HSR Act's waiting period requirements.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no special remedy rules or practices applicable to foreign-to-foreign mergers. If the transaction gives rise to competitive issues in the United States, those issues must be resolved before the transaction can proceed.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Rules contain provisions that are applicable only to tender offers. If the transaction in question is a cash tender offer (or a transfer in bankruptcy covered by 11 USC section 363(b)), the statutory initial waiting period is 15 days (instead of the usual 30 days). If a second request is issued in such a transaction, the waiting period is extended for 10 days (instead of the usual 30 days) after the date on which the acquiring person substantially complies with the request. Also, for any tender offer, failure to substantially comply with a second request by the acquired person does not extend the waiting period. Further, in cases involving tender offers or other acquisitions of voting securities from third parties, the waiting period begins when the acquiring person files. All other aspects of the HSR Act are equally applicable to public and non-public transactions.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Notification and Report Form (the Form) that must be submitted to comply with the HSR Act requires the filing party to provide basic information about its US revenues, corporate organisation and certain minority shareholdings of entities engaged in an industry similar to the target's operations on a worldwide basis, and the structure of the transaction (including the executed purchase agreement or letter of intent), as well as a variety of business documents. In particular, the parties are required to submit all studies, surveys, analyses and reports prepared by or for any officers or directors (of any entity within the filing party) for the purpose of evaluating or analysing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographical markets. Documents routinely found to be responsive, and filed by parties, include board and management presentations, confidential information memoranda, synergy and efficiency analyses. Documents need not be formal presentations, and emails may need to be filed if they meet the criteria set forth above.

The antitrust agencies consider these documents highly relevant to their initial evaluation of the antitrust implications of a transaction. The agencies also require submission of certain documents analysing synergies or efficiencies to be achieved in the transaction. Private equity and other investment funds making acquisitions must also include certain activities of 'associates' and portfolio investments that are not 'controlled' by the acquirer but are engaged in an industry similar to the target's operations. (Refer to the FTC's website.)

Unlike, for example, the European Union's Form CO, completion of the Form does not require any discussion or description of the relevant markets or the competitive conditions in those markets. Preparation of the Form can take a few days to a number of weeks, depending principally on whether the company has submitted a filing in the recent past and on how the company organises its data.

An officer or director must certify under penalty of perjury that the information in the HSR form is true, correct and complete.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Once the parties to a transaction file their Forms, the FTC will initially review the Forms to ensure that they are complete and comport with the transmittal rules. Then, the two antitrust agencies decide between themselves which one of them will review the transaction beyond the filings themselves and publicly available information. If either the FTC or the Antitrust Division wants to conduct such further review of the transaction, it notifies the other agency and obtains 'clearance'. If both agencies want to investigate the merger, the matter is assigned through an internal liaison process. Often, one of the agencies will have greater expertise than the other with respect to a particular industry or company.

Once a transaction has been assigned to a particular agency, a staff attorney will normally contact the parties' lawyers to ask for additional information. Responding to such a request is not mandatory during the initial waiting period, but a failure to respond may leave the agency with important issues unresolved that may result in the issuance of a formal second request. The FTC and the DOJ have published guidelines listing the types of information and documents that may be useful to provide during the initial waiting period (available on the FTC's website and on the DOJ's website).

Often, the information provided to the agency during the initial waiting period will be sufficient to allow the agency to terminate its investigation. It is not uncommon for the parties to submit some form of letter or 'position paper' to the agency during the initial waiting period, addressing the questions of the agency and explaining in detail why the transaction will not substantially lessen competition or create a monopoly. It is also very common for the agency to contact the parties' customers and competitors to obtain additional information regarding the industry, and to interview executives from the merging firms.

For those mergers that continue to raise significant antitrust issues at the end of the initial waiting period, the procedure available to the agencies is to issue a 'request for additional information and documentary material' or, as it is more commonly referred to, a 'second request'. In some cases, the parties may also withdraw and 'refile' under the HSR Act, which starts a new initial 30-day (or 15-day) waiting period. This voluntary process gives the agency additional time to review the deal and may avoid the need for a second request.

A second request is a detailed set of interrogatories and document demands designed to provide the agency responsible for reviewing the transaction with information on issues such as market structure, entry conditions, competition, marketing strategies, and the rationale of the acquisition under review.

Compliance with a second request may be a burdensome and time-consuming task, requiring the parties to a transaction to produce substantial volumes of documents and to answer detailed questions. The burden may be particularly great in cases involving parties located outside the United States, because the rules require all documents submitted in response to a second request to be translated into English.

However, the agencies have implemented a number of reforms to the second request process designed to reduce the burdens associated with compliance by, among other things, limiting the scope of initial document requests and the number of company personnel whose files must initially be searched. Parties often negotiate with the reviewing agency to attempt to further limit the scope of material requested.

Either during the period of compliance, or following the submission of the complete response, it is not uncommon for the agency reviewing the transaction to take the sworn testimony of senior executives of the parties to the transaction. These oral examinations, or depositions, can cover a wide range of issues and are usually designed to explore the rationale for the transaction, entry issues, competitive conditions and other strategic issues. The depositions can be useful vehicles for the parties to put forward their views on the likely competitive impact of the transaction.

Following the parties' compliance with the second request (which can take a number of months), the agency responsible for reviewing the particular transaction must decide whether to let the transaction proceed, or to seek a court order enjoining the transaction, or take other enforcement action for alleged violation of the antitrust laws. Alternatively, the parties and the responsible agency may enter into a 'consent agreement' – a form of settlement that is designed to address the anticompetitive effect that the agency believes may result if the transaction proceeds as planned. If the agency in question takes no action, the parties are free to consummate the transaction at the end of the second 30-day waiting period.

18 | What is the statutory timetable for clearance? Can it be speeded up?

If a transaction is subject to the HSR Act, the closing of the transaction must be delayed for an initial 30-day waiting period (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), a 15-day period) following the filing of the Form. The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the agencies may, at their discretion, grant such requests. If the agency decides to issue a request for additional information and documentary material ('second request'), the applicable waiting period will be extended until the 30th day (or the 10th day in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b)) following substantial compliance with the second request.

Although they have not taken a public position on expediting requests for early termination as a result of economic circumstances, the antitrust agencies have been sensitive to the need to complete investigations of mergers involving distressed firms promptly. The agencies generally grant requests for early termination swiftly for transactions clearly raising no competitive concerns.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Clayton Act prohibits acquisitions the effect of which 'may be substantially to lessen competition or to tend to create a monopoly'. As a general matter, in merger cases, the US federal courts have largely adopted the analytical methodology set out in the Horizontal Merger Guidelines issued by the antitrust agencies. The previous Guidelines were first released in 1992 to guide the antitrust agencies' determination whether to challenge a horizontal merger and describe their approach to counsel and the business community. The current, revised set was published in August 2010.

The unifying theme of these Guidelines is that a merger should not be permitted if it will create or enhance market power or facilitate its exercise. The agencies assess market power by analysing whether the merged entity 'is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives'.

Under the Guidelines, the likelihood that a proposed transaction will create or enhance 'market power' or facilitate its exercise may be established either by direct evidence of likely anticompetitive effects (or actual anticompetitive effects in cases of consummated transactions) or alternatively by circumstantial evidence. The Guidelines recognise the potential for merger efficiencies to enhance competition and benefit consumers. In practice, the agencies have found efficiencies most likely to make a difference when likely adverse competitive effects were not great.

Although the Guidelines have no force of law, they are highly influential in the antitrust agencies' determinations whether to challenge horizontal mergers. The 2010 Guidelines, in particular, downplay the reliance on market definition in the horizontal merger analysis, and provide for certain alternative measurements of anticompetitive effects. Because most horizontal merger investigations in the US are resolved at the agency level, rather than challenged in court, the revised Guidelines provide important insight into how best to address agency concerns.

The Guidelines note that in extreme cases a failing firm defence may be taken into account; however, in practice, these situations are very rare.

20 | Is there a special substantive test for joint ventures?

Joint ventures involving competitors that completely eliminate competition between the parties and that are intended to exist for at least 10 years are analysed in the same way as all other mergers or acquisitions. In February 2019, the Federal Trade Commission (FTC) approved a joint venture involving three polyethylene terephthalate (PET) resin producers' acquisition of an under-construction PET production facility. The terms of the final order restrict how the joint venture partners can use the assets in the joint venture. Other competitor collaborations are analysed by the agencies pursuant to a framework described in the agencies' 2000 'Antitrust Guidelines for Collaborations Among Competitors'.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Market share analysis is only one method of antitrust analysis in the US. The responsible agency, if it believes that the transaction may raise competitive concerns, will examine all aspects of competition in the relevant markets. In recent years, the agencies have been particularly concerned about transactions that have combined competitors that sell products or services that are especially close substitutes for each other, which could give rise to unilateral effects, as well as the possibility of coordinated effects. (See the agencies' 2010 Horizontal Merger Guidelines for a more detailed discussion of unilateral and coordinated effects.)

Elimination of potential competition – where one of the merging firms is about to enter the relevant market – has also been a concern, particularly in pharmaceutical mergers. Following a long line of FTC challenges involving future competition, Roche Holding AG and Spark Therapeutics Inc were able to consummate a merger that had been subject to an extensive 10-month investigation into whether the merger would lessen potential competition in the US market for haemophilia A therapies. The FTC allowed the deal to proceed after determining that the evidence 'did not indicate that Roche would have the incentive to delay or terminate Spark's developmental effort for its hemophilia A gene therapy, or that the acquisition would affect Roche's incentives regarding [its haemophilia treatment drug] Hemlibra.'

The DOJ recently displayed its concerns with potentially anticompetitive acquisitions of future competitors by suing to block the proposed merger of Visa Inc and Plaid Inc in November 2020. The complaint alleged that Plaid, a financial data aggregator, planned to leverage its existing technology to launch an online debit product that would compete with Visa, and the DOJ alleged that Visa's attempted acquisition was an attempt to neutralise a nascent threat to their online debit business. In January 2021, the companies abandoned their merger plans.

Similarly, in December 2020, the FTC filed an administrative complaint to block Procter & Gamble's (P&G) proposed acquisition of Billie Inc, alleging that the acquisition would eliminate competition in women's wet razors. The FTC alleged that P&G is a monopolist in both men's and women's razors, and that Billie is a new and expanding maker of women's razors, whose plans to expand into brick-and-mortar stores posed a serious threat to P&G. P&G announced in January 2021 that it was abandoning the deal.

Prior challenges involving future competition include the FTC's May 2020 settlement claiming the proposed acquisition of Allergan plc by AbbVie Inc would eliminate future competition in the development and sale of certain drugs to treat Crohn's disease and ulcerative colitis, which required divestitures. The FTC similarly settled with Össur Hf and College Park Industries, Inc in April 2020, requiring the parties to divest College Park's myoelectric elbow business to protect future competition in the development and sale of such devices. The FTC also entered into a July 2018 settlement claiming Amneal Pharmaceuticals' acquisition of an equity stake in Impax Laboratories Inc would likely harm future competition in US markets for seven generic pharmaceutical products, which required divestitures and licensing arrangements. In January 2017, the FTC claimed Mallinckrodt plc harmed competition when its subsidiary Questcor Pharmaceuticals Inc acquired the

US rights to Synacthen Depot, a potential competitor to Questcor's HP Acthar Gel product. Mallinckrodt agreed to grant a licence to develop Synacthen Depot to a licensee approved by the FTC and to pay a fine of US$100 million.

Vertical concerns are less common, but a number of transactions have been subject to the consent decrees, which the agencies based on vertical theories (see, for example, the *Ticketmaster/Live Nation* acquisition, the *Comcast/NBC Universal* joint venture, and Google's acquisition of ITA Software).

Finally, conglomerate theories or 'portfolio effects' have not, as such, been a genuine source of concern to the antitrust agencies in recent times.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The antitrust agencies can seek to enjoin only transactions that violate certain substantive antitrust statutes (section 7 of the Clayton Act, section 5 of the FTC Act, and sections 1 and 2 of the Sherman Act). While there has been some recent movement to incorporate non-competition factors in merger analysis, the agencies have often pointed out that they do not and cannot consider such factors in their merger reviews.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Horizontal Merger Guidelines clarify how the antitrust agencies analyse and evaluate claims that mergers will result in efficiencies and lower prices. The FTC chair was quoted in 1997 as saying that presentation of efficiencies from a merger 'won't change the result in a large number of cases, [rather they will have] the greatest impact in a transaction where the potential anticompetitive problem is modest and the efficiencies that would be created are great'.

The Guidelines' discussion of economic efficiencies can be summarised as follows:

- they explain the relevance of efficiencies in merger analysis;
- they indicate that the agencies will only consider those efficiencies that are 'merger-specific'; that is, efficiencies that could not be achieved by the parties in the absence of the merger;
- they make it clear the parties to a merger will have to substantiate any efficiency claims by 'reasonable means'. Efficiency claims will not be considered if they are vague or speculative; and
- they clarify the types of efficiencies that are more likely to be accepted by the agencies. For example, reductions in production costs that are achieved through a consolidation of underutilised manufacturing facilities are more likely to receive favourable consideration than are efficiencies relating to procurement, management or capital costs.

In sum, the Guidelines' discussion of efficiencies provides a useful clarification of the issue and makes explicit the actual practice of the agencies in recent years. The Guidelines do not necessarily, however, hold out the promise that merging parties are likely to encounter less vigorous merger enforcement in the United States as a result of presenting robust evidence of merger efficiencies. By way of example, in October 2016, the proposed merger between Penn State Hershey Medical Center and PinnacleHealth System was abandoned by the parties after a Circuit Court remanded the case, and directed the District Court to enter a preliminary injunction even though the parties presented 'considerable evidence' to show that the merger would produce pro-competitive effects.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The antitrust agencies have the power to subpoena documents and information in a merger investigation. In addition, the agencies have the authority to seek an injunction in federal court prohibiting completion of a proposed transaction. The Federal Trade Commission (FTC) may also bring an administrative proceeding to determine the legality of a merger or other transaction. The agencies do not have the authority to preliminarily enjoin a transaction themselves, but if a court preliminarily enjoins a transaction, both agencies may seek a permanent injunction from the court. In addition, the FTC may issue an order, following administrative trial, permanently enjoining the transaction. As a practical matter, however, parties usually abandon a transaction if a preliminary injunction is issued. Mergers and acquisitions can, under some circumstances, also be challenged by state attorneys general and private parties.

In December 2020, the FTC brought an administrative proceeding to block the Procter & Gamble Company's proposed acquisition of Billie Inc, alleging that the proposed acquisition threatened to eliminate substantial and growing competition in the market for wet shave razors. One month later, the parties abandoned the proposed transaction.

In September 2020, the FTC challenged a proposed joint venture between Peabody Energy Corporation and Arch Coal Inc, which would have combined their coal mining and sales operations in the Southern Powder River Basin (SPRB) in Wyoming. The FTC alleged that the two companies were the two largest coal producers in the nation and in the SPRB. The agency sought and was granted a preliminary injunction blocking the transaction from the US District Court for the Eastern District of Missouri after alleging that the company's proposal would give the combined entity control of more than 60 per cent of SPRB coal production. The companies subsequently abandoned their proposed venture.

In February 2020, the FTC issued an administrative complaint and, together with the Commonwealth of Pennsylvania, sued to block the proposed merger of Jefferson Health and Albert Einstein Healthcare Network, alleging that the proposed merger likely would substantially lessen competition for inpatient acute rehabilitation services in the Philadelphia area in the United States. In December 2020, the United States District Court for the Eastern District of Pennsylvania denied the plaintiffs' request for a preliminary injunction, concluding that they had failed to show a likelihood of success on the merits in any of the markets they alleged. After the Third Circuit denied the FTC's emergency motion for an injunction pending appeal, both Pennsylvania and the FTC withdrew their opposition, permitting the deal to move forward.

In February 2020, the DOJ sued to block the proposed acquisition of the Plastics Division of DS Smith plc by Liqui-Box Inc, alleging that the proposed acquisition likely would substantially lessen competition for packaging products used to supply dairy, post-mix, smoothie and wine bag-in-boxes in the United States. The agency simultaneously filed a proposed settlement requiring Liqui-Box to divest all of DS Smith's bag-in-box product lines that overlap with product lines offered by Liqui-Box in the United States. The parties undertook the divestitures and closed the acquisition in February 2020.

In January 2020, the DOJ sued to block the proposed merger of ZF Friedrichshafen AG and WABCO Holdings Inc, alleging that the proposed merger likely would substantially lessen competition for steering gears used on large commercial vehicles in North America. The agency simultaneously filed a proposed settlement requiring the divestiture of WABCO's entire US steering systems business. Pursuant to the settlement, WABCO entered into an agreement to sell its steering technology business.

In November 2019, the FTC issued a final order upholding the administrative law judge's May 2019 decision that the consummated acquisition of FIH Group Holdings by Otto Bock resulted in anticompetitive harm in the microprocessor prosthetic knee market in the United States. The final order required that the merger be unwound.

In October 2019, the DOJ sued to block the proposed acquisition of International Dehydrated Foods LLC and American Dehydrated Foods LLC by Symrise AG, alleging that the proposed acquisition likely would substantially lessen competition for chicken-based food ingredients manufactured and sold to food manufacturers in the United States. The agency simultaneously filed a proposed settlement requiring Symrise to divest its manufacturing facility in Banks County, Georgia, to proceed with the proposed US$900 million transaction.

In September 2019, the FTC issued an administrative complaint and authorised an action to block the proposed acquisition of Stewart Information Services by Fidelity National Financial, alleging that the proposed transaction likely would significantly reduce competition for title insurance sales. The parties decided to abandon the transaction.

In September 2019, the District Court entered a final order giving effect to the October 2018 settlement between the DOJ and CVS Health Corporation and Aetna Inc. The DOJ alleged that the proposed merger likely would substantially lessen competition between the parties for individual Medicare Part D prescription drug plans in 16 regions in the United States. The settlement required the parties to divest Aetna's Medicare Part D prescription drug plan business for individuals to proceed with the US$69 billion merger.

In August 2019, the DOJ sued to block the proposed acquisition of Farelogix Inc by Sabre Corporation, alleging that the proposed acquisition likely would substantially lessen competition for airline booking services. The District Court denied the agency's request to block the merger, but the parties abandoned the transaction in May 2020 after the UK Competition & Markets Authority found the transaction unlawful under UK competition law.

In July 2019, the DOJ sued to block the proposed merger between Nexstar Media Group Inc and Tribune Media Company, alleging that the proposed transaction likely would substantially lessen competition in the sale of broadcast television spot advertising to advertisers interested in reaching viewers in several designated market areas. The agency simultaneously filed a proposed settlement requiring the parties to divest broadcast television stations in 13 markets. Pursuant to the settlement, the parties divested certain stations and entered into a final judgment with the DOJ in February 2020.

In June 2019, the DOJ brought suits to block two proposed mergers. One suit alleged that the proposed merger between Quad/Graphics Inc and LSC Communications Inc would likely substantially lessen competition for magazine, catalogue and book-printing services, and resulted in the parties' decision to abandon the transaction. The other suit alleged that the proposed merger of Harris Corporation and L3 Technologies Inc likely would substantially lessen competition for US military-grade image intensifier tubes in the United States. The agency simultaneously filed a proposed settlement requiring the parties to divest Harris's night-vision business. Pursuant to the settlement, the parties announced a divestiture of Harris's night vision business and entered into a final judgment with the DOJ in October 2019.

In June 2019, the Eighth Circuit upheld a preliminary injunction issued by a District Court in December 2017 to block the proposed acquisition of Mid Dakota Clinic by Sanford Health. The FTC alleged that the proposed acquisition likely would significantly reduce competition for adult primary care physician services, pediatric services, obstetrics and gynaecology services, and general surgery physician services in the greater Bismarck and Mandan metropolitan area. The parties abandoned the transaction in July 2019.

If the responsible agency believes that all relevant information has not been provided in the parties' filings or in the parties' response to a request for additional information, the applicable waiting period will not commence until all information has been provided. The FTC has recently challenged the sufficiency of an acquirer's responses to a second request (which led to a temporary settlement with the agency and, ultimately, abandonment of the transaction).

Failure to comply with any provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) may result in a fine of up to US$43,792 for each day (as adjusted) during which the person is in violation of the HSR Act. The agencies have imposed very substantial fines (up to US$11 million) on parties for completing transactions without observing the requirements of the HSR Act. The agencies may also seek injunctive relief to prevent a violation of the HSR Act.

In addition, if a transaction has been completed in violation of the HSR Act and is believed to violate the antitrust laws, the agencies may seek to undo the transaction through an action in the district court. This would be more likely where the agency believes the acquisition also violated the substantive merger laws.

Finally, the antitrust agencies have jurisdiction to investigate and challenge transactions that fall below the HSR Act notification thresholds, even after they are consummated. They have challenged more than 31 such transactions since December 2008, in industries including pharmaceuticals, medical diagnostics, medical devices, chemical additives (oxidates), educational marketing databases, voting machines and food processing.

In April 2020, the FTC settled Commission charges with Össur Hf and College Park Industries Inc over Össur's proposed acquisition of College Park, a non-reportable transaction. The FTC required the parties to divest College Park's myoelectric elbow business to protect future competition in the development and sale of such devices.

In January 2014, the DOJ filed suit against Heraeus Electro-Nite Co LLC (Heraeus), challenging its September 2012 acquisition of substantially all the assets of Midwest Instrument Company Inc (Minco) in a transaction that was not reportable under the HSR Act. Both Heraeus and Minco supplied sensors and instruments to measure and monitor the temperature and composition of molten steel. The complaint alleged that Heraeus engaged in the transaction to eliminate its closest competitor (with about a 35 per cent market share) after its market share had been reduced from approximately 85 per cent to approximately 60 per cent. The complaint further alleges that the acquisition eliminated the competition between the two parties, creating a near monopoly. The parties agreed to a settlement, and in the final judgment filed in April 2014, Heraeus was required to sell all the Minco assets to a divestiture buyer and take other actions designed to restore the competition that existed prior to the transaction.

In April 2013, the FTC filed a complaint against Graco Inc and a simultaneous consent decree based on two acquisitions Graco made of competitors in the 'fast set equipment' (FSE) market in 2005 and 2008 (neither deal required an HSR filing). In prior challenges to consummated mergers, the agencies usually required the divestiture of assets sufficient to replicate the competitor that was acquired. However, these options were not available in the Graco matter because the acquired companies had been fully integrated into Graco's operations, and separation was no longer possible. This prompted the FTC to adopt a settlement that incorporates some novel elements. In particular, Graco agreed to settle a private litigation it had brought against another competitor and license certain technology to that competitor. In addition, Graco is prohibited from retaliating against distributors that carry competing FSE products or from entering into exclusive contracts with its distributors or from offering to its distributors 'loyalty discounts' above certain levels.

In October 2012, the FTC filed a complaint and simultaneous consent order in *the matter of Magnesium Elektron North America Inc (MEL)*. The complaint alleged that MEL's non-reportable US$15 million acquisition of Revere Graphics Worldwide Inc (Revere) in 2007 resulted in a merger-to-monopoly because the two companies had been the only two suppliers in the market for magnesium plates for photo engraving. The consent decree required MEL to divest the Revere photoengraving products acquired through the transaction.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the agency responsible for a given transaction determines that the transaction may harm competition in a relevant market, the parties and the agency may attempt to negotiate some modification to the transaction or settlement that resolves the competitive concerns expressed by the agency. The most common form of such a settlement is a consent order, pursuant to which the acquiring company agrees to divest a certain portion of its existing assets or a portion of the assets it will acquire.

In the context of certain acquisitions, the antitrust agencies have indicated that, before they will enter into a consent order, the parties must identify an acceptable buyer for the businesses that are to be sold and must enter into a definitive divestiture agreement with such a buyer (with the buyer being approved by the responsible agency). Furthermore, consent orders require that the divestiture be completed within a fixed period of time. If the divestiture is not completed within this period, a trustee can be appointed to complete the divestiture.

On 3 September 2020, the DOJ released its updated Merger Remedies Manual. The Manual emphasises the DOJ's strong preference for comprehensive 'structural' remedies (ie, divestitures) over 'behavioural' or 'conduct' remedies to address potential competitive harms that result from either horizontal or vertical mergers. The Manual states key principles that will guide the DOJ when considering merger remedies, including that remedies must preserve competition, should not create ongoing government regulation of the market and should be enforceable. Moreover, temporary relief should not be used to remedy persistent competitive harm, any remedy should preserve competition, and the risk of a failed remedy should fall on the parties, not on consumers. The Manual also sets forth requirements that must be met before stand-alone conduct remedies would be considered appropriate. The parties bear the burden of proving that (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm; and (4) the remedy can be enforced effectively. Finally, the Manual details characteristics that increase the risk a remedy will not preserve competition, sets out standard provisions a consent decree must include to ensure enforceability, and sets forth criteria the DOJ will use to evaluate divestiture buyers.

In April 2021, the DOJ filed a proposed final judgement requiring Stone Canyon Industry Holdings LLC and SCIH Salt Holdings Inc (SCIH) to divest their entire evaporated salt business in order to proceed with their proposed acquisition of Morton Salt Inc. The Department alleged that, without the divestiture, the proposed acquisition would have substantially lessened competition in the sale of several types of evaporated salt, including bulk evaporated salt, round-can table salt, and pharmaceutical-grade salt.

In May 2020, the FTC settled its charges over the proposed acquisition of Allergan plc by AbbVie Inc. In addition to requiring divestiture of certain pharmaceutical products, the agency imposed an extensive set of conditions designed to ensure that the acquiring companies could bring and were incentivised to bring the products to market.

In May 2020, the DOJ filed a proposed final judgment with a District Court requiring Novelis Inc to divest Aleris Corporation's entire aluminium automotive body sheet operations in North America to proceed with the proposed acquisition. The final judgment followed the DOJ's March 2020 victory in its first-ever binding arbitration. The terms of the arbitration agreement between the government and the parties required Novelis to agree to divest Aleris's aluminium automotive body sheet operations in North America if the agency prevailed in arbitration.

In May 2020, the DOJ sued to block the proposed acquisition of Dean Foods Company by Dairy Farmers of America Inc, alleging that the proposed acquisition threatened to lessen competition substantially in the market for fluid milk. The agency simultaneously filed a proposed settlement requiring the divestiture of three fluid milk processing plants, which the parties agreed to undertake to consummate the transaction.

In April 2020, the FTC entered into a consent order with Axon Enterprise Inc and Vievu LLC, requiring the parties to rescind the non-compete and non-solicitation provisions of their consummated acquisition. The agency alleged that the acquisition likely would substantially lessen competition for body-worn camera systems.

In March 2020, the DOJ sued to block the proposed merger of United Technologies Corporation and Raytheon Company, alleging that the proposed merger likely would substantially lessen competition in the markets for design, development, production, and sale of military airborne radios and military GPS systems. The agency simultaneously filed a proposed settlement requiring the parties to divest Raytheon's military airborne radios business and UTC's military GPS business to BAE Systems Inc, or an alternate acquirer approved by the United States. The parties agreed to divest the businesses and consummated the transaction in April 2020.

In November 2019, the DOJ settled with BB&T Corporation and SunTrust Banks Inc with respect to their proposed merger. The DOJ alleged that the proposed merger would have anticompetitive effects in the provision of banking products to consumers. The settlement required that the companies divest 28 branches across North Carolina, Virginia and Georgia.

In July 2019, the DOJ settled with T-Mobile and Sprint with respect to their proposed merger. The DOJ alleged that the proposed merger likely would substantially lessen competition for retail mobile wireless service. The settlement required a divestiture of Sprint's prepaid business and of certain spectrum assets to Dish Network Corp, and the provision of several cell sites and retail locations to Dish.

In May 2019, the FTC settled its charges that the proposed merger of Tronox Limited and National Titanium Dioxide Company likely would substantially lessen competition for chloride-process TiO_2 in North America. Under the terms of the settlement, the parties agreed to divest National Titanium Dioxide Company's North American TiO_2 assets within 30 days of the acquisition date.

The agencies have required divestitures in a number of other recent transactions, including the following: CVS Health Corporation and Aetna Inc (September 2019, healthcare and insurance); Fresenius Medical Care and NxStage Medical (April 2019, pharmaceutical products); Penn National Gaming and Pinnacle Entertainment (February 2019, gaming, lodging entertainment); Agilent Technologies and Varian Inc (October 2018, scientific products); and CRH plc and Ash Grove Cement Company (March 2018, building materials).

In June 2017, the DOJ entered into a consent decree with The Dow Chemical Company and EI DuPont de Nemours & Co, requiring them to divest multiple crop protection and two petrochemical products to proceed with their proposed US$130 billion merger. The DOJ claimed that the parties were two of only a handful of chemical companies that manufacture certain crop protection chemicals and that vigorous competition between them had benefited farmers through lower prices, more effective solutions and superior service, which would be lost if the merger was allowed to proceed.

Behavioural remedies may also be imposed, though they have been uncommon in practice. However, the imposition of such remedies, which are often uniquely tailored to the merger concerned and require detailed monitoring, has been on the rise where mergers may present vertical foreclosure issues.

In December 2018, the FTC settled its charges that Northrop Grumman's acquisition of Orbital ATK likely would provide Northrop with the ability and incentive to harm competition for missile contracts. Under the terms of the settlement, Northrop agreed to make its solid rocket motors and related services available on a non-discriminatory basis to all competitors for missile contracts and separate the operation of its SRM business from the rest of its operations with a firewall. The settlement also allows the Department of Defense to appoint a compliance officer to oversee Northrop's conduct related to the settlement.

In May 2018, the FTC settled its charges that a proposed merger between two companies providing air ambulance transport services in Hawaii was likely to lessen competition. Under the terms of the settlement, AMR Holdco agreed to sell the business in question and enter into a Monitor Agreement pursuant to which the parties' divestiture, asset maintenance and other obligations would be monitored.

In July 2013, the FTC challenged General Electric Company's US$4.3 billion acquisition of the aviation business of Avio SpA, alleging that the acquisition gave GE the ability and incentive to disrupt the design and certification of an engine component designed by Avio for rival aircraft manufacturer Pratt & Whitney. GE and Pratt & Whitney were the only engine manufacturers for Airbus's A320neo aircraft and competed head-to-head for A320neo sales. Avio was the sole designer for the accessory gearbox (AGB) on the Pratt & Whitney engine for that Airbus aircraft. As a condition to the transaction, the FTC prohibited GE from interfering with Avio's design and development work on the AGB for the Pratt & Whitney engine, and from accessing Pratt & Whitney's proprietary information about the AGB that was shared with Avio.

In April 2011, the Antitrust Division allowed Google Inc's acquisition of ITA Software Inc to proceed on condition that Google continues to license and improve ITA's travel software product, which was used by airfare comparison and booking websites. Google's acquisition of ITA was considered to be its first step towards entering the online travel search market, and the Antitrust Division expressed concern that Google's ownership of ITA's software would give the former the incentive to foreclose competitors' access to ITA or significantly reduce the quality of the software available to them.

In January 2011, the Antitrust Division required that Comcast and General Electric's NBC Universal business (NBCU), as a condition of a joint venture between Comcast and NBCU, provide online video distributors (OVDs) with access to their video programming on terms comparable to those given to traditional multichannel video programming distributors. Conditions also included prohibitions on restrictive licensing practices, which serve to limit distribution of content to OVDs, and retaliation against any other content provider for providing programming to an OVD.

In January 2010, the Antitrust Division imposed, as a condition of the merger between Ticketmaster and Live Nation, which combined the country's primary ticketing service provider and largest concert promoter, certain 'anti-retaliation' restrictions, prohibiting the merged firm from retaliating against any concert venue owner that chooses another firm's ticketing or promotional services. The conditions included allowing former Ticketmaster clients to retain a copy of ticketing data generated while they were Ticketmaster clients. The Antitrust Division also imposed a 'firewall' preventing the merged firm from using information obtained from its ticketing business in its promotions and artist management businesses. The Antitrust Division's settlement expired in January 2020, and in December 2019, the DOJ began the process of asking the court to clarify and extend by five-and-a-half years the final judgment entered in 2010. Despite the prohibitions in the 2010 final judgment, the DOJ claims that Live Nation repeatedly and over the course of several years engaged in conduct that violated the final judgment.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In fashioning an acceptable divestiture, the agencies' goals are to eliminate the competitive problems raised by the transaction, find a buyer that can effectively and rapidly 'step into the competitive shoes' of the divesting party, and ensure that the buyer has all the assets necessary to enable it to be an effective competitor. In this regard, the FTC has published a helpful guide to its divestiture process entitled 'Frequently Asked Questions About Merger Consent Order Provisions' and a Statement of the Bureau of Competition on Negotiating Merger Remedies. The DOJ has also issued its Merger Remedies Manual.

In April 2018, the FTC settled its charges that the proposed merger between Red Ventures and Bankrate would harm competition in the market for third-party paid referral services for senior living facilities. Under the terms of the settlement, the parties agreed to divest Caring.com no later than six months after the acquisition and provided transition services to an FTC-approved buyer.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The range of remedies are the same for domestic and foreign transactions. In most transactions, remedies involve the divestiture of certain assets, a business line or intellectual property (or a combination thereof) of one of the parties that overlaps in the geographic or product market of the other party. Sometimes, one party is required to license certain intellectual property to a third-party competitor (or potential competitor). The agencies do not discriminate between foreign-to-foreign mergers and those involving domestic undertakings when imposing remedies, so long as the requisite anticompetitive effect in the United States is found.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The HSR review process does not result in affirmative 'clearance' or 'approval' of a transaction or any ancillary arrangements. Instead, if the agencies decide not to challenge a transaction, the applicable waiting period expires and the parties are free to close the transaction. The agencies retain the legal right to challenge the transaction or any ancillary arrangements in the future, although, as a practical matter, this is not very likely.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Complainants (customers, competitors or others) have no formal rights to participate in the Hart-Scott-Rodino process. Nonetheless, as a practical matter, the agencies are very likely to contact a broad group of interested parties if a transaction presents possible competitive issues. The agencies often rely on information provided by such parties (particularly from customers) in deciding whether to challenge a particular transaction. Both agencies' procedures, however, provide for third-party participation before a settlement is made final: at the Federal Trade Commission (FTC) there is a period for public comment, and the Department of Justice (DOJ) must follow the procedures of the Tunney Act providing notice and an opportunity to file views. Under certain limited circumstances, private individuals, as well as foreign and state governments, may sue in federal court for damages or injunctive relief based on violations of the Clayton Act or the Sherman Act.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the information contained in the Form, as well as the fact that the Form has been filed, is confidential and may be disclosed only to Congress or pursuant to an administrative or judicial proceeding. The same is true of information submitted in response to a second request.

However, if early termination is requested and granted, notice of the fact of early termination will be published in the Federal Register and on the website of the FTC. In addition, if the responsible agency interviews third parties in connection with the transaction, the practical impact may be to make public the existence of the transaction.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The United States' efforts to cooperate with other antitrust authorities during merger investigations continue to increase. The United States has entered into various cooperation agreements with jurisdictions such as Australia, Brazil, Canada, Chile, Colombia, Israel, Japan, Mexico, Peru and the European Union that allow competition authorities to share certain information relating to antitrust investigations. Cooperation can also occur without an agreement. International enforcement efforts may be further assisted by the International Antitrust Enforcement Assistance Act of 1994 (IAEAA), which authorises the Antitrust Division and FTC to enter into written agreements with foreign antitrust enforcement authorities to exchange otherwise confidential investigative information in situations where such exchange is in the public interest. The IAEAA also authorises the domestic enforcement agencies to collect evidence in the United States on behalf of foreign antitrust authorities. The United States is party to an antitrust-specific mutual legal assistance agreement with Australia, authorised by the IAEAA.

In addition, the United States has entered into memoranda of understanding with Russia, China, India and Korea to facilitate exchange of policy developments and best practices and provides for cooperation on competition law enforcement matters as appropriate.

In September 2020, the FTC and DOJ entered into the Multilateral Mutual Assistance and Cooperation Framework (MMAC) to strengthen cooperation between the United States and the competition agencies of Australia, Canada, New Zealand and the United Kingdom. The MMAC provides the basis for a contemplated series of agreements that would permit cross-border evidence gathering and the sharing of confidential information between the parties.

When dealing with merger reviews with international dimensions, parties or third parties may provide the agencies with waivers of confidentiality to enable cooperating agencies to discuss confidential information and analyses. In September 2013, the antitrust agencies issued a model waiver of confidentiality for parties and third parties to use in transactions involving concurrent review by non-US competition authorities and a set of frequently asked questions to accompany the model waiver.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

If the agency responsible for reviewing a transaction determines that the transaction would violate the US antitrust laws, and if an acceptable consent arrangement cannot be negotiated, the agency may apply to a federal court for a preliminary injunction blocking the acquisition. The agencies are not required, however, to seek preliminary relief. Failure to seek such relief does not preclude the agency's challenge at a later time.

To obtain a preliminary injunction, the agency has to persuade a court that it has a 'probability of success on the merits' of its antitrust claims. The merits will be adjudicated in a subsequent trial before the court or in a Federal Trade Commission (FTC) administrative proceeding. The preliminary injunction action may be essentially a 'mini-trial', during which the agency and the parties submit evidence to the court on the antitrust issues. In some instances, the trial on the merits and the preliminary injunction motion have been combined in an action for a permanent injunction.

If the responsible agency obtains an injunction from the district court prohibiting the transaction, the parties may appeal to the court of appeals for the circuit in which the district court is located. If the court of appeals denies the appeal, the parties may petition the Supreme Court to hear the case. It is rare for the Supreme Court to accept such an appeal.

In March 2020, the Department of Justice (DOJ) prevailed in a first-of-a-kind arbitration, which resolves the civil antitrust lawsuit filed by the DOJ in September 2019 challenging Novelis Inc's proposed merger with Aleris Corporation. Prior to filing the complaint, the Antitrust Division reached an agreement with defendants to refer the matter to binding arbitration if the parties were unable to resolve the United States' competitive concerns with the defendants' transaction within a certain period of time. Fact discovery proceeded under the supervision of the district court. Pursuant to the arbitration agreement, following the close of fact discovery, the matter was referred to binding arbitration to resolve the issue of product market definition. A 10-day arbitration hearing was conducted, and as a result of the arbitration, Novelis was required to divest Aleris's entire aluminium auto body sheet operations in North America.

In June 2018, the US District Court for the District of Columbia, despite objections from the DOJ, ruled that AT&T could acquire Time Warner without any conditions, in a decision emphasising that vertical integration is often procompetitive and lawful. The case was the first time in 40 years that a court heard a fully litigated challenge to a merger proposing to combine companies at different links in the same supply chain. The DOJ argued that the merger would substantially lessen competition in the video programming and distribution market by enabling AT&T to use Time Warner's 'must-have' television content to raise its rivals' video programming costs, therefore harming consumers with increased prices. However, the judge ruled that the government failed to prove that the transaction would violate the antitrust laws. The US Court of Appeals for the DC Circuit upheld the district court's decision in February 2019, and the DOJ decided not to seek Supreme Court review.

In March 2017, the FTC sued to block the merger of Advocate Health Care Network and NorthShore University HealthSystem, alleging that the combination would create the largest hospital system in the North Shore area of Chicago. The FTC alleged that the combined entity would control more than 50 per cent of the general acute care inpatient hospital services in the area. While the District Court denied the FTC's initial request for a preliminary injunction, the Seventh Circuit reversed, and after further proceedings, the District Court granted an injunction and the parties abandoned the merger.

In 2014, the Sixth Circuit reviewed and upheld an FTC hospital merger decision and order, which challenged ProMedica Health System's (ProMedica) acquisition of rival St Luke's in 2010 (the parties are two hospital providers in Toledo, Ohio). In January 2011, the FTC challenged the transaction arguing that it was anticompetitive and would raise prices for consumers and ordered a divestiture of St Luke's. The Sixth Circuit agreed with the FTC's analysis and upheld its decision and order. In 2015, the Supreme Court declined to hear the case.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The usual time frame for a resolution of an agency's application for an injunction to block an acquisition is approximately three to six months. An appeal to a court of appeals of an injunction blocking the transaction may be heard within a few months of the grant of that injunction. It is rare for the Supreme Court to accept an appeal of a court of appeals decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The agencies have been active in their enforcement of the merger laws in recent years. Numerous transactions have resulted in divestiture agreements or court challenges. In addition, the agencies have become more active in making informal enquiries to the parties for further information during the initial Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) waiting period. The Federal Trade Commission (FTC) and Department of Justice provide annual reports on their enforcement actions, which are available online.

The agencies have required divestitures or other conditions, or both, through settlements, in a number of cases in recent years involving technology and information databases, pharmaceuticals, medical devices and clinics, telecommunications services, energy, media, supermarkets, agriculture, and scientific research and measurement devices. It appears that technology, telecommunications and media, and products and services related to the healthcare industry will, in particular, continue to be enforcement priorities.

Reform proposals

35 | Are there current proposals to change the legislation?

The most recent significant amendments to the HSR Rules were in 2005 when the FTC amended the rules regarding the application of the HSR Act to non-corporate entities (partnerships, LLCs, etc). Dollar thresholds in the HSR Act and the Rules are adjusted annually to reflect changes in the GNP. In July 2011, the FTC released significant amendments to the Form, which streamline several items within the Form. The FTC more recently finalised some additional changes to the HSR Rules, the most significant of which would apply to licensing transactions in the pharmaceutical industry. Refer to the FTC's website to confirm the currently applicable thresholds and for notice of any potential changes to rules.

In 2013, the FTC formally adopted a change to its pre-merger rules that essentially codified the existing informal practice of withdrawing and refiling HSR notifications. The purpose of a 'pull and refile' is to effectively restart the initial 30-calendar-day waiting period and allow the agencies additional time to complete a review of a transaction without being forced to issue a second request to obtain additional time. The new rule specifies that an acquirer can withdraw and refile a notification within the second business day of withdrawal without paying a new filing fee. While an acquirer can withdraw and refile multiple times, the proposals make clear that an acquirer can refile without paying a new fee only once.

In June 2016, the FTC announced an increase in the maximum civil penalties it may impose for violations of the HSR Act. The maximum civil penalty for HSR violations increased from a daily fine of US$16,000, to a much larger fine of US$40,000 per day, which was adjusted to US$43,792 in January 2021. These higher maximum civil fines apply to violations that predate the effective date. The agencies annually adjust for inflation their maximum civil penalty threshold every January.

As of 2016, rule changes allow for HSR filings to be submitted on DVD (but see below regarding procedures during the covid-19 pandemic). The notification form and instructions were also updated in September 2016 and July 2018, and in September 2019 the FTC further amended the rules and the HSR notification form and filing instructions to incorporate the new 10-digit North American Product Classification System (NAPCS) codes introduced by the Census Bureau. Mandatory reporting of NAPCS codes began on 25 September 2019.

Owing to the covid-19 pandemic, beginning 17 March 2020 and continuing through the time of publication in 2021, the FTC implemented a temporary e-filing system for submission of HSR filings. Guidance for filings during the pandemic can be found on the FTC website.

In December 2020, the DOJ and FTC proposed amendments to the HSR Rules. The first proposed amendment would define 'person' under 16 CFR § 801.1(a)(1) to include 'associates' and thereby require filers to disclose additional information about their associates and to aggregate acquisitions in the same issuer across those entities. The second proposed amendment would exempt the acquisition of 10 per cent or less of an issuer's voting securities unless the acquiring person already has a competitively significant relationship with the issuer, such as being a competitor, officer or director, or vendor. On the same day, the agencies also promulgated an Advance Notice of Public Rulemaking that sought to gather information on seven topics to help advise the agencies on possible future amendments to the HSR rules and interpretations thereof. These topics included: the size of transaction; real estate investment trusts; non-corporate entities; acquisitions of small amounts of voting securities; influence outside the scope of voting securities; transactions or devices for avoiding the HSR Act requirements; and issues pertaining to the HSR filing process. The comment period closed on 1 February 2021, but no further agency action has yet been taken.

In February 2021, Senator Amy Klobuchar (D-MN) introduced S. 225, the Competition and Antitrust Law Enforcement Act, which if passed would significantly revamp merger review and enforcement. Among other things, the bill seeks to change the legal standard courts use to determine whether an acquisition is anticompetitive from asking whether the effect 'may be substantially to lessen competition or to tend to create a monopoly' to whether the transaction would 'create an appreciable risk of materially lessening competition, or to tend to create a monopoly or a monopsony'. The bill also proposes to shift the burden of proof to the merging parties to demonstrate that the benefits of the transactions outweigh the risks in certain enumerated circumstances, including where the transaction is valued at more than US$5 billion, where the acquiring party has assets, net revenue, or market capitalisation above US$100 billion and attempts to make an acquisition valued at US$50 million or more, and where a firm with greater than 50 per cent market share or significant market power acquires a competitor or company with a 'reasonable probability' of becoming a competitor.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Several significant developments took place in merger control within the past year.

In one of the most significant regulatory changes of the past decade, the Department of Justice (DOJ) and Federal Trade Commission (FTC) released a final version of the agencies' updated Vertical Merger Guidelines in June 2020, which contain a number of important new provisions. Among these, the new Guidelines make clear that elimination of double marginalisation is the principal pro-competitive effect that can be anticipated from vertical mergers. Second, they explain that mergers often present both horizontal and vertical elements, and the agencies may apply both the Horizontal Merger Guidelines and the Vertical Merger Guidelines in their evaluation of a transaction. Third, they discuss in detail the 'raising rivals' costs' and 'foreclosure' theories of harm. They also recognise unilateral effects from access to competitively sensitive information; mergers of complements and diagonal mergers. Fourth, the new Guidelines recognise coordinated effects, where a vertical merger weakens competition by enabling tacit coordination among competitors. Finally, they identify conditions under which a vertical merger would not require an extensive investigation.

Although the latest Guidelines continue to acknowledge that vertical mergers may benefit consumers, continued and possibly increased scrutiny could be on the horizon. In a recent indication of that trend, the FTC voted unanimously to file an administrative complaint and authorise a federal lawsuit challenging Illumina Inc's proposed acquisition of Grail Inc. Illumina is a provider of DNA sequencing technology and Grail is developing a multi-cancer early detection test, which relies on DNA sequencing. The FTC's Complaint argues that 'Illumina will gain the incentive to foreclose or disadvantage firms that pose a significant competitive threat to Grail and to limit the competitiveness of any MCED product' and that, consequently, 'Illumina will control the fate of every potential rival to Grail for the foreseeable future'. At the time of writing, the proceedings remain pending.

In September 2020, the FTC published a blog post withdrawing guidance (unchanged since 2003) that categorically excluded special dividends from consideration as an HSR avoidance device under 16 CFR § 801.90. Under the previous guidance, filing parties could pay special dividends to reduce their assets below the relevant size of parties test.

Additionally, scrutiny of consummated transactions was a notable focus of US regulators last year, particularly for the FTC. In 2020, the FTC brought suit to unwind Facebook's acquisition of Instagram and WhatsApp, alleging that Facebook illegally maintained its monopoly in 'personal social networking' by eliminating nascent competitors to its core Facebook product. It also sued to unwind Altria's acquisition of a 35 per cent stake in Juul. The FTC alleges that Altria dealt with Juul becoming the leading e-cigarette company in the country by agreeing not to compete in return for a substantial ownership interest in Juul. At the time of writing, both cases remain pending.

Finally, privacy and data protection have emerged as key considerations within antitrust law, including within the area of merger control. This consideration has emerged in the courtroom via the Facebook litigation, in which the FTC has alleged that one of the benefits of increased competition in the personal social networking market would be enabling users to select a provider that more closely suits their preferences regarding the availability, quality and variety of data protection privacy options. Outside of the merger context, the DOJ has alleged in their antitrust suit against Google that Google's conduct has harmed consumers by reducing the quality of internet searches, including on privacy, data protection and the use of consumer data dimensions. Acting FTC chair Rebecca Kelly Slaughter has explicitly advocated for the Commission to 'look . . . with both privacy and competition lenses at problems that arise in digital markets.' And the House Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary issued a Majority Staff Report and Recommendations that advocated that future acquisitions by the largest tech platforms be presumed anti-competitive. The Report made clear that several congresspeople have the digital economy's antitrust implications firmly in their sights.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The merger control regime is regulated by the Law of the Republic of Uzbekistan No. ZRU-319 on Competition (the Competition Law), which entered into force on 6 December 2012, replacing the Law on competition and restriction of monopolistic behaviour in the commodities markets. The Competition Law now also governs merger control in financial markets, whereas the previous law applied only to commodity markets.

Other legislation includes Decree of the Cabinet of Ministers of the Republic of Uzbekistan on approval of certain administrative regulations on the provision of services in the field of antimonopoly regulation in commodity and financial markets No. 338, dated 28 May 2020 (Regulation No. 338). The document sets out the following regulations: on reviewing and obtaining preliminary consent for concluding share acquisition agreements in legal entities; and on issuing preliminary consent for mergers and consolidations of legal entities. These regulations establish detailed procedures for obtaining the antimonopoly pre-approval in the commodities markets and financial markets.

Uzbek merger control provisions are enforced by the Antimonopoly Committee of the Republic of Uzbekistan (the Antimonopoly Committee) and its 14 regional departments across the country.

Scope of legislation

2 What kinds of mergers are caught?

The following transactions will require an antimonopoly clearance, provided that the respective thresholds are met:

- merger and consolidation of legal entities; and
- acquisition transactions.

It seems that basic principles of the merger control regime that existed until 2012 were retained in the Competition Law. In May 2020, the relevant pre-closing notification was slightly revised. Pursuant to Regulation No. 338, the merger control requirements in respect of acquisitions apply in cases where the acquisition of a stake crosses 50 per cent (previously an acquisition of 35 per cent, 50 per cent, and 75 per cent in the case of joint-stock companies and 50 per cent and 66 per cent in the case of limited liability companies required notification).

Filing would not, however, be required by limited liability companies or joint-stock companies where the foreign purchaser has an Uzbek subsidiary, but the target has no subsidiary or local presence in Uzbekistan.

The filing is not required for an entity, even if the above criteria are met, if there is a specific presidential decree or a decree of the Cabinet of Ministers on the merger, consolidation or acquisition of shares of such entity.

Unlike the previous regulations, now the same test for clearance applies to both commodities and financial markets.

3 What types of joint ventures are caught?

Uzbekistan merger control does not set out specific rules applicable to the establishment of joint ventures. Joint ventures are reviewed within the general legal framework. In other words, the creation of a joint venture is treated as an acquisition of shares or rights by the joint venture company from its founders and third parties. When a joint venture is established from scratch, notification requirements are not applied.

In addition to new merger control requirements, the Competition Law introduced a revised clearance procedure for agreements restricting competition. Joint venture agreements, shareholders' agreements and certain other agreements relating to the creation of joint ventures that could potentially restrict competition in Uzbekistan may be challenged by the Antimonopoly Committee.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law does not provide for a definition of control. However, through the definition of 'group of persons' the Competition Law determines that control includes the following main situations:

- two or more legal entities where one legal entity, directly or indirectly, holds or represents more than 50 per cent of the voting shares in a company;
- the holding or representing by individuals together with their close relatives of more than 50 per cent of voting shares in two or more companies;
- the holding or representing by a legal entity of more than 50 per cent of voting shares in each of two or more companies;
- two or more legal entities where executive management positions are held by the same individuals or by their close relatives;
- two or more legal entities where more than 50 per cent of seats in the collegial executive management body or supervisory board are held by the same individuals or by their close relatives;
- two or more legal entities, where one company, by virtue of law, constitutive documents or agreements is entitled to give mandatory instructions to another; and
- two or more legal entities, where one individual or legal entity, by virtue of law, constitutive documents or agreements is entitled to give mandatory instructions to another.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

For legal entities in commodities markets: notification and pre-approval are required if the aggregate balance sheet value of the assets of both parties to the transaction or the aggregate amount of sales of goods for the last calendar year of both parties exceeds 100,000 times the basic calculation value (BCV), which is currently 245,000 Uzbekistani so'm.

For legal entities in financial markets the same rules of notification and pre-approval apply as opposed to previous regulations where the test and procedures for clearance varied in terms of the amount of the thresholds depending on the members of financial markets.

Notification and prior approval is also required if one of the parties to the transaction holds a dominant position in the market.

For the purpose of determining whether the thresholds apply, the purchaser and target are taken into account (the seller is not taken into account). Asset values or market shares and volume of sales are assessed at the level of individual entities (eg, the target or local subsidiaries) and at the group of companies level.

The thresholds can be satisfied by one party only and it does not matter which party. Consequently, if the target owns a legal entity that is registered in Uzbekistan, the first two thresholds set out above will in practice almost always be met.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory in all cases where the transaction meets the thresholds set by the legislation. However, if there is a special resolution issued by the government in respect of certain deals (where the government approves the purchase by an investor of certain shares in the local entity or consolidation of legal entities), then it is regarded as if formal approval has been received.

Intra-group transactions are also subject to mandatory Antimonopoly Committee control.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Based on the provisions of the Competition Law, which state that the Law applies to transactions carried out outside Uzbekistan if the transaction may have an adverse impact on competition in Uzbekistan, from current practice we can surmise that a foreign-to-foreign transaction falls within the Uzbekistan merger control regime where the target entity directly or indirectly controls any Uzbek entities, owns assets located in Uzbekistan or has substantial turnover from operations in Uzbekistan.

Usually, foreign-to-foreign mergers are not subject to merger clearance or notification if the target does not have any local presence in Uzbekistan in the form of a subsidiary or branch or shareholding in any of the existing corporate forms (limited liability company, joint-stock company, etc). In addition, Uzbek merger control only applies to transactions outside the territory of Uzbekistan, if such transactions (acquiring indirect control, etc) may have an impact on the relevant market of Uzbekistan. In practice, however, applicability of filing is reviewed on a case-by-case basis and decided at the discretion of the Antimonopoly Committee.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, there are special rules with respect to foreign investments in the mass media sector such as TV, radio, newspapers, web sources, etc. In particular, there is a prohibition on the acquisition by a foreign investor of 30 per cent or more shares in mass media.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no legal deadlines for a pre-completion filing. Merger control clearance must be obtained before completion and the filing must be made well in advance of the envisaged completion date of the transaction.

The purchaser is liable for a penalty. However, there is no procedure for holding a foreign entity liable in the case of foreign-to-foreign transactions. In case of a breach of the Competition Law in mergers, consolidations and acquisitions, the following fines and penalties can be imposed:

- administrative: a fine in the amount of one to three times the BCV applies where an individual is involved (and five to 10 times the BCV, if committed repetitively within one year of the date of the application of a fine for the similar actions), and of five to 10 times the BCV applies where a legal entity is involved (and 10 to 20 times the BCV, if committed repetitively within one year of the date of the application of a fine for the similar actions); and
- criminal (applicable after imposing administrative fine): a fine in the amount of 25 to 50 times the BCV, or deprivation of a right to hold certain positions for the period from three to five years, or up to 360 hours of mandatory public works, or up to three years of corrective labour. There is no notion of corporate criminal liability in Uzbekistan, therefore criminal liability is imposed on the official or any other authorised person from the company of the purchaser.

In addition, the Antimonopoly Committee may apply to a court to invalidate, in full or in part, agreements and other transactions for which its prior authorisation or subsequent notice was required but has not been obtained or given, or to liquidate a company if it was incorporated without prior approval, provided that the relevant transaction or incorporation results in limitation of competition.

10 Which parties are responsible for filing and are filing fees required?

The purchaser of the shares or assets is responsible for filing with the Antimonopoly Committee. A filing fee is set in the amount of 10 times the BCV.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Antimonopoly Committee is obliged to consider antitrust filings within 10 calendar days of the filing date and take a decision on approving the filing or returning it as incomplete and in this case the review period will start anew as soon as the full set of documents is submitted. However, if the Antimonopoly Committee determines that further disclosure, documents or information is needed or that the transaction may result in limitation of competition, the Antimonopoly Committee may extend the term of review by up to one month.

Closing of the transaction must be suspended prior to clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a transaction that falls under the scope of the merger control is closed before antimonopoly pre-approval has been obtained, the following potential fines and penalties can be imposed:

- administrative: a fine in the amount of one to three times the BCV applies where an individual is involved (and five to 10 times the BCV, if committed repetitively within one year of the date of the application of a fine for the similar actions), and of five to 10 times the BCV applies where a legal entity is involved (and 10 to 20 times the BCV, if committed repetitively within one year of the date of the application of a fine for the similar actions); and
- criminal (applicable after imposing administrative fine): a fine in the amount of 25 to 50 times the BCV, or deprivation of a right to hold certain positions for the period from three to five years, or up to 360 hours of mandatory public works, or up to three years of corrective labour. There is no notion of corporate criminal liability in Uzbekistan; therefore, criminal liability is imposed on the official or any other authorised person from the company of the purchaser.

In practice, the parties can only be prevented from closing by a court decision. However, for a direct acquisition of shares in a company registered in Uzbekistan, closing cannot be carried out without preliminary approval of the antitrust authority, as the registration agency may request a preliminary approval of the transaction.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Clearance must be made before closing. As there is no procedure for holding a foreign entity liable in case of foreign-to-foreign transactions, we are not aware of any such cases.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Hold-separate arrangements are not provided for by the Competition Law.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules and notably no exemption from the prohibition on completing the transaction before clearance.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Competition Law lists the documents and information that must be collected for the filing. These include the following:

- an application, which must include the full name of the business entity, information about the transaction, purpose of the agreement to be concluded, list of the executive and supreme management bodies of all parties to the transaction and information on shareholdings in other business entities;
- a copy of a passport if an individual is involved, including full passport details of an individual;
- information on types of activities rendered, names of goods and the volume of goods manufactured and sold by an applicant for the last two years prior to the application, or from the date of company's operation if less than two years;
- annual financial and statistical reports for the past two calendar years;
- information on the group of persons indicating certain grounds for forming the group, including other additional information, as may be requested by the Antimonopoly Committee; and
- a power of attorney.

The documents listed above (except for the power of attorney) are required from all parties to the transaction. Documents issued abroad must carry an apostille (if the country where the document is issued is a party to the 1961 Hague Convention on Apostille) or be legalised. They need to be further translated into Uzbek or Russian by a certified translator and the translation must be notarised in Uzbekistan.

In the event of supplying the Antimonopoly Committee wrong or misleading information the following fines and penalties can be imposed:

- administrative: a fine in the amount of one to three times the BCV applies where an individual is involved (and three to five times the BCV, if committed repetitively within one year of the date of the application of a fine for the similar actions), and of three to five times the BCV applies where a legal entity is involved (and five to 10 times the BCV, if committed repetitively within one year of the date of the application of a fine for the similar actions); and
- criminal (applicable after imposing administrative fine): a fine in the amount of up to 25 times the BCV, or deprivation of a right to hold certain positions for the period of up to three years.

However, in practice, we are not aware of any cases of application of fines or penalties for submitting wrong information and the Antimonopoly Committee may simply request clarification of the submitted information or ask the applicant to submit missing information.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

After submission of all necessary information and documents, the Antimonopoly Committee must decide within 10 calendar days of the filing date whether to clear the merger or return it as incomplete and in this case the review period will start anew as soon as the full set of documents is submitted.

If the transaction raises competition concerns, the Antimonopoly Committee is entitled to extend the review for up to one month. In practice, the Antimonopoly Committee usually issues its decisions within 10 calendar days. There are no legal means to speed up clearance.

18 What is the statutory timetable for clearance? Can it be speeded up?

Upon filing, the set of documents and information as filed is forwarded to the Special Commission of the Antimonopoly Committee (the Special Commission) formed by its chair.

The Special Commission is obliged to consider antitrust filings within 10 calendar days of the filing date and take a decision on approving the filing or returning it as incomplete.

As mentioned above, if the Antimonopoly Committee determines that further disclosure, documents or information are needed or that the transaction may result in limitation of competition, the Antimonopoly Committee may extend the term of review by up to one month.

The Antimonopoly Committee is entitled at its own discretion to invite the applicant (or his or her authorised representatives) and other concerned parties to attend meetings of the Special Committee.

A decision of the Antimonopoly Committee approving the transaction must sent to the applicant on the same day. This decision is valid for one year and transactions on the establishment of association of legal entities, merger and consolidation of legal entities and acquisition of the shares must be entered not later than one year from the date of the decision.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

A merger must be prohibited or made conditional by the Antimonopoly Committee if it leads to the creation or strengthening of a dominant position in the relevant Uzbekistan market sector or otherwise leads to a limitation of competition in the Uzbekistan market.

Dominance is defined in the Competition Law as the position of one or several companies or groups in the market for a specific product or service that allows it or them to carry out their business activities independently from their competitors and seriously influence the terms of trade of such product or service or to impede other companies' access to this market sector.

A company or group is viewed as dominant if its market share is:

- 50 per cent or more; or
- between 35 per cent and 50 per cent, provided a company or group had a stable market share for at least one year, there are no other companies or group with a market share of more than 20 per cent and there are limitations to enter the market for new entrants and competitors.

20 Is there a special substantive test for joint ventures?

No, there is no special substantive test for joint ventures in Uzbekistan. The general merger control rules will apply.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The Antimonopoly Committee investigates whether the transaction may lead to limitation of competition in the Uzbekistan market, including through abuse of a dominant position or coordinated actions of two or more business entities. These actions may include:

- reduction of the quantity of goods on the market with the purpose of creating scarcity on commodities or financial market, which results in an increase of prices;
- establishing monopolistic high or low prices for goods;
- creating barriers on commodities or financial markets for new entrants;
- an increase or decrease in the prices of commodities or financial markets that is not owing to market forces; and
- other actions that may lead to limitation of competition on the commodities or financial markets of Uzbekistan.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Usually, the legal test for clearance is competition-related and other issues, including the ones related to industrial policy or public interest are not covered by the review process. However, if Antimonopoly Committee identifies any non-compliance with industry policy or conflict to public interests it very likely to report its findings to the relevant state authorities.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Antimonopoly Committee's role is to find a compromise between protection of competition and economic development in Uzbekistan. The Antimonopoly Committee considers the economic impact of the transaction and may give clearance even if the transaction results in limitation of competition, provided that the parties perform certain actions to mitigate or eliminate the negative effects. Economic efficiencies are not covered by the review process.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Antimonopoly Committee is authorised to either prohibit a transaction that has or may have an adverse effect on competition or to require the parties to fulfil certain conditions before a clearance is issued. In this event the Antimonopoly Committee issues binding orders aimed at protecting competition. If a transaction that leads or may lead to limitation of competition in the Uzbekistan market is closed without Antimonopoly Committee approval, the Antimonopoly Committee is authorised to challenge the transaction in court.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

An approval may be subject to compliance with certain conditions at the decision of the Antimonopoly Committee. The Antimonopoly Committee may condition its approval, inter alia, with divestment undertakings or behavioural remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Conditions of divestments undertakings or behavioural remedies, as well as timing, are specified by the Antimonopoly Committee in each particular case.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no relevant track record available regarding remedies in foreign-to-foreign mergers.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Law is silent on this matter. Most likely, the clearance decision will cover only the transaction in question. If there are any doubts on whether an antitrust approval is required for related arrangements, an additional application should be filed.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Usually, customers and competitors are not involved in the review process. However, the Antimonopoly Committee is entitled at its own discretion to invite the applicant (or his or her authorised representatives) and other concerned parties to attend meetings of the Special Committee.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The review process is not public.

Commercial secrets and any other information protected by law cannot be withheld in a filing. The Antimonopoly Committee has the right to demand it from the parties and suspend the review process until it is provided. The Antimonopoly Committee is under an obligation not to disclose commercial secrets or any other information protected by law contained in filings. The Antimonopoly Committee's officials are criminally liable for unauthorised disclosure and compensation of the material damage done by such disclosure. However, in practice, these types of cases are rare.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Uzbekistan has signed bilateral treaties on legal assistance and legal cooperation with a number of countries, and each treaty provides a mechanism for how requests for information can be submitted to other jurisdictions. In practice, to our knowledge, the Antimonopoly Committee's cooperation with antitrust authorities in other jurisdictions is very limited.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the Antimonopoly Committee may be challenged in the Uzbek court or with superior government authority. An appealed decision of the Antimonopoly Committee is put on hold for the duration of the appeal process.

Time frame

33 What is the usual time frame for appeal or judicial review?

Uzbekistan's judicial process takes approximately two months at each of the three review levels: the first instance court, the court of appeal (or cassation) and the supervisory court of appeal. In practice, it could take up to six months to overturn a decision of the Antimonopoly Committee. If the case reaches the fourth appeal level, the Highest Economic Court, the review could take six months or longer.

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ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Usually, the Antimonopoly Committee grants clearance without delay if all procedural requirements are met and a merger does not restrict competition.

Recent practice indicates that the Antimonopoly Committee requires filing of a notification even for foreign-to-foreign mergers where one of the entities carries out certain activities in Uzbekistan without having an established presence there (sales, supplies of equipment or commodities, etc). Usually, the Antimonopoly Committee's reply is provided without delay in the form of clearance or confirmation that the merger does not affect the Uzbek market.

Regardless of the above reviewed thresholds, the most recent practice has been that applicability of filing and pre-approval is reviewed on a case-by-case basis and decided by the Antimonopoly Committee, which is the only state body authorised to make an assessment of whether or not a particular transaction has any impact on the relevant market in Uzbekistan. Thus, obtaining a prior written confirmation of the Antimonopoly Committee that no pre-approval is required for a particular transition is a must even if the envisaged transaction does not exceed the thresholds provided in the Competition Law.

Reform proposals

35 Are there current proposals to change the legislation?

Uzbekistan's antimonopoly regulations have recently been amended, including the introduction of the Regulation No. 338. No other changes are expected at this point.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, a new online process for the submission of notifications was introduced. Accordingly, the procedure for filing applications in paper form was completely abolished. Individuals and legal entities now file applications via Public Services Center or via online platform, namely the Single Portal for Interactive Public Services.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The most important legislation regulating merger control is the Competition Law effective as of 1 July 2019 (the 2018 Competition Law). The 2018 Competition Law replaced the law that was effective between July 2005 and June 2019 (the 2004 Competition Law).

Two decrees implement the 2018 Competition Law:

- Decree 75 sets out administrative penalties for violations. Decree 75 became effective on 1 December 2019; and
- Decree 35, effective from 15 May 2020, sets out guidance on key aspects of an economic concentration, including the definition of control, filing thresholds and standards for assessing the competitive impact of a transaction.

The government will soon issue a third decree to set up a new competition law authority, namely the National Competition Commission (NCC). The NCC will replace and take over the functions of the two former authorities, namely the Vietnam Competition and Consumers Protection Authority (which is empowered to review and make decisions on the clearance of economic concentrations and to investigate alleged violations of competition laws) and the Vietnam Competition Council (which is empowered to hear and make decisions on cases investigated by the Vietnam Competition and Consumers Protection Authority). As used herein, VCA means the competent competition authority of Vietnam.

Scope of legislation

2 | What kinds of mergers are caught?

The 2018 Competition Law regulates economic concentrations in the following forms:

- mergers of enterprises (defined as the transfer by one or more enterprises of all its lawful assets, rights, obligations and interests to another enterprise and, at the same time, the termination of the business activities or the existence of the merging enterprises);
- consolidation of enterprises (defined as the transfer by two or more enterprises of all their lawful assets, rights, obligations and interests to form one new enterprise and, at the same time, the termination of the business activities or the existence of the consolidating enterprises);
- acquisition by an enterprise of shares or ownership interests or assets of another enterprise (defined as the purchase by one enterprise of all or part of the capital contribution or assets of another enterprise sufficient to control or govern the acquired enterprise or any of its trades or business lines); and
- joint venture between enterprises (defined as two or more enterprises together contributing a portion of their lawful assets, rights, obligations and interests to form a new enterprise).

The 2018 Competition Law contains a catch-all provision covering 'other forms of economic concentration in accordance with laws'. There is no further guidance on this. However, as an enterprise is defined to include foreign companies operating in Vietnam, it is possible that an economic concentration may arise on the basis of a business cooperation contract between independent enterprises without creating a new entity.

3 | What types of joint ventures are caught?

The definition of a joint venture under the 2018 Competition Law broadly covers all types of joint ventures between two or more enterprises (including 'greenfield' joint ventures). Unfortunately, the law is silent on important questions, such as whether:

- there needs to be joint control;
- the joint venture should be full-function, including whether it:
  - needs to be autonomous in terms of operation; or
  - is established on a lasting basis; and
- the joint venture needs to operate in the same relevant market as either of the parties.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

There is a definition of 'control' in the context of acquisition transactions only. An acquirer will be deemed to have control over the target company or a business line of the target company if it:

- acquires more than 50 per cent of the charter capital or the voting shares of the target;
- acquires the right to own or use more than 50 per cent of the assets of the entire business or one business line of the target; or
- has the right to make decisions regarding any of the following in respect of the target:
  - (either direct or indirect) appointment or removal of a majority of or all the directors, the chair of the members council, or the CEO or general director;
  - amendment of the charter; or
  - important business activities, those being the organisation of the business operation, business lines, the geographic scope of the operations, the mode of doing business, adjustment of the scope of the business and the business lines and the forms and methods of raising, allocating and utilising capital.

The law is unclear on whether the minority protection rights of a shareholder would constitute 'control'. However, in our experience, depending on the nature of the rights, the target (whether it is a public or private company) and how such rights work in the relevant agreements between the acquiror and the target or other shareholders of the target, it might not be viewed as conferring 'control' on the acquiror.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

An economic concentration will be notifiable if it exceeds one of four thresholds (based on the fiscal year preceding the transaction):

1. the combined market share of the parties;
2. the cash value of the transaction (applicable to onshore transactions only);
3. the total assets of one of the parties (or, arguably, the total assets of all the parties combined) (on a group-wide basis) in Vietnam; or
4. the total turnover of one of the parties (or, arguably, the total turnover of all the parties combined) (on a group-wide basis) in Vietnam.

The applicable thresholds are set out in the table below.

Sectors	Turnover	Assets	Transaction value	Combined market shares
Insurance	10 trillion Vietnamese dong	15 trillion Vietnamese dong	3 trillion Vietnamese dong	20 per cent or more in the relevant market in Vietnam
Securities	3 trillion Vietnamese dong	15 trillion Vietnamese dong	3 trillion Vietnamese dong	20 per cent or more in the relevant market in Vietnam
Credit institutions	20 per cent or more of the total turnover of credit institutions in Vietnam	20 per cent or more of the total assets of credit institutions in Vietnam	20 per cent or more of the total charter capital of credit institutions in Vietnam	20 per cent or more in the relevant market in Vietnam
All other sectors	3 trillion Vietnamese dong	3 trillion Vietnamese dong	1 trillion Vietnamese dong	20 per cent or more in the relevant market in Vietnam

The turnover and assets thresholds mentioned in (3) and (4) refer to a 'group company', which is defined under Decree 35 as 'a group of enterprises which are under common control by one or more of the enterprises in the group or which are under the common management'.

The law is silent with regard to whether only the market shares of the direct parties to the transaction (as opposed to the market shares calculated on a group-wide basis) would be taken into account when it comes to determining whether the market share threshold test has been met. However, in precedent filings under the 2004 Competition Law, the competent competition authority (VCA) took into account the market share on a group-wide basis, and the same approach may be expected to continue to apply.

The law is not clear on whether the turnover and assets thresholds will apply to each party to the economic concentration or on a combined basis of all the parties participating in the economic concentration. However, our experience suggests that, for the test to be satisfied, at least one of the parties to the concentration would need to meet the applicable turnover or assets thresholds.

The VCA may launch an investigation into a transaction that does not meet the filing thresholds if it receives a complaint, or there are signs that the transaction (despite not being notifiable) has the effect of significantly restraining competition within three years of the closing date of the transaction.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory if a transaction (regardless of whether it is onshore or offshore) constitutes an economic concentration, and it meets one of the applicable filing thresholds. The law contains no exception.

However, article 1 of the 2018 Competition Law states that the law regulates 'economic concentrations that affect or are likely to affect a restraint of competition in the Vietnamese market'. One potential interpretation is, therefore, that an economic concentration transaction that does not affect and is not likely to affect competition in the market in Vietnam would not be covered by the 2018 Competition Law. Assessment of whether there is an effect or a likely effect on the Vietnamese market would need to be done on a case-by-case basis.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified in Vietnam if the relevant conditions are met.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, in respect of onshore transactions. Foreign investors must obtain approval from the Department of Planning and Investment (DPI) of the province where the target company is located when investing in Vietnam if the relevant conditions are met. For instance, foreign investors must obtain an investment registration certificate (which technically serves as permission for the investment in Vietnam) before applying for an enterprise registration certificate to incorporate a new joint venture company in Vietnam.

In addition, for a foreign investor to acquire a majority stake in a Vietnamese company, it must take steps to register its intention and obtain approval for the acquisition from the DPI.

The licensing authorities have broad discretion in reviewing the applications. In practice, the authorities may take into account certain national security interests, public interests or domestic market protection measures during the licensing process, especially in sensitive sectors, such as oil and gas, infrastructure and energy, banking and financial services.

In addition, there are foreign ownership shareholding caps in various investment sectors in Vietnam.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

If an economic concentration is notifiable, the parties must make the filing before the consummation of the transaction. In practice, the competent competition authority (VCA) tends to accept that the deadline for the parties to make the filing is before the completion of their proposed transaction (rather than the signing of the transaction agreements).

If the parties fail to make the filing, they may each be exposed to an administrative fine of up to 5 per cent of the total turnover of each party (but not the turnover of its group companies) in the relevant market in Vietnam in the fiscal year prior to the year of the closing of the transaction. Depending on the specific violations, the parties may also be exposed to additional administrative sanctions, such as the confiscation of proceeds from the breach of the competition law and revocation of the relevant certificate or licence of the parties.

10 Which parties are responsible for filing and are filing fees required?

It is the responsibility of all the parties participating in the economic concentration to make the filing. All the parties must complete the notification form and are liable for the truthfulness and accuracy of the information and documents submitted.

There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Where a notification is required, the parties must wait for a clearance to be issued before closing or implementing the transaction.

The VCA will carry out the review of a filing in three stages.

- Checking the completeness of the documents: seven business days after the receipt of a filing, the VCA will issue a written confirmation on the completeness of the file. If the file is incomplete, the VCA will issue a written request for the parties to supplement the relevant documents and information within 30 days from the date of the request. If the parties cannot supplement the required documents within this 30-day period, the file will be returned to the parties.
- Preliminary review: the VCA will carry out the preliminary review of the file within 30 days from the date that the VCA issues a written confirmation on the completeness of the file. After this 30-day period, the VCA will issue a clearance decision or a written decision that the transaction is subject to an official review. If the VCA does not respond during this 30-day period, the parties are allowed to implement the transaction.
- Official review: the official review of the file will take up to 90 days from the date the VCA issues a written decision that the file is subject to an official review, which may be extended for an additional 60 days in complex cases, as determined by the VCA.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the parties implement a notifiable transaction before obtaining clearance, they are liable to an administrative fine from 0.5 per cent to 1 per cent of the total turnover of each party (but not at the group level) in the relevant market in Vietnam in the fiscal year preceding the year of the violation.

There is no reported case in which the VCA has applied a sanction on any such gun-jumping conduct.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

If the parties implement a foreign-to-foreign notifiable transaction before obtaining clearance, they are liable to an administrative fine from 0.5 per cent to 1 per cent of the total turnover of each party (but not at the group level) in the relevant market in Vietnam in the fiscal year preceding the year of the violation.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The parties might consider lodging a written consultation letter to the VCA for permission to close pending clearance. The VCA will have discretion to decide whether to grant permission.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The parties must submit the following documents, among other things, in a filing:

- a prescribed form describing the proposed transaction and the details of the parties;
- a draft economic concentration agreement or term sheet, a memorandum of understanding or a draft summary of the terms of the proposed transaction;
- copies of the incorporation certificates or equivalent documents of each party;
- audited financial statements of each party for the two consecutive fiscal years preceding the economic concentration;
- a list of the affiliates of each party;
- a list of the products and services provided by each party;
- the market share data or a report of each party for the two consecutive years preceding the economic concentration;
- a plan for addressing any possible restraint of competition as a result of the economic concentration; and
- a report on the assessment of the positive impact of the economic concentration.

The authority may request additional documents and information. Submission of inaccurate information may expose the parties to an administrative fine of up to 50 million Vietnamese dong.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

The VCA will carry out a three-stage review of the filing that includes:

- the checking of the completeness of the filing documents within seven business days after the receipt of a filing;
- preliminary review of the file within 30 days from the date the VCA issues a written confirmation on the completeness of the file; and
- if the transaction does not pass the test in the preliminary review, the official review, which may take up to 150 days.

There is no requirement for pre-notification consultation. However, in practice, where there are strong grounds for the parties to believe that their transaction has no impact on the Vietnamese market, the parties may consider submitting a consultation letter to the VCA seeking an opinion regarding notification. There is, however, no guarantee that the VCA would respond to the consultation letter or that the response would be obtained in a timely manner. The parties will only proceed with the official filing if the VCA so requires in responding to the consultation letter.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The statutory timetable for the three-stage review is up to 180 days, plus seven working days from the date the parties submit the filing to the VCA until the issuance of the clearance decision.

The statutory timetable may be shortened if the parties provide detailed information or documents of the proposed transaction to the VCA and quickly respond to the VCA's inquiries.

Besides the required documents for the filing, the parties should consider submitting any clearance decisions issued by the competent competition authorities in other jurisdictions (eg, the European Union, Japan and the United Kingdom) for the VCA's consideration to speed up the process.

In practice, it often takes up to six months for the VCA to review and make a decision on a transaction.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Under the 2018 Competition Law, an economic concentration is prohibited if it causes or is likely to cause a significant restraint of competition in the Vietnamese market. To assess this, the competent competition authority (VCA) will consider the following matters:

- the combined market share of the parties before and after the economic concentration;
- the extent of the concentration in the relevant market before and after the concentration, which is assessed to determine the danger of creating or strengthening the market power of the enterprises involved and the ability to increase coordination between the enterprises in the relevant market;
- the relationship of the parties in the chain of production, distribution and supply of a specific type of good or service, which is assessed to determine the ability of the parties after the economic concentration to create superior competitive advantages as compared to other competitors, aimed at preventing or excluding competition from accessing the market;
- overall consideration of the competitive advantage brought about by the economic concentration in the relevant market, based on advantages regarding the product characteristics, the production and distribution chains, financial capacity, the brand name, technology, intellectual property rights and other advantages of the enterprise after the economic concentration;
- the ability of the enterprise to increase prices or profit margins after the economic concentration;
- the ability of the enterprise after the economic concentration to exclude or prevent other enterprises from accessing or expanding the market; and
- other specific factors in the relevant industry or sector that directly influence or significantly change the results of the assessment of the materiality of the restraint on competition of the relevant economic concentration.

In its preliminary review, the VCA will issue a clearance for the transaction in one of the following cases:

- the combined market share of the parties proposing to participate in the economic concentration is less than 20 per cent in the relevant market;
- the combined market share of the parties proposing to participate in the economic concentration is 20 per cent or more in the relevant market, and the Herfindahl-Hirschman Index (HHI) of the enterprises competing in the market post-economic concentration is less than 1,800;
- the combined market share of the parties participating in the economic concentration is 20 per cent or more in the relevant market, the HHI in the market post-economic concentration is above 1,800, and the increase in HHI is less than 100 points; or
- the market share of the parties participating in the economic concentration that have a relationship with each other in the chain of production, distribution and supply of a specified type of good or of which the business lines provide mutual inputs or provide ancillary support to each other is less than 20 per cent in each relevant market.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

There is as yet no jurisprudence on this.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

There is no indication in the law or guidance of any non-competition issues that must be considered in the review process; however, the authority may consider those issues in sectors where the government has a policy of protection of the domestic market (or state companies in it) or there are concerns about national security or public interest.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The 2018 Competition Law explicitly permits the VCA to consider the economic efficiencies of a transaction when reviewing a filing. In doing so, the VCA will look into the positive impact of the transaction on:

- the development of the relevant industry or sector;
- the development of science and technology;
- the promotion of the development of small and medium-sized enterprises; and
- the competitiveness of Vietnamese enterprises in the international market.

However, the law is silent on the extent to which the economic efficiencies would affect the final decision of the VCA on an economic concentration.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The competent competition authority (VCA) has the power either (1) to prohibit the transaction or (2) to approve it subject to conditions.

If the parties fail to comply with the decision of the VCA in (1), each party participating in the economic concentration may be exposed to an administrative fine of between 1 per cent and 5 per cent of its total revenue in the relevant market in Vietnam in the preceding fiscal year, as well as other sanctions (including the forced unwinding of the transaction or monitoring by the competent state authorities for a certain period in respect of sale and purchase prices or other aspects of the economic concentration).

If the parties do not fully comply with the conditions set out in the conditional clearance in (2), they may each be exposed to an administrative fine of between 1 per cent and 3 per cent of its total revenue in Vietnam in the preceding fiscal year in the relevant market.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The VCA can issue a conditional clearance. It may impose the following conditions:

- division, separation or divestment of part of the equity interest or assets of the parties;
- monitoring of the purchase or selling price of goods, services or other transaction conditions in contracts signed by the relevant parties after the economic concentration;
- other measures to minimise the restraint on competition in the market; and
- other measures for enhancing the positive impact of the economic concentration.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The divestment or other remedies are new provisions introduced under the 2018 Competition Law. There is no detailed guidance or precedent in practice. As such, it would be dictated by the authority on a case-by-case basis when it grants the conditional clearance.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The relevant provisions entered into force in July 2019, and there have not yet been any relevant decisions.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The law is silent on this question. As such, it would be dictated by the authority on a case-by-case basis when it grants the clearance.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Yes, the competent competition authority (VCA) can seek the views of any enterprise or individual (eg, customers and competitors) about the proposed economic concentration to assist with its review of the transaction. For example, the VCA announces on its official website that it is in process of reviewing of a merger filing and it asks all the competitors in the market to provide their views on the proposed merger.

In addition, any concerned person (eg, customers and competitors) may lodge a complaint to the VCA if it thinks that its lawful rights and interests have been infringed as a result of a breach of the provisions of the 2018 Competition Law. The complaint must be made in writing using a prescribed form issued by the VCA, and it must be submitted together with supporting evidence.

The VCA will then consider the complaint to decide whether to investigate the case or not.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The VCA must publish its clearance decisions (although, in practice, this has not always been respected by the VCA) and it may redact the confidential information (if any) before the publication. There is no prescribed form for the clearance decision. In practice, the decision normally states the names of the parties, a basic description of the transaction and the conclusion of the VCA.

The VCA also has a right to annually publish its activities on its website, and it may describe some of the notified economic concentrations in its annual report (eg, a brief description of the transaction as set out in the notification form and the decision of the VCA).

Despite the right to publish information, the VCA has an obligation to keep confidential the information and documents provided by the relevant parties and individuals in accordance with the law.

The parties are recommended to expressly state in the notification form which information is confidential and should not be disclosed to any third party or the public without prior consent.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Under the 2018 Competition Law, the VCA will coordinate with the relevant antitrust authorities in other jurisdictions in respect of the legal proceedings to promptly discover, investigate and deal with any practice showing signs of breach of competition law. The scope of coordination in competition legal proceedings includes consultation, exchange of information, documents or other appropriate activities of international cooperation in accordance with Vietnamese laws and international treaties of which Vietnam is a member.

In practice, the VCA, has taken into account the view of competition authorities in established jurisdictions (such as the European Union) when it deemed it to be appropriate.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

If one of the parties to an economic concentration or a third party disagrees with a decision of the competent competition authority (VCA) on the filing of the economic concentration (the VCA decision) and has grounds to believe that the VCA decision is unlawful or directly infringes its rights and lawful interests, the person (complainant) will be entitled to file a complaint (the first complaint) to the head of the VCA within 90 days of receiving, knowing or being informed of the VCA decision.

If the complainant does not agree with the decision of the head of the VCA on the first complaint, it can file a second complaint to the Ministry of Industry and Trade within 30 days of the date of receipt of the first complaint (extendable to 45 days, applicable to remote areas with difficult travel conditions).

Alternatively, at any time within one year of the receipt of the VCA decision and regardless of whether the complainant has made the above-mentioned complaints to the head of the VCA or the Ministry of Industry and Trade, the complainant may initiate an administrative lawsuit before a competent court in Vietnam to request the judicial review and nullification of the VCA decision. In that case, any pending review process by the head of the VCA or the Ministry of Industry and Trade will be suspended.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The head of VCA must review the first complaint and issue its decision within 30 days of the date of its receipt (extendable to 45 days in complex cases and to 60 days in complex cases in remote areas with difficult travel conditions).

The Ministry of Industry and Trade must issue its decision on the second complaint within 45 days of its receipt (extendable to 60 days in complex cases and up to 70 days in complex cases in remote areas with difficult travel conditions).

An administrative lawsuit can be tried before a trial court or an appellate court as well as through cassation procedures. The time frame of the proceedings will depend on the complexity of the case.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The enforcement of the merger control regime has been very limited, although our expectation is that enforcement activity will increase over time.

More than 60 filings have been made to the VCA over the last 12 months. Most of the filings were cleared unconditionally and a few filings were cleared but coupled with general requests regarding behaviour post-transaction. Most of the notified transactions were acquisitions between foreign owned companies incorporated in Vietnam or between foreign companies. There were at least three major offshore transactions reported where all the relevant parties were foreign entities.

Apart from the *Grab/Uber* transaction, we are not aware of any case where the VCA has blocked any transaction or has imposed any administrative fines on any party for failure to make a filing.

Reform proposals

35 | Are there current proposals to change the legislation?

The 2018 Competition Law has been in effect since 1 July 2019. The government is still drafting implementing regulations.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The most significant change introduced in the new merger control regime is that it has moved away from a simple market share test and applies a broader economic assessment of the market power of the parties and the competitive impact of the transaction.

A notable case recently handled by the competent competition authority (VCA) was the investigation (under the former 2004 Competition Law) of the transaction between Grab and Uber in 2019. The VCA concluded that the transaction failed to make the filing required by law and that the transaction itself exceeded the prohibited market share threshold. In particular, the VCA opined that the transaction was an economic concentration because Grab acquired the entirety of the assets of Uber Vietnam and, therefore, had control over all the business activities of Uber in Vietnam. The VCA identified the relevant markets of Grab and Uber in Vietnam as the market providing intermediary services connecting passengers and drivers of cars under nine seats on a software and switchboard basis in Hanoi and Ho Chi Minh City. Accordingly, the combined market shares of Grab and Uber (for the fiscal year 2017) in Hanoi and Ho Chi Minh City were 44.1 per cent and 82.68 per cent respectively. As a result, according to the VCA, the transaction between Grab and Uber should be prohibited under the 2004 Competition Law as the combined market share of the parties exceeded 50 per cent in the relevant market.

This case was then transferred to the Vietnam Competition Council (VCC) for hearing. The VCC in its decision dated 11 June 2019 did not agree with the conclusion of the VCA and decided that the transaction did not constitute an economic concentration, so there should not be any violation of the competition law. The VCC explained that although Grab acquired the assets of Uber and had control over Uber, Grab did not have any voting rights over any part of the Uber's group company as required under the implementing decree of the 2004 Competition Law. Therefore, the transaction did not constitute an economic concentration under the 2004 Competition Law regime.

The VCA subsequently lodged an appeal against this decision of the VCC on 25 June 2019. This case is ongoing, and the final outcome is not available yet.

The *Grab/Uber* case is unprecedented in the 15 years of enforcement of the competition law regime in Vietnam. It was the first time the VCA publicly concluded that a transaction was in violation of the law and must be prohibited. It shows the VCA's proactive role in investigation and also in defending its view before the VCC. Regardless of the future outcome of the case, the case may signal a more robust enforcement of the competition law in the years to come.

Zambia

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Competition and Consumer Protection Act No. 24 of 2010 (the Act) and it is enforced by the Competition and Consumer Protection Commission (the CCPC).

Scope of legislation

2 | What kinds of mergers are caught?

A merger occurs where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

A merger contemplated may be achieved in the following circumstances:

- where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;
- where an enterprise amalgamates or combines with another enterprise; or
- where a joint venture occurs between two or more independent enterprises.

Internal reorganisations are not notifiable, provided they do not amount to a change in control. Scenarios of when control occurs are given in the Competition Act as:

- beneficially owning more than half of the issued share capital of the enterprise;
- being entitled to the majority of the votes at a general meeting or having the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
- having the power to appoint or to veto the appointment of a majority of the directors of the enterprise;
- being the holding company of a subsidiary;
- having the ability to materially influence the policy of the enterprise; and
- having the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust.

Foreign to Foreign mergers with a local nexus are also captured. A local nexus is established where locally established presence is pertinent, either direct or indirectly. It is largely based on an 'effects doctrine' as presented in section 7(1) and (2) of the Act. Significant import sales would be sufficient to meet the test.

3 | What types of joint ventures are caught?

Not all joint ventures are subject to merger control. The CCPC distinguishes between 'full function' joint ventures and joint ventures that are 'auxiliary' to the activities of their parent enterprises. A full function joint ventures, whose assets or turnover value is above the notification threshold, must be notified to the CCPC as a merger. By definition, such a joint venture performs on a lasting basis all functions of an autonomous economic entity, competing with other enterprises in a relevant market, and has sufficient resources and staff to operate independently on the relevant market.

Although full-function joint ventures would generally conduct little business with the parent enterprises, there may be situations in which the business with the parent enterprise's networks or outlets to conduct its sales. A full function joint venture may also rely entirely on an initial start-up period on sales to its parent enterprises or purchases from them before it can become established independently on the market. The length of the start-up period depends on the characteristics of the market concerned. Auxiliary joint ventures fulfil a specific purpose for their parent enterprises, for example in sales, production or research and development (R&D).

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Yes. Control is defined in section 24(3) the Act, which defines control as the following scenarios:

1. where a person beneficially owns more than one half of the issued share capital of the enterprise;
2. where a person is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
3. where a person can appoint or to veto the appointment of a majority of the directors of the enterprise;
4. where a holding company and the enterprise is a subsidiary of that company;
5. in the case of an enterprise that is a trust, where a person can control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
6. where a person can materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in (1) to (4); or
7. where a person can veto strategic decisions of the enterprise, such as the appointment of directors and other strategic decisions that may affect the operations of the enterprise.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Under the Act, a merger is notifiable to the CCPC if either the combined Zambian turnover or gross value of Zambian assets, whichever is higher, of the acquirer and the target in the relevant markets where the target is active exceed 50 million fee units, namely 15 million Zambian kwacha in the last financial year. In determining whether a merger is notifiable, the relevant markets within which the parties operate is not taken into consideration.

There are circumstances, however, in which transactions falling below the above thresholds may be investigated. The CCPC may, where it has reasonable grounds to believe that a merger falls below the prescribed thresholds, review the merger if the following factors exist:

- the merger is likely to create a position of dominance in a localised product or geographical market;
- the merger is likely to contribute to the creation of a dominant position through a series of acquisitions that are not individually subject to prior notification;
- the merger may substantially prevent or lessen competition;
- the merger is concluded outside Zambia and has consequences in Zambia that require further consideration; or
- as a result of the merger there are, or are likely to be, competition and public interest factors that must be considered.

Further, the turnover of joint venture parents is included in determination of a filing requirement in Zambia. Where the joint venture parents are not present in Zambia, the turnover of the joint venture is attributed to the contributions the joint venture parents are making to the joint venture.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is only mandatory when the notification threshold is met. There are no exceptions available to avoid filing if the proposed merger meets the threshold. The merger regime is supervisory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

If the target has no local turnover, no local assets and no corporate presence in Zambia, a filing would not be required and therefore notification is not required.

However, the enterprise in Zambia that is controlled by a foreign enterprise as a subsidiary will be subject to notification and review where the prescribed threshold is met by the local subsidiary. In that case, the turnover or assets that will be assessed will be those of the target present, that is, duly registered in accordance with the laws of Zambia.

If the control of a Zambian enterprise comes about purely as a result of a merger involving enterprises wholly domiciled outside Zambia, the CCPC will nonetheless assess the merger if it has a local nexus, namely a local connection. The CCPC will only assert jurisdiction over those transactions if the foreign enterprise has a local nexus of sufficient materiality, such as having subsidiaries in Zambia or having made 10 per cent of its total sales in Zambia over the last three years.

Having a subsidiary domiciled in Zambia is sufficient to establish a local nexus. The local nexus consideration is fundamental in assessing whether foreign to foreign mergers are notifiable in Zambia. The CCPC will assert jurisdiction if the threshold for merger notification is met.

A local nexus may arise where a foreign company generates a turnover in Zambia through export sales into the Zambian market. In the case of export sales into Zambia, a transaction will be considered to have an appropriate local nexus if the export sales have been at least 10 per cent of the target's total sales for the last preceding three years. The sales of the foreign enterprise should be at least 10 per cent of its sales in each year of the last preceding years or the sales must average 10 per cent.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are none.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

All notifications must be filed prior to the merger being implemented. There are no deadlines prescribed by law.

10 Which parties are responsible for filing and are filing fees required?

Generally, there is no legal obligation as to which party files in the notification. Either the acquiring firm or the target firm can make a filing or a joint filing can be made in terms of the Commission Form 1. The minimum consideration is that information on both parties is provided.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period of assessment of mergers is 90 days.

The Competition and Consumer Protection Commission (the CCPC) completes the assessment of a notification and issues its determination on the case within 90 calendar days of the application for authorisation of the proposed merger. The period can be extended for 30 days and the CCPC gives the parties notice of the extension at least 14 days prior to the lapse of the 90 day assessment period. This extension will be equivalent to the time period the information was delayed (this amounts to 'stopping the clock' for this period).

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Implementation of a merger is an offence under the Competition and Consumer Protection Act No 24 of 2010 (the Act). Further, the merging parties can be punished by an administrative fine not exceeding 10 per cent of the annual turnover of the merging parties.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, as long as they have a local nexus and are notifiable in Zambia. Puma Energy was fined 50 billion kwacha, being 2 per cent of its annual turnover based on its latest audited accounts for breach of merger regulations.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign to foreign merger can fall under Zambian merger controls if:
- they involve an economic activity that has an effect in Zambia; or
- they have consequences in Zambia that require further consideration or a material bearing on the Zambian market, such as the existence of subsidiaries in Zambia or having made 10 per cent of sales in Zambia in the last three years.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

Some merger control rules apply.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The documentation required for the CCPC to commence the formal review process is the prescribed in Form 1 as well as a Supplementary Information Request form, which are fairly detailed.

Form 1 specifies the following documents to accompany the application:
- two copies of the latest annual report and audited accounts (including the balance sheet);
- a copy of the agreement or other documents relating to the transaction;
- a press release or other shareholders, board or management statement on the transaction;
- other market or industry study reports that support the transaction; and
- strategic plans or minutes of the board on the transaction.

Notwithstanding the above, supplementary information requests may be done prior to assessment and during assessment if needed. Further, applicants for merger approval may have pre-notification meetings with the CCPC to inter alia, determine the information actually required by the CCPC and may result in a significant reduction in the information required to be submitted. The CCPC may, at any time, revoke an approved merger if a party to the merger submitted materially incorrect or misleading information in support of the merger.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The merger approval process is a two-step process. The CCPC through the Technical Committee (TC) of the board of the CCPC issues interim authorisations while final approval is granted by the full board of the CCPC. Where interim authorisation has been granted, the parties are allowed to proceed with the transaction as though final authorisation had been granted.

An interim decision is the basis on which an interim authorisation can be made. Interim authorisation is given by the TC of the board, with reasons as to why the interim authorisation has been given, pending final authorisation from the board. In short, the interim authorisation is embedded in an interim decision. The interim decision might also contain a rejection. It is called interim because it is given pending the final determination of the merger review by the board.

The two-phase investigation process applies to all merger cases. The CCPC begins its investigation immediately if a complete notification has been submitted. The merger notification is presented to the technical committee of the board for interim authorisation and, to the final board for final authorisation.

The CCPC grants interim authorisation where it is concluded at the first phase that a merger is less than likely to harm competition and that no further evidence is likely to be uncovered to revise this finding.

The interim authorisation is granted after the TC commissioners have considered the transaction after making a preliminary market assessment based on the information provided by the parties making the application as well as information that was sourced from third parties.

The assessment is aimed at properly examining whether the proposed transaction would have the effect of substantially lessening competition in the relevant market or become detrimental to public interest in the economy of Zambia. Local clearance must be obtained before a merger can be implemented. A merger that meets the prescribed threshold under the law and is implemented without the CCPCs authorisation is void.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The statutory timetable for clearance is 90 days. The process can be speeded up if all the correct documentation required for assessment is provided by the parties to the merger.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test against which a merger will be tested and assessed is whether the merger is likely to reduce competition in a market within Zambia. The following factors are considered:
- calculating the market shares and market concentration;
- benefits to consumers;
- barriers to entry and market entry;
- availability of substitutes;
- removal of vigorous competitors; and
- the extent of import competition.

The CCPC carries out a competition assessment, market assessment and public interest assessment.

20 | Is there a special substantive test for joint ventures?

The following factors are considered:
- calculating the market shares and market concentration;
- benefits to consumers;
- barriers to entry and market entry;
- availability of substitutes;
- removal of vigorous competitors; and
- the extent of import competition.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In the investigation and assessment of potential or likely violations of the competition provisions of the Competition and Consumer Protection Act No. 24 of 2010 (the Act), the Competition and Consumer Protection

Commission (the CCPC) takes a multiple assessment approach, that is, it carries out various tests to ascertain whether the alleged violations have or are likely to result in any negative effects on the market, to the consumer, fair trade or the economy in general:

- the substantial lessening of competition or 'effect' test: the CCPC shall, in considering a proposed merger, assess whether the merger is likely to prevent or substantially lessen competition and take into account the likely and actual factors that affect competition in a defined market in Zambia;
- the dominance test: whether the transaction, through abuse or acquisition of a dominant position of market power, would or is likely to limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effect on trade or the economy in general;
- the public interest test;
- the abuse of dominant position test; and
- the efficiency test.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The CCPC will consider public interest issues in assessments of mergers that result in a significant benefit to the public, a rich transfer of skill and knowledge to locals living and working in the locality of a proposed merger and the overall positive economic benefits a merger promises to provide.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The CCPC always takes into account the economic benefits of a proposed merger. The improvements to the relevant industry in which a merger is expected to contribute will influence the assessment outcome of a proposed merger. The growth of the energy industry saw the approval of the BP and Dana Oil Merger in the late 1990s in Zambia.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition and Consumer Protection Commission (the CCPC) has the power to suspend revoke a merger approval if it has cause to believe that that the merger approval was obtained fraudulently or tainted with deceit by withholding information.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The CCPC has the power to issue directives that it deems fit to be imposed on a merger for failure to comply with the regulations of the Competition and Consumer Protection Act No. 24 of 2010 (the Act).

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The CCPC will always indicate the time period within which a remedy or directive given is to be complied with or adhered to in order to encourage compliance within a measurable amount of time. Some of the basic conditions that are commonly issued are to comply suspend all implementation of a merger until clearance is issued by the CCPC.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CCPC has recorded a number of foreign-to foreign mergers remedies in the recent past as long as the mergers were considered to have an effect of lessening competition in Zambia in a given industry.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision may cover ancillary restrictions in circumstances where an exemption or authorisation would be required under the Act.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The review process is open to the customers and competitors. The CCPC at times requests members of the public to give submissions in relation to the merger.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The process of assessment of the merger by the CCPC is private until a decision of the board is rendered. The decisions rendered and appeal judgments determined by the CCPC Tribunal are uploaded on the CCPC website and publicised in executive summary style statements.

To protect commercial information, confidential information is redacted for the reports, decisions and judgments of the CCPC. For any confidential information given during merger notification, the parties can declare the information as confidential and give reasons.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Yes. The CCPC cooperates with the Southern Africa Development Committee (SADC) and the Common Market for Eastern and Southern Africa (COMESA) and has a loose alliance with the International Competition Network (ICN).

Further, section 65 of the Competition and Consumer Protection Act No. 24 of 2010 allows a foreign authority to approach the CCPC to inform them that a merger operating within the boarders of Zambia is deemed as having negative effects on the competition of an industry in another country. The CCPC may cooperate with such foreign counterpart to broker a solution.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The Competition and Consumer Protection Act No. 24 of 2010 provides for an appeal process under section 60 of the CCPC Act. The Tribunal hears an appeal that is lodged within 30 days of the Board rendering its decision.

There has been no judicial review cases of decisions rendered by the Competition and Consumer Protection Commission.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Thirty days for an appeal to the Competition and Consumer Protection Tribunal and if judicial review is applicable it must be made within 90 days.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In terms of the highest fine or sanction imposed by the Competition and Consumer Protection Commission (the CCPC) to date, the CCPC gave conditional approval to BP Africa Limited to acquire Castrol Oil in a merger transaction in August 2001. The parties did not comply with the conditions that were set by the CCPC and the CCPC proceeded to impose a fine of 2 per cent of the annual turnover on Puma Energy Zambia Limited, which was a subsidiary of BP Africa Limited. The CCPC also fined Dana Oil, which had entered into a distribution agreement with BP Africa for the distribution of Castrol branded products marketed or made available by BP Africa within Zambia. The fine that was imposed on Dana Oil was 0.1 per cent of its annual turnover so that it could willingly abide by the CCPC's conditions. The fines were imposed so as to act as deterrence to BP Africa Limited and Dana Oil for non-compliance with the CCPC's conditions. The penalty was also meant to send a strong signal to various market players not to engage in similar conduct.

Reform proposals

35 | Are there current proposals to change the legislation?

None that have been publicised yet but there are invitations to amend the legislation.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There were none.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Albania	
Voluntary or mandatory system	Mandatory system: the filing of a notification with the Albanian Competition Authority is mandatory in cases where the applicable turnover thresholds are met.
Notification trigger/ filing deadline	Concentrations have to be notified within 30 days from the date of entering into the merger agreement or the agreement pursuant to which a controlling interest is acquired, or from the date of publication of the public offer to purchase or exchange shares.
Clearance deadlines (Stage 1/Stage 2)	A preliminary proceeding (Phase I) applies where a merger is unlikely to lead to the creation or strengthening of a dominant position in the relevant market. The Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. Since June 2016, a fast-track proceeding is available. An in-depth (Phase II) proceeding applies where the transaction gives rise to concerns regarding a dominant position being created or reinforced. The Authority must investigate the case and issue a decision within three months from the start of such Phase II proceeding (which can be extended by up to one month). If within these time limits, the Authority does not issue a decision, the concentration is deemed to be approved.
Substantive test for clearance	The Authority assesses whether the concentration may lead to a substantial lessening of competition in the market or a part thereof, especially by the creation or strengthening of a dominant position on the relevant market.
Penalties	If the undertakings that are required to notify the merger fail to duly file within the set time limits (late filing), the Authority may impose fines of up to 1 per cent of their annual turnover in the last completed business year. If the undertakings concerned close the transaction prior to clearance, the Authority may impose fines amounting to up to 10 per cent of each participating undertaking's previous annual turnover.
Remarks	Although the Albanian merger control regime is still a rather young regime, it has experienced a clear increase in activities by the Authority in enforcing merger control law (and competition law in general).

Australia	
Voluntary or mandatory system	Australia's merger filing system is voluntary.
Notification trigger/ filing deadline	As Australian merger filings are voluntary, there are no specific notification triggers or filing deadlines. However, the Australian Competition and Consumer Commission's Merger Guidelines indicate that it expects notification where the products of the merger parties are either substitutes or complements, and the merged firm will have a post-merger market share greater than 20 per cent in the relevant market (but this is not a safe harbour).
Clearance deadlines (Stage 1/Stage 2)	For informal merger reviews, there are no statutory deadlines. Many mergers are 'pre-assessed' expeditiously, often within two to four weeks. If the Australian Competition and Consumer Commission decides that a public review is necessary to assess a merger, the review will typically take a further six to 12 weeks. Complex mergers that require a statement of issues are likely to take an additional six to 12 weeks, but this time varies depending on a range of factors. For merger authorisations, there is a statutory deadline of 90 days, which can be extended with the applicant's consent. If the Australian Competition and Consumer Commission has not made a decision by the deadline, it is taken to have declined the application.
Substantive test for clearance	Informal merger reviews are assessed against the standard in section 50 of the Competition and Consumer Act 2010: whether the acquisition will have the effect or likely effect of substantially lessening competition in a market. Merger authorisations will be granted if the acquisition either does not substantially lessen competition in a market; or if the likely public benefit from the acquisition outweighs the likely public detriment, including any lessening of competition.

Penalties	The Australian Competition and Consumer Commission has standing to seek injunctions to prevent potential mergers it considers are likely to result in a substantial lessening of competition.
	The Australian Competition and Consumer Commission may also seek other remedies at the Federal Court following an acquisition including damages, divestiture, an order declaring the transaction void, and pecuniary penalties to a maximum of:
	• for individuals, A$500,000; and
	• for corporations, the greater of:
	  • A$10 million;
	  • three times the value of the benefit obtained directly or indirectly by a body corporate that is reasonably attributable to the contravening conduct; or
	  • where the value of that benefit cannot be readily calculated, 10 per cent of the annual Australian turnover of the body corporate and its related bodies corporate.

Remarks	Although merger clearance in Australia is voluntary, the law is vigorously enforced by the ACCC. Where parties choose not to make a voluntary merger notification to the ACCC, it is not uncommon for the ACCC to contact the parties seeking information to enable the ACCC to determine if the transaction is likely to raise competition concerns.

Austria	
Voluntary or mandatory system	Mandatory system, based on: • turnover thresholds; and • specific legal definitions for transactions constituting notifiable concentrations.
Notification trigger/ filing deadline	A merger must be notified prior to its completion if, in the last business year: • the combined worldwide turnover of all undertakings concerned exceeded €300 million; • the combined Austrian turnover of all undertakings concerned exceeded €30 million; and • the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million. Even where these thresholds are met, mergers are exempt from the notification obligation where the domestic turnover of only one of the undertakings concerned exceeded €5 million and where the worldwide combined turnover of the other undertakings concerned did not exceed €30 million. Note: a merger must be notified in any case if: the combined worldwide turnover of all undertakings concerned exceeded €300 million, the combined Austrian turnover of all undertakings concerned exceeded €15 million, the value of consideration exceeds €200 million and the target is active in Austria to a significant extent. It is possible to file a pre-merger notification even prior to the signing of the relevant agreement, provided the parties have, in principle, agreed on the structure and timing of the transaction and intend to enter into this agreement in the foreseeable future. There is no filing deadline but mergers subject to merger control must not be completed before clearance.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: four weeks from filing (six weeks in the case of extension upon request by the notifying party; legal amendment of 2013). Stage 2: five months from receipt by the Cartel Court of a request of Stage 2 proceedings (six months in the case of extension upon request by the notifying party; legal amendment of 2013).
Substantive test for clearance	Whether the merger will create or strengthen a dominant market position.
Penalties	The Cartel Court can impose on each party that has intentionally or negligently violated the standstill obligation a fine in the amount of up to 10 per cent of the worldwide turnover achieved by that party in the last business year.
Remarks	Acquisitions of 25 per cent or more of the shares of a company are subject to merger control even if they do not confer sole or joint control on the acquirer. Special rules for media mergers, both as regards the calculation of turnover and the substantive test for clearance. Special rules also for calculation of turnover of banks and insurance companies. Bank exemption – temporary acquisitions by financial institutions are exempted from merger control subject to certain conditions. Due to the two-level authority system (with the statutory parties having a right to appeal against court decisions), long stop dates need to be carefully considered for (potentially) problematic cases.

Belgium	
Voluntary or mandatory system	Mandatory system. The form of notification is the special form similar to Form CO and made in French or Dutch.
Notification trigger/ filing deadline	Combined Belgian turnover over €100 million and at least two of the parties have an individual Belgian turnover of at least €40 million. A concentration must be notified and cleared prior to its implementation.
Clearance deadlines (Stage 1/Stage 2)	Stage 1 decisions must be adopted within 40 working days. Stage 2 decisions must be made within an additional 60 working days. If the parties offer commitments in order to meet competition concerns, the first phase can be extended by 15 working days and the second phase by 20 working days.
Substantive test for clearance	Whether a concentration would 'significantly impede effective competition' on the Belgian market or on a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.
Penalties	A fine of up to 1 per cent of the total turnover in the preceding financial year where the notifying parties obstruct merger control investigations (eg, by providing incorrect or incomplete information). Where parties implement the concentration without clearance, a fine of up 10 per cent of the total turnover in the preceding financial year can be imposed.

Bosnia and Herzegovina	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	Signing of the respective agreement, the announcement of a public offer of shares or an acquisition of control – 15 days.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 30 days from the issuance of the certificate of completeness for (1) the approval of the concentration or (2) initiation of Stage 2. Stage 2: 3 months from the initiation of Stage 2, possible extension by an additional 3 months.
Substantive test for clearance	Concentration resulting in the creation or strengthening of a dominant position that may restrict competition in the market.
Penalties	Failure to notify within due time: • a fine of up to 1 per cent of the total turnover of the undertakings concerned, realised in the business year preceding the concentration; and • a fine of between 5,000 and 15,000 Bosnia and Herzegovina convertible marks for the responsible individuals. Closing a concentration without obtaining prior clearance: • a fine of up to 10 per cent of the parties' total turnover in the year preceding the closing; and • a fine of between 15,000 and 50,000 Bosnia and Herzegovina convertible marks for the responsible individuals.

Brazil	
Voluntary or mandatory system	Mandatory system for mergers, acquisitions, consolidations and joint ventures that produce an effect in Brazil and meet the double turnover legal threshold.
Notification trigger/ filing deadline	There is no deadline for filing in Brazil, but transactions cannot be closed or implemented before clearance. The notification with CADE should be made preferably after the signing of the binding document.
Clearance deadlines (Stage 1/Stage 2)	Simple and ordinary cases that are not challenged by the General Superintendence do not go to CADE's Tribunal and are approved at the General Superintendence level. Complex cases that are challenged by the General Superintendence are first reviewed by the General Superintendence and then sent to CADE's Tribunal for analysis and decision. Clearance time has been in an average of 15 days for simple cases, and can take six or more months for complex ones (up to 240 plus possible 60- or 90-day extensions). In complex cases, pre-filing meetings with the authority are not only welcome but required.
Substantive test for clearance	The law provides for both dominance and substantial lessening of competition tests, though the former has implicitly been more used by CADE. CADE can approve transactions, despite any anticompetitive effects, if the merger achieves the following results: • an increase in the productivity or competitiveness; • an increase in the quality of goods and services; and • contribution to efficiency and technological and economic development. Additionally, a relevant part of these results must be shared with the consumers.
Penalties	Pecuniary penalty that may range from 60,000 to 60 million reais: • the act being null and void; or • administrative proceeding if the deal is considered harmful to competition.
Remarks	CADE has stated in the decision of the *Cisco/Technicolor* merger review (Merger Review No. 08700.009018/2015-86) that CADE will not accept carveouts of the Brazilian assets as a means to avoid gun jumping. We welcome the publication of CADE's Resolution No. 16, which establishes that the analysis of fast-track cases will not surpass 30 days, and Resolution No. 17 sets forth rules on the 'associative agreements' and the memorandum of the understanding signed between CADE and the Central Bank deals with each agency's jurisdiction in merger control cases involving the banking sector. In July 2019, CADE's Tribunal approved Resolution No. 24 of 2019, which replaces Resolution No. 13 and establishes procedural aspects for gun-jumping investigations and the notification of transactions the submission of which is not mandatory. It also sets forth the criteria for the calculation of gun-jumping fines based on CADE's practices, including aggravating factors (eg, timing, severity of conduct and intent). On the same date, CADE approved Resolution No. 25 of 2019, which provides for the formal aspects and standards for the Commissioners of CADE's Tribunal to write and present their votes on cases before they are read during CADE's hearing sessions.

Bulgaria	
Voluntary or mandatory system	Mandatory and voluntary.
Notification trigger/ filing deadline	The entry into an agreement, the publication of a bid or the announcement of acquisition of control as a result of trading in exchange traded securities, but before the undertaking of actual actions to accomplish the concentration. No filing deadline.
Clearance deadlines (Stage 1/Stage 2)	Phase I: three + 25 working days (possibility to extend by up to 20 working days). Phase II: four months (possibility to extend by up to 40 working days). Information requests stop the clock. The deadlines are instructive.
Substantive test for clearance	The creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded. A clearance is possible despite the creation or strengthening of dominance, where significant efficiencies resulting from the transaction outweigh any potential negative effects.
Penalties	Up to 10 per cent of the annual turnover of the infringer.

Canada	
Voluntary or mandatory system	Notification is mandatory for transactions that exceed certain thresholds. However, the Competition Act's substantive jurisdiction extends to mergers of any size that have an effect on the Canadian marketplace, whether involving domestic parties or purely foreign-to-foreign mergers.
Notification trigger/ filing deadline	No filing deadline. Where advance notification is required, parties may file at any time after reaching an agreement or letter of intent. However, transactions may not be completed during mandatory no-close periods.
Clearance deadlines (Stage 1/Stage 2)	A mandatory 30-day no-close period is triggered by submission of a notification. If the Commissioner issues a supplementary information request, submission of the required responses will trigger a further no-close period that expires 30 days after both parties have responded.
Substantive test for clearance	Whether the merger is likely to prevent or lessen competition substantially in a relevant market.
Penalties	The criminal penalty for not filing a mandatory notification is a fine of up to C$50,000, as well as the possibility of an additional penalty of up to C$10,000 per day for closing a transaction prior to the expiry of a waiting period. Remedies for an anticompetitive merger include prohibition of a proposed merger, dissolution or divestiture.
Remarks	The acquisition of control of a Canadian entity by a non-Canadian will also require notification and possibly review and approval under the Investment Canada Act.

China	
Voluntary or mandatory system	Notification is mandatory.
Notification trigger/ filing deadline	Notification is required for any transaction that constitutes a 'concentration of undertakings' if one of the following notification triggers is met: • The total worldwide turnover of all parties to the transaction exceeded 10 billion yuan and the PRC turnover of each of at least two parties to the transaction exceeded 400 million yuan in the preceding financial year. • The combined PRC turnover of all parties to the transaction exceeded 2 billion yuan and the PRC turnover of each of at least two parties to the transaction exceeded 400 million yuan in the preceding financial year. There is no filing deadline.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 30 days from the notification being declared complete by SAMR. Stage 2: 90 days from the date of SAMR's decision to initiate further review of the transaction with the possibility of extension by another 60 days.
Substantive test for clearance	Whether the concentration has or is likely to have 'the effect of eliminating or restricting competition'.
Penalties	SAMR may order the undertakings to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and adopt other necessary measures to restore the market situation to that before the implementation of the concentration. SAMR may also impose a fine of a maximum of 500,000 yuan.
Remarks	SAMR may order the undertakings to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and adopt other necessary measures to restore the market situation to that before the implementation of the concentration. SAMR may also impose a fine of a maximum of 500,000 yuan.

Colombia	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	Merger control is triggered whenever the transaction entails the acquisition of competitive control between parties engaged in the same economic activities or value chain, and exceed an economic threshold of approximately US$16 million in operating income or total assets. No specific deadlines for filing are established in the law. However, the parties must obtain clearance before closing the transaction.
Clearance deadlines (Stage 1/Stage 2)	For a notification proceeding (ie, when the parties market shares are below 20 per cent in all the relevant market), SIC has 10 business days to issue an acknowledgement of receipt. For a prior approval proceeding, once the parties have submitted all the required information, SIC has (1) 30 business days to decide the proceeding in Phase I; (2) three months from the time all the information for Phase II has been provided; or exceptionally (3) SIC may reset the three-month period for one time only through a second Phase II information request.
Substantive test for clearance	SIC assesses whether a transaction produces an 'undue restriction on competition'. In this analysis, the following aspects are reviewed: • Relevant market definition (product and geographic market). • Quantitative assessment, including market shares, concentration, asymmetry and dominance indexes. • Qualitative assessment, including barriers to entry and buyer power. • Potential anticompetitive effects.
Penalties	For gun jumping, SIC could impose the following sanctions: • Against the parties, fines up to 100,000 monthly legal wages (approximately US$27 million for 2020) or 150 per cent of the revenue obtained from the infraction, whichever higher. • Against individuals, fines up to 2,000 monthly minimum legal wages (approximately US$600,000 for 2020). • Additionally, SIC may order the reversion of the transaction, if there is evidence that it generated an undue restriction on competition.
Remarks	In Colombia, all of the parties to the transaction (including the seller) may be fined if they fail to notify the transaction before SIC. There are special provisions for cases involving financial entities and aeronautical matters, which are covered by the respective regulatory authorities; each of those sectors is under special surveillance and transactions have to meet sector-specific conditions.

Costa Rica	
Voluntary or mandatory system	Mandatory
Notification trigger/ filing deadline	Five days after closing.
Clearance deadlines (Stage 1/Stage 2)	Thirty days after the information is complete (special complexity cases may be extended up to 60 days).
Substantive test for clearance	Anticompetitive effects analysis. Analysis of potential anticompetitive effects of the transaction. If such anticompetitive effects exist, the Commission analyses the potential efficiencies generated by the transaction and determines whether they offset the anticompetitive effects. Market dominance, coordinated effects and vertical foreclosure are among the issues considered.
Penalties	Up to approximately US$200,000.

Croatia	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	The notification has to be submitted to the CCA prior to the implementation of the concentration and following the conclusion of the merger agreement on the basis of which control or decisive influence will be acquired or following the publication of the invitation to tender.
Clearance deadlines (Stage 1/Stage 2)	In Phase I, the CCA has 30 days to clear the concentration. If no decision has been adopted after the expiry of the waiting period, the concentration is deemed to be cleared in Phase I. Should the authority enter into Phase II proceedings, the final decision regarding the concentration must be taken within three months (which may be extended by an additional three months). If no decision is taken prior to the expiry of the waiting period, the concentration is presumed by law to be approved in Phase II.
Substantive test for clearance	The CCA assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.
Penalties	In the case of a breach of the merger control rules, the CCA may impose fines ranging between 1 and 10 per cent of an undertaking's total annual turnover realised in the preceding business year, depending on the type of breach.

Cyprus	
Voluntary or mandatory system	Mandatory system for concentrations of major importance.
Notification trigger/ filing deadline	No filing deadline exists but a concentration cannot partially or entirely be implemented without notification and clearance while the CPC can order the partial or complete dissolution of a concentration that was not notified and was implemented.
Clearance deadlines (Stage 1/Stage 2)	Clearance is notified within one month to the notifying undertakings, as of the date of the notification or the date at which additional information is received by the CPC, of which the period can be extended by 14 days. In the case where a full investigation will be conducted (Phase II), the Service has three months to submit its report to the CPC and the latter has four months from such submission to issue its decision as to the compatibility of the concentration, by which time the parties must also be notified.
Substantive test for clearance	A concentration, which creates or strengthens a dominant position in the affected markets within Cyprus, shall be declared incompatible with the requirements of the competitive market. In reviewing a concentration as to its compatibility with the competitive market, the CPC takes into account the following: • the structure of the affected markets; • the market position of the participants; • the economic power of all the undertakings in the market; • any barriers of entry to the affected market; • the interests of the intermediate and end consumers of the products and services; and • the alternative sources of supply of the products and services that are traded in the affected markets and of their substitutes.
Penalties	Partially or completely putting into effect a concentration without prior approval carries a fine of 10 per cent of the total turnover of the notifying undertakings in the financial year immediately preceding the concentration, in addition to a fine of up to €8,000 for each day that the infringement persists. Implementing a concentration without conforming to a condition imposed by the CPC carries a fine of 10 per cent of the total turnover of the notifying undertakings in the financial year immediately preceding the concentration, in addition to a fine of up to €8,000 for each day that the infringement persists. A fine of up to €50,000 may be imposed for a failure to provide requested information or clarifications, or for providing misleading or inaccurate information.

Czech Republic	
Voluntary or mandatory system	Mandatory system.
Notification trigger/ filing deadline	There is no deadline for filing the notification, but the concentration may not be implemented unless and until it has been approved by the Office. The notifying party may file the notification as soon as the legally binding transaction documents have been signed. The notification may even be submitted prior to the signing of the relevant transaction documents, provided the parties have, in principle, agreed on the structure and timing of the concentration.
Clearance deadlines (Stage 1/Stage 2)	Phase I: 30 days (in case of a simplified procedure, 20 days). Phase II: up to five months. Where remedies are proposed, extension of the above deadlines by 15 days.
Substantive test for clearance	The Office assesses the notified concentrations against a test that basically corresponds to the 'substantial impediment to effective competition' test under the EU Merger Regulation. The Office shall prohibit implementation of concentrations that would significantly impede competition on the relevant market. A significant impediment to competition can be caused particularly by the creation or threat of a dominant position. The Act presumes that a concentration will not have as its result the significant impediment of competition where the aggregate market share of the parties to the concentration on the relevant market does not exceed 25 per cent.
Penalties	Fine up to 10 million Czech koruna or 10 per cent of the net turnover. Measures necessary to restore effective competition on the relevant market, particularly demerger obligations.

Denmark	
Voluntary or mandatory system	In Denmark, there is a mandatory system, if the mergers meet the thresholds.
Notification trigger/ filing deadline	Concentrations falling within the thresholds must be notified to the DCCA after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.
Clearance deadlines (Stage 1/Stage 2)	The time frames (Phases I and II) are inspired by article 10(1) and (3) of the EU Merger Regulation. The DCCA may approve a concentration before the expiry of the initial investigation (Phase I), which is 25 days from the receipt of the notification. The 25 days can in some circumstances be extended to 35 days. The DCCA cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if there are serious doubts regarding the concentration's compatibility with the Competition Act. The Phase II investigation lasts for 90 days but can in some circumstances be extended to 110 days.
Substantive test for clearance	The DCCA will assess whether the concentration significantly impedes effective competition (SIEC). If it does not, the merger will be cleared.
Penalties	For failing to notify a merger to the DCCA, the undertakings can receive fines. The merging undertakings can also receive fines, if they implement a merger prior to the approval.
Remarks	Pre-notification consultation with the DCCA are important. A lot of the mergers are approved following a simplified procedure.

Ecuador	
Voluntary or mandatory system	The Antitrust Law includes mandatory economic concentration notifications when established thresholds are exceeded, as well as informative notifications.
Notification trigger/ filing deadline	The Antitrust Law requires that economic concentration notifications be filed within a period of eight calendar days from the date of agreement execution. • 30 per cent of the market • 78.8 per cent of prior year's turnover
Clearance deadlines (Stage 1/Stage 2)	Sixty working days from the date the SCPM notifies that it has received the submitted notification. The SCPM may suspend the term for up to 60 calendar days. Furthermore, the initial term of 60 working days may be extended for up to 60 working days, as an exception. In total, up to six months.
Substantive test for clearance	• Structure of the defined relevant market. • Concentration indexes. • Barriers to entry. • Efficiencies analyses. • Supply and demand structure. • Benefits for or detriments to the consumer that the concentration and competitive pressures could cause. • General interest.
Penalties	• 8 per cent of the breaching economic operator's total turnover in the fiscal year prior to the year the fine is imposed for having filed an economic concentration notification beyond the legally defined time period. • 10 per cent, for executing an economic concentration operation when notification is mandatory, before the operation is notified to or authorised by the SCPM.

Egypt	
Voluntary or mandatory system	Mandatory post-closing obligation. No exemption as long as conditions are met. Purely informative, no approval or clearance is sought or granted.
Notification trigger/ filing deadline	Thirty calendar days from closing.
Clearance deadlines (Stage 1/Stage 2)	Not applicable.
Substantive test for clearance	Not applicable.
Penalties	Criminal fine up to 500,000 Egyptian pounds for failure to notify and up to 1 million Egyptian pounds for intentionally providing false information.

European Union	
Voluntary or mandatory system	European Merger Control Regulation. Mandatory system. Form of notification: special form. Form CO. Detailed information on the parties (turnover, business sectors, groups), the merger proposal, the affected markets, competitors and customers in any of the EU official languages. Short Form CO can be used in certain circumstances for mergers raising no issues and Form RS is applicable for pre-notification referral requests by the notifying parties.
Notification trigger/ filing deadline	• Combined worldwide turnover over €5 billion and EU-wide turnover of at least two parties over €250 million unless each of the parties achieves more than two-thirds of the EU turnover in one and the same state; • combined worldwide turnover over €2.5 billion; • EU-wide turnover of at least two of the undertakings over €100 million each; • combined turnover in each of at least three member states over €100 million; or • a turnover in each of those three member states by each of at least two of the undertakings over €25 million unless each of the parties achieves more than two-thirds of the EU turnover in one and the same state. Filing must be made prior to implementation. The filing can be made prior to the conclusion of a binding agreement so long as the parties intend in good faith to enter a binding agreement.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 25 working days from notification or 35 working days from notification where the parties have submitted commitments intended to form the basis of a clearance decision. Stage 2: 90 working days, plus 15 working days where commitments have been offered after the 55th day. Possibility of 20-working-day extension. Suspension effects: suspension of transaction until final decision with limited exceptions for public bids.
Substantive test for clearance	Whether a merger will significantly impede effective competition in the EEA or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. In addition, the cooperative aspects of full-function joint ventures are appraised in accordance with the criteria of article 101(1) and (3) TFEU. Broadly, economic benefits must outweigh the detriment to competition.
Penalties	Failure to file or implementation before clearance: fines of up to 10 per cent of parties' turnover. Failure to provide information or supply of incorrect, incomplete, misleading information: fines of up to 1 per cent of parties' turnover (in certain circumstances). Failure to comply with a condition or obligation imposed by decision: fines of up to 10 per cent of parties' turnover. Possible revocation of clearance decision (for breach of obligation) and order for dissolution or other measures (for breach of condition). Implementation contrary to a prohibition Commission decision: fines of up to 10 per cent of parties' turnover and possible order for dissolution of the merger or other measures. Periodic penalties of up to 5 per cent of average daily aggregate turnover payable for each day that certain infringements persist.
Remarks	Special rules for the calculation of thresholds for banks and insurance companies.

Faroe Islands	
Voluntary or mandatory system	It is a mandatory system, where mergers must be filed, if the thresholds are met.
Notification trigger/ filing deadline	The notification must be made no later than one week after the conclusion of the agreement, the merger is publicly notified or control is acquired.
Clearance deadlines (Stage 1/Stage 2)	Within 30 working days of the Faroese authorities' receipt of a complete filing submission, the Competition Council will notify the participating undertakings if further investigations are required, or alternatively whether the merger can be approved. If the authorities have not given this notification within the 30-day time limit, the authorities can no longer annul the merger. The Competition Council must make its final decision within 90 working days of the above-mentioned notification being sent to the participating undertakings. This deadline can be extended by up to 20 working days when commitments are proposed, and again by up to 20 working days with the parties' consent.
Substantive test for clearance	Section 15 of the Faroese Competition Act applies the substantial impediment of effective competition test.
Penalties	Fines can be issued for failure to notify a merger, or if the merger is implemented prior to clearance.

Finland	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	Combined aggregate worldwide turnover of the parties exceeds €350 million and the aggregate turnover in Finland of at least two of the parties exceeds €20 million. Filing must be made prior to implementation. The filing can be made as soon as the parties demonstrate with sufficient certainty their intention to conclude a concentration.
Clearance deadlines (Stage 1/Stage 2)	The FCCA must either approve the concentration or initiate an in-depth investigation within 23 working days of the filing of the complete notification (Stage 1). If the FCCA decides to initiate an in-depth investigation, it must within 69 working days (or 115 working days with the permission of the Market Court) of such decision either approve the concentration or request the Market Court to block it (Stage 2).
Substantive test for clearance	Whether the concentration may significantly impede effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.
Penalties	Fines of up to 10 per cent of the total turnover of the relevant undertaking(s) may be imposed. In addition, the Market Court may order the concentration to be dissolved or annulled (eg, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of the joint control).
Remarks	Foreign-to-foreign mergers are caught where the relevant jurisdictional thresholds are met.

France	
Voluntary or mandatory system	Compulsory system. Form of notification: no special form. Similar type of information but less detailed than Form CO. In French.
Notification trigger/ filing deadline	Main thresholds: • combined worldwide turnover over €150 million; • at least two of the undertakings concerned each achieved turnover in France over €50 million; and • the concentration does not have an EU dimension. Thresholds specific to the retail sector: • worldwide combined pre-tax turnover of over €75 million; • at least two of the undertakings concerned each achieved in the retail trade sector in France a turnover exceeding €15 million; and • the concentration does not have an EU dimension. Thresholds specific to the French overseas territories: • worldwide combined pre-tax turnover of over €75 million; • at least two of the undertakings concerned each achieved a pre-tax turnover exceeding €15 million (or lowered to €5 million in the retail trade sector) in at least one (but not necessarily the same) French overseas department or community; and • the concentration does not have an EU dimension. Filing: no time limit for notification; but in any event sufficiently in advance of completion, as French merger control has a suspensive effect.
Clearance deadlines (Stage 1/Stage 2)	First phase: 25 working days for the Authority, plus five working days for the Minister to possibly ask the opening of a second phase; review is automatically extended by 15 working days if remedies are proposed, and it can also be further extended by up to 15 working days if the notifying party requests a 'stop the clock'. The Authority may also stop the clock if it is not provided with relevant information. Second phase: 65 working days for the Authority, plus 25 working days for the Minister to possibly decide the case. Second phase may be extended by up to 20 working days if remedies are proposed/modified after the first 45 days of the second phase, and can also be further extended by up to 20 working days if the notifying party requests a 'stop the clock'. Eventually, it can be extended with no limit of time by the Authority if the notifying party or a third party fails to provide in due time requested pieces of information. In a nutshell: • the first stage will normally last between 25 and 60 working days; and • the second stage will normally last between 90 and 130 working days, and even longer with no time limit in the event of failure to provide information. Suspension effect: suspension until clearance (possibility of a derogation upon request).
Substantive test for clearance	Substantial lessening of competition with particular emphasis on the creation or reinforcement of a dominant position. The authorities also examine whether the operation creates or reinforces purchasing power, placing suppliers in a state of economic dependency.
Penalties	Failure to file or implementation before clearance: for corporate entities, 5 per cent of their turnover in France; for individuals, €1.5 million.
Remarks	Special rules for press and audiovisual sectors, banks and insurance companies. Foreign investments are generally unrestricted but some of them in strategic sectors are subject to declaration or prior authorisation. Foreign-to-foreign mergers are subject to notification if the French relevant turnover thresholds are met.

Germany	
Voluntary or mandatory system	Mandatory system.

Notification trigger/ filing deadline	Notification trigger:
	• the concentration does not have an EU dimension; and
	• combined worldwide turnover of all parties is over €500 million; and
	• either (1):
	  • at least one party has turnover of over €25 million in Germany; and
	  • another party has turnover of over €5 million in Germany;
	• or (2):
	  • one party has turnover of over €25 million in Germany, but neither the target nor any further participating undertaking has a turnover in Germany exceeding €5 million;
	  • the value of consideration for the transaction is over €400 million; and
	  • the target is active in Germany to a significant extent.
	
	No notification is required if thresholds in (1) are met but one party to the merger achieved less than €10 million worldwide turnover (in the case of the target including the seller and its affiliates provided that the seller controls the target and, in the case of the acquirer, including its affiliates).

Clearance deadlines (Stage 1/Stage 2)	Stage 1: one month from notification. Stage 2: four months from notification (extension possible if merging parties consent). Extension by one month, if merging parties submit remedies proposals. Suspension effects: suspension until clearance (possibility of a derogation upon request for important reasons).
Substantive test for clearance	Whether a merger will significantly impede competition, in particular if it will create or strengthen a dominant market position (statutory rebuttable presumptions of dominance) which is not outweighed by improvement of market conditions on other markets (balancing clause).
Penalties	For incomplete, incorrect or late notification and completion before clearance, fines of up to €1 million or, in the case of undertakings, of up to 10 per cent of their total worldwide group turnover in the preceding business year. If the transaction is completed before clearance, it is also regarded as invalid until final clearance is given.
Remarks	Special rules for calculation of thresholds in cases of goods traded only as well as for the publishing and broadcasting sector and for credit and other financial institutions and insurance companies. In addition to merger control proceedings, there are special regulatory procedures for certain strategic sectors, banks and insurance companies. Post-completion notice is required 'without undue delay' after completion of the notified merger.

Greece	
Voluntary or mandatory system	Filing is mandatory, in Greek.
Notification trigger/ filing deadline	Pre-merger filing: combined aggregate worldwide turnover of at least €150 million and aggregate turnover in Greece for each of at least two participating undertakings exceeding €15 million. Filing within 30 calendar days of signing of a binding agreement.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: one month from notification. Stage 2: two additional months. Implementation is prohibited until issuance of the Commission's decision.
Substantive test for clearance	A concentration must not substantially restrict competition in the Greek market, especially by way of creating or reinforcing a dominant position.
Penalties	Pre-merger filing: in case of failure to file, fines ranging from €30,000 up to 10 per cent of the aggregate turnover may be imposed by the Commission. In case of early closing, fines range from €30,000 up to 10 per cent of the aggregate turnover.
Remarks	Special provisions for acquisition of major holdings in companies in traditionally regulated sectors (ie, banking, insurance, media, telecommunications, etc).

Greenland	
Voluntary or mandatory system	It is a mandatory system, where a merger must be filed, if the thresholds are met.
Notification trigger/ filing deadline	A merger must be filed after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.
Clearance deadlines (Stage 1/Stage 2)	The Competition Tribunal must make its decision on the substance within 40 working days (Phase I) from the receipt of a complete notification. It will decide to either approve the concentration or initiate further proceedings. In the latter case, the Competition Tribunal must make a final decision within 90 working days (Phase II) after the expiry of the original 40 working days. These time limits may be extended with up to 20 days if the undertakings propose new or revised commitments at a late stage (ie, fewer than 20 days remaining of the original deadline). The deadline is only extended with as many days required to provide 20 days for the assessment of the new or revised commitments. The deadline can also be extended with up to 20 days on request by the parties or with the parties' consent. Whether the concentration significantly impedes effective competition, in particular as a result of the creation or strengthening of a dominant position. In addition, the cooperative aspects of full-function joint ventures are appraised in accordance with the criteria applying to anticompetitive agreements.
Substantive test for clearance	The substantive test for clearance is to assess whether the concentration significantly impedes effective competition. If it does not, the merger will be cleared.
Penalties	For failing to notify a merger, the undertakings can receive fines. The merging undertakings can also receive fines, if they implement a merger prior to the approval.

Hong Kong	
Voluntary or mandatory system	Voluntary apart from the mandatory requirement under the Takeovers Code, which requires that an offeror of a potential mandatory general offer seeks the prior consent of the CA in relation to the 'change' of a carrier licensee before it triggers an obligation to make a mandatory general offer.
Notification trigger/ filing deadline	There is no financial trigger for notification. There is generally no requirement for pre-notification except in a situation involving a mandatory general offer.
Clearance deadlines (Stage 1/Stage 2)	There is no formal timeline for clearance. The Competition Ordinance only stipulates that the competition authority may only commence an investigation of a merger within 30 days after the day on which the competition authority first became aware, or ought to have become aware, that a merger has taken place; if the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Tribunal for an order within six months of the day on which the merger was completed or the competition authority became aware of the merger (whichever is later).
Substantive test for clearance	The substantive test to be applied is whether the merger has, or is likely to have, the effect of substantially lessening competition in Hong Kong.
Penalties	There are no specified sanctions for not filing, because the merger control regime is voluntary in general. However, the competition authority may apply to the Tribunal for an order to unwind a completed merger or to prohibit a proposed merger, if it has reasonable cause to believe that the merger will likely contravene the Merger Rule. In the case of a mandatory general offer involving the 'change' of a carrier licensee, failure to obtain the CA's prior consent before triggering the mandatory general offer may result in disciplinary action under the Takeovers Code. Possible sanctions include issuance of a public apology, public censure, and requirements on the company involved, licensed representatives and registered institutions not to act or implement the merger or acquisition.
Remarks	The merger control regime at present only applies to transactions where an undertaking that directly or indirectly holds a telecommunications carrier licence is involved. It is anticipated that the regime might be extended to more or all sectors in the future.

Hungary	
Voluntary or mandatory system	Filing is mandatory in the case of mergers that reach the jurisdictional thresholds. Filing is voluntary in the case of mergers that do not reach the jurisdictional thresholds, but may be subject to the GVH's investigation.
Notification trigger/ filing deadline	No deadline for filing, but the merger cannot be implemented without the GVH's permission. Mergers above the statutory threshold must be notified.
Clearance deadlines (Stage 1/Stage 2)	Fast-track review: eight days. Stage 1: 30 days (including fast-track review). Stage 2: four months (including Stage 1).
Substantive test for clearance	The SIEC test is applied.
Penalties	The GVH may block the transaction and impose fines.
Remarks	Sector-specific rules apply to mergers in the media, energy, telecom and financial sectors.

Iceland	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	The CA shall be notified of a merger before it takes effect but after the conclusion of an agreement on the proposed merger, the public announcement of a takeover bid or the acquisition of a controlling interest in an undertaking.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 25 working days. Stage 2: up to 90 working days.
Substantive test for clearance	The substantive test for clearance is whether the merger impedes effective competition by creating or strengthening an individual or collective dominant position or otherwise significantly impeding effective competition.
Penalties	A merger falling within the regime shall not take effect while it is being examined by the CA. Any violation of this can be subject to fines of up to 10 per cent of the total turnover of the preceding business year of any undertaking or association of undertakings involved in the violation.

India	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	A combination would be required to be notified to the CCI, and receive approval from the CCI prior to closing.
Clearance deadlines (Stage 1/Stage 2)	Phase I: 30 working days from receipt of notification excluding 'clock stops' for responding to information requests. This can extend to 45 working days if the CCI reaches out to third parties. Phase II: up to 210 days from receipt of notification. Where modifications are proposed in Phase II, the time may be extended up to an additional 60 working days.
Substantive test for clearance	Combinations that cause, or are likely to cause, an appreciable adverse effect on competition (AAEC) in India are void.
Penalties	The CCI has the power to impose a penalty of up to 1 per cent of the total turnover or value of assets, whichever is higher, of the proposed combination. In addition, in the event the CCI believes the transaction will have or be likely to have an AAEC in India, the transaction will be treated as void, and all actions taken in pursuance of the void transaction shall also be void. In such a case, the CCI also has the power to unwind the transaction, though this has not happened to date.

Ireland	
Voluntary or mandatory system	The Irish merger control regime is a mandatory system and no exceptions exist. The mandatory obligation to notify arises where, for the most recent financial year: • the aggregate turnover in the state of the undertakings involved is not less than €60 million; and • the turnover in the state of each of two or more of the undertakings involved is not less than €10 million. Section 18(3) of the Act provides for voluntary notification of a merger that does not meet the jurisdictional thresholds. The CCPC can request parties to potentially problematic mergers that fall below the relevant financial thresholds to voluntarily notify mergers under section 18(3).
Notification trigger/ filing deadline	The notification must be made prior to the merger or acquisition being put into effect. The notification may be made in the following circumstances: • one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted; • the undertakings involved demonstrate to the CCPC a good faith intention to conclude an agreement or a merger or acquisition is agreed; or • in relation to a scheme of arrangement, a scheme document is posted to shareholders.
Clearance deadlines (Stage 1/Stage 2)	A Phase I clearance determination must be issued by the CCPC within 30 working days of the submission of a full and complete filing by the merging parties (the 'appropriate date'), unless either the CCPC has used its power to 'stop and restart the clock' by issuing a formal request for information, or where the parties and the CCPC negotiate remedies to 'ameliorate the effects of the merger', which extends the Phase I period to 45 working days. A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date, unless the CCPC has used its power to 'stop the clock' by sending a formal request for information, or where the parties and the CCPC negotiate remedies to 'ameliorate the effects of the merger', which extends the Phase II period to 135 working days.
Substantive test for clearance	Section 20(1)(c) of the Act provides that the substantive test for assessment of competition issues is 'whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State' (the SLC test).
Penalties	Under section 18(9) of the Act, wilful and knowing failure to notify a merger or acquisition that is caught by the jurisdictional thresholds is a criminal offence punishable by fines of up to €250,000, plus €25,000 per day for a continued breach. The CCPC does not have legal powers to impose a fine itself; instead the CCPC can recommend that the Director of Public Prosecution initiate a prosecution in the Irish Courts. Liability attaches to the undertaking itself and/or the 'person in control' of an undertaking. Section 18(11) of the Act provides that the 'person in control' of an undertaking is: • in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention; • in the case of a partnership, each partner who knowingly and wilfully authorises or permits the contravention; or • in the case of any other form of undertaking, any individual in control of that undertaking who knowingly and wilfully authorises or permits the contravention.
Remarks	The revised thresholds have resulted in a significant reduction in merger notifications in 2019. As of 20 June 2019, 16 mergers had been notified to the CCPC, a 68 per cent reduction as compared to the same time period in 2018.

Italy	
Voluntary or mandatory system	Mandatory system. Form of notification: special form. Detailed information similar to the EU Form CO. In Italian.
Notification trigger/ filing deadline	Combined turnover over €498 million in Italy and turnover of each of at least two of the undertakings involved in Italy over €30 million. No filing deadline; no standstill obligation. Pre-notification procedure is available but not required for all transactions. It is necessary to notify the transaction prior to implementation: the IAA, when opening a Phase II investigation, has the power to order the suspension of a notified concentration pending approval if it raises serious competition concerns.
Clearance deadlines (Stage 1/Stage 2)	Phase I: 30 days (15 days for public bids) from notification. Phase II: 45 additional days (extendible by a further 30 days where the information provided is materially incomplete). As a general rule, the transaction can be implemented after notification (not suspensory).
Substantive test for clearance	Whether the merger will create or strengthen a dominant position in the national market in a way that threatens to eliminate or reduce competition to a considerable and lasting extent. De facto the same test under the EUMR is applied.
Penalties	Failure to file: fines of up to 1 per cent of the notifying parties' worldwide turnover in the last fiscal year. Implementation before clearance: no penalties. If parties implement the transaction notwithstanding a prohibition decision or non-compliance with conditions imposed in a Phase II clearance decision, the IAA may impose fines of between 1 and 10 per cent of the turnover of the businesses concerned.
Remarks	Special provisions in the electricity and gas, defence, broadcasting, telecommunications and film distribution sectors and for banks and insurance companies. In addition, special powers granted to the government (golden share rules) applicable to M&A transactions relating to assets in key industries, such as defence and national security, energy, communications and transportation.

Japan	
Voluntary or mandatory system	It is a mandatory system.
Notification trigger/ filing deadline	Different thresholds apply depending on the transaction structure. For example, for share acquisitions exceeding the threshold of either 20 per cent or 50 per cent stake, the acquiring group must have Japanese turnover of over ¥20 billion and the target group (excluding the seller) over ¥5 billion. No filing deadline, apart from the suspensory obligation until clearance.
Clearance deadlines (Stage 1/Stage 2)	30 calendar days from formal submission of filing for Stage 1. Once Stage 2 is triggered, the later of 120 days from the date of the FTC's acceptance of the notification or 90 days from the date of submission of the additional materials or information.
Substantive test for clearance	Merger Guidelines elaborate on the items considered by the FTC, but are generally consistent with other major jurisdictions.
Penalties	Gun jumping is subject to a criminal fine of up to ¥2 million.

Kenya	
Voluntary or mandatory system	Mandatory notification system.
Notification trigger/ filing deadline	There are no notification triggers under the Act, nor is there a filing deadline. Nevertheless, the merging parties are prohibited from implementing the merger without the Authority's approval.
Clearance deadlines (Stage 1/Stage 2)	The Authority has up to 180 days after the submission of a merger notification form to determine whether to approve the proposed merger, or approve it with conditions or reject it outright.
Substantive test for clearance	The Authority applies both the substantial lessening of competition and the public interest tests.
Penalties	Any person who fails to comply with the Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenya shillings or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual turnover in Kenya of the offending undertakings.

Liechtenstein	
Voluntary or mandatory system	In general, there is no specific national legislation regarding merger control in Liechtenstein. The Liechtenstein Authority (ie, the Office of Justice) is authorised to apply merger control. For merger control on a supranational level in Europe, the basic provisions are contained in the EEA Agreement and Annex XIV to the EU Merger Regulation. Additionally, the provisions of Protocol 4 on the functions and powers of the EFTA Surveillance Authority in the field of competition do apply (Protocol 4 to the Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice).
Notification trigger/ filing deadline	There is no special merger control legislation in Liechtenstein; however, the EU Merger Regulation is directly applicable. According to the provisions of the EU Merger Regulation, a transaction can be notified prior to the conclusion of a binding agreement. Once an agreement has been entered into, or a bid launched, there is no deadline or recommended period in which the parties must file a notification. However, the notification of the concentration needs to be made before its implementation.
Clearance deadlines (Stage 1/Stage 2)	Within 25 working days of when the notification is made, the EFTA Surveillance Authority (ESA) or the European Commission must reach a decision where the parties submit commitments (remedies) to resolve competition issues. In case of serious doubts, the competent authority will commence investigations; the period of this investigation is 90 working days.
Substantive test for clearance	The principle is that the activities of the EU and its member states should be conducted in accordance with the principle of an open market economy with free competition. Concentrations significantly impeding effective competition in the common market or a substantial part of it are prohibited in accordance with the provisions of the EU Merger Regulation.
Penalties	Companies failing to suspend implementation of a merger pending examination or that put into effect a merger that is prohibited by the ESA or the European Commission are exposed to fines.
Remarks	There is no specific national merger control, antitrust or cartel legislation in Liechtenstein. It is unlikely that a national merger control legislation will be implemented in the near future in Liechtenstein.

Malaysia	
Voluntary or mandatory system	Both regimes are voluntary.
Notification trigger/ filing deadline	**Notification trigger** Aviation services sector • Combined turnover in Malaysia in the preceding financial year of at least 50 million ringgit; or • combined worldwide turnover in the preceding financial year of at least 500 million ringgit. Communications and multimedia sectors Proposed horizontal M&A: • At least one party is a licensee in a dominant position; or • M&A would result in the proposed merged or acquired firm obtaining a dominant position (post-M&A market share of 40 per cent or more). Completed horizontal M&A: Merged or acquired entity is a licensee in a dominant position. Proposed non-horizontal M&A: At least one of the parties is a licensee in a dominant position. Completed non-horizontal M&A: Merged or acquired entity is a licensee in a dominant position **Filing deadline** Aviation services sector Anticipated mergers: • When merger parties have bona fide intention to proceed with anticipated merger; • details of the anticipated merger are available; and • anticipated merger has been made public or may be made public by MAVCOM. Completed mergers: At any time. Communications and multimedia sectors Notification and assessment: Parties are encouraged to submit transactions prior to completion. However, this is not mandatory. MCMC may even assess M&A that proceeded prior to the issuance of the M&A Guidelines. Authorisation of conduct: MCMC allows licensees to apply before, during or after submitting an assessment application pursuant to the M&A Guidelines; however, parties are encouraged to apply prior to engaging in any conduct that may be construed to have the purpose or effect of substantially lessening competition.
Clearance deadlines (Stage 1/Stage 2)	Aviation services sector: On a case-by-case basis. Communications and multimedia sectors: Phase I assessment: within 30 days of receipt of valid Form 1. Phase II assessment: will commence within 10 business days from the date of receipt of a valid Form 2. Indicative time frame for completion is 120 business days from the date of commencement.
Substantive test for clearance	Both regimes use the 'substantial lessening of competition' test.
Penalties	Aviation services sector Up to 10 per cent of worldwide turnover of the enterprise over period of infringement. Non-compliance of guidelines can lead to fines of up to 1 million ringgit or 5 per cent of annual turnover. Communications and multimedia sectors Criminal penalties: fine of up to 500,000 ringgit, imprisonment up to five years, or both. A person may further be liable to a further fine of 1,000 ringgit for every day or part of a day during which the offence is continued after conviction.

Malta	
Voluntary or mandatory system	Mandatory system.
Notification trigger/ filing deadline	Filing of a notification of concentrations, for which there is an administrative filing fee of €163.06, must be done within 15 days prior to their implementation and following: the conclusion of the relevant agreement; the announcement of the public bid; or the acquisition of a controlling interest.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: six weeks, but can be increased to two months if after notification and not later than the end of the fifth week the undertakings concerned submit commitments. Also, until the end of the fifth week, the undertakings concerned may request suspension of periods for three weeks to discuss a new commitment proposed but which would be granted at the discretion of the DG. Under the simplified procedure, duration of Stage 1 is four weeks instead of six weeks. Stage 2: four months but suspension for a period of up to one month may be requested by the undertakings concerned when they submit commitments, and the request will be generally acceded to. But concentration is suspended only during Stage 1.
Substantive test for clearance	The DG will consider: the need to maintain and develop effective competition in the Maltese market; the geographical and product markets and potential competition from other undertakings; whether the business or part of the business of a party to the concentration has failed or is likely to fail; the market position of the undertakings concerned and their economic and financial power; the alternatives available to suppliers and users and their access to supplies or markets; any legal or other barriers to entry; supply and demand trends for the relevant goods and services; the interests of the intermediate and ultimate consumers; the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition; and the nature and extent of development and innovation in a relevant market.
Penalties	Penalties for failure to file a notification before implementation are a fine of between €1,000 and €10,000; and penalties for breaching the mandatory waiting period are up to 10 per cent of the turnover of the undertaking that benefits from the transaction.
Remarks	There are no bills or amendments to the law in the pipeline, though one may envisage an amendment to the Control of Concentrations Regulations and the Maltese Competition Act aimed at increasing the thresholds, which are currently set at low parameters that are easily exceeded even where the effect on competition may in fact turn out to be negligible.

Mexico	
Voluntary or mandatory system	Mandatory. Filing fee of approximately US$9,000.
Notification trigger/ filing deadline	Monetary thresholds met. The transaction must be notified before closing. Mandatory waiting period upon notice by the agency. Main monetary thresholds: consideration above approximately US$75 million. For the Mexican component of the transaction; acquisition of 35 per cent or more of target's assets or stock and target's sales or assets in Mexico above approximately US$75 million; or combined sales or assets of parties of approximately US$200 million and target size of over approximately US$35 million.
Clearance deadlines (Stage 1/Stage 2)	Fast-track: 15 days. Stage 1: approximately 35 days. Stage 2: from 60 to 155 days.
Substantive test for clearance	Lessening, impairing or preventing competition.
Penalties	Up to 5 per cent of the parties' turnover in Mexico for failing to notify. The agency may order divestitures or behavioural remedies.
Remarks	No waiting period or freeze orders. Closing, only after the COFECE or IFT issues its final resolution.

Morocco	
Voluntary or mandatory system	The filing is mandatory.
Notification trigger/ filing deadline	The notification of a concentration must occur when: • the combined aggregate worldwide pre-tax turnover of all of the undertakings or groups of natural or legal persons parties to the concentration is equal to or more than 750 million dirhams; • the aggregate Morocco-wide pre-tax turnover of at least two of the undertakings or groups of natural or legal persons concerned by the concentration is equal to or more than 250 million dirhams; or • the undertakings that are parties to the concentration, or that are the subject of the concentration, or the undertakings that are economically linked to them, have generated altogether, during the previous calendar year, more than 40 per cent of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market. The notification should take place as soon as the parties concerned are able to present a sufficiently concrete file to allow the investigation of the case.
Clearance deadlines (Stage 1/Stage 2)	Phase I: the Competition Council assesses the concentration within 60 days of the notification. If the parties offer commitments during Phase I, the 60-day deadline may be extended by 20 days. In case of particular necessity, parties may ask the Competition Council to suspend the deadline of the examination of the transaction for a maximum of 20 days. Phase II: the Competition Council assesses the transaction within 90 days. If the notifying parties offer commitments less than 30 days before the end of the 90-day deadline, the deadline will then expire 30 days after the reception of the commitments. The 90-day deadline may also be suspended at the request of the parties for up to 30 days in case of particular necessity. This deadline may also be suspended by the Competition Council, in particular when the notifying parties have failed to provide it with requested information or to inform it of the occurrence of a new material event. The time limit resumes when the cause of the suspension has been addressed.
Substantive test for clearance	The substantive test for clearance is whether the planned concentration is likely to infringe competition, notably by creating or strengthening a dominant position or a buying power that places suppliers in a position of economic dependency.
Penalties	The sanctions for not filing are as follows: • for legal entities responsible for filing: a fine that amounts to a maximum of 5 per cent of the pre-tax turnover made in Morocco during the last fully closed financial year, increased, when applicable, by the turnover made in Morocco during the same period by the acquired company; and • for natural persons responsible for filing: a fine of a maximum amount of 5 million dirhams. Upon failure to file a notification, the Competition Council also compels the parties, subject to a daily penalty payment, to notify the operation, unless they revert to the previous state of affairs.
Remarks	Law No. 104-12 of 30 June 2014 on free pricing and competition and Law No. 20-13 of 30 June 2014 relating to the Competition Council, which transfer the merger control function to the Competition Council, have taken effect after the appointment of the new Competition Council's president and members, which occurred in November and December 2018.

Netherlands	
Voluntary or mandatory system	Mandatory system. Form of notification: standard form. In Dutch.
Notification trigger/ filing deadline	Combined worldwide turnover exceeding €150 million and at least two undertakings each with turnover in the Netherlands exceeding €30 million. Filing deadline: complete notification prior to merger becoming effective. Special thresholds apply to concentrations in the insurance and healthcare sectors.
Clearance deadlines (Stage 1/Stage 2)	Phase I: four weeks. Phase II: 13 weeks (subject to suspension should the authority require additional information).
Substantive test for clearance	Whether the concentration significantly impedes effective competition in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position.
Penalties	Failure to file or implementation before clearance: transaction void plus fines of maximum €900,000 or 10 per cent of the worldwide turnover (whichever is higher). Incorrect or incomplete information: fines of up to €900,000 or 1 per cent of the worldwide turnover (whichever is higher).

New Zealand	
Voluntary or mandatory system	Voluntary, but the New Zealand Commerce Commission prioritises enforcement against non-notified mergers that may substantially lessen competition.
Notification trigger/ filing deadline	Filing and clearance must be undertaken pre-closing. The New Zealand Commerce Commission has 'concentration indicators' over which it recommends a filing be considered.
Clearance deadlines (Stage 1/Stage 2)	Target time frame is 40 working days from filing, but the New Zealand Commerce Commission can request extensions. The average time frame is approximately 60 working days, but this will depend on complexity and opposition.
Substantive test for clearance	The New Zealand Commerce Commission must be satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market.
Penalties	Up to NZ$500,000 for individuals and up to NZ$5 million for companies.
Remarks	Special rules can apply to certain industrial sectors (telecommunications, banking).

North Macedonia	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	The participants are obliged to notify the Commission prior to the implementation of a concentration and following the conclusion of the merger agreement, or the announcement of the public bid on the purchase or the acquisition of the controlling interest in the charter capital of the undertaking.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 25 business days. Stage 2: 90 business days.
Substantive test for clearance	A concentration, that would significantly prevent, restrict or distort efficient competition on the market or its significant part, in particular as a result of the creation or strengthening of a dominant position of the participants, is non-compliant with the provisions of the LPC.
Penalties	Failure to notify is a misdemeanour penalised by a fine amounting to up to 10 per cent of the value of the aggregate annual income of the undertaking (respectively its group) made in the business year preceding the year when the misdemeanour was committed. In addition to the fine, the Commission for misdemeanour matters may impose to the legal person a temporary ban on the performance of specific activity for between three and 30 days, and to the natural person a ban on the performance of an occupation, activity or duty for between three and 15 days.
Remarks	None.

Norway	
Voluntary or mandatory system	Mandatory notification for concentrations where the undertakings concerned exceed certain turnover thresholds. No particular rules for foreign-to-foreign mergers. Combined threshold is 1 billion kroner annual turnover in Norway. Individual threshold is 100 million kroner annual turnover in Norway.
Notification trigger/ filing deadline	No deadline for filing. As long as the transaction is not implemented, it is entirely up to the parties when to submit the notification. The notification can be submitted as early as desired by the parties, as long as the content requirements can be fulfilled, and as soon as the parties are ready to go public.
Clearance deadlines (Stage 1/Stage 2)	After receipt of a notification the NCA has 25 working days to give notice that intervention may take place (Phase I) and then another 45 working days to present a reasoned draft prohibition decision or accept and make binding remedies presented by the notifying party or parties (Phase II). The parties have 15 working days to comment on a draft prohibition decision and the NCA then has another 15 working days to render such a decision.
Substantive test for clearance	The NCA shall intervene against concentrations that significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. The NCA investigates possible unilateral, coordinated, vertical and conglomerate effects of the concentration. The NCA takes into account substantiated efficiencies that benefit consumers, are merger-specific and verifiable.
Penalties	Infringement of the prohibition against implementation of the transaction (automatic suspension) may lead to significant fines. The same goes for infringement of a final decision of intervention. The NCA may issue a fine of up to 10 per cent of the undertaking's global turnover.
Remarks	Some amendments to the Norwegian Competition Act also applied as of 1 July 2016, including the change of the substantive test for clearance of mergers to that of the EUMR.

Pakistan	
Voluntary or mandatory system	Mandatory system.
Notification trigger/ filing deadline	As soon as agreement is reached in principle or a non-binding letter of intent is signed.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: most mergers are cleared at this stage. The CCP has 30 working days to examine a merger application from the time of its filing. No decision in 30 working days means the merger is cleared. Stage 2: few merger issues reach this stage. If the CCP raises concerns, then Stage 2 begins after the conclusion of the 30-working-day period for Stage 1. Stage 2 involves its own 90-working-day period for review. No decision in 90 working days of Stage 2 (or 120 working days overall) means the merger is cleared. The CCP will issue a show-cause notice and provide the opportunity of a hearing before passing any adverse order, interim or final.
Substantive test for clearance	Substantial lessening of competition by creating or strengthening of a dominant position.
Penalties	Prohibition, unwinding the merger, including interim orders to protect competition. Fines of up to 10 per cent of turnover or 75 million Pakistani rupees.
Remarks	No penalty has ever been imposed in merger-related cases since the CCP's inception in 2007.

Peru	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	Transactions that involve a transfer or change of control over a company or part of it and fulfil concurrently the following thresholds: • The total sum of the value of annual sales or gross income or value of assets in Peru of the companies involved in the concentration operation has reached during the fiscal year prior to that in which the operation is notified, a value equal to or more than 118,000 Peruvian tax units (UIT), equivalent to 519.2 million Peruvian soles or approximately US$133.13 million (using an exchange rate of 3.9 Peruvian soles per dollar) for the year 2021. • The value of annual sales or gross income or value of assets in Peru of at least two of the companies involved in the concentration operation have reached, during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UIT, equivalent to 79.2 million Peruvian soles or approximately US$20.3 million (using an exchange rate of 3.9 Peruvian soles per dollar) by 2021. There is no filing deadline. Reportable concentration acts must be notified to the Competition Commission at INDECOPI (the Commission) and cannot be implemented unless and until INDECOPI grants clearance.
Clearance deadlines (Stage 1/Stage 2)	The first phase review period is 30 business days. Said period commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification. If the Commission concludes that the transaction may potentially raise 'serious concerns' of generating restrictive effects upon competition, it can initiate a second phase review that may last up to a maximum of 120 business days.
Substantive test for clearance	The substantive test for clearance requires the evaluation of the effects of the transaction, in order to identify whether it produces a significant restriction of competition in the markets involved. This evaluation includes different economic factors.
Penalties	Depending on the seriousness of the infringement, fines up to 12 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior the issuance of the decision by INDECOPI.
Remarks	The Peruvian authority INDECOPI may 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 a review by the authority regardless of whether the concentration exceeds the thresholds or not. The Merger Act and its Regulation are not yet in force and the date of elaboration of this document. Hence, mandatory pre-notification and clearance is required only for vertical or horizontal concentrations occurring in the fields of electricity generation, transmission or distribution (in accordance with Law No. 26876).

Poland	
Voluntary or mandatory system	If a concentration meets the statutory thresholds and no exemptions apply, the notification is mandatory.
Notification trigger/ filing deadline	There is no official deadline for filing. The parties are obliged to notify their intention of the concentration, which means that the notification has to be filed before implementation. There is a bar on closing.
Clearance deadlines (Stage 1/Stage 2)	The authority has one month to issue its decision for simple case in Stage q. Complex cases may enter into the second stage, which gives the OCCP an additional four months to complete the review.
Substantive test for clearance	The OCCP clears a concentration that does not result in significant impediments to competition in the market, in particular, by the creation or strengthening of a dominant position in the market (in practice, the SIEC test applies).
Penalties	If an undertaking has implemented a concentration without regulatory clearance, the general principle is that the OCCP may fine the undertaking by way of a decision, with the fine not to exceed 10 per cent of the revenue earned in the accounting year preceding the year within which the fine is imposed.

Portugal	
Voluntary or mandatory system	Mandatory notification.
Notification trigger/ filing deadline	• Combined market share in Portugal higher than 50 per cent; • combined market share in Portugal equal to or higher than 30 per cent and lower than 50 per cent, provided that the individual turnover in Portugal of at least two participant undertakings exceeds €5 million; or • combined turnover in Portugal of more than €100 million, provided that the individual turnover in Portugal of at least two participant undertakings exceeds €5 million. Two or more concentrations made within a period of two years among the same individuals or legal entities, which considered individually would not be subject to prior notification, are deemed as a sole concentration subject to such prior notification when the set of concentrations reaches the turnover figures set out above. Notification must be filed after the conclusion of the agreement and before their closing or, whenever relevant, after the date of disclosure of the preliminary announcement of a public takeover bid or of an exchange offer or the date of disclosure of the announcement of the acquisition of a controlling shareholding in a listed company, or, in the case of a public procurement procedure, after the definitive award of the contract and before the closing. When the participant undertakings show serious intent to conclude an agreement or, in the case of a public takeover bid or of an exchange offer, the undertakings show public intent to carry out the offer, the concentration may be notified before the above deadlines. Projected concentrations may be the object of pre-notification assessment by the Authority.
Clearance deadlines (Stage 1/Stage 2)	Phase I: within 30 working days of the notification's effective date (extendible, notably, if requests for additional information are made), the Authority shall clear the concentration (with or without conditions or obligations) or initiate an in-depth investigation. Lack of decision is deemed as clearance. Phase II: within 90 working days, counted as of the effective date of the notification (extendible, notably, if requests for additional information are made), the Authority must authorise the concentration (with or without conditions or obligations) or prohibit the concentration. Lack of decision is deemed as clearance.
Substantive test for clearance	Concentrations falling within the scope of the Act are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it, in particular if such impediments result in the creation or strengthening of a dominant position.
Penalties	Penalties are applied within a sanctioning procedure launched by the Authority, which shall be subject to the opportunity principle, pursuant to which the Authority may, on public interest grounds, grant different degrees of priority in respect of the matters it is called to assess. Failure to file: fines up to 10 per cent of the turnover in the year preceding that of the decision; periodic penalty payments up to 5 per cent of the average daily turnover in the year preceding that of the decision, applied per day. Violation of obligation of suspending transaction until clearance: fines of up to 10 per cent of the turnover in the year preceding that of the decision. Non-compliance with decision that prohibited the transaction or that approved it with conditions or obligations attached: fines up to 10 per cent of the turnover in the year preceding that of the decision, legal transactions being null and void.
Remarks	Filing subject to fees. Obligation of suspending transaction may be derogated by the Authority.

Romania	
Voluntary or mandatory system	The filing of a notification with the RCC is mandatory, provided the thresholds are met.
Notification trigger/ filing deadline	The notification has to be submitted to the RCC prior to the implementation of the concentration.
Clearance deadlines (Stage 1/Stage 2)	Phase I – 45 days as of the effective date. Phase II – five months as of the effective date.
Substantive test for clearance	The RCC assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.
Penalties	In case a merger is implemented before a clearance decision is received, the RCC may impose a fine of between 0.5 and 10 per cent of the undertaking's total annual turnover in the preceding financial year. In addition, the RCC may order measures aimed at restoring efficient competition in the relevant market.

Russia	
Voluntary or mandatory system	Mandatory system. Free form of notification, standard form for disclosure of certain information, in Russian.
Notification trigger/ filing deadline	No filing deadline but prior to the completion of transaction if: • the aggregate book value on a worldwide basis of all companies within the acquirer's group and the target's group > 7 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group > 400 million roubles; or • the aggregate turnover on a worldwide basis of all companies within the acquirer's group and the target's group > 10 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group > 400 million roubles; and • for joint venture agreements between competitors operating in the territory of Russia: the aggregate book value on a worldwide basis of all parties to the agreement (and their respective groups) exceeds 7 billion roubles or their aggregate turnover on a worldwide basis exceeds 10 billion roubles for the calendar year preceding entry into the joint venture agreement.
Clearance deadlines (Stage 1/Stage 2)	Two-stage process. Statutory waiting period at Stage 1 is 30 days from submission of all necessary documents, and at Stage 2, another two months. Either at Stage 1 or Stage 2, conditions for clearing the transaction may be issued. Suspension effects: completion prior to clearance is prohibited. The transaction may be challenged by the antimonopoly authority if completed before clearance.
Substantive test for clearance	Would the transaction constitute or strengthen a dominant position of a legal entity? Does (or may) it cause limitation of competition in a market? Positive social and economic effects from the transaction are taken into consideration.
Penalties	Failure to submit a pre-acquisition filing 300,000 roubles to 500,000 roubles (on legal entities) and 15,000 roubles to 20,000 roubles (on managers).
Remarks	Special rules apply to certain Russian law-specific types of transactions and to transactions with 'financial entities' (eg, banks, securities dealers and brokers, insurance companies, non-governmental pension funds, share investment trusts, leasing companies, credit consumer unions) and natural monopolies (eg, gas and oil pipeline distribution, electric power transmission, rail transport, services provided at transport terminals, public electronic and postal communications providers) as targets.

Saudi Arabia	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	Creation of an establishment with a dominant position (ie, an establishment that is in a position to influence the prevailing price of a specific commodity, product or service through controlling at least 40 per cent of the total supply of that commodity, product or service in Saudi Arabia). Notification must occur at least 60 days prior to implementation.
Clearance deadlines (Stage 1/Stage 2)	The Competition Council has 60 days to inform a notifying party whether the transaction is under review, or whether the transaction has been blocked. If the Council has informed the notifying party that the transaction is under review within the 60-day deadline and has not cleared the transaction within that period, the Council will have an additional 30 days to conduct its review.
Substantive test for clearance	Whether the transaction will lessen competition in Saudi Arabia. No guidance is given on how the substantive test interacts with the 'dominance' jurisdictional test.
Penalties	Failure to notify: fines of up to 10 per cent of sales, capped at 10 million Saudi riyals (to be doubled in the case of recurrence). Other sanctions may also be imposed.
Remarks	In its assessment, the Council is required to consider whether the notified transaction can be justified by reason of 'public interest', as well as economic efficiencies where it appears from other factors that the transaction is likely to substantially prevent or lessen competition. There is, however, no guidance on what constitutes 'public interest' for these purposes.

Serbia	
Voluntary or mandatory system	The filing of a notification with the Commission is mandatory in cases where the applicable jurisdictional thresholds have been met.
Notification trigger/ filing deadline	The merger notification must be submitted to the Commission within a period no later than 15 days after the triggering event (ie, the signing of the agreement, the announcement of a public offering, the announcement of the start or end date of a public takeover bid or the acquisition of control (whichever occurs first)). The filing may already be submitted once the parties have a serious intention to conclude the relevant agreement (ie, they sign a letter of intent, or announce their intention to make a public offer for the purchase of shares in an undertaking).
Clearance deadlines (Stage 1/Stage 2)	After submitting the complete filing, the Commission will decide either in one month (in Phase I) or within four months from the decision to initiate in-depth proceedings (Phase II).
Substantive test for clearance	The Commission assesses whether the notified concentration will lead to a significant prevention, restriction or distortion of effective competition, in particular, if it will result in the creation or strengthening of a dominant position in the relevant market. In addition to a test of dominance (over 40 per cent market share), the Commission will consider anticompetitive effects that could potentially arise out of a concentration (eg, loss of current and potential competition, unilateral effects resulting from horizontal mergers, joint dominance, conglomerate effects, vertical effects).
Penalties	For late filing, the Commission may impose on the notifying party a procedural penalty in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of that undertaking). For failure to file and breach of the suspension obligation the Commission may impose a fine of up to 10 per cent of the total annual turnover of the responsible undertaking generated in Serbia in the preceding financial year (protective measure). Moreover, it may also order to dissolve the concentration, sell shares, terminate a contract, or take other measures necessary to re-establish the status as before implementation of the concentration (measure of de-concentration).

Singapore	
Voluntary or mandatory system	Voluntary.
Notification trigger/ filing deadline	Notification encouraged where: • the merged entity will have a market share of 40 per cent or more; or • the merged entity will have a market share of between 20 and 40 per cent and the post-merger market share of the three largest firms, that is, the concentration ratio of three largest firms (CR3), is 70 per cent or more. Mergers involving small companies where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5 million and the combined worldwide turnover of all of the parties is below S$50 million will be unlikely to raise competition concerns.
Clearance deadlines (Stage 1/Stage 2)	Phase I review: approximately 30 working days. Phase II review: approximately 120 working days.
Substantive test for clearance	Whether a merger has resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.
Penalties	Financial penalty of up to 10 per cent of turnover in Singapore for each year of infringement for such period, up to a maximum of three years for an infringement that was committed intentionally or negligently. Directions at the discretion of the Commission include directions to: • prohibit an anticipated merger from being carried out or dissolve or modify a merger in such manner as the Commission may direct; • dispose of operations, assets or shares; • enter into legally enforceable agreements; or • provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine.

Slovakia	
Voluntary or mandatory system	The filing of a notification with the AMO is mandatory in cases in which a concentration meets the applicable jurisdictional thresholds.
Notification trigger/ filing deadline	There is no explicit filing deadline. However, in any event the concentration has to be notified to the AMO prior to its implementation (ie, before any rights or obligations resulting from a concentration are executed). Inter alia, the notification can be filed with the AMO already prior to the conclusion of a formal merger agreement.
Clearance deadlines (Stage 1/Stage 2)	If the concentration does not require an in-depth analysis due to the identification of competition law concerns, the AMO issues a decision within 25 working days of the receipt of the notification (Phase I proceedings). In cases that require an in-depth analysis, the AMO may initiate in-depth proceedings within 25 working days from the receipt of the notification (Phase II proceedings). Once the AMO has initiated Phase II, it must issue a decision within 90 working days. Requests for information stop the clock. At the request of the parties or with their consent, the AMO may also prolong the Phase I and II periods, even repeatedly, by a total of up to 30 working days at a maximum. The AMO may request the parties to propose conditions (commitments) within 30 working days upon delivery of such request. This effectively stops the clock, that is, the above-described Phase I and II review/decision-making periods are not in effect until the parties submit their proposed commitments or the expiry of the 30-day period (whichever occurs first).
Substantive test for clearance	The AMO examines whether the concentration will not significantly impede effective competition in the relevant market, in particular due to the creation or strengthening of a dominant position (SIEC test).
Penalties	In the event of failure to notify the concentration or failure to comply with the standstill obligation, the AMO may impose a fine of up to 10 per cent of the undertaking's worldwide turnover generated in the preceding business year; or up to €330,000 on an undertaking that generated a turnover not exceeding €330 or has not achieved any turnover, or when its turnover cannot be calculated.

Slovenia	
Voluntary or mandatory system	The filing of a notification with the CPA is mandatory in cases where the applicable jurisdictional thresholds have been met.
Notification trigger/ filing deadline	A merger notification has to be submitted to the CPA no later than 30 days after the conclusion of the agreement, the announcement of a public bid or the acquisition of a controlling interest (whichever of these triggering events occurs first). If the CPA requested the parties to provide a notification of the concentration because their combined market share in Slovenia exceeds 60 per cent, the merger notification has to be submitted no later than 30 days from receipt of this request.
Clearance deadlines (Stage 1/Stage 2)	In the event the concentration does not raise serious doubts as to its compatibility with the Slovenian competition law rules, the CPA must issue its decision within 25 working days of the receipt of a complete notification (Phase I). In cases that raise serious doubts as to their compatibility with the Slovenian competition law rules, the CPA initiates Phase II proceedings within 25 working days of receipt of a complete notification. Once the CPA has initiated Phase II, it must issue a decision within 60 working days from initiating such proceedings. If the parties propose remedies, the deadline for issuing the Phase I or II decision is extended by an additional 15 working days.
Substantive test for clearance	The CPA assesses whether the intended concentration results in a significant impediment of effective competition within the territory of the Republic of Slovenia, or on a substantial part of it, in particular due to the creation or strengthening of a dominant position.
Penalties	In the case of a failure to notify the concentration within the filing deadline (or failure to notify the concentration at all), the CPA may impose fines of up to 10 per cent of the annual turnover generated by the undertakings concerned in the preceding business year. In addition, a fine of between €5,000 and €10,000 may be imposed on the responsible persons of such undertakings and (if applicable) a fine of between €3,000 and €5,000 on a natural person already controlling at least one undertaking. If the nature of the infringement of the filing obligation is particularly serious, a fine of between €15,000 and €30,000 may be imposed on the responsible person of a legal entity, and (if applicable) a fine of between €10,000 and €15,000 on a natural person already controlling at least one undertaking.

South Africa	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	N/A.
Clearance deadlines (Stage 1/Stage 2)	Small and intermediate mergers – 60 business days. Large mergers – 40 business days, extensions of 15 business days at a time.
Substantive test for clearance	(1) Whether the merger results in a substantial lessening or prevention of competition in any relevant market, which cannot be outweighed by technological, efficiency or other pro-competitive factors, and (2) the effect of the merger on certain public interest grounds. Penalties The merger parties may face the following sanctions for failing to notify an intermediate or large merger: • an administrative penalty of up to 10 per cent of annual turnover in South Africa and exports from South Africa during the preceding financial year; and • being ordered to sell any shares, interest or other assets it has acquired pursuant to the merger (ie, divestiture) and any provision of an agreement to which the merger was subject may be declared void.
Penalties	N/A.

South Korea	
Voluntary or mandatory system?	Mandatory system.

Notification trigger/ filing deadline	**Type of transactions subject to merger notification**
	• The acquisition of 20 per cent (15 per cent in the case of a company listed in Korean stock exchange markets) or more of the voting shares of another company;
	• the acquisition of additional voting shares of another company by a shareholder who already owns 20 per cent (15 per cent in case of a company listed in Korean stock exchange markets) or more of the voting shares of a company, which results in such shareholder becoming the largest shareholder of such company;
	• the acquisition of all or substantial part of the business or assets of another company;
	• a merger;
	• the establishment of a new joint venture company; and
	• an interlocking directorate
	
	Jurisdictional thresholds
	• The size-of-transaction test (this will take effect as of 30 December 2021):
	  • the acquisition price is above a certain level and the target company has significant presence in the Korean market.
	• The size-of-party test:
	  • a party to the merger has total worldwide assets or annual worldwide turnover of 300 billion won or more as of the most recent fiscal year-end; and
	  • the other party to the merger has total worldwide assets or annual worldwide turnover of 30 billion won or more as of the most recent fiscal year-end.
	• Local nexus for foreign-to-foreign mergers:
	  • the foreign acquiring company and the foreign target company each has annual turnover in Korea of 30 billion won or more as of the most recent fiscal year-end.

Clearance deadlines (Stage 1/Stage 2)	There is no distinction in terms of different review stages in Korea. For all cases, the statutory review period is 30 calendar days from the filing date, which may be extended for up to additional 90 days. The time between the date of issuance of a request for information by the KFTC and the date of submission of a response to such request is excluded from the calculation of the review period.
Substantive test for clearance	The main question is whether a proposed business combination has an anticompetitive effect on any of the relevant markets. Various factors can be considered in the substantive test depending on the nature of the transaction. • Horizontal mergers: the degree of market concentration, unilateral effect, coordinated effect, overseas competition, barriers to entry, substitutable goods, and the existence of an adjacent market. • Vertical mergers: vertical foreclosure and coordinated effect in the market. • Conglomerate mergers: exclusion of potential competitors and increase in barriers to entry. If the combined market share of the parties meets all the following elements, it is presumed to have an anticompetitive effect: • the merging companies have a combined market share of at least 50 per cent in the relevant market or if the top three companies in the market including the merging companies have a combined market share of at least 75 per cent in the relevant market); • the combined market share of the merging companies is the largest in the relevant market; and • the combined market share of the merging companies exceeds the market share of the second-ranking company in the market by more than 25 per cent.
Penalties	The KFTC may impose an administrative fine of up to 100 million won for a failure to file or a late notification.
Remarks	The new amendments to the MRFTA, which includes the introduction of 'a size-of-transaction test' as part of the jurisdictional thresholds for mergers, will take effect on 30 December 2021.

Spain	
Voluntary or mandatory system	Mandatory system. Form of notification: special form. Detailed information similar to Form CO. In Spanish. Short notification for straightforward cases is also available.
Notification trigger/ filing deadline	• Combined turnover in Spain of over €240 million and at least two parties have turnover of over €60 million each; or • combined market share in Spain (or in a 'defined' market within Spain) of 30 per cent or more, unless the turnover in Spain of the target or the target's asset value does not exceed €10 million and the individual or combined market share of the parties does not amount to 50 per cent or more in any 'affected market' in Spain or in any 'defined' geographical market within Spain. Filing prior to completion.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: one month, extended by 10 days if commitments offered. Stage 2: two months, extended by 15 days if commitments offered. If no unconditional clearance, the Ministry of the Economy has 15 days to decide whether to request government intervention. If it does, the government has one month to make a decision. Suspension until clearance.
Substantive test for clearance	Whether the notifiable concentration might prevent the maintenance of effective competition in the whole or part of the national market.
Penalties	Failure to file: fines up to 1 per cent of the turnover of the relevant undertaking if (1) the parties fail to file a concentration carried out through a public takeover bid in Spain within statutory deadline; or (2) the parties fail to file a concentration upon ex-officio request by the CNMC. Implementation before clearance: fines of up to 5 per cent of the turnover of the relevant undertaking. Non-compliance with relevant final decision: fines of up to 10 per cent of the turnover of the relevant undertaking and potential daily penalties of up to €12,000 per day of delay.
Remarks	If the Ministry of the Economy requests the government's intervention at the end of Stage 2, the government's decision is based on general public policy and general interest criteria.

Sweden	
Voluntary or mandatory system	Mandatory system, with voluntary notification possible below the thresholds for mandatory notification.
Notification trigger/ filing deadline	Before a change of control on a lasting basis.
Clearance deadlines (Stage 1/Stage 2)	Phase I (25 days, extended to 35 days in case of commitments). Phase II (three months).
Substantive test for clearance	Significant impediment of effective competition in Sweden as a whole or a substantial part thereof (as under EU law).
Penalties	No pecuniary sanctions for gun jumping unless expressly stated in a decision by the Competition Authority, but ex post prohibition is possible.
Remarks	Swedish merger control is harmonised with EU merger control to a significant extent.

Switzerland	
Voluntary or mandatory system	Mandatory filing.
Notification trigger/ filing deadline	Turnover of 2 billion Swiss francs worldwide or 500 million Swiss francs in Switzerland and turnover of at least two enterprises involved of 100 million Swiss francs in Switzerland. Prior to completion of merger.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: one month (clearance or opening of investigation). Stage 2: four months (investigation).
Substantive test for clearance	No dominant market position created or enhanced liable to eliminate effective competition. Improvement of competition in other markets outweighing dominant market position.
Penalties	Penalty up to 1 million Swiss francs. Fine of up to 20,000 Swiss francs (on the individual manager).
Remarks	Special approvals for: banks; acquisition of Swiss real estate companies; companies holding special concessions or licences.

Taiwan	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	A notification filing must be made where a combination meets any of the thresholds set out in the Fair Trade Law of 1991 (FTL) and where there are no exemptions. Clearance must be obtained before completion of the combination. Clearance occurs 30 working days from the date the Fair Trade Commission (FTC) accepts the complete filing materials, provided that this period may be shortened or extended by the FTC by written notice as it deems necessary. The filing thresholds include: • where any of the parties has a 25 per cent share in a market in Taiwan, and as a result of the merger the enterprises will have a 33 per cent market share; • where all of the parties in aggregate, in the preceding fiscal year, had combined global sales in excess of NT$40 billion, and each of at least two of the parties had sales, in the preceding fiscal year, in Taiwan exceeding NT$2 billion; and • where the Taiwan-sourced annual turnover of one of the parties is NT$15 billion in general with another party having NT$2 billion of the same or NT$30 billion in the case of a financial enterprise with another party having NT$2 billion of the same.
Clearance deadlines (Stage 1/Stage 2)	Clearance before closing is required. The reviewing authority has 30 working days from accepting the complete filing materials to acquiesce, object, unilaterally shorten the review period or unilaterally extend the review period for an additional 60 working days. Thus, filing should be made at least 90 working days before the scheduled closing.
Substantive test for clearance	Generally, whether the economic benefits of the combination outweigh the restrictions on competition that result from the combination.
Penalties	Fines range from NT$200,000 to NT$50 million. The FTC also has broad equitable powers to block or unwind unauthorised combinations. Further, according to the Administrative Penalty Act, if the benefit gained exceeds the maximum statutory fine permitted, the fine may be increased to an amount comparable to the benefit gained.
Remarks	No carveouts are allowed. Where required, the notification must be made in a timely manner, or the parties will be subject to a penalty.

Thailand	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	Pre-merger filing is required for any merger that may result in a monopoly or a business operator having dominant market power (ie, one business operator having a market share of 50 per cent or more; or one of the top three business operators having a market share of 75 per cent or more in aggregate, excluding any business operator having a market share of less than 10 per cent or a sales turnover of less than 1 billion Thai baht). Transactions requiring a pre-merger filing must receive approval from the Trade Competition Commission (TCC) before closing. Post-merger notification is required for any merger where the sales turnover of any one business operator or of all business operators conducting a merger in aggregate, amounts to 1 billion baht or more. Notification must be submitted within seven days from the date of closing.
Clearance deadlines (Stage 1/Stage 2)	For pre-merger filing, the TCC must complete its consideration of an application within 90 days of filing. If the TCC is unable to complete its consideration within this period, the TCC may extend the period by up to 15 additional days. For post-merger notification, there is no statutory timetable for the TCC to verify the notification.
Substantive test for clearance	Whether the merger: • is reasonably necessary for the business; • is beneficial to business promotion; • poses no serious harm to the Thai economy; and • has no material effect on the due interest of consumers in general.
Penalties	**Failure to file pre-merger filings** • Administrative sanction: a fine not exceeding 0.5 per cent of the total value of the merger transaction; a director, manager or any person responsible for the operation of the company is also subject to the same penalty. • Civil claim: any person who suffers damage from a violation of the pre-merger filing requirement by a business operator may claim for damages. • The TCC may issue an order to a business operator to suspend, cease or vary the merger if it has sufficient evidence to believe that the business operator is in violation of the pre-merger filing requirement. **Failure to file post-merger notifications** • A fine not exceeding 200,000 Thai baht and a daily fine not exceeding 10,000 Thai baht throughout the period of the violation; a director, manager or any person responsible for the operation of the company is also subject to the same penalty.
Remarks	The merger control provisions only came into force in Thailand in December 2018. Interpretation and application of the laws, by the authorities, with regard to certain criteria and requirements for pre-merger filing and post-merger notification, are still unclear.

Turkey	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	No filing deadline. Final and executed version of the transaction document requested. No closing before approval.
Clearance deadlines (Stage 1/Stage 2)	Thirty days following a 'complete' notification. Waiting period of six months with the possibility of a further six months' extension in the case of a Phase II investigation.
Substantive test for clearance	Dominance test: creation of a dominant position or strengthening of an existing dominant position as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country.
Penalties	Realisation of a notifiable transaction without the approval of the Competition Board: turnover-based monetary fine of 0.1 per cent 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 taken into account). The minimum fine for 2020 is 31,903 liras. Liability for fines is on the acquiring firm in the case of an acquisition or on both merging parties in the case of a merger. Moreover, a notifiable transaction, not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences. If the Board concludes that a non-notified notifiable transaction would have been prohibited had it been notified, fines of up to 10 per cent of turnover generated in the financial year preceding the date of the fining decision will be incurred (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party.

Ukraine	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	A transaction qualifying as a concentration requires AMC merger clearance if in the last financial year immediately preceding the year of the concentration: • the combined worldwide value of assets or turnover of the parties to the concentration exceeds €30 million and the value of Ukrainian assets or turnover of each of at least two parties exceeds €4 million; or • Ukrainian value of assets or turnover in Ukraine of the target, or of the seller of the assets, or of at least one of the founders of a new entity exceeds €8 million and worldwide turnover of at least one other party exceeds €150 million. All figures shall be taken for the last financial year immediately preceding the year of the concentration. In either case, the parties to a concentration should be considered at their group level. That means that the assets or turnover of the controlling shareholder or seller should still be counted towards the target.
Clearance deadlines (Stage 1/Stage 2)	Preview period: 15 calendar days. Phase I review period: up to 30 calendar days. Phase II review period: up to 135 calendar days. Also, there is a fast-track simplified 25-day review procedure for transactions where: 1 only one party is active in Ukraine; or 2 parties' combined shares do not exceed 15 per cent on the overlapping markets or 20 per cent on vertically related markets.
Substantive test for clearance	No monopolisation or substantial restriction of competition in the Ukrainian market or a significant part of it.
Penalties	Statutory maximum fine for pre-clearance closing or closing without clearance is up to 5 per cent of the consolidated turnover in the year immediately preceding the year when the fine is imposed. In practice, according to the Guidelines on Fines, the actual fines in merger cases are lower.
Remarks	The Ukrainian merger control regime is extraterritorial, in some cases excessively: the AMC claims jurisdiction over transactions reasonably lacking sufficient local nexus.

United Arab Emirates	
Voluntary or mandatory system	Mandatory; however, a number of exclusions currently exist (for companies operating in certain sectors, government-owned or government-controlled entities, and for small and medium-sized enterprises).
Notification trigger/ filing deadline	Forty per cent market share thresholds, as well as a preliminary assessment as to whether the transaction is likely to affect competition in the UAE. Filing must be made at least 30 days prior to the conclusion of a draft contract or agreement bringing about the transaction (unclear whether this allows for the signing of a legally binding share purchase agreement).
Clearance deadlines (Stage 1/Stage 2)	Initial review period of 90 days, may be extended by a further 45 days. The Law does not provide for any expedited review process.
Substantive test for clearance	Whether the transaction will negatively affect competition, or whether there may be economic benefits that would outweigh the detriment to competition.
Penalties	Fine of between 2 and 5 per cent of sales in the UAE, or alternatively 500,000 to 5 million UAE dirhams for failure to notify. Fine of 50,000 to 500,000 dirhams for implementing the transaction before clearance (gun jumping). Closing down of an infringing establishment for three to six months. Possibility for affected third parties to seek damages.
Remarks	Although the Competition Law is now officially in force, certain gaps in the legislation and considerable uncertainty in its application remain. Companies doing deals in the UAE that are likely to meet the 40 per cent market share threshold will need to consider carefully whether to make a merger control filing, and if so how to approach the Ministry, in the absence of any formal filing process or of any public record of decisions to date.

United Kingdom	
Voluntary or mandatory system	Voluntary system. Form of notification: CMA's prescribed form. In English.
Notification trigger/ filing deadline	The turnover in the United Kingdom of the enterprise being taken over exceeds £70 million or combined share of supply in the UK of 25 per cent created or enhanced. Filing: no formal time limit.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 40 working days. Stage 2: 24 weeks (can be extended for eight weeks for special reasons). Suspension effects: ability to impose 'hold-separate' obligations on mergers at either stage.
Substantive test for clearance	Whether the merger will result in a substantial lessening of competition in the UK or a substantial part of the UK.
Penalties	Failure to file: no penalties. Implementation before clearance: no penalties, unless in breach of a statutory prohibition, undertaking or order. Non-compliance with orders for the production of documents or information: penalties.
Remarks	Special provisions for cases involving national security, media mergers, government contractors, water mergers or mergers necessary to protect financial stability.

United States	
Voluntary or mandatory system	Mandatory system. Each party must submit a filing. Filing fee (paid by acquiring person) is between US$45,000 and US$280,000, depending on size of the transaction.
Notification trigger/ filing deadline	Must satisfy the commerce test, size-of-parties test (for deals valued between US$90 million and US$359.9 million) and size-of-transaction test, and not qualify for an exemption. No filing deadline.
Clearance deadlines (Stage 1/Stage 2)	30-day initial waiting period (15 days for all-cash tender offer or sale in bankruptcy). Can be shortened by early termination or extended by issuance of a second request. Stage 2 period ends on the 30th day after compliance by all parties with the second request (in the case of a cash tender offer, Stage 2 ends on the 10th day after compliance by the acquiring person with the second request). Transaction suspended until waiting periods have been observed.
Substantive test for clearance	Whether the transaction may substantially reduce competition or tend to create a monopoly.
Penalties	Failure to file: fine of up to US$42,530 per day; divestiture can be required. Transaction cannot be implemented prior to clearance. Same penalties apply if transaction is consummated before approval.
Remarks	Special rules can apply to certain industrial sectors (telecommunications, banking).

Uzbekistan	
Voluntary or mandatory system	The system is mandatory.
Notification trigger/ filing deadline	For legal entities in commodities and financial markets: • the notification and pre-approval are required if the aggregate balance sheet value of the assets of both parties to the transaction; or • the aggregate amount of sales of goods for the last calendar year of both parties exceeds 100,000 times the BCV, which is currently 245,000 Uzbekistani so'm. There are no legal deadlines for a pre-completion filing. Merger control clearance must be obtained before the transaction.
Clearance deadlines (Stage 1/Stage 2)	Ten calendar days. May be extended to up to one month.
Substantive test for clearance	A merger must be prohibited or made conditional by the Antimonopoly Committee if it leads to the creation or strengthening of a dominant position in the relevant Uzbekistan market sector or otherwise leads to a limitation of competition in the Uzbekistan market.
Penalties	Administrative liability: a fine in the amount of one to three times the BCV applies where an individual is involved, and five to 10 times the BCV applies where a legal entity is involved. Criminal liability (applicable after imposing administrative fine): a fine in the amount of 25 to 50 times the BCV, or deprivation of a right to hold certain positions for a period of three to five years, or up to three years of corrective labour. There is no notion of corporate criminal liability in Uzbekistan; therefore, criminal liability is imposed on the official or any other authorised person from the company of the purchaser. In addition, the Antimonopoly Committee may apply to a court to invalidate, in full or in part, agreements and other transactions for which its prior authorisation or subsequent notice was required but has not been obtained or given, or to liquidate a company if it was incorporated without prior approval, provided that the relevant transaction or incorporation results in limitation of competition.
Remarks	None.

Vietnam	
Voluntary or mandatory system	Notification is mandatory if an economic concentration meets the filing thresholds.
Notification trigger/ filing deadline	• Filing thresholds are based on the combined market share of the parties; the value of the transaction (applicable to onshore transactions only); the total assets of one of the parties (or, arguably, the total assets of all parties combined) (including affiliates) in Vietnam; or the total turnover of one of the parties (or, arguably, the total turnover of all parties combined) (including affiliates) in Vietnam. Different threshold values apply to transactions in different sectors. • Filing must be made before closing a notifiable transaction.
Clearance deadlines (Stage 1/Stage 2)	The VCA will carry out the review of a filing in three stages. The statutory review process may take up to 180 days, plus seven working days from the date the parties submit the filing to the VCA until the issuance of the clearance decision.
Substantive test for clearance	An economic concentration is prohibited if it causes or is likely to cause a significant restraint of competition in the Vietnamese market. The substantive test will be based on the: • combined market share of the parties before and after the economic concentration; • extent of the concentration in the relevant market before and after the concentration; • relationship of the parties in the chain of production, distribution and supply of a specific type of goods or services; • competitive advantage of the parties after the concentration; • ability of the parties to increase the prices or profit margin after the economic concentration; and • ability of the parties to exclude or prevent other enterprises from entering or expanding the market.
Penalties	Each party to a prohibited transaction could be exposed to an administrative fine of 1 per cent to 5 per cent of its total revenue in the relevant market in Vietnam in the preceding fiscal year.
Remarks	• The competition law in general and the merger control regime in particular are relatively new in Vietnam, with limited enforcement practice. However, with the introduction of the 2018 Competition Law, it is expected that enforcement will be more robust in the foreseeable future. • In the new regime, the government has moved away from the old market share test but applies a broader economic assessment of the market power of the parties and competitive impact of the transaction. This is more in line with international practice. • The evolving legal framework and the lack of enforcement precedents result in difficulty in predicting the view of the VCA in the interpretation and application of the relevant provisions of the law. • In addition to the black-letter law, the parties should consider other market and economic factors around a transaction as well as the government's policy in respect of the relevant market when making a filing decision.

Zambia	
Voluntary or mandatory system	The merger system is mandatory in Zambia if the prescribed threshold is met.
Notification trigger/ filing deadline	Making the declaration of a merger and the threshold outlined in the legislation. No filing date prescribed save for notification being issued prior to implementation of a merger.
Clearance deadlines (Stage 1/Stage 2)	• Six weeks for Stage one and six weeks for Stage 2 (maximum 90 days in total).
Substantive test for clearance	• Calculating the market shares and market concentration; • benefits to consumers; • barriers to entry and market entry; • availability of substitutes; • removal of vigorous competitors; and • extent of import competition.
Penalties	Up to 10 per cent of annual turnover of the merging parties or criminal sanctions.
Remarks	None.

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