Merger Control

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PREFACE

We are delighted to introduce the seventh edition of *Global Legal Insights – Merger Control.* As in previous editions, the 29 country chapters each concern a particular jurisdiction and offer comment and strategic insights into merger control laws around the world, as well as their enforcement in practice. This edition also contains an additional chapter looking at anti-competitive buyer power under UK and EC merger control. This work, together with the other titles in the now well-established Global Legal Insights series, goes beyond the basic letter of the law and adds important colour and texture to the core topics which it discusses.

The publishers have again gathered a group of leading practitioners from around the world to provide their personal insights into the practical operation of the merger control rules. We have continued to give the authors considerable scope to express their professional judgment and to explain the workings of their home regime, as well as a free rein to decide the focus of their own chapter.

As merger control regimes are introduced in ever more countries, the trend to converge best practice and procedures continues. We hope that this latest edition of *Global Legal Insights – Merger Control* will be a useful resource in understanding the approaches of different competition authorities, and that merger control practitioners will continue to find this book a useful and insightful addition to their libraries.

Nigel Parr and Ross Mackenzie
Ashurst LLP

Anti-competitive buyer power under UK and EC merger control – too much of a good thing?

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Introduction

The main context in which buyer power is relevant to merger control analysis is assessing whether customers – particularly large customers – have the ability and incentives to resist efforts by large suppliers to increase wholesale prices above the competitive level. This issue is routinely considered in merger assessments by the European Commission, the Competition and Markets Authority (CMA) and many other competition authorities globally, and countervailing buyer power is rightly emphasised in many competition authorities' merger guidelines as a factor that may negate supplier market power.[1]

If a merged entity obtains lower input prices due to buyer power, this is generally seen by competition authorities as a rivalry-enhancing efficiency. This is because reductions in a firm's variable costs may be passed on to customers in the form of lower prices.[2] This point is highlighted in both the CMA's Merger Assessment Guidelines[3] and the European Commission's Horizontal Merger Guidelines.[4] The European Commission's Horizontal Merger Guidelines state that:

> "*… increased buyer power may be beneficial for competition. If increased buyer power lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices.*"[5]

Nevertheless, a merger that increases a customer's buyer power may have anti-competitive effects.[6] This is a topical subject for several reasons. First, this issue is increasingly considered as a matter of course in UK merger control cases and in some EC cases. In particular, in January 2018, the first UK adverse finding for over ten years (at either Phase 1 or Phase 2) on purchasing market power was reached by the CMA at Phase 1 in *European Metal Recycling/Metal & Waste Recycling*.[7]

Second, in some cases, anti-competitive buyer power may be an important competition concern in its own right. It is noteworthy that the CMA assessed this issue in some detail in its Phase 2 decision in *Tesco/Booker* (2017), reflecting the fact that it received a large body of complaints on this issue and grocery retailers have been found in previous investigations to have substantial buyer power that may have certain anti-competitive effects.[8] Similarly, this issue has also arisen in various mergers assessed by the European Commission, with the Commission reaching an adverse finding due to anti-competitive buyer power effects most recently in its Phase 2 decision in *Liberty/Ziggo* (2014). This latter case is of interest

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more generally as a competitor (KPN) successfully appealed the Commission's conditional clearance decision to the European General Court, and the Commission is currently reviewing the merger again.

This chapter:

- considers the circumstances in which a merger may lead to anti-competitive buyer power;
- assesses the application of various theories of harm associated with anti-competitive buyer power in the three cases referred to above, as well as some other recent UK cases that have considered the risks of anti-competitive buyer power; and
- offers some conclusions about the implications for practitioners working on future cases.

When is buyer power anti-competitive?

Anti-competitive buyer power is addressed in a mere two paragraphs of the CMA's Merger Assessment Guidelines and only three paragraphs of the European Commission's Horizontal Merger Guidelines. However, several themes can be identified from these guidelines and the economics literature relating to how mergers that increase buyer power may:

- create or enhance monopsony power, whereby a powerful customer may be able to reduce input prices by withholding demand;
- have an anti-competitive waterbed effect, where lower input prices negotiated by large buyers may lead to smaller buyers facing higher input prices, thereby harming competition in downstream markets;
- have anti-competitive effects on suppliers' incentives to invest to reduce costs or improve quality; and
- enable powerful buyers to enter into agreements with their input suppliers that foreclose competition or deter downstream entry by these suppliers.

These theories of harm are considered in turn below. The reason for describing these theories in some detail is to highlight the key economic relevant economic evidence that should be considered to assess whether these theories apply in any particular market context.

Theory of harm 1: Monopsony power and withholding demand

There are several definitions of buyer power. Competition authorities commonly draw a distinction between bargaining power (that is, the strength of buyers in negotiations with suppliers), and monopsony power. In its report for the Office of Fair Trading on "The competitive effects of buyer groups" (the RBB report), RBB succinctly describes monopsony power as arising where "*a large buyer purchases fewer units so as to obtain lower prices on all units it purchases*", with uniform market prices for the input rising as volumes increase and there not being bargaining or negotiation between buyers and suppliers.[9]

Given these assumptions, monopsony buyer power manifests as the mirror image of the pricing power held by a monopolist (or potentially by an oligopolist). Following the logic of a monopolist setting prices above competitive levels by withholding supply, the theory of harm involves a monopsonist (or an oligopsonist) reducing its purchase prices below competitive levels by withholding demand.[10] The key characteristic of the market structure in this case is an upstream market with a relatively fragmented supply structure (i.e. competitive suppliers) and a relatively concentrated purchaser ecosystem (i.e. a monopsony or oligopsony).

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In the above case, even if an economic inefficiency arises, this would not be an inefficiency harming the consumer if the monopsonist purchaser was the final consumer of the product, because its gain from paying less per unit would exceed its loss from consuming less. On the other hand, if the purchaser was a downstream supplier itself, then its upstream exercise of buyer power could lead to restricted output and higher prices for downstream consumers, depending on downstream competition.

This monopsony scenario, in which increased buyer power may be anti-competitive, is identified in both the CMA's and European Commission's merger guidelines. The CMA's Merger Assessment Guidelines describe this issue in the following terms:

> "One circumstance in which unilateral effects may arise from increased buyer power is when:
>
> - *the merged firm has an incentive to lower the amount it purchases so as to reduce the purchase price it pays (known as 'demand withholding'); and*
> - *the merged firm also has sufficient market power over its customers so that, as it reduces the quantity sold to them in the market, it can increase the price at which it sells to them."*[11]

The European Commission's Horizontal Merger Guidelines express the issue in similar terms.[12]

However, as noted above, the monopsony model relies on the very specific assumptions outlined above. In this regard, we agree with the RBB report that:

> ".. *the monopsony model relies on a situation where, as more purchases are made, the purchasing price rises for all units. In our experience, intermediate markets are rarely characterised by this condition. It is more common for input prices to decline as purchases increase. Further, the monopsony model assumes that bargaining does not take place, yet intermediate markets are often characterised by negotiated terms of supply. Nevertheless, monopsony effects may occur in certain commodity markets where there is a uniform input price.*"[13]

Theory of harm 2: Bargaining power and the waterbed effect

As noted above, buyer power may also arise in a bargaining context. In a bilateral bargaining framework, both the buyer and seller may each have some bargaining power *vis-à-vis* each other. The range of prices and supply terms within which the bargain is struck will depend on the suppliers' and buyers' respective fall-back options or threat points, which are determined by what happens if they do not reach agreement. In particular, a buyer may switch to another supplier if it does not reach agreement, and thus its fall-back option may be that alternative supplier's price. A supplier, on the other hand, will either need to find another buyer (possibly at a lower price) or sacrifice the profits on this sale. Precisely where the bargain is agreed within this range depends on various other factors including: the buyer's/seller's sophistication (including their respective investments in their procurement process); the information they possess as to the position of the opposing party; their respective abilities to add value to the other side (e.g. a buyer's ability to boost the supplier's sales, such as by providing superior information on end consumer demand); and the ability and incentives of the buyer/seller to act strategically to improve their positions.[14]

The RBB report indicates that customers may have substantial buyer power where both of the following conditions apply:

- they can, at low cost, rapidly switch to credible alternative sources of supply, or develop such alternatives; and

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- the buyer acts as a gateway to the market in the sense that if the supplier fails to reach agreement with that buyer, then the supplier will need to sell via inferior sales channels or forgo economies of scale.[15]

In this framework, a purchaser with high relative bargaining power can secure discounts without having to withhold demand. In this context, gateway buyers will clearly be large purchasers. However, even large purchasers do not automatically have substantial countervailing buyer power, particularly where the inputs they purchase are indispensable, they have few suppliers to choose between and/or their ability to switch suppliers is limited by supplier capacity constraints or if suppliers' products are highly differentiated. (This is obvious, as otherwise competition authorities would never reach adverse findings in relation to mergers in markets where there are only a few customers.) Moreover, smaller customers may be able to secure more competitive input prices if their purchasing requirements are less demanding (potentially enabling them to purchase from a wider range of suppliers), and they can be more opportunistic in their purchasing decisions.

In addition, upstream suppliers could behave strategically by offering the dominant buyer's rivals comparable (or even cheaper) prices to ensure that they do not become too weak. *Bedre-Defolie* and *Shaffer* (2011)[16] show that when a dominant retailer facing a competitive fringe of small retailer rivals attains significant bargaining power, the supplier could offer a lower wholesale price to the competitive fringe in order to ensure that its own outside options (i.e. selling to smaller retailers) do not deteriorate further (i.e. to prevent the dominant buyer from becoming a gateway).

If large purchasers secure lower wholesale prices for inputs, the direct effect is to reduce its downstream sales price: it can pay less to buy more (without withholding demand) and may find it profitable to sell more downstream at lower prices. Accordingly, the direct consequences of increased buyer bargaining power may benefit consumers.

Nevertheless, consumers may suffer from higher prices if there is a '*waterbed effect*'.[17] This occurs if discounts to one purchaser with greater buyer power lead to an increase in wholesale prices for that input to its rivals.

Inderst and *Valletti* (2011) consider how waterbed effects may arise in a model that assumes that buyers incur a fixed cost if they switch suppliers.[18] These fixed switching costs could include developing and marketing an own-label brand, testing that an alternative supplier's product meets the buyer's precise standards or requirements, or the costs of finding another supplier.

In their model, buyer power arises from purchase volumes, because larger buyers can spread the fixed cost of switching suppliers over a larger volume of purchases. This scale advantage leads to a large firm's threat of switching being relatively more credible, which implies that it can exert greater pressure on its suppliers to obtain discounts. The large firm can use these discounts to grow even larger at the expense of its rivals. As the smaller firms lose market share, this weakens their bargaining power (in the sense that their fixed costs of switching supplier would have to be recovered over smaller purchase volumes), resulting in their input purchase prices increasing.

However, *Inderst* and *Valletti* rightly emphasise that buyer power from purchase volumes depends on the magnitude of the buyer fixed switching costs. If these switching costs are sufficiently low, then there will be little scope for suppliers to price-discriminate between large and small customers, and further growth in the large buyer will reduce all retail prices.

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Moreover, it is not sufficient to establish a mechanism via which one buyer's low input prices may increase the prices paid by others. One must also consider how downstream consumer prices are affected.[19] *King* (2013)[20] considers whether waterbed effects are likely in terms of downstream price increases, even if large buyers secure higher discounts from their input suppliers. King identifies three different effects that determine how downstream prices will be affected:

- The '*competition effect*' – a buyer benefiting from lower input prices sets lower downstream prices, leading to rivals reducing their own downstream prices and/or suffering a loss in sales. This reduction in rivals' downstream profits reduces the smaller firms' (derived) demand for the input, which will in turn lead to the input prices to these smaller rivals also falling. As a result, this competitive effect acts against the waterbed effect for downstream competitive rivals.
- The '*cost effect*' – in King's model, a cost effect arises as a lower input price increases total sales of the input. If marginal costs rise as output increases, then this will increase the marginal production cost to all downstream firms. However, if the upstream marginal cost of supply does not change as input volumes change, then the cost effect will be zero.
- The '*elasticity effect*' – changes in downstream prices may lead to consumers becoming less or more price sensitive, which may increase or offset the cost effect.

Based on this analysis, King emphasises two important points. First, if there is no waterbed effect, then an increase in one downstream firm's countervailing buyer power will simply reduce downstream prices to the benefit of consumers. Second, if there is a waterbed effect and downstream prices for smaller buyers increase, the benefits to one set of consumers who benefit from lower prices (i.e. those of the firm with greater buyer power) would need to be balanced against the adverse effects to consumers facing high prices from rivals facing higher input prices. Accordingly, the overall effects on consumers depend on the magnitude and interaction between these effects, including the willingness of consumers to switch between firms.

In our view, there are plausible theories of harm in which adverse waterbed effects may arise, and these issues have been explored in a number of merger cases (see further Section 3). As regards market investigations, the Competition Commission found no evidence on waterbed effects in its 2008 *Groceries* report. Similarly, in a 2014 report commissioned on the impact of modern retail on the EU food sector,[21] the European Commission found no statistical association between retail concentration at national level and product variety,[22] and found a mostly positive statistical association between retail concentration at the national level and product innovation.[23]

Theory of harm 3: Bargaining power and supplier innovation

Moving away from waterbed effects, another concern is how buyer power could reduce supplier innovation. This concern stems from a standard 'hold-up' perspective that suggests that a reduction in upstream suppliers' total profits due to buyer power could weaken suppliers' investment incentives.[24] In this regard, the CMA's Merger Assessment Guidelines briefly observe that:

> "*Buyer power may also lead to suppliers having lower incentives to invest in new products and processes.*"[25]

This is a clear reference to the Competition Commission's adverse finding in relation to its market investigation into the supply of groceries, which found that:

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> "*Grocery retailers' buyer power is of benefit to consumers since part of the lower supplier prices arising from this buyer power will be passed on to consumers in the form of lower retail prices. We did not find that the financial viability of food and drink manufacturers was under threat as a result of the exercise of buyer power by grocery retailers. However, the transfer of excessive risks or unexpected costs by grocery retailers to their suppliers is likely to lessen suppliers' incentives to invest in new capacity, products and production processes. We concluded that, if unchecked, these practices would ultimately have a detrimental effect on consumers.*"[26]

This adverse finding was narrowly defined since it related to a certain conduct by retailers, not overall pricing levels or returns to innovation. In addition, *Inderst* and *Wey* (2011)[27] show that there are scenarios in which a strong buyer could induce a supplier to improve the competitiveness of its offering by engaging in innovation to lower costs or increase quality.

The intuition behind Inderst and Wey's model is straightforward, and follows the points made at the start of this section. The outcomes of bargaining between suppliers and buyers depend on their respective outside options; for example, from a buyer's perspective, the prices offered by rival suppliers relative to those offered by its incumbent supplier. Similarly to Inderst and Valletti (2011), Inderst and Wey assume that if a buyer switches supplier it incurs some fixed costs, but also an investment cost to achieve an optimal cost reduction. Again, this gives large buyers better outside options (and thus greater bargaining power), as they can spread these costs over a greater quantity of purchases. In this scenario, the presence of large buyers would reduce a supplier's total profits. However, crucially it could also increase the incremental profits from supplier investment, because the payoff to a sufficiently large buyer from bargaining depends solely on its outside option (i.e. its ability to switch to alternatives), while innovation that improves the appeal of the incumbent supplier's products makes switching to (higher-cost) alternatives less appealing. Furthermore, an investment that reduces the marginal cost of the supplier could reduce the value of a buyer's alternative supply options.

Theory of harm 4: Bargaining power deterring entry or inducing input foreclosure

A final possibility identified in the European Commission's Horizontal Merger Guidelines is that:

> "*Competition in the downstream markets could also be adversely affected if, in particular, the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals.*"[28]

Since input foreclosure may have anti-competitive effects in downstream markets, it is a logical possibility that such concerns might also emerge if a powerful customer were to induce its suppliers not to supply essential inputs to its rivals. Powerful customers might also be able to contractually compel suppliers not to enter into competition with them in downstream markets.

Recent cases where the risk of anti-competitive buyer power has been assessed

This section considers five cases where the authorities assessed the risk of anti-competitive buyer power. These cases have been grouped under three headings: the risk of anti-competitive waterbed effects; the risk of excessive buyer power in isolation; and the risk of buyer power deterring downstream entry and leading to input foreclosure. Only one of these relates to a European Commission decision (*Liberty/Ziggo* (2014)), since this issue has been considered less often in recent EC merger decisions.

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The risk of anti-competitive waterbed effects

Dawn Meats/Dunbia (2017) (UK – phase 1)

Dawn Meats and Dunbia operate abattoirs (i.e. slaughterhouses), de-boning facilities and meat processing and packaging facilities across the UK and Ireland. They are active both upstream in the purchase of livestock (sheep/cattle) and downstream in the supply of processed and unprocessed meat products – mainly beef/lamb sold to retailers, hotels, restaurants, caterers and food manufacturers.[29]

The CMA investigated whether increased buyer power could create a waterbed effect, whereby the merged entity negotiates lower prices (or worsens other terms) for livestock from suppliers, leading to those suppliers recouping the losses from the parties' competitors. Competitive harm would arise if this resulted in competitors exiting the market or otherwise reducing operations such that there was softer competition in the supply of processed and unprocessed meat. This could therefore offset any pro-competitive effects from an increase in buyer power (e.g. passing cost savings into lower prices to downstream customers).[30]

The evidence suggested that the parties had modest shares of purchasing at the national level (GB), with shares below 20% for both sheep and cattle. In Northern Ireland (NI), the shares were redacted but the CMA concluded the merger would not raise the parties' buyer power *vis-à-vis* sheep. However, the CMA did believe that the parties accounted for a significant proportion of demand for cattle in the North West of England.

The low GB-wide shares of purchasing are consistent with many alternative competitors for the acquisition of sheep/cattle at a national level – with at least nine large purchasers and several small local abattoirs for each meat species. There were still three purchasers in the North West of England, and at least eight in NI, who would constrain the parties post-merger. Additionally, there is significant spare capacity for additional slaughter at the national level (shares redacted), and around 62-76% capacity utilisation throughout the island of Ireland. Accordingly, the CMA concluded that it would be difficult for the parties to leverage their buyer power even at the regional level, particularly as farmers were willing to travel up to 200 miles.[31]

Finally, the CMA considered internal documents suggesting the parties could secure significant savings on the price of cattle. However, given the CMA's view that there was no significant increase in the parties' buyer power and farmers were able to switch supply quickly and easily, the CMA dismissed the theory of harm and cleared the merger.[32]

Cargill/Faccenda (2018) (UK – phase 1)

Cargill and *Faccenda* entered a joint venture (JV), overlapping in the supply of fresh and value-added chicken to various customers, including retailers, caterers and food manufacturers in the UK. The CMA's analysis considered competitive harm associated with potential waterbed effects from the parties' increased buyer power when acquiring broiler chickens from 'grow-out' farms. However, the CMA noted that several cumulative conditions would need to be met:

(a) the JV needed to negotiate better terms from 'grow-out' farm suppliers;

(b) better terms (i.e. lower prices) are then passed on to customers, attracting business away from competitors supplying chicken downstream;

(c) the loss of customers among rivals downstream is sufficiently harmful such that it causes exit, or increases the cost to service remaining customers; and

(d) the lessening in competition downstream increases the JV's ability to increase prices or

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worsen terms in the long term (with entry or expansion by remaining competitors not sufficient to negate such effects).

The CMA concluded that the JV was not in a strong position to negotiate better supply terms with the 'grow-out' farms for several reasons:

(a) The lack of volume discounts to poultry suppliers.

(b) The parties' combined low market share (0-10%).

(c) Grow-out farms having at least one outside option they could switch to if the parties tried to offer worse terms.

(d) An effective cap on negotiating strength posed by the mutually dependent relationship between farms and chicken suppliers. One farmer noted that they would simply stop producing chickens if margins were not sufficient.

(e) Individual firms tend to only supply one of the parties (for health and safety reasons). Therefore, the parties did not have common grow-out farm suppliers, and a theoretical increase in the JV's buyer power would not affect the pricing to other suppliers.

(f) The JV had modest shares of supply in fresh or fresh added-value chicken (less than 25%), and there were several credible suppliers who supply similar customers.

Finally, when contacted by the CMA, neither farmers nor the National Farmers' Union expressed concerns about the merger. Consequently, the CMA dismissed the waterbed theory of harm and cleared the merger.

Tesco/Booker (2017) (UK – phase 2)

The merger between *Tesco* and *Booker* likely needs little introduction. In 2017, Tesco, as the UK's largest supermarket chain, purchased Booker, the UK's largest grocery wholesaler servicing retailers and caterers via delivery and cash & carry services.

The merger was between firms at different levels of the supply chain (i.e. a vertical merger), which the CMA generally accepts are competitively benign.[33] As noted in Section 2, increases in buyer power are also likely to be viewed as pro-competitive if lower prices from better-negotiated terms with suppliers are likely passed on to customers. However, the CMA received many third-party complaints alleging the merged entity would receive more favourable terms from suppliers – either through harmonising prices across suppliers,[34] or a general increase in buyer power. Third parties also suggested that the terms could extend to non-price aspects including access to products during periods of peak demand, or exclusive product access or product format (e.g. price-marked packs), to the detriment of other wholesalers. They were also concerned that the merged entity would likely stock fewer branded products favouring its own-brand goods, consequently reducing supplier innovation. Thus, the CMA felt it needed to address third-party concerns that the merged entity's buyer power would lessen competition in the market for grocery wholesale services.

The CMA identified a series of conditions that would all need to be satisfied for this theory of harm to apply:

- the merged entity negotiates better terms with its suppliers;
- lower input prices are then passed through to retailers and caterers, allowing the merged entity to attract business from competitors;
- competition from wholesalers would be weakened through wholesalers either exiting the market, or remaining but facing increased costs from suppliers via a 'waterbed effect'; and

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- the merged entity can therefore raise prices or otherwise worsen its offer in the long term due to weakened delivered and/or cash & carry grocery wholesale (with no countervailing effects from entry/expansion).[35]

The CMA was confident that any efficiency savings would arise quickly, while competitive harm would only occur in the less foreseeable, long term.

The CMA assessed this theory in two stages as follows:

- *Whether the merged entity may negotiate better supply terms and will pass them on*

  Whether the merged entity could negotiate better supply terms depends, unsurprisingly, on how it negotiates with suppliers. The CMA therefore considered detailed evidence on supplier procurement practices, cost synergies, the parties' share of procurement and the increment in its share across product categories, and their overall share of both grocery and wholesale retailing.

  The evidence suggested that "*the merged entity will not have materially stronger bargaining power in tobacco or any other products following the Merger*".[36] This was because the procurement increment was relatively low, and tobacco suppliers were likely to gain bargaining power due to high supplier concentration – constraining any ability for the merged entity to exercise its own increase in buyer power.

  Given its view that the merged entity did not have appreciably greater buyer power, the CMA went on to assess the effect of price harmonisation on competition.

- *Will competition become weaker?*

  Assuming the parties could achieve some savings through price harmonisation, the CMA found that this would only affect a small proportion of Booker's grocery purchases. Booker's share of wholesaling is also relatively low (18%), and the CMA would not expect a firm in this position to be able to lessen competition across the whole marketplace. As regards the waterbed effect (i.e. rival wholesalers receiving worse terms), while some suppliers said they might seek to recoup profit lost from the merged entity, the argument suffers from a very logical counterpoint: if suppliers can charge weak buyers higher prices before the merger, why did they not do so? This argument therefore held little weight with the CMA.

  Based on its analysis of competitive conditions in grocery wholesale and the options available to wholesalers after the merger, the CMA concluded that it is unlikely that the merger would weaken competition, with competitors continuing to act as a constraint on the merged entity. The CMA's final point is also worth repeating: "*we note that it would generally be against the principles of merger control to find that a merger gives rise to a likely SLC* [substantial lessening of competition] *just because it made one or both parties more efficient and a stronger competitor*".[37] Thus, there was no SLC from the merged entity's increase in buyer power.

Excessive buyer power alone – European Metal Recycling/Metal & Waste Recycling (2018) (UK – phase 1)

This was a merger between two purchasers of ferrous and non-ferrous scrap metal, which they then shredded or processed for selling to end-users (e.g. steel manufacturers). This merger follows further consolidation in the market for scrap metal, with European Metal Recycling (EMR) recently purchasing five sites from SITA in 2014, and Sims merging with Dunn in 2011.

This case is particularly striking for two reasons. First, it is the first case for over ten years where an adverse finding has been reached at either phase 1 or phase 2 relating to anti-

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competitive buyer power. Second, the CMA did not reach any finding in relation to the supply of ferrous or non-ferrous metal in the UK, because the parties' combined shares of supply were not of a level that raised concerns (respectively, 30-40% and 20-30%, with small increments of 0-5%).

The main competition concerns resulted from the merging parties purchasing ferrous and non-ferrous scrap metal in South Wales, the West Midlands, the North East, and London. The CMA found fairly low combined shares of purchasing in both South Wales (30%) and the West Midlands (40-50%), while in the North East the parties were not close competitors despite high shares of purchasing (70-80%). This focused attention on London, where the parties had a combined purchasing share of 60-70%, with an increment of 5-10%.

In London, there would be only one significant competitor in the region (S Norton) post-merger that could constrain the parties, with the parties competing particularly closely when purchasing waste scrap metal from industrial sources. Accordingly, the CMA concluded that the merger gives rise to a realistic prospect of an SLC in the purchase of scrap metal in London.

The CMA also reached an adverse finding in relation to the shredding of waste metal in the Hitchin area, where the merged entity's market share of purchases would increase by 20-30% to 50-60%.

The CMA's reference decision makes no reference to the Office of Fair Trading's (OFT) analysis in *Sims/Dunn* (2011), which related to the same markets. In particular, in *Sims/Dunn* the OFT similarly found that the merged business' share of scrap metal purchases may have been high in certain regions (although there was uncertainty in the data), and some third parties raised concerns about the merged entity's buyer power in these regions. However, in contrast to *European Metal Recycling/Metal & Waste Recycling*, but in line with the Merger Assessment Guidelines (as discussed above in Section 2), the OFT stated that:

> "*Generally, an increase in buyer power as a result of a merger is not likely to give rise to unilateral effects. However, unilateral effects may arise from anticompetitive buyer power when: (i) a merged firm has an incentive to reduce the amount it purchases (of scrap from scrap merchants, in this case) so as to reduce the purchase price; and (ii) also has sufficient market power over its customers so that, as it reduces the quantity sold to them in the market for the trade of scrap, it can increase the selling price there.*"

The OFT's analysis then focused first on the second limb, since the merged entity's market shares in the downstream markets were too low (no higher than 10-20%, depending on the metal considered) for there to be any scope for the merged entity to increase national scrap prices to its customers. The CMA's later decision, however, makes no reference to this point.

As regards the first limb, the OFT found that:

- the increase in Sims' purchases was likely to be low at 0-10%;
- scrap merchants may sell outside their regions if prices paid were to fall; and
- no regional scrap merchants had expressed any concerns, and transparency of international processed scrap metal prices may negate any regional buyer concentration.

The CMA clearly reached opposing views as to the increase in buyer power in *European Metal Recycling/Metal & Waste Recycling*.

The CMA's reference decision appears to attach considerable weight to the fact that an absence of purchasing competition could adversely affect the interest of local authorities and consumers, but there is no indication that these groups represent a high share of the

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scrap metal purchased by the parties. The case is still being considered by the CMA at Phase 2, with a provisional decision expected in May 2018 and a final decision in July 2018.

Anti-competitive buyer power deterring downstream entry and leading to input foreclosure – Liberty/Ziggo (2014) (EC phase 2)

Introduction

Liberty is an international operator of cable networks, offering internet, television, fixed telephony and mobile services in 11 EU member states and Switzerland. Liberty is active in the Netherlands through its cable network subsidiary UPC, which distributes the Pay TV channels Film1 and Sport1. In 2014, Liberty acquired Ziggo, a broadband cable network company covering more than half of the Netherlands. Its services include digital and analogue cable video, broadband internet, mobile telecommunications and digital telephony (VoIP) services.

The Commission considered that the merger raised two main potential competition concerns:

- in the possible market for wholesale supply and acquisition of Premium Pay TV film channels and the market for wholesale supply and acquisition of Premium Pay TV channels; and
- in the downstream market for the retail supply of Pay TV services.

We focus here on the first of these issues, namely the merged entity's purchasing of both Premium Pay TV and Pay TV film channels, and the impact on wholesale suppliers. The main concern was that the combined Liberty and Ziggo would control (60-70%) of Pay TV subscribers in the Netherlands. In the Commission's view, this had the potential to impede effective competition through strengthening the merging parties' buyer power on the upstream markets for the supply and acquisition of Basic and Premium Pay TV channels.

The Commission structured its investigation by first investigating whether the transaction increased the merged entity's buyer power *vis-à-vis* TV broadcasters, then investigating four specific theories of harm. We mirror this structure in our discussion below.

Effect of the transaction on the merged entity's bargaining power *vis-à-vis* broadcasters

The merging parties purchase Pay TV packages (both basic and premium) that they then offer their customers. The merged entity would account for 50-60% of the market for the acquisition of Pay TV channels, with a sizeable (10-20%) increment. The Commission also notes that these shares are likely to understate the buying power of the combined entity, due to their significant market position in retail Pay TV services (which is closely related to the number of households served).

In its assessment of bargaining power, the Commission considered a range of evidence including:

- That there was a negative correlation between the price paid by TV service providers per TV household to TV broadcasters and the number of households served by the TV service providers. In other words, as a provider services more households, their bargaining power increases and they are able to negotiate a better 'per subscriber' rate with broadcasters.
- The merged entity would control at least twice (if not three times) as many households as the next largest provider (KPN). This is consistent with the share of spending of broadcasters' TV channels being significantly smaller than the share of revenue generated from selling those TV channels (i.e. they pay less 'per subscriber' than rivals).

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- Internal documents confirmed that Liberty was paying under the average market cost for TV channels (percentage redacted), while others verified the close link between the number of household subscribers and the market power exerted on upstream suppliers (specific documents are redacted).
- Submissions from the TV broadcasters noting that large retail TV providers hold the most bargaining power and the merger would increase that bargaining strength, allowing the merging parties to dictate their prices and other conditions.

Following this evidence, the Commission went on to consider four specific theories of harm relating to how increased buyer power for the merging parties may:

(a) "Increase its ability and incentive to hamper the emergence of innovative Pay TV services;

(b) [i]ncrease its ability and incentive to negatively influence the breadth and quality of the programming content that broadcasters offer in the Netherlands;

(c) [i]ncrease its ability and incentive to obtain terms and conditions from broadcasters that ultimately have a negative impact on the access of competing retail TV providers to that very same content; and

(d) [i]ncrease its ability and incentive to block TV broadcasters' hybrid broadcast broadband TV signals."[38]

We consider the four theories and the specific evidence and conclusions in the following sections.

Effect of increased bargaining power on the emergence of OTT services

This theory of harm deals specifically with the potential threat the merged entity's increased buyer power could have on product innovation. In particular, TV broadcasters have been offering content not only via Pay TV channels but also over the internet via Over the Top (OTT) services. It is common for retailers to negotiate restrictions in content contracts that prevent them from offering the same content via the internet. The intuition for this is relatively simple; if consumers could view the same content for free via the internet, they would be much less likely to subscribe to Pay TV services. This, in turn, would reduce the demand for such content and its value to both retailers and broadcasters.

Therefore, the Commission assessed whether the merger would allow the merging parties to either sustain these restrictive agreements or negotiate agreements that were even more onerous (to the detriment of broadcasters and ultimately consumers).

There are three main distribution channels for TV content. First, including that content in linear TV channels offered to retail TV service providers. Second, offering the content in a non-linear fashion to the same retail providers, but for their Video on Demand (VOD) services. Third, offering content over the internet (either directly or via an aggregator – e.g. Netflix). This third form of distribution is a relatively new way to distribute content and is growing in importance in the Netherlands. If unhindered, it would likely form a growing competitive constraint on the first two (more traditional) distribution models.

The Commission investigated the link between Pay TV and OTT services in detail, finding that Pay TV and OTT services are typically negotiated and acquired jointly between broadcasters and the parties. Thus, the Commission concluded that there was a strong direct link between the merged entity's market power in acquiring Pay TV channels and their ability to influence how broadcasters distribute their TV channels and content over OTT services.[39]

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The Commission concluded that the market was already subject to agreements restricting the ability of broadcasters to offer content via OTT services. However, until now, some TV broadcasters had been able to resist such agreements, while others had 'watered down' their restrictive nature. The Commission therefore investigated both the ability and incentive of harm to OTT innovation via restricting OTT services:

- Ability via contractual means – The Commission concluded that the parties would have a greater ability to prevent, delay or hamper OTT innovation via contractual means, even accounting for countervailing factors including broadcasters co-ordinating market responses and facilitating entry downstream.
- Ability to technically restrict OTT services – The Commission concluded that the parties have the technical ability to shut down or degrade OTT services via access to their internet networks services.

The Commission therefore concluded:

> "*[T]he proposed transaction would confer upon the merged entity an increased degree of buyer power vis-à-vis TV broadcasters in the Netherlands. This would increase its ability to impose contractual terms on TV broadcasters that prevent, hamper or delay, by direct and indirect means, the OTT services that include those broadcasters' content. The increased ability to do so would be compounded by the fact that the Parties already have the technical means at their disposal to shut down or to degrade the access to their Internet networks, which these OTT services will need to reach the merged entity's broadband customers*."[40]

The Commission also concluded that the transaction would likely increase the existing incentive to prevent or hamper OTT services. In combination with the ability noted above, this would likely lead to the merger parties adopting a strategy that prevents, hampers or delays OTT innovation post-merger.[41]

Finally, the Commission looked at the likely negative effects on competition from OTT providers resulting from the merged entity using their increased buyer power. They concluded that the merging parties would likely restrict broadcasters' content over the internet and foreclose its potential and existing retail rivals for Pay TV services (particularly innovative OTT service providers such as Netflix, but also smart TV providers like Samsung and Sony). Further, and as noted above, restricting access to OTT service providers would likely prevent further competition and innovation in the retail market for Pay TV services – depriving Dutch consumers of those benefits. Without these constraints, existing Pay TV providers will be less constrained in price setting, likely leading to consumer harm.

Therefore the Commission found:

> "*[T]he proposed transaction is unlikely to be compatible with the internal market in that it is likely to significantly impede effective competition on the market for the acquisition of Pay TV channels, on the market for the retail provision of Pay TV services or on the hypothetical market for the retail provision of multiple play services.*"[42]

Ability and incentive of the Notifying Party to use its increased buyer power to foreclose TV broadcasters' competing content from having access to its Pay TV distribution platform

Another theory of harm related to the merging entity using their increased buyer power to restrict TV broadcasters from using the merged entity's Pay TV distribution platform (i.e. to foreclose particular TV channels). The particular concern was around thematic channels (i.e. channels with a focus on one topic – e.g. history or cooking), and whether the merging party would have the ability and incentive not to carry broadcasters' thematic channels.

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The Commission considered that ability was reasonably clear, although the Commission did note that recent OTT developments (e.g. VOD TV) would provide different routes to customers, so ability to prevent distribution could be undermined over time. However, the parties' incentive not to carry depends on the specific content and whether that is in direct competition with the merged entity's own content. A non-competing channel could well enrich the merged entity's TV offering, allowing it to attract a broader base of subscribers.

However, the merging entity's commitments would also reduce its buyer power in the acquisition market for TV channels. Therefore, the Commission did not need to conclude on this point, given that the parties' commitments would eliminate any potential adverse effects on competition.

Ability and incentive of the Notifying Party post-merger to use its increased buyer power to foreclose its rivals in the retail market for the provision of Pay TV services

As concluded above, the merged entity was found to have an increase in bargaining power *vis-à-vis* TV broadcasters. The Commission therefore investigated whether this buyer power could:

(a) force broadcasters into exclusivity agreements in exchange for increased licence fees – limiting channel availability;

(b) thereby lead broadcasters to charge higher fees to the merged entity's downstream competitors (i.e. impeding competition via a waterbed effect).

On point (a), TV broadcasters were adamant during the investigation that higher fees could not compensate for exclusively. They rely heavily on advertising income, which requires TV channels to have a national reach (in most cases greater than 90% of Dutch households). On point (b), the waterbed theory of harm arises through buyer power leading to higher licence fees paid by the merging parties' competitors downstream of TV broadcasters. These higher costs would then have to outweigh any positive benefits to consumers from the lower licence fees paid by the merging parties. However, the Commission (like the CMA as noted above) was not convinced by this argument, particularly as, if the TV broadcasters are in a position to negotiate higher licence fees post-merger, why did they not do so pre-merger? There was also no evidence to suggest that rivals would pay higher licence fees as a result of the merger.

Therefore, the Commission concluded that "*the proposed transaction would not significantly impede effective competition in so far as it is unlikely to confer upon the Notifying Party the ability and the incentive to engage in input foreclosure vis-à-vis its downstream rivals*".[43]

Ability and incentive of the Notifying Party post-merger to block TV broadcasters' Hybrid Broadcast Broadband TV signals

Hybrid Broadcast Broadband TV (HbbTV) signals (triggers) allow TV broadcasters to allow retail TV customers who have a smart TV to connect directly to the broadcasters' own OTT services. However, neither Liberty nor Ziggo allowed triggers on its network pre-merger, with both actively engaging in blocking HbbTV signals on their cable networks. Therefore, the Commission concluded that both parties already engage in such a strategy, and any ability or incentive is not merger-specific. Consequently, there was no impediment to effective competition on this basis.[44]

Conclusions

To sum up, several theories of harm can be advanced as to how buyer power can have anti-competitive effects and lead to higher prices to consumers. In our view, monopsony models

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only apply in very specific circumstances. Economic models also explain how substantial bargaining power can lead to anti-competitive waterbed effects. However, it is important to assess whether these models fit the facts of the market in question.

The fact that such waterbed theories of harm are not reflected in either the European Commission's or CMA's merger guidelines is likely because these theories of harm were still somewhat novel when they were written,[45] but the possible existence of waterbed effects has been assessed in several cases.

Finally, in certain circumstances, it should be noted that powerful purchasers may be able to restrict supplier entry and engage in input foreclosure. *Liberty/Ziggo* (2014) provides an important illustration of this mechanism.

* * *

Endnotes

1. See paragraphs 9-233 to 9-239 of Parr, Finbow and Hughes, *UK Merger Control: Law and Practice*, November 2016, 3rd Edition, Sweet & Maxwell.
2. See, for example, the CMA's Phase 2 decisions in *Tesco/Booker* (paragraph 8.10) and *Poundland/99p* (2015) (paragraph 6.95). The factors influencing the pass-through of merger-specific cost savings and the assessment of efficiencies is considered more generally at paragraphs 9-240 to 9-270 of Parr, Finbow and Hughes, *op cit*, note 1.
3. Competition Commission and Office of Fair Trading, "Merger Assessment Guidelines", September 2010, CC2/OFT1254, paragraph 5.4.19. These guidelines have been adopted by the CMA and are referred to as the Merger Assessment Guidelines in this chapter.
4. European Commission, "Guidelines on the assessment of horizontal under the Council Regulation on the control of concentrations between undertakings", OJ C31, 5 February 2004, paragraph 62.
5. European Commission, Horizontal Merger Guidelines, paragraph 62.
6. This chapter draws heavily on the analysis of the potential anti-competitive effects of increased buyer power set out at paragraphs 9-134 to 9-136 of Parr, Finbow and Hughes, see note 1.
7. This case is still subject to Phase 2 review by the CMA. As at the time of writing, the last adverse finding at phase 2 in the UK on the basis of purchasing market power was *Stonegate/Deans* (2007).
8. In particular, the Competition Commission's 2008 *Groceries* report led to the establishment of the Groceries Code Adjudicator, which is the independent regulator ensuring that the ten largest UK supermarkets treat their direct suppliers lawfully and fairly.
9. RBB Economics, "The competitive effects of buyer groups" (OFT Economic Discussion Paper OFT863), January 2007, paragraph 1.16.
10. This is the consequence of a monopsonist having a higher marginal factor cost compared to a competitive purchaser (similar to a monopolist having a lower marginal revenue compared to a competitive supplier). See OECD – *Monopsony and Buyer Power*, DAF/COMP(2008)38, 2009.
11. CMA Merger Assessment Guidelines, paragraph 5.4.20. The CMA cites the Competition Commission's decision in *Stonegate/Deans* (2007) as an illustration of demand-withholding. In this case, the Competition Commission stated that it was concerned

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about the monopsony buying power of the merged company, and concluded that: "*Lower prices to producers of eggs could benefit consumers if passed on to them but we believe it would ultimately result in a reduction in the quantity of eggs produced and so would raise prices to retailers and final consumers. Hence, in our view the merger may be expected to a result in a SLC in the procurement of shell eggs from producers.*" (paragraph 21).

12. The European Commission's Horizontal Merger Guidelines indicate that: "*… a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position. The merged firm may be in a position to obtain lower prices by reducing its purchase of inputs. This may, in turn, lead it also to lower its level of output in the final product market, and thus harm consumer welfare. Such effects may in particular arise when upstream sellers are relatively fragmented.*" (Paragraph 61).
13. *Op cit*, note 9.
14. These issues are discussed further at paragraphs 9-23 to 9-25 of Parr, Finbow and Hughes, *op cit*, note 1.
15. *Op cit,* note 9, paragraph 1.22.
16. Bedre-Defolie, O. & Shaffer, G. – "Countervailing power hypothesis and anti-waterbed effects", ESMT Berlin Working Paper, 2011.
17. See Dobson, P.W. & Inderst, R. – "Differential buyer power and the waterbed effect: do strong buyers benefit or harm consumers?", *European Competition Law Review*, 2007. There are also several dynamic theories of harm of excessive buyer power. For example, Inderst and Shaffer (2007) specify a model where a horizontal merger makes it easier for the merged retailer to adopt a single-sourcing strategy to increase its buyer power. This, in turn, incentivises wholesalers to strategically reduce their product differentiation, which reduces consumer welfare by reducing product variety.
18. Inderst, R. & Valletti T.M. – "Buyer power and the 'waterbed effect'", *The Journal of Industrial Economics* (39/1, pp. 1-20), 2011.
19. Although this is essential to any coherent theory of harm. For example, it is not sufficient to assert that if a supplier lowers its prices to one (large) buyer, then it must increase prices to others to recover its costs. This is because such arguments based on cost recovery fail to address why a supplier did not increase its prices to other buyers beforehand.
20. King, S.P. – "Countervailing power and input pricing: when is a waterbed effect likely?", *International Journal of the Economics of Business* (20/3, pp. 325-340), 2013.
21. European Commission – "The economic impact of modern retail on choice and innovation in the EU food sector – final report", 2014.
22. European Commission (2014), *op cit*, note 22, p. 207. The Commission found no statistically significant relationship between retail concentration at national level and product variety/product size variety. At local level (e.g. number of different retailers in a town), it found a weak and negative relationship between retail concentration and product size variety (albeit the magnitude of this effect was small).
23. European Commission (2014), *op cit*, note 22, p. 210. The Commission found a statistically significant and positive relationship between retail concentration at the national level and the number of new products, new range extensions and a measure of innovation named 'Opus innovations', but a negative relationship regarding the number of new packaging introduced. The latter negative relationship was also observed as regards new packaging and retail concentration at the local level.

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24. For a paper formalising this concern, see Battigalli, P., Fumagalli, C. and Polo, M. – "Buyer power and quality improvement", *Research in Economics* (61, pp. 45-61), 2007.
25. CMA Merger Assessment Guidelines, paragraph 5.4.21.
26. *Groceries*, paragraph 36.
27. Inderst, R. and Wey, C. – "Countervailing power and dynamic efficiency", *Journal of the European Economic Association* (9/4, pp. 702-720), 2011.
28. European Commission's Horizontal Merger Guidelines, paragraph 61.
29. *Dawn Meats/Dunbia*, paragraph 3.
30. *Dawn Meats/Dunbia*, paragraph 72.
31. *Dawn Meats/Dunbia*, paragraph 58.
32. *Dawn Meats/Dunbia*, paragraph 72.
33. CMA Merger Assessment Guidelines, paragraph 5.6.1.
34. This refers to moving supply of both parties' products to either Tesco or Booker's suppliers, depending on who had negotiated the better terms pre-merger.
35. *Tesco/Booker*, paragraph 8.11.
36. *Tesco/Booker*, paragraph 8.51.
37. *Tesco/Booker*, paragraph 8.74.
38. *Liberty/Ziggo*, paragraph 277.
39. *Liberty/Ziggo*, paragraph 320.
40. *Liberty/Ziggo*, paragraph 394.
41. *Liberty/Ziggo*, paragraph 398.
42. *Liberty/Ziggo*, paragraph 409.
43. *Liberty/Ziggo*, paragraph 439.
44. *Liberty/Ziggo*, paragraph 448.
45. Note that the European Commission's Horizontal Merger Guidelines were published in 2004 and the UK Merger Assessment Guidelines in 2010.

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Albania

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Overview of merger control activity during the last 12 months

According to the Annual Report of the Albanian Competition Authority ("ACA") for 2017,[1] ACA has reviewed 22 merger filings, out of which, 16 underwent merger control review procedures and six were not reviewed at all due to the notified transaction not constituting a notifiable merger in the meaning of the Competition Law (No 9121 dated 28 March 2003), or the turnover thresholds not being met.

The number of notified merger notifications in 2017 was similar to that of 2016 (21 merger filings), which is partly due to limited M&A activity in the Albanian market. Overall, out of 47 decisions taken by ACA in 2017, only 16 were related to merger control decisions – mainly in the financial, telecommunications and retail markets.

According to the Annual Report, the average timeframe for the review of a notification was 24 days, quite shorter than the average review period in previous years, thus significantly reducing the notifying parties' waiting period after the signing of a transaction. In this respect, ACA relied on its instruction, "On simplified procedures for the treatment of certain concentrations", which instruction is fully approximated with the *Commission Notice* of 5 December 2013 on a *simplified procedure* for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

Out of the reviewed merger notifications, 10 were foreign-to-foreign transactions meeting the turnover thresholds of the Competition Law, and only six were related to domestic M&A activity.

The key legislative development of 2017 was the approval by ACA at the end of 2017 of a Regulation "On categories of technology transfer agreements", which Regulation approximates the Commission's Regulation No 316/2014 dated 21 March 2014, "On enforcement of Article 101(3) of the Treaty on the Functioning of EU on Categories of Technology Transfer Agreements".

New developments in jurisdictional assessment or procedure

There have been no changes to merger control procedures during the last year, thus the jurisdictional test for the assessment of mergers and procedures remains the same. As a rule, the Competition Authority will assert its jurisdiction over any domestic, foreign-to-foreign or foreign-to-domestic transaction resulting in a qualitative change of control, provided that the following turnover thresholds are met in respect of undertakings concerned for the previous financial year:

- the parties' worldwide combined turnover is more than approx. €51m and at least one

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of the parties has achieved a local turnover of more than approx. €1.4m; or

- the parties' domestic combined turnover is more than approx. €2.8m and at least one of the parties has achieved a domestic turnover of more than approx. €1.4m.

The 2016 instruction, "On simplified procedures for the review of some concentrations", based on which certain non-issue concentrations are subject to a shortened review timeframe of 25 days, finally started to show its positive effects, since most of the non-issue-notified transactions appear to have been cleared within less than a month.

However, while the review period is a maximum of 25 days for non-issue transactions, parties will still have to wait one or two weeks for the review timeframe clock to start ticking, as the Authority generally requires a few days to assess whether a notified transaction meets the jurisdictional test, or if a notified transaction is complete in terms of documents and information required.

According to the instruction, the notifying parties must submit a Simplified Notification Form which is similar to the Short Form CO for the notification of a concentration pursuant to Regulation (EC) No 139/2004, and several accompanying documents such as the transaction agreement, power of attorney, financial statements, group chart and diagrams, commercial registry excerpts, etc. Official translation of the foreign language documents is required (apart from translation of annual reports in the English language), even when the transaction is clearly a non-issue one and notified only due to the turnover figures of the parties in Albania.

Only the following transactions are entitled to a simplified review process:

(a) an acquisition between undertakings on the condition that none of the participating undertakings shall engage in the same business activity for the same product and market;

(b) an acquisition between undertakings if both of the following conditions are simultaneously met:

  - the combined market share of all the parties dealing with the same business activity, in the same product or geographic market (horizontal relationship), is less than 15%;
  - individual or combined market shares of all parties in the concentration dealing with business activities in a product market which is an upstream or downstream market of a product market in which any other party in the concentration is engaged (vertical relationship) is less than 25%;

(c) an acquisition where both the following conditions are met:

  - the combined market share of all the parties in the concentration being in a horizontal relationship is less than 50%;
  - the delta of HHI resulting from the concentration is under 150;

(d) a joint venture between two or more undertakings, on the condition that the joint venture does not or will not conduct activities in the Republic of Albania, and provided that the turnover of the joint venture or contributing members of the joint venture is less than 300 million ALL (approx. €2.2 million) in the domestic market, or the total value of assets transferred to the joint venture is less than 300 million ALL in the Republic of Albania at the time of the notification; or

(e) an acquisition where one party acquires sole control over an undertaking where it already has joint control.

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The Competition Authority may always opt to apply the standard Phase I and Phase II review timeframes if it judges that the concentration deserves closer investigation, or if third parties submit written concerns regarding the notification concentration during the third-party-comment phase. It may also select not to apply the simplified review period in those cases when clearly there are no market overlaps, but the markets concerned are deemed to be 'neighbouring markets'.

Key industry sectors reviewed, and approach adopted to market definition, barriers to entry, nature of international competition etc.

During 2017, ACA received in total 22 merger filings. While 16 were cleared without conditions within the Phase I review process, no jurisdiction was asserted by the Authority on the remaining filings, mainly based on the turnover thresholds not being met.

Out of the 16 merger control filings that were reviewed, 10 were foreign-to-foreign transactions with one or both parties having presence or sales in Albania, and six were domestic transactions in key industry sectors such as telecommunications and insurance.

The most important merger transaction reviewed concerned the transfer of spectrum frequencies, licensed to the last entered and smallest mobile operator in Albania, i.e. Plus Communications respectively to Vodafone Albania and Telecom Albania. The Authority authorised this transaction despite market concentration from 4 to 3 mobile companies, mainly due to financial issues of the seller which had suffered considerable losses during the past. Further, the Authority invoked Article 13(3) of the Competition Law, which provides that a concentration may be authorised even when it results in the strengthening of the market share of the notifying undertakings, if a party to the transaction is at serious risk of going bankrupt and being unable to restructure its activity, or it must exit the market in the near future. In this case, the Authority recommended to the regulator of electronic communications in Albania to conduct a market analysis of the remaining market players to assess the *Operators with Significant Market Power* (three in total after the concentration) and impose obligations accordingly.

Other industry sectors reviewed in the context of merger notifications included the life insurance, banking and retail markets.

Reference to the European Commission decisions by both competition law practitioners and the Competition Commission is common practice, hence the ACA will, as a rule, accept any proposed definition of the relevant market that relies on EU precedents to the extent the proposed markets display similar features in Albania.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The instructions of ACA on horizontal and non-horizontal/conglomerate mergers provide guidance on the appraisal techniques used by the Commission to assess proposed mergers.

According to these instructions, in principle, vertical or conglomerate concentrations are likely to attract less attention. ACA shall most probably not investigate non-horizontal mergers when market shares of the new entity in each relevant market post-merger will be below 25% and the HHI after the concentration will be under 1800. The noted market shares and HHI thresholds only serve as an indicator of the absence of competition concerns, but they do not give rise to a legal presumption that the merger does not pose any competition issue. In specific circumstances, ACA can also investigate transactions that,

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post-closing, would result in market shares and HHI below the above-noted thresholds.

Notifications from undertakings that have been subject to abuse-of-dominance investigations will be scrutinised by the Authority even where vertical or conglomerate mergers are concerned.

Horizontal mergers will always attract investigation from the ACA, especially if the combined market share of the undertakings concerned post-acquisition will be above 15%.

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

The Instruction on Remedies (2015) has not been tested yet in practice. It relies on the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

The Instruction on Remedies provides that remedies may be offered by the undertakings concerned in any phase of the merger review procedure. During Phase I, remedies should be offered within one month from the confirmation of receipt of a complete notification. During Phase II, remedies should be offered within two months from the decision of the Competition Authority to open an in-depth investigation.

The Competition Authority may clear the notified transaction within Phase I, i.e. without opening the in-depth investigation only if proposed remedies will be deemed sufficient for the elimination of serious anti-competitive 'concerns'. On the other hand, remedies following the opening of Phase II should be able to address not only 'concerns' but also anti-competitive 'effects' of the proposed concentration.

Preferred remedies are of structural nature (i.e. sale of asset or business). Behavioural remedies shall be accepted by ACA only in exceptional circumstances.

Key policy developments and reform proposals

The Authority is currently in the process of reviewing the Competition Law. According to its Annual Report for 2017, it has already conducted a comparative analysis of the existing legal framework with that of some EU countries, and assessed issues resulting from enforcement of the law in practice. It is expected that the Authority will soon start an EBRD-assisted project which aims to: (i) strengthen the skills and competencies of Authority officials and case handlers through competition law enforcement training and upgraded skills in econometric analysis; (ii) strengthen the Authority's competition advocacy role; and (iii) complete the approximation of competition legislation to the EU *acquis*.

* * *

Endnote

1. http://www.caa.gov.al/uploads/publications/Raporti_Vjetor_2017_i_AK.pdf.

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Australia

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Key features of Australia's merger control regime

Australia's merger control regime is contained in the *Competition and Consumer Act 2010* (Cth) (the **CCA**), and is primarily administered by the Australian Competition and Consumer Commission (**ACCC**) through an informal process. The Australian Competition Tribunal (the **Tribunal**) has a limited role to play in the regime.

The regime is voluntary and non-suspensory. It is not subject to turnover thresholds and does not contain a mandatory notification procedure.

In practice, the ACCC's extensive investigatory powers and ability to apply to the Federal Court of Australia (the **Federal Court**) for urgent interlocutory relief, including for orders to delay completion of mergers, and the Australian Foreign Investment Review Board's (**FIRB**) practice of contacting the ACCC to ask it if it has any competition concerns with acquisitions notified to the Australian Federal Treasurer under Australia's foreign investment rules, mean that the Australian regime usually functions as if it is mandatory and suspensory.

The ACCC co-operates with other competition law agencies, as a result of MOUs, bilaterals and other arrangements. The extent and frequency of the co-operation appears to be increasing and, in some cases, may mean that the ACCC delays making a decision on a transaction notified in other jurisdictions until other agencies (such as the DoJ or the EC) have made their decision.

The ACCC's policy is to further investigate proposed acquisitions:

- that would result in the acquirer having a market share of 20% or more; and
- where the products of the parties are either economic substitutes or complements.

The basis for the policy is that where an acquisition of shares or assets meets these requirements, it may have the potential to raise concerns under section 50 of the CCA. Section 50 of the CCA prohibits acquisitions of shares or assets that would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia.

Where a proposed acquisition of shares or assets would be likely to substantially lessen competition in a market in Australia and the parties proceed with the acquisition without first obtaining clearance from the ACCC, they bear the risk that the ACCC will seek an injunction, or orders for divestiture or to void the acquisition, from the Federal Court. They also bear the risk of the ACCC applying to the Federal Court of Australia for civil pecuniary penalties of up to the greater of A$10m, three times the gain from the transaction or (where the gain cannot be ascertained), 10% of the corporate group's annual turnover attributable to Australia. Individuals involved in the breach can face civil pecuniary penalties of up to

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A$500,000 as well as orders disqualifying them from holding management positions and orders for legal costs.

Australia's merger control regime is also affected by its foreign investment review regime, which is governed by the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**) and Foreign Investment Policy (**Policy**). Under Australia's foreign investment review regime, the FIRB examines foreign investment proposals and makes recommendations to the Federal Treasurer based on whether the merger is contrary to the Australian national interest.

When it is compulsory to notify a merger to FIRB, failure to do so, or completing an acquisition before FIRB approval is obtained, is an offence which carries a maximum criminal penalty of A$787,500 for companies and A$157,500 for individuals, or three years' imprisonment for individuals.

Australia's foreign investment rules and procedures were overhauled in late 2015, with changes to the mandatory thresholds and filing fees introduced for compulsory and voluntary notifications. Most notably, the previous 15% threshold for determining whether a foreign person has a substantial interest in an entity was increased to 20%.

As part of the assessment of all applications made to the Treasurer under the FATA or Policy, FIRB will consult with Federal and/or State Government Departments and bodies, including the ACCC, as part of its 'whole of government' approach. Where the ACCC considers that an acquisition would be likely to result in a breach of section 50 of the CCA, the Treasurer takes the view that the acquisition is not in the national interest and will not issue a letter of no objection under the FATA. A decision to not issue the notice of no objection is a bar to completing the acquisition.

As a result, in the usual course, FIRB engages with the ACCC with respect to proposed acquisitions and will not make a decision until the ACCC has notified FIRB in writing that it does not have any concerns with the acquisition. The practical effect of this is that the ACCC plays a pivotal role in determining the amount of time the Treasurer takes to make a decision under the FATA, notwithstanding the statutory timeframes that apply to decisions by the Treasurer under the FATA. The pivotal role played by the ACCC may result in multiple extensions of FIRB's statutory timetable and, in some cases, applicants having to withdraw and subsequently refile their application under Australia's foreign investment rules.

The practical effect of the increasing interaction between FIRB and the ACCC is that for those acquisitions where it is mandatory for the acquirer to notify FIRB and obtain a notice of no objection from the Australia Federal Treasurer, filing with the ACCC is quasi-mandatory and suspensory.

There has been a trend of increasing interaction between FIRB and the Australian Tax Office, with FIRB tending to wait for the "all clear" from the Australian Tax Office before approving applications under Australia's foreign investment rules.

Overview of merger control activity during the last 12 months under the informal merger review process

In the 2016-17 financial year, the ACCC considered 288 matters under its informal merger review process. This was a minor decrease from the 319 matters it considered during the previous financial year.

However, 253 of the matters the ACCC considered in 2016-17 (or around 88%) were 'pre-assessed' without a public review being conducted. This represents a decrease of around 12% from the previous financial year (in which 287 matters were pre-assessed).

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The ACCC pre-assesses every acquisition notified to it (including by FIRB) before deciding whether a public review is required. We increasingly see the ACCC issuing requests for information and/or seeking waivers to speak to non-Australian regulators and to conduct 'discrete targeted inquiries' (including with competitors and those whom it considers may wish to complain about the acquisition) during its pre-assessment phase.

Where the ACCC becomes satisfied during its pre-assessment process that there is a low risk of an acquisition substantially lessening competition in a market in Australia, it will decide that it is not necessary to conduct a public review and issue a qualified letter of comfort to the acquirer/s. Our recent experiences suggest that parties may be subject to lengthier pre-assessment timeframes than those set out in the ACCC's policies. For example, we acted on a matter which was in pre-assessment for over five months and was subject to eight extensions of FIRB's timetable before the ACCC pre-assessed it.

Of the 253 cases pre-assessed in the 2016-17 financial year, it is difficult to know how many gave rise to any potential for substantial competitive effects at all.

Therefore, the key statistics for assessing year-to-year merger review activity are the number of public reviews conducted by the ACCC. In the 2017 calendar year, the ACCC subjected 26 acquisitions to public review (down around 21% on the previous calendar year).

Although the ACCC did not oppose outright any acquisition during the 2017 calendar year, it published a Statement of Issues (initiating a second-stage review) in nearly 40% of the public reviews it undertook (10), and in half of those instances (five), the parties abandoned their proposed transaction.

There were no instances in the 2017 calendar year of the ACCC clearing an acquisition subject to the parties giving court enforceable undertakings. However, the ACCC opposed one transaction outright in the 2017 calendar year (BP's proposed acquisition of Woolworths' retail service station sites).

So far in the 2018 calendar year (as at 27 April 2018), the ACCC has not opposed any mergers. It published a Statement of Issues in two cases, both of which were ultimately cleared. In one of those (Saputo Dairy Australia Pty Ltd's proposed acquisition of Murray Goulburn's operating assets), the ACCC indicated it will be publishing a Public Competition Assessment after it had cleared it. One of the public reviews that the ACCC has undertaken in the 2018 calendar year thus far related to a completed acquisition (Qube Logistics' (**Qube**) completed acquisition of Maritime Container Services Pty Ltd (**MCS**)), which the ACCC ultimately decided not to oppose. Qube provided the ACCC with a court-enforceable undertaking to hold the MSC business separate from Qube's existing operations while the ACCC conducted its review.

The ACCC appears keen to increase levels of transparency and engagement with parties throughout its review process, but acknowledges that this may also create delays. Despite its stated goal of greater transparency, there is still no provision under the ACCC's informal review process for parties to have access to any part of the ACCC's file.

<u>Use of alternatives to Australia's informal merger review process</u>

As of 6 November 2017, the alternative to the ACCC's informal merger review process for obtaining clearance is to apply to the ACCC for authorisation of their proposed acquisition.

Between the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**Competition Policy Review Act**) taking effect on 6 November 2017 and 2007, the Australian Competition Tribunal was the first-instance decision-maker for merger authorisations.

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Authorisation provides an alternative to informal clearance. Authorisation is granted by the ACCC when it is satisfied that the acquisition will not be likely to result in substantial lessening of competition or would be likely to give rise to a net public benefit. The test for authorisation is wider than the test for informal clearance because it takes into consideration factors other than the likely effects on competition of an acquisition (including efficiencies, import replacement, environmental benefits and so on). Authorisation, like informal and formal clearance, may be granted subject to conditions (remedies).

Although there has yet to be an application for merger authorisation to the ACCC since the Competition Policy Review Act took effect on 6 November 2017, the Tribunal granted three authorisations between 2007 and 6 November 2017. On each of those occasions, the Tribunal authorised the acquisition in the face of opposition from the ACCC.

2016 saw a successful application for merger authorisation by Sea Swift in relation to its acquisition of Toll Marine Logistics Australia's Far North Queensland and Northern Territory marine freight business, which the ACCC had opposed in July 2015. The Tribunal authorised the acquisition on 1 July 2016, subject to conditions imposing a cap on future prices and continuing to operate certain services. The Tribunal relied on factual evidence from over 40 witnesses and seven experts and found that: (i) the relevant counter-factual was that Toll Marine Logistics would exit the Far North Queensland and Northern Territory markets; (ii) there was, therefore, no competitive detriment with the acquisition which would not exist without it; and (iii) undertakings given by Sea Swift in relation to prices and services had the public benefit of giving remote communities certainty.

The Tribunal previously authorised, on 24 March 2014, AGL's proposed acquisition of electricity generation plants owned by Macquarie Generation, a State-owned corporation, which had been opposed by the ACCC. Significantly, the Tribunal viewed the State's receipt of a sale price reflecting the assets' retention value as a public benefit in circumstances where the Tribunal considered that the State was unlikely to obtain a commensurate price from another buyer. On 24 July 2014, the ACCC announced it would not appeal the Tribunal's decision.

The implication for parties seeking clearance of complex and contentious mergers is that authorisation may be an effective alternative to the ACCC's informal clearance process where there are likely to be significant public benefits resulting from the transaction. However, we expect parties will continue to achieve 'clearance' more efficiently through the ACCC's informal review process in the majority of cases. Although the authorisation process is subject to statutory timeframes, there are a number of ways in which the authorisation process could result in timing uncertainties, including the ability to apply to the Tribunal for a limited merits review of, or to the Federal Court of Australia for judicial review of, the ACCC's decision.

For example, Tabcorp and Tatts Group decided on 13 March 2017 to withdraw their application to the ACCC for informal clearance for their $11 billion merger after the ACCC published a Statement of Issues and moved to a Phase 2 investigation and lodged an application with the Tribunal for authorisation of the merger. This was the last merger authorisation application made to the Tribunal before the first-instance decision-making power transferred back to the ACCC on 6 November 2017. Tabcorp observed that the authorisation process would deliver greater transaction certainty by requiring the consideration of public benefits, and the application will be considered within a statutory timetable. Although the Tribunal granted conditional authorisation for the merger on 22 June 2017, the ACCC and CrownBet applied to the Federal Court of Australia for judicial review of the Tribunal's decision. The Federal

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Court set aside the Tribunal's decision because of an error of law and remitted the matter back to the Tribunal for reconsideration. The Tribunal, for the second time, authorised the merger on 17 November 2017 (250 days from the day the application was lodged with the Tribunal).

In each of the three applications to the Tribunal for authorisation, the Tribunal granted authorisation despite continued opposition by the ACCC in its capacity as *amicus curiae* to the Tribunal (and, in the case of the appeal of the Tribunal's decision to authorise the Tabcorp/Tatts merger, as the applicant to the Federal Court for judicial review).

New developments in jurisdictional assessment or procedure

Issues affecting foreign mergers

Although Australia's merger control regime is voluntary and non-suspensory, in key respects it is administered by the ACCC as though it were mandatory and suspensory. Unlike competition authorities in some other voluntary jurisdictions (such as the United Kingdom), the ACCC does not conduct reviews of completed mergers under its normal processes. Rather, it approaches completed mergers as a potential breach of the CCA and investigates them accordingly. The investigation will not be subject to a published, indicative timeframe, and will not result in the ACCC publishing a Statement of Issues even if it identifies potential significant concerns with the merger during its initial consultations with market participants and other stakeholders.

This can create procedural challenges, particularly in the context of large global deals, where the voluntary and informal nature of the regime can make it difficult for acquirers in competitive scenarios to negotiate a condition precedent to obtain clearance from the ACCC prior to closing the transaction.

Despite these issues, the ACCC had not accepted a hold separate undertaking to allow a global deal to close while the ACCC completed its review, until the acquisition by Dometic Group AB of Atwood Investment Holdings LLC in late 2014. We provide further details on this case below.

Another factor for foreign acquirers to consider is the nature of the ACCC's powers under the CCA in relation to completed acquisitions. These can vary depending on the structure of the acquisition.

'Close around' undertakings

Dometic's acquisition of Atwood was a global deal which the ACCC considered gave rise to around a 75% combined share in Australia for the supply of heating, ventilation and air-conditioning units for use in recreational vehicles. In the context of the global acquisition, however, the value of the Australian part of the deal was relatively minor.

The ACCC accepted a court-enforceable undertaking from Dometic under section 87B of the CCA to:

- hold the Australian business of Atwood separate from Dometic's other assets and business for six months (subject to extension, including if a remedy was offered) pending completion of the ACCC's review of the acquisition; and
- ensure that Atwood's Australian business remained viable, effective, stand-alone and an independent competitor of Dometic while the undertaking was in force.

The undertaking provided for the appointment of an independent auditor to audit compliance with the undertaking, and an independent manager to ensure that Atwood's Australian business continued to be managed in the ordinary course.

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The undertaking also included a provision which required Dometic to 'negotiate and offer in good faith a remedy' if the ACCC decided at the end of its review that the acquisition was likely to substantially lessen competition.

The hold separate undertaking was accepted on 14 October 2014, around three weeks after the ACCC had commenced a public review of the acquisition under its informal merger review process. The acquisition completed globally three days later on 17 October 2014 once clearance had been received from the United States Federal Trade Commission. Following completion of the acquisition, the ACCC stopped reviewing the acquisition under its informal merger review process. However, it continued to review the transaction with a view to deciding whether it considered that it would result in a substantial lessening of competition.

Ultimately, the ACCC decided not to oppose the transaction, and did not trigger the clause in the undertaking obliging Dometic to offer a remedy. The undertaking terminated after six months, and the Australian businesses were able to be integrated.

ACCC's powers in relation to foreign acquisitions

The ACCC has no jurisdiction as such to review acquisitions unless the foreign acquirer is incorporated in Australia, registered as a foreign corporation in Australia or carrying on business in Australia, through an agent or nominee (which could be a subsidiary). Rather it has powers to seek orders from the Federal Court where it considers that there has been or is likely to be a breach of section 50 of the CCA.

Generally, the application of section 50 to an acquisition will be clear. However, where there is a foreign element to an acquisition, the question of whether section 50 applies may not be straightforward. These are not new issues under the CCA, but they remain unsettled and can be important for global deals having indirect effects in Australia.

It is clear that section 50 will apply where there is a direct acquisition of Australian shares or assets. However, it is not settled that section 50 would apply to an acquisition by a foreign corporation of Australian shares or assets through a foreign subsidiary. Section 50A of the CCA was introduced in 1986 to address this perceived gap, but remains untested.

The test which applies under section 50A is different to that under section 50, and the orders which the ACCC may seek in relation to a potential breach of section 50A are different to those which it may seek in relation to section 50.

Under section 50A, the ACCC may apply to the Tribunal for a declaration. The Tribunal may make the declaration where it is satisfied that the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia, and would not result in 'such a benefit to the public' that this effect should be disregarded.

Where a declaration is made, it is a breach of the CCA for the Australian subsidiary indirectly acquired by the foreign corporation to continue carrying on business longer than six months after the date of the declaration. This is a perverse outcome for competition, for the target to exit.

Where the indirectly acquired Australian subsidiary continues to carry on business after six months from the date of the Tribunal's declaration, the ACCC can apply for orders that the Australian subsidiary dispose of assets to remedy the anticompetitive effect.

Most acquisitions that would engage section 50A are nonetheless reviewed under the ACCC's informal merger review process on the premise that section 50 applies. This is not generally problematic, because the ACCC opposes comparatively few deals.

However, the basis on which the CCA applies to a given acquisition is important where the

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acquirer may be considering not filing with the ACCC (including where the thresholds in the ACCC's policy are met), or completing without first obtaining clearance from the ACCC.

Priority sectors

The ACCC's continued focus for merger reviews is on concentrated and emerging markets, and markets significant to the Australian economy. Deals in these markets are more likely to be subject to scrutiny, particularly if the ACCC receives complaints.

Within this broader policy, the ACCC is likely to give specific attention to the following types of deals:

- acquisitions in the financial services sector;
- acquisitions in the commercial construction sector;
- acquisitions in the health and medical sector;
- acquisitions in the agriculture sector;
- acquisitions in the media and telecommunications sector, particularly where it involves a digital platform or 'big data'; and
- 'three-to-two' mergers.

The financial services sector has become a priority area for the ACCC. Following the Australian Treasurer's FY2017/2018 budget announcement, the ACCC established a Financial Services Unit (**FSU**) to undertake regular inquiries into specific financial competition issues. In May 2017, the ACCC was directed by the Australian Treasurer to conduct an inquiry into the pricing of residential mortgage products until 30 June 2018. The ACCC has also announced that the FSU will commence its market studies work from July 2018 onwards, which could include assessing the impact of regulatory measures which affect the ability of smaller banks to compete against the majors, barriers to entry in financial services markets, and consumer-switching. The information gathered by the ACCC in these market inquiries and market studies will likely inform any merger reviews in these sectors.

Another priority area is the media and telecommunications sector and, increasingly, digital platforms and the use of 'big data'. On 4 December 2017, the Treasurer directed the ACCC to hold an inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms on the state of competition in media and advertising services markets. The ACCC released an issues paper in February 2018 and will release its preliminary report to the Treasurer in December 2018 (and its final report in June 2019).

In October 2017, the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017* (Cth) was passed, which repealed the "2 out of 3 cross media control rule" and the "75 per cent audience reach rule". The ACCC published its updated Media Merger Guidelines on 31 October 2017, which identifies some of the key issues the ACCC may focus on when assessing mergers in the sector, including diversity of media voices, the impact of technological change and access to content. In 2017, the ACCC publicly reviewed three media mergers (Foxtel's acquisition of Fox Sports Australia Pty Ltd, Birketu Pty Ltd and Illyria Nominees Television Pty Ltd's proposed joint bid for interests in Ten Network Holdings Pty Limited, and PMP Limited's proposed merger with IPMG Group). Although the ACCC ultimately cleared all three mergers, it issued a Statement of Issues in relation to one transaction (PMP/IPMG).

The ACCC can only assess the competitive effects of a current acquisition, rather than the combined effect of several incremental acquisitions.

More generally, in-depth reviews are likely to be conducted where, on a plausible market

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definition, the acquirer would have a greater than 40% market share or there would be fewer than three significant competitors in that plausible market. This may be despite the existence of strong mitigating factors such as countervailing power wielded by customers, low barriers to entry, or the likelihood of dynamic competition.

The ACCC tends to be highly sceptical of arguments for negligible competitive effect relative to a favourable assessment of the counterfactual scenario. Where clearance is dependent on such arguments, the parties can expect very close scrutiny.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The ACCC's approach to analysing the likely effect of mergers is set out in its 2008 Merger Guidelines (updated in 2017) and, for mergers in the media sector, in its 2017 Media Merger Guidelines. In October 2017, the ACCC also published a consultation draft of its Merger Authorisation Guidelines in anticipation of the ACCC becoming the first-instance decision-maker for merger authorisations as of 6 November 2017. The Guidelines set out the ACCC's analytical approach to assessing unilateral effects (both horizontal and non-horizontal), co-ordinated effects and, for merger authorisations, the weighing of public benefits and public detriments. The ACCC's approach to these issues is orthodox, and the Guidelines themselves are high-level.

The ACCC employs economists within its Legal and Economic division, and the ACCC's Chairman, Rod Sims, is an economist. However, use of economic appraisal techniques (such as critical loss and diversion ratio analyses, or upward pricing pressure tests) is not something that we regularly see in merger reviews.

Public statements by the ACCC tend to indicate that it will be sceptical of such analyses, and will tend to be more persuaded by economic argument than quantitative analysis. The Chairman of the ACCC has stated:

> "*. . . some economists place too high a reliance on econometric techniques. In my experience, econometric models can help test logic; they are never a substitute for it.*
>
> *We are seeing a trend to more sophisticated econometric techniques and simulation models to predict the likely effect of particular conduct. Sometimes it is claimed that the analysis and models are "proof" of the likely effects of the conduct.*
>
> *This claim seems based on the false premise that the economist has conducted a controlled scientific experiment. This is not so. It must be remembered that the predictions from this form of analysis depend on the decisions and assumptions made, which are often highly contestable.*
>
> *We are seeing an increasing number of economists' reports without sufficient critical assessment of those decisions and assumptions.*
>
> *Finally, data limitations often mean that we need to assess the likelihood of competitive harm based on economic theory, and market incentives and realities, without supporting quantitative analysis.*
>
> *This is not a problem. Logic can prevail. An inability to quantify competitive harm does not indicate an absence of harm.*
>
> *More important, it does not mean an absence of economic analysis. Instead, it is when true economic argument, steeped in practical market understanding, can come to the fore.*"

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Taking their lead from the ACCC, notifying parties tend to employ economists to make submissions, arguing that potential theories of harm raised by the ACCC (for instance, in a Statement of Issues) are unlikely to arise in practice based on qualitative features of the market concerned rather than on econometric analysis.

One underlying reason for this trend may be that, historically, the Federal Court has tended not to accept economic evidence when competition matters (including mergers) have been litigated.

Approach to remedies and impact on process and timing

Overview of 2017 remedies cases

In the 2017 calendar year, the ACCC cleared 17 mergers – all without conditions. Those 17 mergers accounted for approximately 65% of the mergers the ACCC reviewed publicly. In contrast, the ACCC accepted remedies in the form of court-enforceable undertakings in four public cases in the 2016 calendar year.

A Statement of Issues initiating a second-stage investigation was published in 10 cases. In half of those cases (five instances) where the ACCC published a Statement of Issues, the parties abandoned their proposed merger. Those five instances could be a *de facto* measure of cases the ACCC would have opposed, or would only have cleared with conditions, had they not been abandoned.

As at 27 April 2018, no remedies in the form of court-enforceable undertakings have been accepted in the 2018 calendar year thus far. However, on 22 December 2017, the ACCC accepted one court-enforceable undertaking from Qube to hold the MCS business separate until the ACCC had completed its review of the completed acquisition. The ACCC ultimately cleared the acquisition without conditions in March 2018.

Impact of remedies on process and timelines

Although the ACCC did not require any remedies to clear transactions in the 2017 calendar year, based on our experience in the 2016 calendar year, the average period from commencement of the ACCC's public review to clearance of cases involving remedies was just over seven months. However, this average timeframe is affected by the length of time taken to negotiate the undertaking in one case (Primary Health Care's undertaking in relation to its acquisition of pathology assets previously operated by Healthscope in Queensland). In that case, 16 months passed between the ACCC initiating its review of the completed acquisition and the undertaking being accepted. If the Primary case is excluded, the average review period is just over four months.

The ACCC is not always willing to consider remedies in the very early stages of its review process (i.e., before its initial market inquiries have been conducted).

The complexity of the remedy being offered can often be the most significant factor in determining timing, rather than whether a Statement of Issues is published. One reason for this is that negotiating a complex remedy with the ACCC can take some months.

Typically, the ACCC will accept a 'post-closing' divestment where the buyer is not identified in the undertaking (as was the case with Iron Mountain's undertaking), but the ACCC's preference is for pre-closing remedies where the buyer is identified (as was the case with Primary's undertaking). Locating and negotiating with a third-party purchaser to be approved by the ACCC for a pre-closing remedy can extend the time required to agree an undertaking still further. Another factor relevant to global deals is that where parties offer first-stage or 'up-front' remedies in the European Union or the United States of America, the ACCC may

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accept an undertaking in Australia to comply with commitments offered overseas where it considers that those commitments address its concerns.

Key policy developments

Continued exploration of "innovation theory of harm" and the use of data in merger control

In the 2017 calendar year, the ACCC continued to explore the 'innovation theory of harm' in merger control. For example, although the ACCC granted clearance for the merger of El du Pont de Nemours and Company (DuPont) and The Dow Chemical Company (Dow), the ACCC expressed some concerns in its Statement of Issues regarding the impact of the merger on innovation. In its Statement of Issues, the ACCC's preliminary concern was that the proposed merger might lead to a substantial lessening of competition in upstream markets for the development of new technology for crop-protection products. The ACCC noted that both Dow and DuPont were leading innovators in this sector, and the removal of competition between them could "lead to less innovation across a broad spectrum of products", which could reduce the rate at which new products come to the market. When it ultimately cleared the merger, the ACCC took into account the divestment of the parties' R&D business in Europe.

Similarly, Australian Grain Technologies Pty Ltd (AGT) abandoned its proposal to acquire InterGrain Pty Ltd (InterGrain) after the ACCC published a Statement of Issues. The ACCC never made a final decision on the proposal. However, the ACCC expressed a preliminary concern that, with AGT and InterGrain being the only two significant barley breeding programmes in Australia, the loss of competitive tension resulting from the proposed acquisition could lead to less research and development in barley.

The ACCC has increased its focus on the use of data. In its public decisions, the ACCC stated that it considered the effect of a party's access to, or use of, information or data, but did not express any ultimate concern or articulate any clear theory of harm:

- In its decision to unconditionally clear Cabcharge's proposal to acquire Yellow Cabs Queensland, which owned and operated a taxi network in Queensland, the ACCC focused on whether the acquisition would raise a barrier to entry or otherwise give Cabcharge an ability to foreclose rivals. Interestingly, the ACCC's decision also specifically considered whether Cabcharge's access to its downstream competitor's information through its in-taxi payment terminals would provide it with a significant competitive advantage (the ACCC ultimately found it would not).
- In its decision to unconditionally clear the global merger between Essilor (a global prescription lens manufacturer) and Luxottica (a global luxury eyewear manufacturer and optical retail chain operator), the ACCC focused primarily on whether the merger would give rise to vertical and/or conglomerate effects. The ACCC also specifically considered whether the merger would allow the merged entity access to downstream rivals' commercially sensitive information through Essilor's practice management system. The ACCC ultimately found that the commercially sensitive information would be protected through contractual arrangements.

The ACCC remains strongly focused on concentrated market structures

In 2017, the ACCC continued to stand by its longstanding theory of harm that mergers which reduce the number of players in a market from three to two, or two to one, will substantially lessen competition because they will allow the merged entity to increase prices and/or reduce service levels:

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- Bain Capital LP, the owner of Camp Australia Pty Ltd, withdrew its proposal to acquire part of Advent Private Capital's shareholding in Junior Adventures Group Ltd after the ACCC published a Statement of Issues expressing concerns with the acquisition. The ACCC's preliminary view was that the proposed acquisition would be likely to substantially lessen competition for the supply of before- and after-school care in several States because it involved the consolidation of two of the largest providers, who would not be effectively constrained by the other remaining competitors. The ACCC considered the acquisition could lead to higher prices and lower quality of services.
- APN Outdoor Group Limited and oOh!media Limited abandoned their proposed merger following the ACCC's publication of a Statement of Issues. In the Statement of Issues, the ACCC expressed a preliminary view that the proposed merger would likely result in a substantial lessening of competition because it would result in the consolidation of the number-one and number-two providers of outdoor advertising services in Australia and create a market leader with over 50% share. In the ACCC's view, the proposed merger would have been likely to result in higher prices, reduced level services and "possibly less innovation" (which is another illustration of the ACCC's focus on competition for innovation).
- South32 Limited (**South32**) withdrew its proposal to acquire Metropolitan Colleries Pty Ltd (Metropolitan), an Australian subsidiary of Peabody Energy Corporation after the ACCC published a Statement of Issues. In the Statement of Issues, the ACCC expressed a preliminary view that the proposed acquisition would remove the competitive rivalry between South32 and Metropolitan for the supply of coking coal to Australian customers. The ACCC considered that this could result in a single supplier of material volumes of coking coal from a particular region in Australia, which was considered to be the closest source of coking coal to Australian customers.

The ACCC may be persuaded to clear a transaction where the proposed merger would result in the reduction of the number of competitors from four to three. For example, in Platinum Equity's proposal to acquire OfficeMax Australia from Office Depot Inc, the ACCC expressed some preliminary concerns over the horizontal aggregation of two leading suppliers of office products to large and commercial and government customers in Australia in circumstances that would reduce the number of credible suppliers from four to three. However, the parties were ultimately able to obtain unconditional clearance from the ACCC on the basis that, should the merged company seek to increase prices, the large customers in this sector could easily switch to the other suppliers and the other suppliers would seek to grow their respective market shares.

Increased concern regarding the vertical effects of a transaction

The ACCC has demonstrated a keen focus on the vertical mergers and a strong preference to prevent upstream monopolists from arising, rather than relying on behavioural commitments and/or access regimes to manage their existence. This was seen most clearly by the ACCC's approach to Qube's and Brookfield's proposed acquisition of Asciano.

The ACCC initially considered two separate proposals to acquire Asciano, one by a Brookfield-led consortium and the other by a Qube-led consortium. The ACCC published a Statement of Issues in October 2015 in relation to the Brookfield-led consortium's acquisition and expressed reservations about the proposal due to perceived vertical effects.

Prior to the ACCC publishing a Statement of Issues, the Brookfield-led consortium had proposed behavioural undertakings in conjunction with existing third party access regimes to address potential vertical effects arising from the transaction.

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The ACCC's Statement of Issues rejected that approach, stating: "The ACCC's strong view is that the only way to avoid the risks to competition that are likely to be created by vertical integration is to avoid the creation of a vertically integrated market structure altogether." In respect of existing regulatory regimes for access to upstream infrastructure, the ACCC concluded that "relying on an access regime to mitigate the competitive detriments arising from vertical integration between a monopolist and a participant in a related (competitive) market is a second-best solution compared to preventing such situations of vertical integration in the first place."

This 'high watermark' regarding concerns arising from vertical integration caused the parties to put together an alternative deal structure. Following the restructuring, the ACCC continued to express concerns regarding the acquisition of the Patrick Container Terminal business by the parties (and published a Statement of Issues on 26 May 2016). However, the ACCC ultimately identified several constraints on Patrick's ability and incentive to discriminate against Qube's competitors, and proceeded to clear the deal in July 2016.

Use of formal information-gathering powers

The ACCC uses its formal powers under section 155 of the CCA in merger assessments, including to obtain copies of documents (e.g., internal reports and board papers) relating to a transaction's rationale and its expected competitive effects, and to examine executives under oath.

This can occur in cases where the ACCC may not be entirely satisfied by the parties' voluntary production of information or the results of its market inquiries. However, we have seen the ACCC using these powers to better prepare its file in the event that litigation is required. For example, in the context of a completed merger it was investigating, the ACCC issued six compulsory notices in the space of less than two months, one requiring a turnaround time of less than 24 hours. These types of notices are often highly onerous.

Increased cooperation with foreign regulators at an earlier stage in reviews

The ACCC has expanded its cooperation arrangements with authorities in foreign jurisdictions and is increasingly using information obtained from these authorities in its own merger assessments.

In 2017, the ACCC continued to engage with its international counterparts during complex, multi-jurisdictional merger reviews. For example, the ACCC worked closely with competition regulators in the United States, the European Union, Canada and New Zealand during its review of the DowDuPont merger. In granting unconditional clearance, an ACCC Commissioner stated that "*[a]s the remedies provided to other regulators have resolved competition concerns in Australia, the ACCC has taken a pragmatic approach and not sought standalone remedies in Australia.*" At the same time the ACCC was reviewing Essilor's merger with Luxottica, regulators in other jurisdictions – including the US and the EU – were assessing the transaction. Significantly, the ACCC made a decision not to oppose the Essilor/Luxottica deal, without requiring remedies, prior to regulators in other key jurisdictions issuing their decisions. This demonstrates that the ACCC is willing to be the "first mover" in clearing a transaction, where the evidence before it supports it doing so.

The ACCC currently has treaties or agreements with the United States of America, the United Kingdom, the European Commission, China, Canada, South Korea, the Philippines, Papua New Guinea, New Zealand, Taiwan, India and Fiji.

While the ACCC has statutory powers to share information with non-Australian agencies, it prefers a waiver from the parties giving their consent to the sharing of information.

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However, the ACCC's waiver is not negotiable and somewhat one-sided. This can make it challenging to offer reciprocal waivers in Australia and other countries. In addition, the ACCC may request waivers in its pre-assessment phase, and before it has taken a decision to conduct a public review.

Although there is a trend towards co-ordination between international competition authorities during complex, multi-jurisdictional merger reviews, the ACCC may take a 'first mover' position where the evidence before it supports it doing so. For example, in 2017, we saw the ACCC make a decision not to oppose Essilor's merger with Luxottica without requiring remedies, prior to regulators in the US and the EC issuing their decisions.

Recent reforms

Australia's competition policy framework and laws have recently been subjected to a wide-ranging review − the first comprehensive independent review of Australia's competition framework since 2003 (see: http://competitionpolicyreview.gov.au/). In March 2014, the Federal Government released the final terms of reference for the review and announced the members of the review panel (**Review Panel**). The Review Panel delivered its final report to the Federal Government on 31 March 2015 and the Federal Government accepted most of the Review Panel's recommendations. After a public consultation process on its Exposure Draft legislation, the Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth) was passed and took effect on 6 November 2017.

The Competition Policy Review Act consolidated the existing, never used (and wholly unworkable) formal merger clearance process with the authorisation process (which has only been used on a handful of occasions) to create a single authorisation process.

Under the new combined process, the ACCC is the decision-maker at first instance. This means the ACCC has the power to approve direct and indirect acquisitions of shares or assets if it is satisfied that the acquisition would not be likely to substantially lessen competition in Australia, or would be likely to result in a net public benefit.

The new combined process is not subject to prescriptive information requirements, although the ACCC may rely on its existing powers to compel persons to furnish information, provide documents or to appear for examination under oath.

The new combined process is subject to statutory timelines that cannot be extended except with the parties' consent.

The Competition Policy Review Act provides the Tribunal with the power to review the ACCC's decisions on applications for authorisation, and will be required to do so within 90 days of receiving an application. The Tribunal's review should be based upon the material that was before the Commission, but the Tribunal has the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied there is sufficient reason.

Going forward, the vast majority of mergers will continue to be assessed using the pre-assessment and informal merger clearance processes, as these will likely be less costly than applying for authorisation. While the option of authorisation may be attractive for complex mergers that are likely to result in significant public benefits, the willingness of the ACCC to accept public benefit arguments within the context of a merger has been seldom tested in recent years. Ultimately, the success of the new authorisation process will be determined by whether the ACCC can deliver transparent, timely and evidence-based decisions in more complex cases.

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Insights on Australia's merger control regime

The current informal merger clearance process works well for the majority of merger matters, but tends to under-perform in complex cases, especially in terms of transparency. In our experience, the ACCC works hard to deliver timeliness (however, our recent experience suggests there has been some slippage during the pre-assessment phase for some cases) and although it will not give access to its file, it does outline the general nature of any complaints from businesses which may be affected by a merger, without disclosing the identity of those businesses. The ACCC can also be flexible around global deals, as demonstrated by its acceptance of a close-around undertaking in Dometic's acquisition of Atwood, its approach to ChemChina's acquisition of Syngenta in 2016 and the merger of Essilor and Luxottica in 2017 (see above).

Notwithstanding this, Australia's current merger control regime lacks the overall transparency of other jurisdictions, particularly in acquisitions raising complex competition issues. We believe that both the informal clearance process, and the new authorisation process, would benefit from greater disclosure of the ACCC's concerns, and the evidence upon which those concerns are based.

The recent review of Australia's competition policy and laws made it clear that Australian businesses value the flexibility of the informal merger review process, and there is no prospect that Australia will adopt a mandatory, suspensory regime in the medium term. However, there is a perception that Australia's voluntary regime is increasingly fragile and out-of-step with other jurisdictions. As globalisation continues and markets continue to open, these issues are likely to become more acute.

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Austria

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Overview of merger control activity during the last 12 months

In 2017, a total of 439 mergers were notified with the Austrian Competition Authorities, i.e. the Federal Competition Authority ("FCA", "*Bundeswettbewerbsbehörde*") and the Federal Prosecution Attorney ("FPA", "*Bundeskartellanwalt*"; FCA and FPA together, "Official Parties"). Compared to 2016, the number of notified mergers in Austria increased again. This is remarkable, as already in 2016, the number of notifications (420) substantially increased compared to 2015 (366 notifications). To put these figures into context, reference can be also made to the year 2007 (as the year before the economic crisis), when 342 mergers were notified in Austria.

In 2017, only one out of 439 notified mergers came into phase II: On 2 October 2017, the FCA initiated a phase II in-depth proceeding at the Cartel Court (as published by the FCA only on 24 October 2017) concerning the planned acquisition of CIT Rail Holdings (Europe) S.A.S. (including the French based Nacco-Group) by the German VTG Rail Assets GmbH (for details, see below).

It therefore seems that the Official Parties are currently hesitating to initiate phase II proceedings for the simple reason of not having sufficient information and time to examine the filed transaction within the four-week deadline of phase I (on request of the undertakings concerned, phase I can be extended for an additional period of two weeks).

Further, only in 22 out of 420 filings did the official parties grant a waiver concerning their right to initiate a phase II proceeding. In general, waivers may be granted in case of urgency; if a waiver is granted, clearance can be expected within approximately three weeks after filing (as compared to the usual legal waiting period of four weeks). While in the past it was rather simple to get a waiver granted, the official parties recently have been becoming strict and hesitant in granting such waivers. The request must be therefore very well-reasoned. (Threat of) insolvency is usually accepted as a reason for urgency.

Only with regard to five filings did the parties concerned withdraw their notification. Therefore, based on the 434 notifications effectively filed in Austria in 2017, only one filing was sent into phase II. In other words, only 0.23% of all filings ended up in proceedings in front of the Cartel Court (in its function as the responsible authority with regard to phase II filings). The rest of the notified transactions received clearance in phase I.

New developments in jurisdictional assessment or procedure

On 1 May 2017, significant changes to Austrian competition law entered into force by means of the Cartel and Competition Law Amendment Act 2017 (*Kartell- und Wettbewerbsrech*

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tsänderungsgesetz 2017, "KaWeRÄG 2017" / "Amendment"). The changes concern the Cartel Act (*Kartellgesetz*, KartG) and the Competition Act (*Wettbewerbsgesetz*, WettbG).

Concerning merger control, the changes introduced a new transaction value-based notification threshold. Furthermore, the amount of the filing fee for phase I proceedings with the Official Parties was more than doubled.

Transaction value-based notification threshold

By introducing a new notification threshold, which comes in addition to the existing turnover thresholds,[1] the scope of Austrian merger control will be further broadened. It can be therefore expected that the number of merger notifications in Austria will again increase in the future. In general, already before introduction of the new threshold, Austria was (and still is) one of the EU's jurisdictions with the lowest merger control thresholds (e.g., no second domestic Austrian threshold). Based on the new value-threshold, in particular with regard to multijurisdictional filings, one has to bear in mind in the future that not only the respective turnover figures, but also the transaction value, have to be taken into account (in Germany, the 9th amendment to the Act Against Restrictions of Competition includes a similar provision based on the transaction value (in this case, of €400m)).

The new threshold applies to transactions which are implemented after 1 November 2017. It is based on both the turnover of the undertakings concerned, but also on the value of the transaction. The new threshold aims to cover in particular mergers in the digital area, but also acquisitions of pharmacy undertakings, where the target's turnover may be (still) low but its value already is of substantial economic importance. The much discussed Facebook/ WhatsApp Merger before the EU Commission (M.7217 Facebook / WhatsApp), where the respective turnover of WhatsApp, of less than €20m, was reflected in a purchase price of €19bn, was also one of the reasons for the Austrian legislator to introduce this new threshold. In this regard, it has to be noted that for media undertakings, which are often active in the digital arena, the special provision for turnover calculation in cases of so-called "media mergers", namely the application of a multiplying factor (20 times or 200 times the turnover), does not apply in the context of the new notification threshold.

According to this new notification threshold, a concentration will have to be notified to the FCA if:

- the combined worldwide turnover of the undertakings concerned exceeds €300m,
- the combined Austrian turnover of the undertakings exceeds €15m,
- the value of the consideration for the transaction exceeds €200m, and
- the target is active in Austria to a significant extent.

Besides the turnover thresholds concerned (which are, by Austrian standards, far below the previous and in future parallel applicable "traditional" thresholds, *cf* FN 1), the essential criteria are based on the "value of the consideration" on the one side, and the "significant" activity of the target on the other side.

The law neither defines the term "consideration" nor explains what is meant by the fact that the target must be active on the domestic market "to a significant extent".

On 14 May 2018, the FCA, in cooperation with the German *Bundeskartellamt* (the German newly introduced threshold based on value is similar to Austria), published draft guidance which is currently subject to public consultation ("draft common guidance"; an English version of the draft is also accessible via the homepage of the FCA).

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According to the explanatory notes to the law and the draft common guidance, "consideration" comprises any type of consideration of value that the seller receives from the acquirer in connection with the transaction. E.g., cash, securities, intangible assets, assumption of debt, assets and considerations for non-competition have to be included in calculating the amount of the consideration. Also, future and variable purchase price components have to be taken into account (e.g., earn-out payments, payments that are conditional on milestones agreed and future licence payments).

Concerning "activity of the target" in Austria "to a significant extent", the draft common guidelines refer to the fact that activity is generally measured on the basis of indicators other than turnover. The explanatory notes and the draft common guidelines state that regard must be had to "recognised key measures used in the respective industry". As far as the digital economy is concerned, e.g., user numbers, downloads or website visits, may give an indication. With regard to the pharmaceutical industry it could be, e.g., the number of staff engaged in research and development, or the research and development budget. Furthermore, the location of the target company is also a reference point concerning significant domestic activity. Such activity must generally be presumed to exist if the company to be acquired has a site in Austria. However, this factor must also take account of the extent to which the activities at this site have domestic market orientation.

The draft common guidelines itself state that the guidelines do not model every possible case scenario or application-related issue and should be regarded as preliminary. For merging parties, it may therefore still be difficult to assess with certainty whether the relevant merger is subject to Austrian merger control. The FCA is open for (informal) pre-notification talks in order to discuss whether a planned transaction is notifiable in Austria.

If a reportable merger is not notified, fines of up to 10% of the group turnover of the last business year may be imposed.

Increased filing fee

By increasing the amount from €1,500 to €3,500, the filing fee in Austria will be more than doubled (before, the filing fee amounted to €1,500). However, in comparison to other jurisdictions, e.g. Germany, the lump sum fee of €3,500 (independently of the size of the transaction and filing) can still be considered to be moderate.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

In general, with regard to merger control, the Official Parties do not focus their merger control practice on key industries. Merger notifications, which had been in the special focus of the Official Parties in 2017, and the respective key industries concerned, can be summarised as follows (including, e.g., market definition, etc.):

Rental of railway wagons

As mentioned above, the only phase II merger proceedings initiated in 2017 referred to the business area of rental of railway wagons. On 2 October 2017, the FCA initiated a phase II in-depth proceeding at the Cartel Court (as published by the FCA only on 24 October 2017) concerning VTG Rail Assets' planned acquisition of CIT Rail Holdings (Europe) S.A.S. (including the French based Nacco-Group).

In substance, following its press release, the FCA challenged the parties' proposed definition of the relevant market. While the parties claimed that the (former) national railway operators (DB-Cargo, CD Cargo, RCA (ÖBB), SBB) were to be included as market

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players in the relevant market for the rental of railway wagons, the FCA was of the opinion that the national operators rent out their wagons to third parties only to a limited extent. A calculation of the FCA, which did not include the capacities of the national operators, came to the conclusion that in the segments "rental of dry cargo wagons" and "rental of tank wagons", the parties' market shares exceeded the presumption threshold of 30% according to section 4 (2) clause 1 of the Austrian Cartel Act. Following this approach, the parties would be (rebuttable) dominant in the market for the rental of railway wagons.

The Cartel Court appointed an economic expert, who submitted his opinion in February 2018. In consequence, potential conditions were discussed. A package of requirements developed by the notifying parties was subsequently examined in the context of a supplementary opinion and found to be suitable for eliminating the given competition concerns. Hence, with its decision of 28 March 2018, the Cartel Court granted clearance. The remedies – which are in accordance with the proceedings in Germany – are not published yet (but will be published later). In its press release, the FCA refers to the fact that the acquirer, upfront, agreed to sell approx. 30% of the Nacco business to third parties. The remedies concerned will be monitored by an independent trustee.

Pet food / Animal needs

Concerning the planned acquisition of Tomy's Zoo GmbH by Fressnapf Handels GmbH, a transaction concerning the business area of pet food / animal needs, the FCA (also based on third parties' complaints) had concerns regarding the market definition applied. In the FCA's view, it was likely that Fressnapf would strengthen its market dominance on the relevant market concerned. The parties first applied for an extension of phase I for two weeks. However, the authority's competition concerns could not be resolved in the extended period of phase I. The FCA initiated a phase II proceeding before the Cartel Court. In consequence, the parties withdrew their planned transaction.

Gambling

In the gambling sector, the FCA scrutinised in detail the planned acquisition of sole control of Casinos Austria AG by SAZKA Group a.s., Czech Republic (SAZKA). The FCA considered the following markets to be relevant in examining this transaction: (i) casinos; (ii) lottery gambling; (iii) gambling machines; (iv) sports betting; and (v) online gambling. Acquirer and target are active in these markets. However, geographically, the markets were defined nationally or even more narrowly in scope. The acquirer, SAZKA – being so far active outside Austria only – was therefore considered as not being active on the relevant markets in Austria. Hence, there was no overlap; the planned transaction did not result in the creation or strengthening of a dominant position. The transaction (also based on pre-notification talks) therefore received clearance already in phase I.

Ski lifts / Skiing areas

Also in 2017, concerning the sector for ski lifts / skiing areas, Bergbahnen AG Wagrein (BB Wagrein) and Fremdenverkehrs GmbH (FVG) acquired all shares in Bergbahnen Flachau Ges.m.b.H (BB Flachau). FVG and BB Wagrein are part of the Raiffeisenverband Salzburg eGen-Group (RVS). RVS also holds shares in Alpendorf Bergbahnen AG (Alpendorf BB), a skiing area next to Wagrein and Flachau. Furthermore, all undertakings concerned are part of the Ski Amadé association, which sets prices for multi-day tickets throughout the entire region. Again, based on pre-notification talks and remedies agreed on, the planned transaction received clearance in phase I. The remedies became binding as a result of the clearance of the merger. The undertakings thereby agreed to offer new types of ski cards. These different types include, e.g., a weekend family ticket collectively for BB Flachau,

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BB Wagrein and BB Alpendorf, and various variants of one-day tickets for families valid in different skiing areas. The tickets will be considerably discounted compared to the tariffs currently being paid for the same services. The FCA expects that the new products (and the respective discounts granted) will both increase consumers' freedom of choice and reduce price pressure, especially to the benefit of families.

Container terminals and related services

Concerning a planned transaction concerning the planned cooperation between Wiener Hafen (Port of Vienna) and ÖBB-Infrastruktur (a subsidiary of the Austrian railway operator) with regard to container terminals and related services, the FCA, already in 2016, initiated an examination of the merger, in proceedings before the Cartel Court, on the basis of extensive objections to the information provided by the merger applicants. After obtaining a judicial expert opinion and a supplementary report, the applicants withdrew the merger application in May 2017.

Free TV and TV advertising segment

Concerning the free TV and TV advertising segment, the German media group ProSiebenSat.1Puls 4 GmbH (which already acquired the Austrian private TV channel Puls4 before) intended and notified its planned acquisition of the Austrian private TV media group, ATV. The parties initiated at an early stage pre-notification talks with the Official Parties. The latter hereby examined in detail the possible effects of the proposed merger on competition in the affected markets and the impact on diversity of opinion and media in Austria. In the course of the pre-notification talks, remedies were negotiated, which were subjected to an extensive market test in phase I of the filing procedure. In total, ten companies sent statements on the published conditions and the merger filed within the 14-day deadline. This extensive feedback was reviewed and analysed by the FCA.

As a result, based on the concerns expressed in the feedback, despite the considerable need for ATV to restructure, a strict tightening of the originally submitted conditions was agreed. In particular, the remedies agreed upon concern the free TV advertising market: they ensure that ATV can still be booked independently for spots, and that a direct customer has the right to use an independent discount scale (i.e., any rebates to be granted by ATV to advertisers will be exclusively based on advertising times on ATV). In consequence, advertisers are not obliged to book a whole package of advertising spots with the acquirer group and its several TV channels but can focus their activity on ATV. ATV will furthermore only slightly increase its advertising time over the full-year average compared to the previous year, in order to strictly limit the possibility for the acquiring group to compete on the market with predatory competition. At the same time, the FCA considered that a further tightening of conditions in the area of the advertising market would jeopardise the necessary remediation of ATV, and thus its very existence. ATV has been posting constant and high operating losses for several years.

Concerning TV broadcasting, the remedies – in order to uphold media diversity – encompass an obligation on ATV to broadcast news also at the weekend. This has a positive effect on ensuring an independent ATV editorial team and office. Furthermore, the continued existence of ATV's HD free satellite coverage was ensured until the end of 2020.

Grocery retail

Within the grocery retail segment, concerning a planned acquisition of a closed-down site of the insolvent Zielpunkt GmbH by Lidl Österreich GmbH, the acquirer withdrew its notification after assessment that the acquisition concerned was not notifiable in Austria.

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The press release of the FCA does not disclose whether this assessment was based on an in-house analysis or talks with the FCA itself.

Seeds and plant-protection products

Also concerning BASF SE's (Deutschland) withdrawn notification concerning acquisition of sole control of certain assets of Bayer AG concerning seeds and plant-protection products, no details were disclosed. It is therefore unclear whether this planned transaction is now covered by the currently ongoing merger notification, M.8851 BASF / BAYER DIVESTMENT BUSINESS which is before the European Commission.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In its publications in 2017, the FCA did not refer to the economic standards as mentioned. Concerning the above mentioned SAZKA / Casinos Austria AG transaction (see above), based on the information published, the fact that the acquirer SAZKA is also active in the gambling sector (however, outside Austria and therefore in a neighbouring market, i.e., a market where Casinos Austrian AG is active as the target), did not result in competition concerns.

In general, the dominance test, as included in Austrian merger control, applies to all kinds of mergers, i.e., horizontal, vertical and conglomerate transactions. In investigating these transactions, the authorities may rely on both unilateral and co-ordinated effects.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

In case the Official Parties – contrary to the Cartel Court in phase II proceedings – cannot agree on remedies which result in a formal (conditional) clearance decision, "informal" remedies entered into with the FCA and the FCP to avoid phase II, do happen in practice. The Official Parties – based on the remedies agreed – withdraw their right to initiate phase II proceedings on the condition that the remedies will be fulfilled. Such "informal" remedies also have binding effect. An undertaking which fails to comply with such remedies is deemed to have violated the standstill obligation, which may result in substantial fines.

In phase II, the Cartel Court may prohibit a transaction, provided that it creates or strengthens a dominant position. In addition, the Cartel Court may clear transactions based on conditions or obligations. In practice, the Cartel Court regularly appoints an economic expert early into phase II. The economic analysis is then largely carried out by the expert witness, whose report is of considerable importance to the outcome of the proceedings. If the expert concludes that the transaction would give rise to the creation or strengthening of a dominant position, the parties may still offer remedies to the Cartel Court.

However, in practice, remedies offered to the FCA and the FCP are also much more common in phase II. If the Official Parties agree on the remedies, their request to initiate a phase II proceeding will be withdrawn. The Cartel Court then has to close its proceedings, with the effect that the transaction concerned is deemed to be cleared. Phase II remedies agreed with the Official Parties to obtain withdrawal of a phase II request have a binding effect. Again, an undertaking which fails to comply with such remedies is deemed to have violated the standstill obligation.

Compared to authorities such as the European Commission, the Austrian authorities are more willing to consider not only structural, but also behavioural remedies. Access remedies are relatively frequent.

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Key policy developments

See above, the Cartel and Competition Law Amendment Act 2017 (*Kartell- und Wettbewerbs rechtsänderungsgesetz* 2017, "KaWeRÄG 2017" / "Amendment") concerning the Cartel Act (*Kartellgesetz*, KartG) and the Competition Act (*Wettbewerbsgesetz*, WettbG) entered into force on 1 May 2017.

As a side note, it can be noted that the FCA hired five new case-handlers at the end of 2017. In total, the FCA's team of case-handlers now consists of 34 case-handlers and its Director General, Dr Theodor Thanner.

Reform proposals

In recent years, there have been discussions whether the FCA should be competent to decide on merger control applications in general and – particularly – on remedies (so far, it is the Cartel Court only and not the FCA which can actively rule on merger control notifications). However, as outlined above, in practice, filed transactions already get clearance granted in phase I based on remedies negotiated between the FCA and the undertakings concerned.

Furthermore, as outlined above, as Austria has one of the lowest national merger control thresholds, it is also regularly discussed whether to increase the existing (domestic) turnover thresholds (e.g., by introducing a second national threshold) in order to limit the number of transactions that are notifiable. Furthermore, Austria also still follows the "creation or strengthening of a dominant position" as a substantive test. Critics have requested to change to the SIEC test (as applied under the EUMR and, e.g., in Germany).

However, as a substantial reform of Austrian competition law only entered into force in 2017, there are no actual reform proposals which are likely to be implemented in the near future.

* * *

Endnote

1. According to Section 9(1) of the Cartel Act, the thresholds of Austrian merger control are met if the undertakings concerned achieved the following cumulative turnover figures in the previous business year: a) a combined global turnover of more than €300 million; b) a combined turnover of more than €30 million in Austria; and c) at least two of the relevant undertakings each had a global turnover of more than €5 million. Furthermore, when only one of the undertakings concerned had a turnover of more than €5 million in Austria, the global turnover of the other undertaking involved must exceed €30 million in order to require merger notification (Cartel Act, Section 9(2)).

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Overview of merger control activity during the last 12 months

The Competition Act ("Act") contains two parts that apply to mergers – Part IX contains the pre-merger notification provisions and Part VIII contains the substantive merger review provisions. These provisions apply independently of each other. Thus, even if a transaction is not subject to pre-merger notification under Part IX, it is still subject to the substantive merger review provisions in Part VIII of the Act.

A transaction that exceeds certain financial thresholds is subject to pre-merger review and may not be completed until the parties have complied with Part IX of the Act. Under Part IX, the parties must either receive an advance ruling certificate ("ARC") from the Commissioner of Competition (the "Commissioner"), or file a pre-merger notification with the Competition Bureau ("Bureau") and wait until the applicable waiting period has expired, been waived, or been terminated. Failure to file 'without good and sufficient cause' is a criminal offence, punishable by a maximum fine of C$50,000.[1] Where the parties close prior to the expiry of the waiting period, the Commissioner can apply to the Court for a range of remedies, including fines of up to C$10,000 per day for each day that the parties have closed in advance of the expiry of the waiting period.[2]

For a pre-merger notification to be required under the Act, both the 'size of transaction' and 'size of parties' thresholds must be met. The 'size of transaction' threshold is generally satisfied if the target has assets in Canada, or revenues in or from Canada generated by assets in Canada, in excess of C$92m (for amalgamations, at least two of the amalgamating corporations must have assets or revenues that exceed the threshold).[3] The size of parties threshold is satisfied if the parties to the transaction, including all affiliates,[4] combined, have assets in Canada or revenues in, from or into Canada in excess of C$400m. For share transactions, the notification requirement is triggered by the acquisition of more than 20% of the votes attached to all of the outstanding voting shares of a public company, or more than 35% of the votes attached to all of the outstanding voting shares of a private company (or, in each case, more than 50% of the votes attached to all of the outstanding voting shares if the acquirer already owns the percentages stated above).[5]

A transaction that is subject to notification cannot be completed until the termination, waiver or expiry of the applicable statutory waiting period. The submission of completed filings by both parties to a transaction commences an initial 30-day waiting period. The initial 30-day period can be extended by the Bureau, should it determine that it requires additional information to complete its review, through issuance of a Supplementary Information Request ("SIR") (akin to a second request in the U.S.). The issuance of a SIR triggers a second 30-day waiting period, which commences when both parties have substantially

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complied with the SIR. The transaction may not close until the expiry or termination of this second waiting period (subject to certain exceptions).

The Act contains an explicit "efficiencies defence", which prohibits the Competition Tribunal ("Tribunal") from issuing an order under the merger provisions of the Act, where the gains in efficiency likely to be brought about by the merger are greater than, and would offset, the likely anticompetitive effects, and those efficiencies likely would not be achieved if the order were made. In *Tervita Corp. v. Canada (Commissioner of Competition)*, the Supreme Court of Canada drew a distinction between quantitative and qualitative effects, and set out a two-step inquiry. The first step is to compare the merger's quantitative efficiencies against its quantitative anti-competitive effects. The Commissioner bears the burden of proving all quantifiable anti-competitive effects of a merger, and any effects that are realistically measurable cannot be considered on a qualitative basis if no quantitative evidence is provided. The second step is to balance the merger's qualitative efficiencies against its qualitative anti-competitive effects, and then a final determination is made as to whether the merger's total efficiencies offset its total anti-competitive effects. The efficiencies defence is available for "mergers to monopoly", does not require a minimum threshold of efficiency gains to apply, and does not require that consumers "benefit" from the efficiencies.[6]

Since *Tervita,* the Bureau has relied on the efficiencies defence in a number of transactions: in June 2016, despite concluding that Superior Plus Corp.'s proposed acquisition of Canexus Corporation would likely result in a substantial lessening of competition in the supply of sodium chlorate in Eastern and Western Canada, and in the supply of chlorine, caustic soda, and hydrochloric acid in Western Canada, the Bureau issued a no-action letter[7] on the basis that the anti-competitive effects of the merger would be clearly outweighed by its efficiency gains.[8] This was the first time that the Bureau has explicitly relied on efficiencies to approve a merger, though the transaction was abandoned by the parties following the granting of a preliminary injunction against the transaction in the United States. In March 2017, the Bureau similarly relied on efficiencies in allowing the acquisition of Canexus by Chemtrade Logistics Fund to proceed.[9] More recently, in September 2017, the Bureau considered the efficiencies defence in its review of Superior Plus LP ("Superior")'s proposed acquisition of Canwest Propane ("Canwest") from Gibson Energy ULC ("Gibson"). The Bureau concluded that the acquisition was likely to prevent or lessen competition substantially for the retail sale of bulk propane in 22 of 25 relevant geographic markets. While Superior entered into a consent agreement with the Bureau to resolve concerns in 12 regions where the efficiencies did not clearly and significantly outweigh the merger's anti-competitive effects, the Bureau concluded that a remedy was not required in 10 local areas because the efficiency gains resulting from the transaction were likely to clearly and significantly outweigh the likely anti-competitive effects in those areas.[10]

In challenging a merger, the Bureau may apply to the Tribunal seeking an interim order under section 104 of the Act enjoining the parties from closing the transaction (in whole or in part) pending a final resolution on the merits.[11] The test applied by the Tribunal in determining whether to issue an order is the standard Canadian test for interlocutory or injunctive relief as set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*[12]: (i) is there a serious issue to be tried; (ii) will irreparable harm result if the requested relief is not granted; and (iii) does the balance of convenience favour the granting of the order? In the *Parkland/Pioneer* transaction, the Bureau obtained an interim order requiring the parties to hold assets separately in six local markets by presenting evidence from which it was possible to infer that, without the order, there would be harm to consumers and the economy

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in respect of such markets; however, the Bureau did not seek to enjoin the transaction as a whole and had proposed a limited hold separate; the Bureau's approach suggests it may be possible, in particular, for parties to close a global transaction in the face of a challenge in Canada.[13]

In the six months ended September 30, 2017, the latest period for which the Bureau has published statistics, the Bureau concluded 122 merger reviews, issuing 62 no-action letters, 44 ARCs and registering six consent agreements.[14] The Bureau's activity level was consistent with its preceding fiscal year, in which the Bureau concluded 238 merger reviews and issued 96 no-action letters, 116 ARCs and registered eight consent agreements.[15]

The Bureau has continued to solicit public comments regarding proposed transactions by inviting Canadian consumers and industry stakeholders to share their views online. Continuing an approach initially adopted in 2015 (regarding the proposed acquisition of Groupe Archambault's retail division by Renaud Bray),[16] and solidified in 2016 (regarding BCE Inc.'s proposed acquisition of Manitoba Telecom Services Inc.),[17] the Bureau has recently sought public comments regarding Superior Plus LP's proposed acquisition of Canwest Propane.[18]

New developments in jurisdictional assessment or procedure

Pre-merger notification thresholds are indexed for inflation. As a result, the 'size of transaction' threshold for pre-merger notification increased from C$88m to C$92m.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Over the last 12 months, the Bureau has reviewed transactions in a number of key sectors, reaching consent agreements in a range of industries including industrial wood coatings, fertiliser products, gasoline retailing, healthcare equipment, and bulk propane retailing industries.

Mergers approved via consent agreements

In June 2017, the Bureau entered into a consent agreement with E.I. du Pont de Nemours and Company ("DuPont") and The Dow Chemical Company ("Dow") to resolve competition concerns related to their proposed merger. The Bureau concluded that the merger was likely to negatively impact competition in Canada with respect to certain herbicides used in the production of cereal crops as well as certain specialised plastics used in high-performance packaging. Under the consent agreement, DuPont was required to divest its global cereal herbicides business to FMC Corporation. Additionally, the consent agreement required Dow to sell its specialised plastics business to SK Global Chemical Co. Ltd. During its examination, the Bureau worked closely with the European Commission, the United States Department of Justice and the Australian Competition and Consumer Commission.[19]

In July 2017, the Bureau signed consent agreements with each of Alimentation Couche-Tard ("Couche-Tard") and Parkland Industries Inc. ("Parkland") related to the acquisition of CST Brands ("CST"). Couche-Tard had entered into an agreement to acquire CST, and had also entered into an agreement with Parkland pursuant to which Parkland would acquire the majority of CST's Canadian assets from Couche-Tard. Following a review of both transactions, the Bureau determined that they were likely to cause a substantial lessening of competition in the retail supply of gasoline in certain regions of Eastern Canada. In order to address the Bureau's concerns, Couche-Tard agreed to divest to Parkland and another third-

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party purchaser over 366 gas stations and dealer contracts in certain regions. Additionally, Parkland agreed to divest certain of its own assets to two separate third-party purchasers approved by the Bureau.[20]

In September 2017, the Bureau signed a consent agreement with Abbott Laboratories ("Abbott") regarding its acquisition of Alere Inc. ("Alere"). The Bureau concluded that Abbott's acquisition of Alere would likely result in a substantial lessening of competition in the supply of certain types of blood gas and cardiac marker-testing products in Canada. To resolve this concern, the Consent Agreement required the sale of Alere's Epoc blood gas-testing system to Siemens AG, and its Triage cardiac market-testing system to Quidel Corporation.[21]

In April 2018, the Bureau announced that it had signed a consent agreement with METRO Inc. ("Metro") regarding its proposed acquisition of The Jean Coutu Group (PJC) Inc. ("Jean Coutu"). Following its review of the transaction, the Bureau concluded that the merger would likely have led to substantially higher prices or decreases in services for consumers related to the purchase of medications and other pharmacy products in eight regions in Quebec. To resolve these concerns, Metro agreed to sell properties or leases to an alternative distributor and franchising services provider and to take steps to terminate franchise, distribution and associated agreements related to pharmacies located in the markets of concern.[22]

Mergers approved without consent agreements

In September 2017, the Bureau issued a no-action letter in respect of the merger of Agrium Inc. (Agrium) and Potash Corporation of Saskatchewan Inc. (Potash Corp.). During its extensive review, the Bureau considered competition between the parties in relation to multiple fertiliser products, including potash fertiliser, dry phosphate fertiliser, liquid phosphate fertiliser and nitric acid. The Bureau concluded that there was effective remaining competition for each of the products from large international competitors including Mosaic, K+S Potash Canada, Simplot, and other suppliers, as well as the entry of a new competitor in potash.[23]

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

Economic analysis is a fundamental component of the Bureau's merger review process. The Bureau rarely considers economic models determinative, but uses such models as either an initial screening mechanism, or for guidance as the merger review progresses. Economic models have recently gained in importance due to the Supreme Court of Canada's 2015 decision in *Tervita*,[24] in which the Court held that the Commissioner has the obligation to quantify all quantifiable anti-competitive effects if the merging parties have raised the efficiencies defence.[25] For example, the Bureau retained an external economic expert to model the likely effects, including deadweight loss, of the Superior/Canexus transaction – a transaction that the Bureau ultimately cleared on the basis of efficiencies.[26] The Bureau also performed a deadweight loss analysis with respect to the *Superior/Canwest* transaction.[27]

The Bureau uses a broad variety of economic analyses in the course of its merger reviews. For example, in the retail sector, the Bureau may use diversion ratio analyses, critical loss analyses, price correlation/cointegration analyses, and regression analyses in order to define a relevant market, and it may use the empirical examination of natural experiments, upward pricing pressure analyses, and merger simulation models in analysing unilateral competitive effects.[28]

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In its position statements, the Bureau often references the economic models it has used during its review. In the Dow/DuPont and Couche-Tard/CST transactions, for example, the Bureau undertook a diversion analysis and estimated the mergers' likely price effects.[29] In Superior/Canwest, the Bureau specifically mentioned the use of the Bertrand model of competition with Logit demand, to help analyse the merger and quantify its likely anti-competitive effects.[30]

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Supplementary Information Requests

Where a transaction raises serious competition issues in Canada, there is a strong likelihood that the Bureau will issue a Supplementary Information Request (SIR). That being said, the issuance of a SIR does not signal that a remedy is inevitable. Indeed, among the transactions where we are aware of the Bureau having completed its review after issuing a SIR, we understand that roughly two-thirds proceeded without any remedy.

In our experience, the likelihood and scope of a SIR depend on a number of factors, including: the public and media profile of the deal; the complexity of the industry; whether the transaction is subject to review in other jurisdictions; the degree and nature of competitive overlap; the extent to which historical business documents provided to the Bureau in the initial period support or refute the "theory of the case"; the likelihood and timing of complaints from market participants; and the extent to which specific issues have been addressed to the Bureau's satisfaction during the initial 30-day statutory waiting period.

Even if a SIR cannot be avoided entirely, parties may be able to reduce the burden of complying with a SIR by educating the Bureau about the parties' businesses, the transaction and the industry, by making business people available to address questions from the Bureau early in the review process, and by being responsive to potential Bureau concerns in parallel with the SIR compliance process.

Parties can reduce the likelihood of the Bureau issuing a SIR by providing the Bureau with additional time to review the merger. Though a pull-and-refile strategy is generally not used in Canada, a similar result can be achieved by engaging with the Bureau prior to the formal commencement of the statutory waiting period.

Remedies

Remedies may be required where a merger is likely to prevent or lessen competition substantially in one or more relevant markets. The guiding principle in determining an appropriate remedy was set out by the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.*, where the Court stated that the "appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger".[31] The Court also noted that: "If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate, but from a legal point of view, such a remedy is not defective."[32]

As a matter of practice, the Bureau will first seek to negotiate a remedy with the parties prior to resorting to litigation, and has also shown a willingness to obtain a remedy through mediation prior to completion of the litigation.[33] In seeking a remedy, the Bureau

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prefers structural remedies, such as divestitures, over behavioural remedies, "because the terms of such remedies are more clear and certain, less costly to administer, and readily enforceable".[34] Structural remedies are also preferred by the courts, as noted by the Tribunal in *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*,[35] where the Tribunal stated: "[O]nce there has been a finding that a merger is likely to substantially prevent or lessen competition, a remedy that permanently constrains that market power should be preferred over behavioural remedies that last over a limited period of time and require continuous monitoring of performance."

Voluntary remedies are implemented through consent agreements. The Competition Tribunal's decision in *Rakuten Kobo Inc. v. Canada (Commissioner of Competition*) clarified the elements that must exist for a consent agreement to secure approval from the Tribunal: (i) the consent agreement must be sufficiently detailed in order for the Tribunal to conduct its review; (ii) the Commissioner must set out in the consent agreement the conclusions arrived at with respect to there being a substantial lessening or prevention of competition; and (iii) there must be a link between the remedy contained in the consent agreement and the Commissioner's conclusion of a substantial lessening or prevention of competition.[36]

As a general matter, where a consent agreement includes either structural or behavioural remedies, or a combination of the two, the Bureau will require that a monitor be appointed to ensure that the merging parties abide by the terms of the consent agreement. Further, to facilitate the implementation of structural remedies, the Bureau generally requires the use of interim hold separate arrangements to "ensure the merging parties do not combine their operations or share confidential information before the divestiture occurs".[37] Pursuant to a hold separate agreement, the parties are required to hold separate the assets to be divested pending the completion of the divestiture. Hold separates have been utilised in a number of recent mergers, including in *Superior/Canwest* and *Metro/Jean Coutu*. While the Bureau's preference is for structural remedies, this is not to say that, in cases where both the respondents and the Commissioner consent, behavioural remedies cannot be effective.[38]

Indeed, the Commissioner has highlighted the Bureau's openness to using behavioural remedies as a means of addressing competitive concerns in connection with certain mergers. This is somewhat of a recent shift as the Bureau has been concerned with the potential difficulty in monitoring behavioural remedies, determining the appropriate duration for the remedy, and the direct and indirect costs associated with monitoring the remedy and its effect on market participants.[39] In recent years, the Bureau has accepted behavioural remedies in a number of matters including *Bell/Astral*, *Agrium/Glencore* and *Telus/Public Mobile* (2013), *Transcontinental/Quebecor* (2014), *BCE/Rogers' acquisition of GLENTEL and Parkland/Pioneer* (2015) and *Superior/Canwest* (2017).

Further, where behavioural remedies "would not, on their own, be effective alternatives to a successful structural remedy", the Bureau has recognised that, "[i]ncluding behavioural components in a remedy may be useful if such components provide a buyer and/or other industry participants with the ability to operate effectively and as quickly as possible".[40] In that respect, the Bureau has negotiated combination remedies including both structural and behavioural aspects in various matters, including remedies in a number of recent transactions, notably *Superior/Canwest* and *Metro/Jean Coutu.*

Key policy developments

On May 1, 2018, Bill C-25 received Royal Assent and amendments to the Act came into force which broaden the Act's affiliation rules and have a significant effect on Canada's

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merger review regime. Prior to the amendments coming into force, the affiliation rules were asymmetrical as between corporations and non-corporate entities such as partnerships, sole proprietorships, and trusts; two corporations were considered affiliates under the Act whereas a corporation and a non-corporate entity – or two non-corporate entities – would not be considered affiliates despite a functionally identical relationship. The amendments eliminated the previous asymmetry by expanding the Act's definition of affiliation to treat corporations and non-corporate entities in the same manner. Affiliation plays an important role in determining: (i) whether a transaction is subject to notification; and (ii) the content of pre-merger notification filings (as customer and supplier information must be included for all relevant affiliates). While the revisions to the affiliation rules exempt most internal reorganisations from notification under the Act (before, an internal reorganisation that involved partnerships or other non-corporate entities may have required notification), they also result in transactions that would not be notifiable under the old affiliation rules being notifiable going forward.

On April 14, 2018, the Bureau announced that the filing fee for merger reviews was going to increase from $50,000 to $72,000 starting on May 1, 2018.[41] The new filing fee applies to companies seeking pre-merger review from the Bureau through the submission of either a pre-merger notification filing or request for an ARC.

On October 27, 2017, the Bureau published a revised version of its Pre-Merger Notification Interpretation Guideline No. 7: Creditor Acquisitions.[42] Interpretation Guideline No. 7 provides guidance regarding the exemption under paragraph 111(d) of the Act that exempts a class of acquisitions by creditors from the pre-merger notification requirements. The revisions clarify that the exemption may, in certain circumstances, extend to acquisitions following the transfer of a creditor's interest (e.g. on secondary markets), provided the acquisition is pursuant to a credit transaction entered into in good faith in the ordinary course of business. The revised guidelines also clarify the need to consider whether the transaction may nevertheless be notifiable by virtue of the business being acquired pursuant to an insolvency proceeding qualifying as an "operating business" under subsection 108(1) of the Act.

The Supreme Court of Canada's decision in *Tervita* has led the Bureau to reconsider its approach to efficiencies in the merger review process. On March 20, 2018, the Bureau published a draft of a new guide to its assessment of efficiencies in merger reviews. In its announcement, the Bureau notes that it has gained additional experience conducting highly complex efficiencies analysis since it had last published guidance regarding efficiencies in 2011, when it updated the Merger Enforcement Guidelines. The announcement also invited interested parties to provide comments and feedback on the draft guide.[43]

* * *

Endnotes

1. See section 65(2) of the Act.
2. See section 123.1 of the Act.
3. The size of transaction threshold is subject to adjustment for inflation, and annual adjustments are published in the Canada Gazette.
4. Affiliation rules under the Act are complex but generally prescribe a legal control test (i.e., more than 50% ownership of voting interests).
5. See section 110(3)(b) of the Act.

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6. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 (CanLII), available at: http://canlii.ca/t/gg19b [Tervita].
7. A "no-action letter" is a letter from the Commissioner indicating that the Commissioner is of the view that he or she does not, at that time, intend to make an application to the Tribunal under section 92 of the Act challenging the transaction. See section 123(2) of the Act.
8. Competition Bureau, Competition Bureau statement regarding Superior's proposed acquisition of Canexus (June 28, 2016), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.
9. Competition Bureau, Acquisition of Canexus by Chemtrade will not be challenged (March 8, 2017), available at: https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition_of_canexusbychemtradewillnotbechallenged.html.Competition Bureau.
10. Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC (September 28, 2017), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.
11. In addition to seeking an interim order where it has already commenced an application challenging a merger, the Bureau can, under section 100 of the Act, apply for an interim order prohibiting the completion or implementation of a proposed merger where: (i) the Commissioner is conducting an inquiry under section 10(1)(b) of the Act and asserts that more time is required to complete the inquiry, and the Tribunal finds that in the absence of the order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition because that action would be difficult to reverse; or (ii) the Tribunal finds that there has been a violation of the merger notification provisions.
12. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117, available at: http://canlii.ca/t/1frtw.
13. Competition Bureau, Statement from the Commissioner of Competition: Tribunal issues interim order in the Parkland/Pioneer merger (June 3, 2015), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03925.html.
14. The Commissioner and a merging party or parties may enter into a consent agreement to remedy the Commissioner's concerns with a transaction or proposed transaction. Consent agreements may be filed with the Tribunal; doing so provides the consent agreement with the same force and effect as an order of the Tribunal. See section 105(4) of the Act. The Bureau has published a template consent agreement which largely reflects recent consent agreements. The template is available on the Bureau's website at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02310.html.
15. Competition Bureau, Quarterly Statistics Report for the period ending September 30, 2017, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04300.html.
16. Competition Bureau, Competition Bureau invites Canadians to share their views on the merger between Renaud-Bray and Groupe Archambault (July 23, 2015), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03974.html.
17. Competition Bureau, BCE's Proposed Acquisition of Manitoba Telecom and Sale of Dealer Locations and Wireless Subscribers to TELUS (May 10, 2016), available at: https://www.canada.ca/en/competition-bureau/news/2016/05/bce-s-proposed-acquisition-of-manitoba-telecom-and-sale-of-dealer-locations-and-wireless-subscribers-to-telus.html.
18. Competition Bureau, Bureau welcomes input on Superior's proposed acquisition of

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Canwest (April 24, 2017), available at https://www.canada.ca/en/competition-bureau/news/2017/04/bureau_welcomes_inputonsuperiorsproposedacquisitionofcanwest.html.

19. Competition Bureau, Competition Bureau statement regarding the merger between Dow and DuPont (June 27, 2017), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04247.html.
20. Competition Bureau, Competition Bureau statement regarding Couche-Tard's acquisition of CST and divestiture of certain assets to Parkland (July 6, 2017), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04252.html.
21. Competition Bureau, Competition Bureau statement regarding the acquisition by Abbott of Alere (September 28, 2017), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04308.html.
22. Competition Bureau, Competition preserved in pharmacy distribution and franchising services in Quebec (April 23, 2018), available at: https://www.canada.ca/en/competition-bureau/news/2018/04/competition-preserved-in-pharmacy-distribution-and-franchising-services-in-quebec.html.
23. Competition Bureau, Competition Bureau statement regarding proposed merger between Agrium and Potash Corporation of Saskatchewan (September 11, 2017), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.
24. See *supra* note 6.
25. For an overview of the efficiencies defence, see section A, above.
26. See *supra* note 8.
27. See *supra* note 10.
28. Competition Bureau, Economic analysis of retail mergers at the Competition Bureau (September 15, 2014), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03796.html.
29. See *supra* notes 19 and 20.
30. See *supra* note 10.
31. [1997] 1 SCR 748, at para. 85, available at: http://canlii.ca/t/1fr34.
32. *Ibid*, at para. 89.
33. Competition Bureau, Competition Bureau statement regarding Parkland's acquisition of Pioneer (April 1, 2016), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04053.html.
34. Competition Bureau, Information Bulletin on Merger Remedies in Canada (September 22, 2006), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html.
35. 2001 Comp. Trib. 34, CT-2000-002, available at: http://www.ct-tc.gc.ca/CMFiles/CT-2000-002_0087_49PBY-982004-9241.pdf.
36. 2016 Comp. Trib. 11, available online: http://www.ct-tc.gc.ca/CMFiles/CT-2014-002_Reasons%20for%20Order%20and%20Order_234_66_6-10-2016_3576.pdf. Brian A. Facey and Cassandra Brown, "Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations," 2nd ed., LexisNexis Canada: 2017 at p 369.
37. Competition Bureau, Information Bulletin on Merger Remedies in Canada (September 22, 2006), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html.
38. *Ibid*, at para. 110.
39. *Ibid*.
40. Competition Bureau, Information Bulletin on Merger Remedies in Canada (September

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Overview of merger control activity during the last 12 months

According to the statistics of the Ministry of Commerce ("MOFCOM"), in 2017, MOFCOM received 400 merger filing cases, among which 353 cases were filed and 344 cases were concluded. Among cases concluded, seven were approved with conditions, a record high since the Anti-monopoly Law ("AML") became effective in 2008. Merger filing cases reviewed under normal procedure accounted for 30%. Overseas mergers and acquisitions continued to be active; the United States, Europe and Japan are still the main targets of mergers and acquisitions. Transaction scale increased significantly; cases with amounts of more than 10 billion yuan accounted for more than 20%. Specifically:

1. In the case of approval with restrictive conditions, MOFCOM requires the reporting party to take such measures as the divestiture of assets and technology in order to protect fair competition in the markets of agrochemicals, shipping, printers, telecommunications and semi-conductors, and safeguard the interests of consumers.
2. In 2017, MOFCOM's average time for accepting and concluding a merger filing case was shortened by 14.2% and 8% respectively, while 97.8% of simplified procedure cases were concluded at Phase I.
3. In the specific case review, the case handler is encouraged to comprehensively use a variety of analytical tools to provide scientific justification for the conclusion of the review and ensure that the case can withstand the test of law and time.
4. MOFCOM publicly imposed penalties on nine cases that were not reported according to law, such as Meinian Onehealth Healthcare's acquisition of Ciming Health Checkup.

In addition, MOFCOM cooperated with antitrust agencies in the US, European Union, South Africa and India to handle over 20 cross-border merger cases. Among them, the merger of Dow Chemical and DuPont was described by the European Union as a model of bilateral competition cooperation.

MOFCOM completed the assessment of market competition conditions in six major industries, such as automobile, iron & steel and semiconductors. MOFCOM also updated its antitrust database for the semiconductor, pesticide, telecommunication equipment and mid- and high-end medical equipment sectors.

New developments in jurisdictional assessment or procedure

In practice, the materials and data required by MOFCOM for review have a tendency towards gradual increase. Especially at the stage of providing supplementary materials before filing, the applicant was often asked to provide more detailed materials.

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The six cases approved with conditions sent a signal that MOFCOM's law enforcement attitude tends to be more rigorous and meticulous, and the conditions attached were "customised". The conditions were not confined to the usual methods of divestiture or commitment used previously. Instead, after analysing carefully the characteristics and competitive conditions of relevant markets, upstream and downstream markets, and being supplemented by economic analysis such as HHI, Gross Upward Pricing Pressure Index (GUPPI), and communicating with the applicant and third parties, MOFCOM customised various individualised conditions that were closely related to competition concerns for the relevant cases. For example, the acquisition by Maersk Line of Hamburg South America, where the condition was imposed that Hamburg South America should withdraw from the ship-sharing agreement on the Far East-South American East Coast Route.

In 2017, MOFCOM increased the supervision and punishment for failure to file a merger which meets the filing threshold. Nine penalties were announced in 2017 for such non-filing cases; more than usual.

By the end of 2017, MOFCOM had announced a total of 17 non-filing cases and fined 27 companies a total of 5 million yuan, including the maximum of 400,000 yuan (the minimum is 150,000 yuan). At present, the main sources of investigation against non-filing cases are self-initiated investigation by MOFCOM, third party reports, and enterprises' filing.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

There is no indication that MOFCOM paid more attention to any specific industry. Conditional approvals included the merger of Dow and DuPont; the merger of Agrium and Potash Corp of Saskatchewan; the acquisition of Hamburg South America by Maersk; the acquisition of Samsung's printer business by HP; Broadcom's acquisition of Brocade; ASE's acquisition of shares of SPIL; and Becton and Bard's merger, showing that MOFCOM reviewed the industries of agriculture, shipping, telecommunications and semiconductors.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

When analysing competition, MOFCOM implemented a variety of economic evaluation techniques, including HHI, average price coefficient and GUPPI, to estimate the changes to market competition before and after concentration of undertakings.

In addition to focusing on the impact on existing competition, MOFCOM was also concerned about whether the concentration of undertakings had a negative impact on future competition and technological progress. For example, in the Becton and Bard merger, after investigation, MOFCOM learned that Becton was developing a technology that would challenge Bard's existing technology and thus threaten Bard's leading position in the relevant market. The deal helped Bard eliminate this problem, and it may reduce the R&D and commercialisation of innovative technology, thus affecting future technology development in this field.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

In 2014, the Rules for Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) ("Rules for Imposing Restrictive Conditions")

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released by MOFCOM made detailed provisions on merger remedies. The 14th articles of Rules for Imposing Restrictive Conditions (called "up-front buyer") stipulates that MOFCOM may require the divestment obligor to find buyers and sign the sale agreement before the concentration is implemented. Up-front buyer has been applied in many cases, such as the acquisition by NXP of Freescale; and the acquisition by Anheuser-Busch InBev of SAB Miller. In most cases, MOFCOM disclosed the buyer who was transferred to the divestment business and required the divestment to be completed before the completion of the main transaction, or within a period of time after the completion of the main transaction. But the change was seen in the case of approval of the merger of Dow and Du Pont with conditions; until the approval by MOFCOM, the divestment obligor has not yet assured the buyer of the divestment business.

In addition, the Measures for the Review of Concentration of Undertakings (Exposure Draft for Revision) promulgated in September 2017 further clarify the length of review, settlement, and ensure the buyers of acquisition subject to restrictive conditions. MOFCOM not only has the right to require the divestment obligors to seek the buyer and sign the sale agreement before concentration is implemented, but also may require obligators to sign an agreement for the sale of the divestment business with a buyer before making a decision of approval.

Key policy developments

On September 8th 2017, MOFCOM published the Measures for the Review of Concentration of Undertakings (Draft for Comments) ("Measures for the Review (Draft for Comments)"). It is the first time the existing Measures for the Review of Concentration of Undertakings have been revised after eight years of implementation.

The Measures for the Review (Draft for Comments) is not only a revision on the basis of the existing Measures for the Review, but also integrates the contents of the regulations, measures and guidance issued by MOFCOM, which aims to systematise the relevant provisions of merger filing and make them more operable.

The Measures for the Review have not yet been published. However, according to the draft for comments, the following draw our attention:

1. "Concentration" has a broader meaning, not only referring to the acquisition of equity and assets, but also the acquisition of components of property, business or rights that can generate turnover.
2. Implementation of concentration by multiple steps is regulated in the Measures for the Review (Draft for Comments). If undertakings obtain control or exert decisive influence on the target though multiple transactions, it will be regarded as a concentration.
3. The method of calculating the turnover of target is clarified. When a party acquires the component of acquired party and the acquired party no longer has control over, or exerts decisive influence over, the component of target, the turnover of target shall only be calculated as the acquired part, and the portion that has not been acquired shall not be counted.
4. After submitting the filing materials to MOFCOM, MOFCOM may return the merger filing form and materials. If the merger filing form and materials are returned, the case shall be re-filed.
5. Even if the filing threshold is not met, MOFCOM may take the initiative to investigate transactions that may restrict competition.

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Reform proposals

The Anti-monopoly Bureau under MOFCOM, the Bureau of Price Supervision and Anti-monopoly under the National Development & Reform Commission (NDRC), and the Anti-monopoly and Anti-unfair Competition Enforcement Bureau under the State Administration for Industry & Commerce (SAIC), were consolidated into a unified antitrust enforcement agency under the State Administration for Market Regulation (SAMR) in April 2018. The newly formed antitrust agency under the SAMR will be a bureau-level agency. After the consolidation, MOFCOM's former officials will continue to oversee merger reviews.

AML may be amended after 10 years of implementation. The proposed amendments may involve the removal of the merger filing exemption, increase penalties against non-filing, and clarify the term concentration, etc.

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Practice experience

- OCI's acquisition of a 100% equity interest in Tokuyama Malaysia;
- JAC and Volkswagen set up JV in China;
- Shandong Gold's acquisition of 50% share of Minera Argentina Gold from Barrick Gold;
- Holcim/Lafarge merger;
- *Qihoo 360 vs. Tencent*;
- *Hytera vs. Motorola*;
- *Ningbo Magnet Companies vs. Hitachi Metals*;
- *Emiage vs. Qihoo 360*; and
- NDRC's antitrust investigation against the container liner shipping companies *re*. THC.

Honours

- *Chambers Asia-Pacific* Leading Lawyers in competition/antitrust 2018.
- *Asia Law* Leading Lawyers in area of competition & antitrust 2016/2017.
- *Legal Band* Top Antitrust Lawyers in China 2015/2016.
- *ALB Client Choice* Top 20 Lawyers in China 2014.

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Denmark

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Overview of merger control activity during the last 12 months

In 2017, the Danish competition authorities received 50 notifications and approved 49 mergers. One merger (JP/Politiken/Dagbladet Børsen) was withdrawn by the parties after the Danish Competition and Consumer Authority (the DCCA) had conducted an extensive Phase II investigation. The competition authorities did not prohibit any mergers in 2017. Even though the number of notified mergers has increased in the past few years (39 mergers in both 2015 and 2016), the number of notified mergers is still low compared to other European countries.

Most of the merger reviews in 2017 were based on simplified notifications (around 80%). A simplified procedure differs from a standard procedure in that the competition authorities require less information from the parties, no real market investigation is conducted and the filing fee is limited to DKK 50,000 (approx. €6,700). The other merger reviews in 2017 were based on full-form notifications. However, for the most part of the full-form notifications, decisions were adopted following simplified procedures, meaning that the DCCA only had to prepare short, written decisions. Only five merger reviews were conducted as full-form procedures. Out of these mergers, two were cleared in Phase I, two were cleared in Phase II and one was, as mentioned, withdrawn by the parties.

New developments in jurisdictional assessment or procedure

Merger notification is compulsory in Denmark if certain revenue thresholds are met. Even in simplified notifications, the parties are obliged to submit quite an extensive amount of information. However, if the merger is clearly unproblematic (i.e. if the parties' activities do not overlap), less market information is required to be submitted, and the competition authorities sometimes adopt an approval after a short process.

As regards timing, it is recommended that the parties alert the DCCA of the merger as early as possible so as to start the pre-notification process (before signing or immediately following signing). If a merger gives rise to concerns, the DCCA will usually inform the parties early in the process. However, it can be difficult to get the DCCA to comment on timing during the pre-notification process, or on whether the DCCA will require a full-form notification.

In recent cases, there has been a development towards a longer and more thorough pre-notification procedure. For example, the public hearing was previously conducted during the Phase I investigation. Recently, however, the public hearing has been conducted as part of the pre-notification process. In fact, we have recently seen examples where Phase I did not commence until the DCCA had no more questions and had conducted most of the market investigation and case analysis. These developments imply that the DCCA has a large time

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frame, with no legislative time limits to assess the merger. However, the final result is usually acceptable as the DCCA does not spend 25 working days, as otherwise granted, on the Phase I investigation. In our experience, a time frame of two to three months between the submission of the first draft notification and the approval is not unusual in cases with relatively small overlaps, while a time frame of up to six months is possible even in Phase I cases.

Whether the DCCA requires a full-form notification depends on the parties' market shares in overlapping activities. However, the market shares naturally depend on the market definition, and it can be difficult to obtain a binding answer from the DCCA regarding the market definition early in the process. In fact, we have experienced the DCCA proposing a new market definition at the end of Phase I. In such cases, the notification procedure can be transformed from a simplified notification into a full-form notification late in the process, with the consequence that the parties have to pay a significantly higher filing fee and possibly submit further information, which could have a negative impact on timing.

Even if the thresholds for a full-form notification are not met, the DCCA has a very wide margin of appreciation and is always entitled to require a full-form notification.

During the course of the merger review, the DCCA is usually easily accessible and available, it adheres to its deadlines, and communication is informal. We find that close communication with the case team reduces the risk of misunderstandings and leads to a faster clearance and more accurate assessments.

As merger notification is compulsory, gun-jumping constitutes an infringement of Danish competition law. In accordance with the EU Merger Regulation, gun-jumping can result in fines of up to 10% of the parties' annual turnover.

The first Danish gun-jumping decision was adopted by the Danish Competition Council (the DCC) in 2015 and concerned a merger from 2013 between the two accounting firms KPMG and Ernst & Young. The parties brought the case to the Danish Maritime and Commercial High Court, which referred it to the European Court of Justice seeking guidance, in a preliminary ruling, on how to interpret the EU merger control rules on implementation of mergers. On 18 January 2018, the Advocate General delivered his opinion, explaining that the test applied by the DCCA was flawed. If the European Court of Justice follows this line of argument, the merging parties did not pre-implement the merger.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Markets with few competitors attract considerable attention from the DCCA and have led to several Phase II investigations (*cf.* most recently, the Imerco/Inspiration and the Boxer/SE a.m.b.a. mergers). Apart from these observations, the limited number of full-form procedures makes it difficult to identify trends as regards enforcement priorities.

We see no direct connection between the merger cases subject to public or media interest and the merger cases subject to scrutiny by the competition authorities. Similarly, we see no direct connection between the sectors that are subject to scrutiny in terms of antitrust and the particular merger cases that are subject to in-depth reviews.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In general, the Danish competition authorities are convergent with the European Commission as regards the substantive test of the effects of a merger. Thus, case law from the EU courts

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and the Commission's practice and guidelines are relevant under the Danish merger regime.

In recent years, the Danish competition authorities have seemed to apply a more economic approach in their assessments. This is evident in the increasing use of economic evidence such as diversion ratios and upward pricing pressure (UPP) calculations. However, classic approaches of defining markets and calculating market shares are still applied as an initial assessment.

The trend towards a more economic substantive assessment was confirmed in e.g. the EY/KPMG merger case from 2014 concerning the markets for tax and accountancy services to large companies. The DCCA stated that it was not enough merely to look at the Herfindahl-Hirschman Index figures (HHI). Instead, the DCCA applied an in-depth assessment of the markets. Similarly, in both of the two DCC decisions that underwent Phase II investigations in 2017 (Imerco/Inspiration and Boxer/SE a.m.b.a.), the Danish competition authorities conducted analyses of diversion ratios, UPP and other in-depth economic calculations.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

As similar to the EU merger regime, if the competition authorities are concerned with the effects of a merger, the parties may propose remedies to address the authorities' concerns. Usually, such commitments are discussed when a Phase II investigation seems unavoidable.

It follows from the Danish Competition Act that merger remedies may include:

- the divestiture of a company, parts of a company, assets or other ownership interests;
- the grant of access to third parties to the merged entity's technology, production facilities, distribution facilities or similar facilities; or
- other measures that may promote competition.

As a general rule, remedies should be offered as early as possible. Remedies offered late in the Phase II investigations will extend the time limit in order to provide the competition authorities with at least 20 business days to assess the remedies (for further details, see the next question). The Danish competition authorities will usually perform market tests of proposed remedies.

In recent case law, the Danish competition authorities seem to favour structural remedies over behavioural remedies. This development is most likely attributable to the difficulties of controlling a merged entity's compliance with behavioural remedies, as well as to the substantial resources that the competition authorities are required to deploy on a regular basis when reassessing behavioural remedies in the light of new market situations.

In 2017, the DCC conditioned two merger approvals upon remedies proposed by the parties.

In the Imerco/Inspiration case, the DCCA found that the merger would significantly impede competition in the Danish market for retail sales of mid-range and high-end housing articles since it would give rise to unilateral effects in the form of higher prices, small variation in supply/range and/or reduction of the level of service. In order to address these concerns, the owner of Inspiration proposed structural remedies under the Phase II proceedings, including a commitment to open a number of new shops and to keep 20 of the 45 Inspiration shops from the planned merger and run the shops in a new retail chain. In addition, the companies offered several behavioural commitments regarding the future operation of the new chain in order to ensure its viability. The DCC assessed that the commitments were sufficient to address the unilateral and possible effects identified by the DCCA.

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In the Boxer/SE a.m.b.a. case, the DCCA found that the contemplated merger would significantly impede effective competition in the markets for retail provision of TV services to end users and for retail supply of fixed internet access services to end users. In the DCCA's view, the merger would give rise to unilateral effects in the market for retail provision of TV services to end users, in the form of reduction of supply and/or higher prices of *à la carte* products. In the market for retail supply of fixed internet access services to end users, the merger would give rise to unilateral effects in the form of tying the supply of fixed internet access to the supply of TV services provided through the DTT network.

To address these concerns, the parties offered remedies, including a commitment for SE to continue to supply the *à la carte* products that Boxer supplied at the time of the notification, and a commitment not to increase prices. The commitments would prevent SE from tying the supply of fixed internet access to end users with the supply of TV services provided through the DTT network. The DCC assessed that the commitments were sufficient to address the unilateral and possible effects identified by the DCCA. The case is notable for a variety of reasons. For instance, the commitments are set to expire on 3 April 2020 when Boxer's DTT licence expires, which is less than three years after the approval of the merger.

Key policy developments

An amendment to the Danish Competition Act entered into force on 1 January 2018. As regards merger control, the amendment includes two changes of relevance. These changes concern merger remedies and procedural time limits.

Firstly, the amendment changes and clarifies the previous regulation of merger remedies as regards the effects of proposing commitments during a merger review. With this change, the Danish legislator has made it clear that only binding commitments, as opposed to non-committal suggestions, affect the time limits for the review. Binding commitments must reach the DCCA within 90 days from the decision to enter into Phase II, and only under special circumstances may the DCCA consider changes made to submitted commitments after this date. If the DCCA receives binding commitments more than 70 business days after entering into Phase II proceedings, the deadline for the merger review is extended by up to 20 business days.

Secondly, corresponding to the EU merger regime, the amendment introduces a "stop-the-clock" provision, which gives the DCCA authority to suspend the time limits for a merger review if the undertakings concerned do not disclose information requested by the DCCA within the deadline.

On a general level, the Danish legislator and the Danish competition authorities seem to strive for further convergence between EU and Danish merger control regulation. The above-mentioned amendment of the Danish Competition Act confirms this development.

Reform proposals

No further changes in the merger control regulation are expected in 2018.

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European Union

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Overview of merger control activity during the last 12 months

In the 2017 calendar year, 380 mergers were notified to the European Commission (EC). This number, which has been steadily growing since 2013, represents the second-highest number of notified cases since the European Union Merger Regulation (EUMR) was originally introduced in 1990 (the only year in which there was a greater number of notifications was 2007). In 2017, 353 cases were approved unconditionally at Phase I. In 18 cases, the parties offered remedies to obtain approval at the end of the Phase I process and avoid the EC commencing a Phase II in-depth investigation.

The year 2017 also saw 280 transactions – the highest number ever – cleared using the so-called simplified procedure under the EUMR. This allows for a shorter-form notification document in cases which satisfy certain criteria to ensure that they do not raise any substantive concerns. It is intended to result in a less burdensome notification process for the parties. However, convincing the EC that a given transaction should benefit from the simplified procedure in the first place, particularly where there is no public or third party data on the relevant markets, can sometimes prove challenging.

The EC opened Phase II in-depth investigations into seven transactions in 2017, none of which were decided in the same year. One of these seven transactions was abandoned by the parties as a result of the EC raising serious concerns during the course of Phase II. This was the Knorr-Bremse/Haldex transaction (Case COMP/M.8222, a competing brakes manufacturers deal).[1] There were two prohibition decisions issued in 2017 (Heidelbergcement/Schwenk/Cemex Hungary/Cemex Croatia, Case COMP/M.7878, and Deutsche Börse/London Stock Exchange Group, Case COMP/M.7995). The former prohibition decision is under appeal (Case T-380/17, HeidelbergCement and Schwenk Zement v Commission).

During the year, there were 13 requests by the merging parties for (full or partial) pre-notification referral from the EC to an EU Member State. There were also 15 requests going the other way, so where the parties, prior to notification, seek to have referred to the EC a deal which only satisfies the thresholds for EU Member State National Competition Authorities (EU NCA). All of these pre-notification requests were successful.

There were also two requests submitted by EU Member States to the EC after notification had already been made, to have a merger falling under the EUMR referred back to the relevant national authority. One of these requests was refused by the EC (NN Group/Delta Lloyd, Case COMP/M.8257).

New developments in jurisdictional assessment

The EUMR provides for a bright-line jurisdictional test. When this test is satisfied,

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notification to the EC is compulsory and the merger cannot be completed until an approval decision has been issued by the EC (or a waiver from the obligation to suspend pending approval has been granted, which is rare).

There are essentially two elements to the jurisdictional test:

(i) is the transaction of the type to which the EUMR applies – or, in the words of the EUMR, is it a "concentration"; and

(ii) does the transaction satisfy the relevant turnover thresholds – or, does it have an "EU dimension"?

Both elements must be met for a merger to require notification to the EC.

A "concentration"

The question of what is a "concentration" is relatively settled after some 28 years of application of the EUMR. A concentration will exist where there is a transaction leading to a change of "control" of an undertaking. An "undertaking" is a term of art under EU law, but essentially means a business with a commercial presence on a market. A "concentration" could arise as a result of a merger between two previously independent undertakings; as well as the acquisition of control by one (or more) undertaking(s) over another undertaking (which includes, for the purposes of the EUMR, the creation of a full-function joint venture). Control by one undertaking over another will be conferred where the former has the ability to exercise decisive influence over the latter. Although the line between what is and what is not decisive influence can raise complex issues in practice, the concept itself is relatively well-understood.

There were no notified transactions in 2017 in which the EC concluded that the transaction did not constitute a "concentration". Indeed, decisions by the EC that transactions which have been notified to it fall outside of the EUMR are rare. There was only one in 2016, there were two in 2014 and 2015, and before that, there had not been one since 2002.

This relative certainty in relation to the EUMR's approach to the definition of a "concentration" was, however, disturbed by the EC in 2014, with its White Paper, "*Towards more effective EU merger control*", in which it considered that certain acquisitions of minority stakes, which did not result in a change/acquisition of control under the EUMR, could be found to have a negative impact on competition. The White Paper set out a proposal to bring acquisitions of minority shareholdings falling below the level of control within the scope of the EUMR. The EC proposed a targeted transparency system to capture anti-competitive acquisitions of minority shareholdings. The system would limit the administrative burden on undertakings because the EC would only need to be informed of a limited number of cases, namely those which would create a "competitively significant link".

The reactions to this proposal were mixed, eventually resulting in the abandonment thereof. Based on the remaining proposals of the 2014 White Paper, the EC launched a public consultation in 2016 (see European Commission Public Consultation on the Evaluation of procedural and jurisdictional aspects of EU merger control, accessible via the following link: http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf), the content of which is discussed in more detail below. In July 2017, the EC published a Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control (accessible at: http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf).

An "EU dimension"

In terms of the second element of the test, the question of whether or not a transaction, which satisfies the definition of a concentration, is to be considered as having an "EU dimension",

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does not typically raise difficult-to-resolve conceptual questions. However, obtaining the relevant "turnover" data in the appropriate form can raise practical complexities. Particular considerations apply to mergers involving financial institutions, in relation to which the EUMR provides for a different method of calculating the "turnover" – or income − needed to satisfy the relevant thresholds.

The growth of the digital sector, and the importance of innovation, has caused the EC in the past two to three years to question whether a purely turnover-based jurisdictional threshold is always appropriate. There are transactions which are commercially and economically very significant, such that it seems appropriate that the EC should have jurisdiction to review them, but where the parties do not generate sufficient turnover to satisfy the thresholds. This is particularly likely to be the case in the digital sector, in the case of so-called "data" mergers, where the products (or services) of the parties to a merger may well be provided to the customer for free or for a nominal fee, so there is no (or only very low) turnover. It may be that the parties generate revenue through advertising, or that income is derived from revenue-generating activities in other markets in addition to their free activities. Or, it may simply be that it is in fact the customers' personal data or privacy considerations which represent the currency that pays for the free services received. Another sector where a revaluation of the jurisdictional thresholds could have a significant impact is the pharmaceutical industry, where so-called "pipeline" products which could be the object of a billion-euro transaction have not (yet) generated any (or only very little) turnover.

Purely turnover-based thresholds may miss transactions with a significant impact on the economy and, potentially, on competition. A prime example of this was the acquisition by Facebook of WhatsApp in 2014. Commissioner Vestager accepted that by just looking at turnover, the EC might miss transactions which could have an impact on competition. In light thereof, in its 2016 public consultation referred to above, the EC opened a discussion on the possibility to review the jurisdictional thresholds. One possible option could be to introduce, in addition to the existing turnover thresholds, a threshold based on the value of the transaction.

Germany and Austria have taken the lead in this area and adopted amendments to their national merger control systems in order to capture deals on the basis of the value of the transaction. The current turnover thresholds are maintained in both countries, but in addition, a review can be triggered if the parties do not meet these thresholds but where the value of the acquisition reaches a certain threshold and the target company is "substantially active" in Germany or Austria. The experiences of both jurisdictions will undoubtedly inform any decision of the EU on the advisability and necessity of making such changes to its own notification thresholds.

New developments in procedure

In recent years, the EC has assessed the functioning of different aspects of the EUMR and identified some areas where refinement, improvement and simplification are desirable. This was the case in the 2014 White Paper, and again in the 2016 public consultation.

In the first instance, the EC currently contemplates a further simplification of the merger control procedure, in addition to the 2013 Simplification Package, which brought more merger cases under the so-called simplified procedure. Two possible options are of particular interest here. The first option consists of amending the EUMR to the effect that the creation of a full-function joint venture located and operating totally outside the EEA, which would not have any impact on markets within the EEA, would fall outside its scope. A second

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option would consist of a sort of "block exemption", which would exempt certain categories of transactions that normally do not raise any competition concerns, from mandatory prior notification. The reality is that, even in simplified cases, the notification requirements in place are still very burdensome on parties to a merger and the EC is required to spend resources considering transactions which have no or only negligible competitive impact in the EU. Even a notification of a transaction which raises no substantive issues whatsoever will require the parties to provide substantial amounts of data and information, draft the filing, engage with the EC and suspend completion of the transaction until a clearance decision has been received (see also: Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, at pp 2-3).

The 2016 public consultation also sought feedback on the functioning of the case referral system between the Member States and the EC which, according to the EC, could be enhanced. Experience has shown that the current process for pre-notification referrals from Member States to the EC tends to be cumbersome and time-consuming. Possible modifications to the case referral system would aim to facilitate referrals in order to make the system more effective overall without fundamentally reforming the features thereof. In particular, the EC is examining a streamlining of the procedure, with the object of enhancing adherence to the one-stop-shop principle.

Apart from these possible legislative developments, in 2017, the EC, the General Court and the Court of Justice also examined a number of procedural aspects in cases under review.

A first aspect related to the suspension obligation. In its Marine Harvest/Morpol decision (Case COMP/M.6850), the EC imposed a fine of €20m for failing to notify an acquisition and for breaching the standstill obligation, i.e. "jumping the gun". In 2012, Marine acquired 48.5% of the shares of Morpol, a listed company. Since Norwegian law obliges an acquirer who holds more than one third of the shares in a listed company to bid for the remaining shares, Marine made a public offer, and the deal was closed in 2013. The acquisition was notified to the EC eight months after Marine had acquired the 48.5% stake in Morpol. Despite the fact that the transaction was cleared, the EC later fined Marine. The EC was of the opinion that the acquisition of the initial 48.5% stake had already given Marine control over Morpol, and that this acquisition should have been notified. Marine, on the other hand, argued that Article 7 of the EUMR was applicable. This provision exempts public bids from the standstill obligation under certain conditions. The decision was appealed and heard by the General Court in September 2016 (Case T-704/14, Marine Harvest ASA v Commission). In October 2017, the General Court rejected Marine Harvest's appeal. The General Court held that an exception to the standstill obligation was not applicable, and that Marine had been negligent in not notifying to the EC its initial purchase of the shares in Morpol. The judgment has been appealed (Case C-10/18P).

In May 2017, the EC sent Altice a Statement of Objections alleging that Altice breached the EUMR by implementing its acquisition of PT Portugal before notifying the EC. In July 2017, the EC sent a Statement of Objections to Canon regarding an alleged breach of the EUMR arising from the implementation of its acquisition of Toshiba Medical Systems Corporation before notification to the EC. The EC's preliminary view was that Canon used a so-called 'warehousing' two-step transaction structure involving an interim buyer, but which nonetheless resulted in Canon effectively acquiring Toshiba Medical Systems prior to obtaining the relevant merger approvals.

A second aspect related to the veracity of information provided by the parties in the context of the notification or investigation process. In the aftermath of the Facebook/

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WhatsApp transaction, the EC has opened new investigations into companies suspected of providing false, incorrect or inaccurate information during merger reviews. In December 2016, Facebook received formal charges from the EC for allegedly providing misleading information during the review of its acquisition of WhatsApp in 2014. During the procedure, Facebook confirmed to the EC that it would not be able to establish reliable automated matching between WhatsApp's and its own user accounts. However, in 2016, WhatsApp made the announcement that it would update its service by linking its users' phone numbers to Facebook users' identities. Facebook maintains that, at the time that the EC requested this information, there were significant technical barriers to introducing this service. It is particularly interesting that the EC did not reopen the merger decision in light of its concerns, the reason being that it had cleared the transaction based on other information. The EC is focused instead on protecting the integrity of the EU merger review procedure, which is heavily based on documentary evidence. It is in the light of these circumstances that the EC is considering revisiting a small number of transactions to assess whether false data had been provided there as well. The EC emphasises that it does "*not have a general worry about the business approach to our procedures*", but that it has been paying attention to the situation for quite some time. On 18 May 2017, the EC issued a decision in which it imposed a fine of €110m on Facebook.

The EC also sent two separate Statement of Objections: to Merck and Sigma-Aldrich, and General Electric in July 2017. The first matter relates to the combination of Merck and Sigma-Aldrich in 2015. The EC cleared the transaction subject to selling-off part of the business. Honeywell was the buyer of the divested business. The EC takes the view that Merck and Sigma-Aldrich failed to disclose to the EC an important R&D project, resulting in the project not being addressed in the commitments package. In the second matter, the EC is of the view that GE failed to give the EC full information about certain research and development plans in connection with GE's purchase of LM Wind, a company that makes blades for wind turbines.

Third, there was one significant judgement by the Court of Justice in the area of merger control in 2017. Austria Asphalt GmbH & Co OG v Bundeskartellanwalt (Case C-248/16) was the first preliminary reference to the Court of Justice concerning the EUMR. The Austrian Supreme Court had to decide whether the acquisition of joint control over a plant required notification to the EC. The Austrian Supreme Court referred the matter to the ECJ for a preliminary ruling on this point. The Court of Justice ruled that the creation of a joint venture (JV) between two or more companies, using a company which was previously controlled solely by one parent, is not subject to EU merger control where the JV itself is not an independent player on the market. In Austria Asphalt GmbH & Co OG v Bundeskartellanwalt, a plant belonged exclusively to one company. The intention was to convert that plant into a JV, so that it would be operated jointly by the company and another one. The plant was not full-function because the business was limited to supplying goods to the parent company. The Court of Justice concluded that the EUMR only applies if the JV resulting from the change in control is full-function.

Fourth, in 2017, the General Court annulled the EC's decisions in relation to two separate merger control matters. In UPS v Commission (Case T-194/13), the General Court held that the EC had infringed UPS' procedural rights by not providing UPS with an updated econometric model. The General Court ruled that this affected UPS' rights of defence. Consequently, the General Court annulled the EC's 2013 prohibition decision in relation to the UPS/TNT deal. Finally, in KPN v Commission (Case T-394/15), the General Court held that the EC's clearance decision in Liberty Global/Ziggo lacked proper reasoning.

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Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

A significant number of notified transactions in 2017 (and previous years) relate to investments by banks, investment firms, infrastructure funds, sovereign wealth funds and other financial institutions. The targets for these investments will be varied, although real estate, transport and infrastructure are popular choices, being considered as relatively secure and reliable investments. Interesting to note is that in 2017, technology businesses have also regularly been the target of investments. These transactions, representing pure financial investments rather than acquisitions to increase market share or vertical integration, typically do not raise any substantive competition law concerns. Accordingly, almost all of them have been reviewed under the simplified procedure.

In terms of transactions cleared in 2017 at Phase I subject to conditions, three (of a total of 18) involved agrochemical companies. Two (of four) transactions subject to a Phase II process were also in the agrochemical industry (Dow/DuPont, Case COMP/M.7932 and ChemChina/Syngenta, Case COMP/M.7962).

The remaining Phase I conditional clearances related to: medical and dental instruments (Abbott Laboratories/Alere, Case COMP/M.7982, and BD/Bard, Case COMP/M.8523); pharmaceutical products (J&J/Actelion Case COMP/M.8401, and DuPont/FMC, Case COMP/M.8440); security systems services (Smiths Group/Morpho Detection, Case COMP/M.8087); automotive components (Valeo/FTE Group, Case COMP/M.8102); air and spacecraft and related machinery (Rolls-Royce/ITP, Case COMP/M.8242); computer & communication equipment (Advent International/Morpho, Case COMP/M.8258, and Broadcom/Brocade, Case COMP/M.8314); refractory products (RHI/Magnesita Refratarios, Case COMP/M.8286); financial services (Nordic Capital/Intrum Justitia Case COMP/M.8287); container liner shipping & air transport (Maersk Line/HSDG, Case COMP/M.8330, and Lufthansa/Certain Air Berlin Assets, Case COMP/M.8633); vending services (KKR/Pelican Rouge, Case COMP/M.8454); and telecommunications (Vivendi/Telecom Italia, Case COMP/M.8465). The remaining Phase II decisions covered: financial services (Deutsche Börse/LSE, Case COMP/M.7995); and cement (Heidelbergcement/Schwenk/Cemex Hungary/Cemex Croatia, Case COMP/M.7878).

Also in 2017, the EC focused to a great extent on the importance of innovation. The competitive harm caused by reduction of innovation is increasingly placed on an equal footing with increased prices and reduced output. In the past year, the EC has – in addition to its traditional interest in the pharmaceutical industry – increased its focus on the chemicals industry. By assessing several significant transactions in parallel instead of giving priority to the first transaction filed, the regulator seems to send the message that mergers which may transform an entire industry will be looked at together. The Dow/DuPont merger was notified in June 2016 and conditionally cleared in Phase II in March 2017; the ChemChina/Syngenta deal was notified in September 2016 and conditionally cleared in Phase II in April 2017; and the Bayer/Monsanto transaction (Case COMP/M.8084) was notified in June 2017 and still under review at the end of 2017. Since, according to the EC, these three deals could transform the agrochemicals industry as a whole, it has been examining the collective impact of these transactions accordingly. Commissioner Vestager did, however, emphasise that, although the three mergers are all in the same agrochemical industry, they presented different problems and concerns that needed to be assessed individually.

Dow/DuPont and ChemChina/Syngenta were both conditionally cleared in the first half of 2017 after Phase II investigations. In both cases, the EC stated that "*effective competition*

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in the pesticides market is necessary so companies are pushed to develop products that are ever safer for people and better for the environment". The EC's competition concerns in Dow/DuPont involved a significant reduction in competition for both existing and innovative pesticides and other petrochemical products, whereas the focus in ChemChina/Syngenta was particularly on competition for existing pesticides, since ChemChina and Syngenta did not compete with each other for the development of new and innovative pesticides.[2] In Dow/DuPont, the EC was of the opinion that the merged entity would have had "*lower incentives and a lower ability to innovate than Dow and DuPont separately*". The commitments offered in both deals were significant, and sent a warning that merging parties need to be prepared to divest research and development operations if innovation is important in the industry. The remedies accepted in both cases were full divestiture of large parts of the parties' pesticide businesses, including the tangible and intangible assets underpinning the divested products, personnel and research and development organisations. Since Dow/DuPont was notified a couple of months before ChemChina/Syngenta, the EC seems to have examined some of the product markets as if Dow and DuPont were already one entity.

Two industry-changing mergers abandoned at Phase II in 2017 highlighted the interplay between competition concerns and other regulatory processes likely to apply to such significant transactions. In the withdrawn Knorr-Bremse/Haldex (Case COMP/M.8222) deal, the question was one of timing. The transaction would have brought together the German vehicle brake systems maker Knorr-Bremse and its smaller Swedish rival Haldex. The EC had expressed serious concerns regarding a number of markets in which Knorr-Bremse and Haldex competed directly. The EC pointed to high barriers to entry/expansion in those markets, due to the technical and regulatory requirements for safety-critical equipment, and the significant research and development costs associated with competition in the market. Knorr-Bremse offered insufficient Phase I commitments and, on 24 July 2017, the EC stated that it would open a Phase II investigation. This had fatal timing implications for the merger. Haldex is a Stockholm-listed company and under the listing rules of the Swedish Securities Council (SSC), the longstop date for the acceptance period was September 26. Knorr had failed to obtain an extension from the SSC, which meant that there was no realistic prospect of obtaining the Phase II approval prior to the SSC deadline: the transaction was abandoned and the notification withdrawn. The second case, the Socar/Desfa deal (Case COMP/M.7095), involved the proposed acquisition of DESFA (the Greek gas transmission operator) by Azeri state oil company SOCAR. The deal was initially notified in 2014. The EC identified concerns that SOCAR would have gained the ability and been incentivised to hinder upstream gas suppliers from accessing the Greek transmission system, reducing competition on the upstream wholesale gas market in Greece. The case was referred to Phase II but had its deadline suspended under Article 11(3), seemingly for over two years. In December 2016 the Greek government announced that the SOCAR bid was in fact non-compliant (due to an unacceptable payment structure), and the government withdrew from the deal. Two months later, the notification was withdrawn.

The EC's strict approach towards mergers in consolidated markets – e.g., "4 to 3" and "3 to 2" deals – is not limited to specific sectors, such as telecommunications (which were heavily scrutinised in 2015 and 2016). The EC recently prohibited the proposed merger between Deutsche Börse and London Stock Exchange (Case COMP/M.7995, decision on 29 March 2017). The investigation led the EC to conclude that the merger would have created a *de facto* monopoly in the markets for clearing fixed income instruments. The deal would have combined the activities of the two largest European stock exchange operators and would

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have affected the downstream markets for settlement, custody and collateral management. Commissioner Vestager stated that "*the European economy depends on well-functioning financial markets. That is not just important for banks and other financial institutions*". The parties were only prepared to offer a complex set of behavioural remedies, but not any divestitures to resolve these concerns. The EC concluded that the proposed remedies would not have been able to prevent the emergence of a *de facto* monopoly, and decided to block the proposed transaction.

Another recently proposed takeover has also been prohibited by the EC (HeidelbergCement/Cemex Croatia, Case COMP/M.7878, decision on 05 April 2017). HeidelbergCement and Schwenk, two German cement companies, would have acquired Cemex' assets in Croatia by means of a joint venture. The EC had serious concerns that the acquisition would have eliminated competition between companies that were competing fiercely for the business of Croatian cement customers and would have led to a dominant position in the relevant markets. The remaining domestic cement suppliers and importers would not have been able to compete effectively. The parties' proposed remedies were not sufficient according to the EC, because they only provided for an uncertain possibility for a competitor to build up a new cement business rather than divest an existing viable business. As a result, the EC prohibited the transaction.

The EC cooperates extensively with other competition authorities around the world. The EC coordinates closely with the US antitrust agencies on deals which are notified in both jurisdictions, e.g. in the Dow/DuPont, AB InBev/SABMiller, Staples/Office Depot and Ball/Rexam deals. It also has a number of bilateral agreements, providing for varying levels of cooperation, with other countries including Canada, Japan and China.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Chief Competition Economist team, currently led by Tommaso Valetti, assists in the economic evaluation of mergers. The use by the EC of economic and econometric analysis in merger cases has become increasingly widespread over the years. Typically, real economic analysis using economic appraisal techniques, including with the parties appointing their own economists, will only be necessary in cases raising more difficult questions. These questions could relate to the definition of the relevant market in cases where this is unclear; Phase II and difficult Phase I cases where there are concerns about the impact of the transaction on competition; and also in relation to the identification and design of appropriate remedies.

The EC is one of the more sophisticated merger control regimes in terms of its use and understanding of economic appraisal techniques. These could cover closeness of competition analysis, using diversion ratios and cross-price elasticities, substitution analysis, merger simulation and even event analysis.

As indicated above, in the past year, the EC focused to a great extent on the importance of innovation. In March 2017, the EC cleared the merger between Dow and DuPont subject to divestment of overlapping businesses and almost all of DuPont's global R&D capability to an up-front buyer. The EC's review in this matter extended to the merger's potential impact on innovation "*at the overall industry level*". The EC considered that innovation is a key competitive parameter in the pesticides industry. The EC decision contains a detailed analysis of potential threats to innovation. According to the EC, only three integrated players could effectively compete with the merged *Dow/DuPont entity* at a global level

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throughout the entire (R&D) value chain. The EC also relied on evidence showing that the merging parties intended to cut back on R&D expenditure, and that the merged entity would have fewer incentives to innovate than Dow and DuPont separately. Consequently, the EC found that the merger would have significantly reduced "innovation competition" for pesticides.

The EC's decision has been criticised for focusing on reduced innovation "*at the overall industry level*", rather than on particular relevant product markets. For instance, the EC examined how new active ingredients and formulated products are developed, without assessing an effect on any specific downstream market. It remains to be seen whether the decision signals that the EC will focus also in future matters on threats to innovation that go beyond identified product markets. In any case, the EC's concern about innovation competition in a sector generally, rather than on specific markets, is novel. With respect to the pharmaceutical sector, the EC has in recent years also extended its merger control review to products in the early stages of development, many of which products may never be marketed. In June 2017, the EC approved a merger between Johnson & Johnson and Actelion (Case COMP/M.8401), subject to commitments ensuring that the parties' phase II pipeline products would not be delayed or discontinued.

In May 2017, the EC approved the merger between chemical companies Reichhold and Polynt, subject to divestment of Reichhold's Etain plant in France (Case COMP/M.8059). Both Reichhold and Polynt produce and sell unsaturated polyester resins. These resins are used in a broad range of products. When combined with fiberglass or mineral fillers, the resins are resistant to corrosion and fire and can be used to manufacture windmill blades, and are used more generally in the construction, marine and land transportation industries. The EC concluded that the merger raised competition concerns in relation to the market for the production and sale of unsaturated polyester resins. This was the case given the relatively high combined market shares of the merged entity and its extensive network of plants, as compared to its main competitors. This is the second time after Ball/Rexam (Case COMP/M.7567) that the EC looked into a theory of harm dealing with the need to have a network of plants to effectively compete.

Recently, the EC expressed its interest in making more use of specialist opinions from experts on future trends. This evolution in appraisal techniques is particularly due to the fact that the EC is getting more involved in mergers in fast-growing, innovative and often very technical industries.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Over the entire lifetime of the EUMR (since 1990), just above 4% of all Phase I clearance decisions have been issued subject to commitments given by the parties to remedy a substantive concern identified by the EC. In calendar year 2017, commitments were offered by the parties and accepted by the EC in 18 cases at Phase I.

Of those 18 commitment decisions, the vast majority required the parties to divest an overlap of some sort, be that an overlapping business or an overlapping asset (such as a fixed customer base or a pharmaceutical product). Five of those cases were resolved with no or limited elements of divestiture.

In order to receive approval for its acquisition of ITP, Rolls-Royce was obliged to ensure that it would not gain further influence on the military engine consortium (EPI) of which both Rolls-Royce and ITP were members by offering amendments to the EPI governance

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rules that would eliminate the conflict of interest created by the merger and ensure that the EPI consortium remains competitive (Case COMP/M.8242). In the Maersk Line/ HSDG transaction (Case COMP/M.8330) relating to the maritime industry for container liner shipping, the remedies offered involved the parties' committing to terminate their participation in existing alliances (five consortia on trade routes). The acquisition by Broadcom of Brocade (Case COMP/M.8314) created concerns that: (i) confidential information from competitors could be used by the merged entity to favour its own products; and (ii) the merged entity could degrade the interoperability between its own products and the normally interoperable products of Brocade's competing vendors. The first concern was addressed by a confidentiality undertaking, and the second by requiring the same level of interoperability post-merger. The competition concerns identified by the EC in Johnson & Johnson's ("J&J") acquisition of Actelion (Case COMP/M.8401) involved reducing the former's shareholding to 10% (or up to 16%, provided that J&J is not the largest shareholder), from 32% as originally submitted, in a new company owning the rights to insomnia medicine transferred from Actelion pre-merger, and a commitment not to nominate any board member. Furthermore, J&J would remove its incentives to negatively influence the development of its own insomnia research programme, by granting its JV partner new rights over the global development and waiving its royalty rights on the sales in the EEA. Finally, the acquisition by Lufthansa of Air Berlin's subsidiary LGW involved Lufthansa agreeing to drop part of its transaction scope (notably the purchase of NIKI, a leisure aircraft carrier), and to reduce its acquisition of slots at Düsseldorf airport (Case COMP/M.8633).

Once the EC has initiated a Phase II in-depth investigation, the likelihood of the parties having to offer a commitment to secure a clearance decision is much higher. Of around 181 Phase II approval decisions over the lifetime of the EUMR, around two-thirds have been concluded with commitments of some sort. In 2017, two (of the total of four) Phase II clearance decisions included commitments (and the other two Phase II decisions were prohibition decisions). Remedies in Phase II decisions tend to be more complex than in Phase I cases. This is because the competition issues are typically more serious and the analysis is often more complex (such complexity is then reflected in the remedy). Indeed, if there had been a relatively straightforward remedy which clearly addressed the concerns of the EC, the parties would have been likely to offer it at the end of Phase I to avoid going into an in-depth Phase II investigation (although there is no obligation on the parties to offer a remedy at this stage and they do not always do so). Nevertheless, even at Phase II the majority of conditional decisions involve the divestment of some form of overlapping business or assets.

The EC has a long-expressed preference for structural, rather than behavioural, remedies. The reasons for this preference are straightforward: in the case of a horizontal overlap, a divestment of an overlapping business is likely to be the most clear-cut and effective way to deal with a competition law concern resulting from the combination of two competing businesses; and a divestment to an independent third party requires no ongoing monitoring once completed. This is compared to a behavioural remedy, where some form of ongoing monitoring by the (resource-constrained) EC is likely to be inevitable; and which also raises difficult-to-answer questions about the duration for which the remedy needs to be in place.

However, it is clear that the EC's position is nuanced on this. Firstly, although the distinction between divestment and behavioural remedies may in certain circumstances be clear, this will not always be so. In its truest sense, a structural remedy should be one that

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completely removes the parties' ability to influence competition; a behavioural remedy is one which, although such ability remains, seeks to constrain behaviour. Secondly, although substantive concerns identified in horizontal mergers are typically more likely to be most easily addressed by a divestment, it is less easy to make such a generalised statement in relation to vertical or conglomerate deals.

Remedies imposed in 2017 included those designed to ensure that the parties to the merger provide access to relevant services or products. For example, the commitment by Lufthansa to limit its flight 'slots' at Düsseldorf airport, or the commitment by Broadcom not to restrict post-merger interoperability of devices with the products of competing vendors.

The identity of the purchaser in the context of a divestment remedy is subject to approval by the EC. In cases where there are doubts about the viability of the divestment package or the interest of suitable purchasers, the EC can require an up-front buyer. This means the parties can only complete the main transaction once the divestment (with a purchaser approved by the EC) has been concluded (see, e.g., the Commitments to the EC in Dow/DuPont, at para. 3). The EC has done this in the past, but still in most cases it will approve the main transaction (so allowing the parties to complete) on condition that the sale process is concluded with a suitable buyer within a specified period.

Key policy developments

Margrethe Vestager took up the position of Competition Commissioner on 1 November 2014. Ms Vestager clearly stamped her mark on competition enforcement, including in relation to review of mergers.

The remit of the EC in reviewing transactions under the EUMR is strictly limited to concluding on whether there is a significant impediment to effective competition. There is no scope for the EC to consider or take account of other public policy or non-competition issues which may arise in merger cases.

Although there will be input into the analysis under the EUMR by different sections of the EC – particularly in relation to Phase II decisions, which are adopted by the entire College of Commissioners − Commissioner Vestager has publicly stated on a number of different occasions that political influence plays no part in merger decisions under the EUMR. Note also that in Phase II proceedings, the EC must consult the Advisory Committee, made up of representatives of the EU NCAs, which issues an opinion on the draft decision prior to the EC's adoption of its decision.

EU Member States, however, do have the right to intervene in relation to transactions which raise certain specified public interest considerations under their own national laws (Article 21(4) of the EUMR). It remains to be seen whether EU Member States will seek to intervene more to protect perceived national interests on this basis.

Vestager has recently called for scrutiny of the effect of institutional investors holding stakes in multiple companies in the same industry.[3] She indicated that "[W]e generally assume that companies are basically independent – that the different companies in an industry are owned by different shareholders. (…) But that picture might not always be right. Because we're seeing signs that companies are getting more closely linked," and that it is "becoming more common for the same investors to hold shares in different companies in the same industry". The EC is "looking carefully at whether this sort of common ownership is really common in practice". Moreover, the EC intends to better understand "what effect common ownership really has".

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Reform proposals

There are no specific major reform proposals, other than those already mentioned in the text above.

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* * *

Endnotes

1. For reference, in 2017, one other deal notified in 2014 was abandoned, namely Socar/Desfa (Case COMP/M.7095).
2. For reference, in its substantive assessment in ChemChina/Syngenta, the EC assessed potential Syngenta overlaps/relationships with other Chinese state-owned enterprises and not just ChemChina.
3. Speech of M. Vestager titled "Competition in changing times" delivered at the FIW Symposium in Innsbruck on 16 February 2018, text available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en.

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Overview of merger control activity during the last 12 months

Further to the Law of Modernisation of the Economy dated 4 August 2008 (the "LME"), the French Competition Authority (the "FCA") has overseen French merger control since 2 March 2009, when it took over this responsibility from the DGCCRF (a directorate reporting to the Minister of the Economy). It issued useful Guidelines in December 2009 (the "2009 Guidelines"), an updated version of which was published in July 2013 (the "2013 Guidelines"), after having organised a broad public consultation of all stakeholders (together, the "Guidelines"). Despite some differences, the main provisions of the Guidelines are in line with the practice of the European Commission (the "EU Commission").

Statistics

The summary table below shows relevant indicators of the FCA's activity over the 2013 to 2017 period:

FCA statistics 2013–2017

	2013	2014	2015	2016	2017
Notifications	214[2]	192[3]	218[4]	235[5]	251[6]
Referrals by the EU Commission	4[7]	5[8]	4[9]	1[10]	2[11]
Decisions	201	200	192	230	235
Phase II openings	2[12]	1[13]	1[14]	3[15]	3[16]
Conditional clearances (overall)	7	10	6	6	8
Conditional clearances after Phase I	5[17]	9[18]	6[19]	5[20]	8[21]
Conditional clearances after Phase II	2[22]	1[23]	0	1[24]	0
Prohibition decisions	0	0	0	0	0

The following comments can be made regarding this table:

- Based on the number of decisions issued, the merger control activity of the FCA in 2017 increased compared to 2016. The number of notifications also increased in 2017 compared to the number of notifications in each of the last four years.
- While the FCA opened only one or two Phase II investigations every year from 2013 to 2015, it reviewed three Phase II cases in 2017, representing 1.3% of all merger decisions (the corresponding figure amounted to 1% in 2013, 0.5% in both 2014 and 2015, and 1.3% in 2016). In both 2016 and 2017, while the FCA opened three Phase II examinations, respectively two[25] and one[26] of these notifications were finally abandoned by the parties.

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- The number of conditional clearances in 2017 remained stable and above the number of conditional clearances over the last two years. In 2017 the FCA also re-examined remedies it had accepted in 2012 in relation to the acquisition of free-to-air TV channels Direct 8 and Direct Star by Vivendi and Groupe Canal Plus, and injunctions taken following the exclusive control over TPS and Canal Satellite by Vivendi SA and Groupe Canal Plus.[27]

From 2009 to 2016, the EU Commission made four referral decisions under Article 9[28] of the EC Merger Regulation No. 139/2004 of 20 January 2004 (the "ECMR") and 18 referral decisions under Article 4§4 of the ECMR[29] to France. In 2017, the EU Commission referred two operations back to the FCA.[30] Although the number of referrals had decreased in 2016 and 2017, the statistic could give rise to several interpretations, the one favoured by the FCA being that it proves the EU Commission's trust in its role as national merger control authority. Until now, the FCA has never blocked a notified merger since it took over responsibility for French merger control in 2009.

New developments in jurisdictional assessment or procedure

The FCA has imposed several substantial fines on undertakings over the past five years for their failure to implement commitments they had given to secure clearance, as well as for their failure to notify mergers to the FCA ("gun-jumping"). Finally, the French Law No. 2015-990 for economic growth and activity, known as the "Macron Bill",[31] came into effect on 6 August 2015 and thereby introduced changes to French merger control law, especially in relation to (i) the timeframes for merger assessments, (ii) the suspensive effect of merger filings, and (iii) remedies in case of non-compliance with commitments conditioning a clearance decision.

Review of simple cases: the simplified procedure

The simplified procedure applies to transactions that do not give rise to any horizontal overlaps or any vertical or conglomerate relationships. The 2013 Guidelines specify that this case is likely to cover most transactions implemented by investment funds.

Moreover, the simplified procedure applies to transactions that: (i) are not caught under the standard jurisdictional threshold provided by Article L. 430-2, I of the French Commercial Code but meet the lower threshold provided by Article L. 430-2, II of the French Commercial Code (which applies to certain transactions in the retail sector); and (ii) do not give rise to a change in the shop sign of the retail stores concerned. The 2013 Guidelines specify that this case may be relevant, *inter alia*, for transactions implemented in the food retail sector and the automotive retail sector.

In simplified cases, the notifying parties may submit a shortened notification form[32] and the FCA issues a clearance decision within a reduced timeframe (approximately 15 working days) which does not include any reasoning but merely states that the notified transaction does not raise any competition issues.

However, the FCA formally reserves the right to revert to the standard procedure where it considers it necessary. The simplified procedure has been applied to 51% of the decisions adopted in 2013; to 41.5% of the decisions adopted in 2014; to 41% of the decisions adopted in 2015; to 50% of the decisions adopted in 2016; and to 58% of those adopted in 2017.

In 2017, the FCA issued its simplified clearance decisions in an average period of 25 working days from the date the notification file was declared complete, thus exceeding the objective set out in the Guidelines. Beyond this average figure there is a significant spread between

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cases, depending on the FCA's workload when receiving the notification. For example, one decision was issued in 10 working days[33] while others were adopted in 36 working days,[34] i.e. corresponding to the standard period.

Derogation from the suspension obligation and failing firm defence

Under exceptional circumstances, notifying parties may be granted a derogation from the suspension obligation, which enables them to implement their transaction prior to its clearance by the FCA, notably when takeover offers of companies in liquidation or *redressement judiciaire* occur, there is a risk of imminent disappearance of the target company, insolvency proceedings or the necessity for the buyer to secure guarantees or to obtain adequate financing to ensure the survival of the target. Unlike the EU Commission, the FCA does not publish decisions by which it grants such derogations, which explains why there is little insight into the FCA's practice in this field.

In the 2017 *Lilnat, Vetura and Agora Distribution/Group Philippe Ginestet* case,[35] *Lilnat, Vetura and Agora Distribution* was subject to three insolvency proceedings and thus obtained a derogation from the stand-still obligation. In that case, the FCA rejected the failing firm defence raised by the notifying parties as it considered that the third criteria, according to which the financially challenged target (Tati) would exit the market, would not be less harmful to consumers than the notified operation. The FCA noted that it has not been proven that the takeover of Tati's assets would be less damaging than its disappearance.

Significant fines for gun-jumping

Since it took over responsibility for merger control in France in March 2009, the FCA has adopted four decisions in which it imposed substantial fines on undertakings that implemented mergers without notifying them to the FCA, thereby infringing the pre-merger notification requirement. In 2016, the FCA imposed an unprecedented fine of €80m on Altice, which is the highest fine ever imposed in France for this type of infringement. The FCA stressed that it wanted to pass on a strong message to businesses: they must be vigilant not to implement notified transactions prematurely, as it could expose them to severe fines.

It must be noted that the harshness of the FCA compared to the previous fines for gun-jumping may be explained by the context of the case itself. The FCA explained that it considered the following criteria to sanction Altice:

- the past behaviour of the notifying party, which had been previously fined €15m for not complying with commitments offered in merger proceedings between SFR and Altice;[36]
- the scope of the transaction was significant as well as the extent of the different antitrust practices and the scope of the activities concerned by that practice;
- the duration of the infringement, which began before the merger was notified; and
- the deliberate intent of Altice and SFR to coordinate their strategy.

This decision-making practice illustrates how active and severe the FCA's approach is with regard to those infringements, and demonstrates that businesses incur substantial risks when they fail to examine whether their transactions qualify as mergers that are reportable to the FCA.

Fines for gun-jumping, 2009–2017

Date of the decision	Undertakings fined	Amount of the fine	Appeal
11 May 2012[37]	Colruyt	€392,000	Appeal dismissed,[38] final decision

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Date of the decision	Undertakings fined	Amount of the fine	Appeal
31 January 2013[39]	Réunica/Arpège	€400,000	No appeal, final decision
20 December 2013[40]	Castel	€4m	Appeal and partial reformation of the FCA decision reducing the fine to €3m;[41] question for a priority preliminary ruling on constitutionality dismissed[42]
8 November 2016[43]	Altice	€80m	No appeal

Strict monitoring of the implementation of remedies

Since March 2009, the FCA has adopted four fining decisions by which it sanctioned undertakings for their failure to implement commitments given to obtain merger clearance.

Fines for failure to comply with commitments given to obtain merger clearance, 2009–2017

Date of the decision	Undertakings fined	Amount of the fine	Appeal
20 September 2011	Canal Plus	€30m	Fine reduced to €27m on appeal
9 July 2012	Bigard	€1m	No appeal, final decision
19 April 2016	Altice/Numericable	€15m	Appeal rejected
8 March 2017	Altice/SFR	€40m	Appeal rejected

In March 2017, the FCA imposed: (i) a €40m fine on Altice/SFR[44] for failure to comply with remedies relating to the high-speed Internet network, and more specifically to the fibre-to-building connections; as well as (ii) injunctions supported by penalties to compel Altice/SFR to refrain from pursuing anticompetitive practices. Thus, the FCA set a new timetable for Altice/SFR with successive phases of completion and progressive penalties to ensure that it carried out the remedies properly. By combining injunctions and penalties, the FCA for the first time applied the Macron Bill which provided it with additional instruments to sanction undertakings failing to comply with remedies.

The *Conseil d'Etat*[45] confirmed the FCA decision and considered that the FCA correctly assessed the extent of the commitments agreed upon by the notifying parties concerning the execution of the "Faber" contract, and qualified the behaviour of the notifying parties as a breach. Finally, the *Conseil d'Etat* rejected the arguments of the plaintiffs against the injunctions imposed by the FCA.

Through these cases, the FCA sent a clear message to all businesses committing to remedies that they should carefully implement them within the deadlines assigned. This strict verification of the implementation of remedies could be seen as the counterbalance of the FCA's open approach to creative behavioural remedies while other competition authorities, such as the EU Commission, seem more reluctant to accept commitments other than clear-cut structural ones.

First use of injunction powers in 2012 followed by a re-examination in 2017

In 2012, the FCA used its injunction powers for the first time. As mentioned above, the FCA withdrew its clearance of the *Canal Plus/TPS and CanalSatellite* merger due to the parties' failure to implement the remedies they had given. On 23 July 2012,[46] when clearing

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this merger again following its re-notification, the FCA took the view that reverting to the situation of 2006 (date of the merger) was not an option, but considered at the same time that the proposed remedies were insufficient, and consequently imposed injunctions on the parties, pursuant to Article L. 430-7 III of the French Commercial Code. Canal Plus appealed against this decision before the *Conseil d'Etat*, which rejected its action for annulment[47] as well as its petition for interim measures.[48]

Following the 2016 public consultation launched by the FCA to determine whether the injunctions imposed on Canal Plus could be lifted following the evolution of the market, notably the entry of Netflix and the possibility to access TV channels via the internet,[49] informal exchanges were held between the FCA and Canal Plus, the latter requesting a revision of the injunctions on 9 June 2017. Although the FCA noted that Canal Plus still enjoys a quasi-monopoly in terms of purchasing broadcasting rights for recent French-language films and remains the market's only producer of a mixed premium channel, its position is increasingly being challenged across markets in which it operates. Indeed, the Altice Group is pursuing an ambitious strategy based on converging its internet service provider activities together with its television production and distribution activities. Moreover, the non-linear television services have grown strongly since 2012, along with the demand for new forms of roaming and multi-screen pay TV consumption. Thus, the FCA[50] lifted several injunctions, such as the restrictions on Canal Plus' behaviour regarding the acquisition of film rights from American studios and the requirement to value catch-up TV and the High Definition version of a channel separately. The FCA also confirmed injunctions such as the ban on framework agreements with French film rights-holders and the obligation to enter into separate contracts with French rights-holders for films in the first and second release windows, as well as the measure ordering Canal Plus to divest its shares in OCS and to propose reference offers for independent channels within CanalSat. The latter was approved by the FCA on 18 December 2017.[51]

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

As in previous years, French merger control focused particularly on the retail sector and on the media and telecommunications sectors.

The retail sector

In terms of volume, the retail distribution sector again generated, as in the past few years, numerous notifications. Out of the 235 decisions adopted by the FCA in 2017, we have identified 94 decisions relating to the retail distribution sector. This is partly due to the lower thresholds set by the LME for retail stores (in short, turnover achieved in France exceeding €15m instead of €50m). ITM, one of the major players in the French food retail sector, alone accounted for 29 decisions in 2017. The FCA rendered two conditional decisions in this sector in 2017.

In the *Fnac/Darty* case,[52] the notifying parties offered structural remedies consisting in the divestiture of six stores to maintain sufficient competition in the market for retail of electronic products in Paris and its suburbs. In April and September 2017, the FCA respectively approved the divestiture of two stores to Boulanger[53] and one store to Cobrason.[54] On 11 September 2017, while the FCA announced that it had opened *ex officio* proceedings to review the conditions under which Fnac is implementing the remedies, it noted that three out of six Darty stores had not yet been sold by the end of the commitment period, which expired on 31 July 2017.[55] In parallel, with respect to the three remaining stores for which

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divestiture had been rejected by the FCA on 28 July 2017, Fnac Darty and the potential buyer Dray applied to the *Conseil d'Etat* for four interim measures. Fnac/Darty sought: (i) the suspension of the execution of the FCA decision of 28 July 2017 refusing to grant authorisation to sell two Darty stores in Belleville and Saint Ouen; and (ii) the suspension of the execution of the FCA decision rejecting Fnac/Darty's request to extend the deadline for the execution of the remedies, and terminating the mandate of the trustee in charge of monitoring the commitments. Dray sought: (i) the suspension of the execution of the FCA decision of 28 July 2017 refusing to grant the authorisation to buy two stores in Belleville and Saint Ouen; and (ii) the suspension of the execution of the FCA decision of 28 July 2017 refusing to grant the authorisation to sell to Dray a store in Beaugrenelle, together with the suspension of the execution of the FCA decision rejecting Fnac/Darty's request to extend the deadline for the execution of the remedies. The *Conseil d'Etat* rejected all four applications for interim measures, stating that the condition relating to exceptional urgency was not fulfilled.

In 2017, the FCA cleared a transaction subject to the divestiture of five Bricorama stores and the termination of a franchise agreement. In the *Bricorama/ITM Equipement de la maison* case,[56] the FCA considered that in eight areas where the notifying parties had overlapping activities, there were no alternative and credible offers for the new entity's stores.

<u>The media and telecommunications sectors</u>

In 2017, the TV sector came under particular scrutiny due to two major transactions involving Canal Plus:

- The first transaction, already referred to above, consisted of the acquisition of TPS and CanalSatellite by Canal Plus in the pay-TV sector.[57] This merger was originally cleared in 2006 but had to be re-notified following the withdrawal of clearance, and was cleared again on 23 July 2012, subject to injunctions imposed by the FCA. On 7 June 2013, the FCA approved three offers made by Canal Plus as part of the execution of the injunctions, following a market test conducted in March 2013. As explained above, Canal Plus requested a revision of the injunctions on 9 June 2017. After reviewing the market, the FCA noted that Canal Plus' position was increasingly being challenged across markets in which it operates, and in particular by the Altice Group. While lifting several obligations, the FCA[58] also confirmed injunctions such as the ban on framework agreements with French film rights-holders and the obligation relating to non-discrimination between original French-language film producers and the obligation to enter into separate contracts with French rights-holders for films in the first and second release windows. It also confirmed the measure ordering GCP to divest its share in OCS.
- The second transaction consisted of the acquisition of Direct 8 and Direct Star by Canal Plus in the free-to-air TV sector, which was cleared by the FCA on 23 July 2012 in Phase II, subject to commitments.[59] As detailed below, in December 2013 the *Conseil d'Etat* annulled part of this clearance decision, following which the transaction had to be re-notified and was cleared again on 2 April 2014, subject to several commitments (these commitments were identical to those made in 2012, with the exception of the one related to the acquisition of the rights to French films, which has been strengthened[60]). In 2017, Canal Plus requested a revision of these commitments. While maintaining the quasi-totality of the remedies, the FCA[61] lifted the commitment relating to the organisation of a competitive bid for the divestiture of rights for major sporting competitions.

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<u>Clarifications on the definition of relevant markets</u>

In 2016, in the *Fnac/Darty* case which gave rise to a conditional clearance after Phase II and structural remedies,[62] the FCA updated the product market definition relating to the market for retail of electronic products by considering that both in-store and online channels of distribution compete with each other, and that online sales exert significant competitive pressure at retail level. It must be noted that online competitors not only include pure players but also websites of physical stores. This new approach was confirmed by the FCA in the *Darty/Boulanger* case[63] where the FCA reiterated that online sales exert competitive pressure on in-store sales, so that these channels should be considered part of the same product market.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Guidelines refer frequently to economic theory, even more so following the additions of the 2013 Guidelines. The 2009 Guidelines already included a specific annex offering practical recommendations for the submission of economic studies. This guide has now been converted into a general guide on the submission of economic studies, which is also applicable to anticompetitive practices proceedings. In any event, the use of this guide for merger control signals the firm resolution of the FCA to use detailed economic analysis when reviewing complex merger cases.

The FCA also set up a team of economists, now comprised of eight economists, which is headed by a chief economist and is involved whenever a merger raises complex competition issues.

It must be noted that the FCA places a stronger emphasis in the 2013 Guidelines on quantitative tests, such as the UPP (Upward Pricing Pressure), GUPPI (Gross Upward Pricing Pressure Index) and IPR (Illustrative Price Rise) tests.

It remains to be seen to what extent the FCA will refer to these quantitative tests and how it will apply them in conjunction with the concept of relevant markets. More recently, in the *Fnac/Darty* case,[64] the FCA referred to both econometric and behavioural GUPPI tests to analyse the consequences of a price increase of Fnac products on the number of Darty clients. The FCA concluded that the transaction would be likely to give the notifying parties the incentive to increase prices, as it would be more profitable for them since the price increase of one of the notifying parties' products would lead consumers to purchase the products from the other notifying party. It is also interesting to note that the FCA assessed the effects of the merger in relation to the quality of the services offered.

With regard to economic appraisal of concentrations, it is also noteworthy that, in several recent conditional clearance decisions (including *Rubis/Chevron*,[65] *Crédit Mutuel/Est Républicain*[66] and *Rossel/Hersant Media*[67]), the theory of harm relied almost exclusively on non-price effects.

Moreover, in the 2017 *Médipôle Partenaires/Elsan* case,[68] the FCA for the first time examined whether the transaction between two private clinics – which cannot have any effects on the prices of medical services, as they are regulated – could have price effects on non-medical ancillary services such as private room supplements, television, accommodation for patients' families, or lead to a decreasing quality of the medical services. Until now the FCA had never reviewed the effects on non-medical ancillary services, as they only represented a limited part of the clinics' turnover.

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Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

In the Guidelines, the FCA indicates that it seeks, by priority, structural remedies, i.e. essentially divestitures to a buyer capable of exercising genuine competitive pressure, but specifies that such structural commitments may be completed by behavioural measures. The 2013 Guidelines detail the different techniques and mechanisms of structural commitments, such as the "crown jewels", the "upfront buyer" and the "fix-it-first" mechanisms.

The 2013 Guidelines further clarify that the choice of the most appropriate remedy also depends on the effects of the transaction. They suggest that while divestitures are most efficient to address competition issues arising essentially due to horizontal overlaps, behavioural remedies aimed at guaranteeing the access of competitors to inputs or customers may prove sufficient, whilst preserving efficiency gains connected with vertical integration where the competition concerns consist in the risk of foreclosure of the upstream or downstream market.

The number of Phase II proceedings handled by the FCA in 2012 (three), 2013 (two) 2014 (one), 2015 (zero), 2016 (one) and three in 2017, has remained significantly lower than the number of Phase I conditional clearances (nine in 2012, five in 2013, nine in 2014, six in 2015, five in 2016 and eight in 2017). This would tend to show that notifying parties prefer to seek an acceptable solution with the FCA in Phase I rather than drifting towards Phase II. This may be partly explained by the FCA's open-minded approach to creative and behavioural remedies that address the issues identified, and focus on them without too significantly jeopardising the synergies of the mergers in question.

<u>Behavioural remedies</u>

Following either Phase I or Phase II proceedings, one of the most distinctive features of the FCA's practice when it comes to merger remedies is its willingness to assess and accept behavioural commitments[69] (whereas the EU Commission gives a clear and almost systematic preference to divestiture commitments).

In 2017, in seven out of eight conditional clearances, the FCA accepted behavioural remedies.

- In the *Anios/Ecolab* case,[70] Ecolab offered behavioural remedies in order to support the structural remedy consisting in the disposal of its customer portfolio to a competitor. Thus, if requested by the buyer, Ecolab committed to enter into an exclusive licensing agreement entitling the buyer to manufacture, market and sell the products concerned by the disposal for a 10-year period. In addition, Ecolab agreed not to bundle or tie its products with Anios' products for healthcare professionals for a five-year period, renewable once.
- In the *Ecofolio/Eco-emballages* case,[71] the notifying parties offered to provide potential competitors with information needed to prepare a request for the required approvals by the public authorities necessary for any party to be active in the concerned market, and, once the approval granted, to offer efficient services to local communities. The remedy applies to the current period for approval by the public authorities (i.e. until 2022) and until the next period for approval.
- In the *Médipôle Partenaires/Elsan* case,[72] in addition to structural remedies, the notifying parties committed not to hinder the freedom of practice of doctors working in both their clinics and in competing groups' clinics for a five-year period.
- In the *Totalgaz/UGI Bordeaux* case,[73] where the *Conseil d'Etat* partially annulled the first decision of the FCA,[74] the FCA reviewed the notified transaction again. The notifying

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parties proposed to offer swap contracts to operators in the LPG markets for their own needs in 18 zones for a five-year period.

- In the *La Poste/Suez RV France* case,[75] the notifying parties addressed the potential conglomerate effects of the transaction by committing not to use the non-reproducible advantages linked to La Poste's position in the market for postal services. Moreover, La Poste agreed not to promote and sell the joint venture's products when receiving incoming calls from its clients. Finally, La Poste agreed to determine its costs in such a way as to identify *ex ante* its avoidable and incremental costs. The remedies will last for a five-year period.
- In the *Coopérative des agriculteurs de la Mayenne/Coopérative agricole Terrena* case,[76] Terrena agreed to amend its articles of association in order to reduce to a minimum of 55% (versus 100%) the members' obligation to supply their cereal, oilseed and protein crops as well as agricultural supplies for polyculture. The remedies will last for a five-year period.
- In the *Lilnat, Vetura and Agora Distribution/Group Philippe Ginestet* case,[77] GPG agreed not to distribute decoration products at a Fabio Lucci store. The transaction only marginally strengthens GPG's position which will still face three competitors. Also, a possible increase of the area dedicated to decoration products in the Fabio Lucci store in *Puy-en-Velay* is currently uncertain, according to the notifying party. Thus, the remedy aims at preventing the growth of the area dedicated to decoration products at the concerned store rather than preventing a structural change resulting from the transaction.

Appeals of competitors against conditional clearance decisions

It is fairly rare that third parties lodge an appeal against clearance decisions of the FCA before the *Conseil d'Etat,* and it is even more rare that such appeals actually give rise to an annulment.

In 2017, there were no appeals from third parties against clearance decisions. The *Conseil d'Etat* rejected the existing appeal of Altice and SFR against the FCA decision for failure to implement commitments and the four applications for interim measures in the *Fnac/Darty* case.

Key policy developments

Focus on competition in French overseas territories

The Macron Bill added to the provisions relating to the lowered notification thresholds involving at least one party active in one or more overseas departments or territories or *Départements d'Outre-Mer* ("**DOM**"). As a reminder, Article L.430-2 of the French Commercial Code provides for lower thresholds in this case (the combined turnover threshold decreasing from €150m to €75m, and the individual turnover threshold from €50m to €15m). The law now specifies that the second threshold does not necessarily have to be reached by "*all of the undertakings concerned in the same overseas department or territory*", i.e. considering the overseas territories and departments as a whole.

For instance, in 2017, only two decisions concerned the DOM. In the case relating to five operations in the real estate sector in the DOM,[78] the FCA reviewed an operation of joint control over five real estate companies by the French State and the *Société Nationale Immobilière*. The transactions were analysed as a single concentration as they are closely linked. In the *ASDL/Groupe Océinde* case,[79] the FCA noted that although the notifying parties' activities do not overlap, the activities of the target in the free-TV sector are closely

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linked to those of Groupe Océinde in the telecommunications markets, insofar as the offers proposed by Groupe Océinde can include free television channels. However, the FCA considered that Group Océinde has no economic incentive to limit the broadcasting of the *Antenne Réunion* Channel and that its main competitors (Orange, SFR, Canal+ Overseas) also have their own television content, which guarantees the attractiveness of their offers. Therefore, the FCA considered that a strategy restricting access to the *Antenne Réunion* Channel is unlikely to have an impact on the clients of competing operators.

Assessment of ancillary restrictions

The FCA encourages merging parties to signal "*those restrictions whose compatibility with competition law seems doubtful, either because of their form, their scope, their combination with other restrictions, or the general competitive landscape*".[80] While the EU Commission no longer reviews or clears such ancillary restrictions, the FCA provides more legal certainty in this respect. This is particularly interesting for the merging parties because: (i) the status of these ancillary restraints was less clear at the time when the DGCCRF had jurisdiction over merger control cases; and (ii) legal certainty following the review of such clauses is high, since the FCA is also in charge of anticompetitive practices. In the 2017 *Hub Safe SAS/Samsic SAS* case,[81] the FCA considered that the transaction whereby the control of Hub Safe SAS would be transferred from *Aéroport de Paris* to Samsic SAS would anticipate the conclusion of agreements between *Aéroport de Paris* and Hub Safe SAS, as they represent 80 to 90% of the turnover of the target and therefore determine its value. The agreements thus guarantee the viability of the target, as well as a sustainable transfer of activities between the notifying parties.

Reform proposals

On 20 October 2017, the FCA launched a public consultation to revise the merger control rules, and in particular its guidelines.[82] The main topics the FCA proposed to discuss were: (i) the merger notification thresholds; (ii) the simplified procedure; and (iii) the role of trustees in merger control.

Concerning more specifically the notification thresholds, the FCA envisages *inter alia* introducing an alternative threshold based on the value of the transaction to be notified, the reintroduction of a threshold based on market shares, and a possible *ex post* intervention of the FCA after a mandatory notification in case of competition concerns, the latter inspired from Swedish merger control rules.

Concerning the simplified procedure, the FCA proposes to expand the scope of cases eligible to the simplified procedure where no competition issues arise. The FCA also envisages reducing the number of documents required to file a transaction. Finally, the FCA proposes introducing a preliminary declaration procedure – which would *in fine* replace the existing simplified procedure – whereby the notifying parties would declare a simplified merger and the FCA, if it deems it necessary, would have to impose remedies or injunctions within a certain timeframe. Once the deadline has expired and absent any reaction from the FCA, the notifying parties would obtain a tacit approval.

With regard to the role of trustees, the FCA suggests accepting only remedies presenting a list of at least three trustees, establishing a more structured framework for relations between trustees and the FCA, publishing the trustee's name and contact details for each case involving remedies on the FCA's website for each case involving remedies, and setting up a fund to pay trustees which would be financed by the undertakings proposing remedies or subject to injunctions.

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Stakeholders had until 30 November 2017 to provide their comments and the FCA agreed to propose a summary including next steps by the end of the year. However, this summary is still pending.

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Endnotes

1. The authors wish to thank Agnieszka Nosowicz, legal intern at Linklaters Paris, for her help in the presentation of this chapter.
2. Source: Annual Report 2013 of the FCA, available at www.autoritedelaconcurrence.fr. This figure includes (i) notifications that gave rise to decisions published by the FCA in 2013, (ii) notifications that were under review by the FCA on 31 December 2013, and (iii) notifications that were withdrawn by the notifying parties.
3. Source: Annual Report 2014 of the FCA, available at www.autoritedelaconcurrence.fr. This figure includes (i) notifications that gave rise to decisions published by the FCA in 2014, (ii) notifications that were under review by the FCA on 31 December 2014, and (iii) notifications that were withdrawn by the notifying parties.
4. Source: Annual Report 2015 of the FCA, available at www.autoritedelaconcurrence.fr. This figure includes (i) notifications that gave rise to decisions published by the FCA in 2015, (ii) notifications that were under review by the FCA on 31 December 2015, and (iii) notifications that were withdrawn by the notifying parties.
5. Source: Annual Report 2016 of the FCA, available at www.autoritedelaconcurrence.fr. This figure includes (i) notifications that gave rise to decisions published by the FCA in 2016, (ii) notifications that were under review by the FCA on 31 December 2016, and (iii) notifications that were withdrawn by the notifying parties.
6. This figure includes 235 notifications which gave rise to decisions published in 2017 and 16 notifications which gave rise to decisions adopted in 2018. Please note that this figure does not take into account (i) certain clearance decisions adopted in 2018 which were not yet published when this table was prepared, and (ii) notifications which were withdrawn by the notifying parties, given that they do not give rise to formal decisions published by the FCA. The actual number of notifications, which will be subsequently published in the FCA's Annual Report 2018 may, therefore, be slightly higher.
7. Source: press release of the FCA dated 19 December 2013. Decisions 13-DCC-137 of 1 October 2013, CDC/Transdev; 13-DCC-102 of 26 July 2013, Glon Sanders Holding-Groupe/Euralis JV; 14-DCC-10 of 28 January 2014, Point P/Wolseley France Bois and Matériaux; 14-DCC-71 of 4 June 2014, Advent International/Nocibé.
8. Source: press release of the FCA dated 12 September 2014, websites of the FCA (www.autoritedelaconcurrence.fr) and of the EU Commission (http://ec.europa.eu/competition). Decisions 14-DCC-79 of 11 June 2014, Bridgepoint/Médi-Partenaires; 14-DCC-141 of 24 September 2014, Ramsay Health Care and Predica/Générale de Santé; 14-DCC-173 of 21 November 2014, Carrefour France/Dia France; Decision 15-DCC-53 of 15 May 2015, UGI/Totalgaz SAS. In addition, the decision of the EU

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Commission M.7283 of 11 August 2014, Kingfisher/Mr. Bricolage (the transaction was subsequently abandoned by the parties).

9. Source: press release of the FCA dated 1 September 2015, websites of the FCA (www.autoritedelaconcurrence.fr) and of the EU Commission (http://ec.europa.eu/competition); Auchan/Système U (notification abandoned by the parties); decision 15-DCC-146 of 26 October 2015, Vedici/Vitalia; decision 15-DCC-141 of 27 October 2015, Davigel Bain Capital; decision 15-DCC-53 of 15 May 2015, Totalgaz SAS UGI Bordeaux Holding SAS. These are the only referrals that we are aware of, but it is not excluded that there were further referrals, given that the FCA does not systematically issue a press release when it receives a referral.
10. Source: press release of the EU Commission (http://ec.europa.eu/competition). Decision M.7997 of 30 May 2016, Steinhoff International/Darty.
11. Source: press release of the EU Commission (http://ec.europa.eu/competition). Decisions M.8326 of 31 January 2017, Elsan/Médipôle Partenaires and M.8407 of 29 May 2017, La Poste/Suez RV/NewCo.
12. Decisions 13-DCC-90 of 11 July 2013, *Casino/Monoprix*; 13-DCC-101 of 4 September 2013, *Bouyer-Leroux/Actifs Briques de la société Imerys TC*.
13. Decision 14-DCC-160 of 30 October 2014, Numericable group/SFR.
14. Decision 16-DEX-01 of 21 January 2016, JC Decaux/Metrobus (final decision to come). On 23 March 2016, the FCA opened an in-depth investigation of the acquisition (notified on 17 February 2016) of Darty by the Fnac group.
15. Decisions 16-DEX-01 of 21 January 2016, JC Decaux/Metrobus; 16-DEX-02 of 23 March 2016 Fnac/Darty; 16-DEX-03 of 23 May 2016 Auchan/Système U.
16. Decisions 17-DEX-01 of 13 January 2017, Fraikin/Petit Forestier; 17-DEX-02 of 11 September 2017, Concept Multimédia SAS/Axel Springer Digital Classifieds France SAS; 17-DEX-03 of 4 December 2017, Agripole/Financière Cofigeo SAS
17. Decisions 13-DCC-46 of 16 April 2013, Groupe Rossel/Groupe Hersant Media Pôle Champagne Ardennes Picardie; 13-DCC-57 of 10 May 2013, Groupe Casino/Norma; 13-DCC-96 of 23 July 2013, Chausson Matériaux/Réseau Pro; 13-DCC-137 of 1 October 2013, CDC/Transdev; 13-DCC-144 of 28 November 2013, FPLPH (Groupe Casino)/9 magasins à l'enseigne G20.
18. Decisions 14-DCC-10 of 28 January 2014, Point P/Wolseley France Bois et Matériaux; 14-DCC-11 of 28 January 2014, Franprix Leader Price Holding/Le Mutant; 14-DCC-15 of 10 February 2014, Canal Plus Overseas/Mediaserv, Martinique Numérique, Guyane Numérique and La Réunion Numérique; 14-DCC-50 of 2 April 2014, Vivendi SA and Group Canal Plus/Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia; 14-DCC-71 of 4 June 2014, Advent International/Nocibé; 14-DCC-82 of 12 June 2014, M Finance group and investment fund Equistone/Park&Suites and GMI group; 14-DCC-123 of 21 August 2014, Antilles Glaces/Brasserie Lorraine; 14-DCC-160 of 30 October 2014, Numericable group/SFR; 14-DCC-167 of 13 November 2014, Total SA/Société du Pipeline Sud-Européen; 14-DCC-173 of 21 November 2014, Carrefour France/Dia France.
19. Decisions 15-DCC-53 of 15 May 2015, Totalgaz/UGI Bordeaux Holding; 15-DCC-54 of 13 May 2015, SARA/Rubis; 15-DCC-63 of 4 June 2015, Société du Journal Midi Libre/Groupe La Dépêche du Midi; 15-DCC-104 of 30 July 2015, Société Réunionnaise de Produits Pétroliers/Rubis; 15-DCC-15 of 18 September 2015, Audika Groupe/William Demant; 15-DCC-170 of 10 December 2015, Quick/Burger King.
20. Decisions 16-DCC-55 of 15 April 2016, Aqualande/Labeyrie and Aquaculteurs landais;

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16-DCC-147 of 21 September 2016, Agri-Négoce/Axéréal Participations; 16-DCC-155 of 14 October 2016, Geimex/Casino; 16-DCC-167 of 31 October 2016, Aéroports de Lyon/Vinci Airports; 16-DCC-208 of 9 December 2016, Sicavyl/Sicarev.

21. Decisions 17-DCC-12 of 31 January 2017, Anios/Ecolab; 17-DCC-42 of 3 April 2017 Ecofolio/Eco-emballages; 17-DCC-95 of 23 June 2017, MédiPôle Partenaires/Elsan; 17-DCC-103 of 3 July 2017, Totalgaz SAS/UGI Bordeaux Holding SAS; 17-DCC-209 of 21 December 2017, La Poste/Suez RV France; 17-DCC-210 of 13 December 2017, Coopérative des agriculteurs de la Mayenne/Coopérative agricole Terrena; 17-DCC-215 of 18 December 2017, Bricorama France SAS, Bricorama Méditerranée SL and Bricorama Asia LTD/ITM Equipement de la Maison; 17-DCC-216 of 18 December 2017, Lilnat, Vetura and Agora Distribution/Group Philippe Ginestet.
22. Decisions 13-DCC-90 of 11 July 2013, Casino/Monoprix; 13-DCC-101 of 4 September 2013, Bouyer-Leroux/Actifs Briques de la société Imerys TC.
23. Decision 14-DCC-160 of 30 October 2014, Numericable group/SFR.
24. Decision 16-DCC-111 of 27 July 2016, Fnac/Darty.
25. Decisions 16-DEX-01 of 21 January 2016, JC Decaux/Metrobus and 16-DEX-03 of 23 May 2016 Auchan/Système U did not result in a decision of the FCA
26. Decision 17-DEX-01 of 13 January 2017, Fraikin/Petit Forestier.
27. Decisions 17-DCC-92 of 22 June 2017, re-examination of the injunctions decided in the decision 12-DCC-100 on the exclusive control over TPS and Canal Satellite by Vivendi SA and Groupe Canal Plus; 17-DCC-93 of 22 June 2017, re-examination of the commitments decided in the decision 14-DCC-50 on the exclusive control over Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi SA and Groupe Canal Plus.
28. Decisions 10-DCC-02 of 12 January 2010, SNCF-Participations, Caisse de Dépôt et Placement du Québec/Keolis-Effia; 10-DCC-98 of 20 August 2010, Eurovia/Tarmac; 10-DCC-198 of 30 December 2010 Veolia/Transdev; Decision of the EU Commission M.5814 of 16 July 2010, Univar/Eurochem (the transaction was subsequently withdrawn). Source: Annual Reports 2009 and 2010 of the FCA, websites of the FCA (www.autoritedelaconcurrence.fr) and of the EU Commission (http://ec.europa.eu/competition).
29. Decisions 11-DCC-87 of 10 June 2011, HTM/Media Concorde SNC; 12-DCC-41 of 23 March 2012, Point P/Brossette; 12-DCC-63 of 9 May 2012, Carrefour/Guyenne-Gascogne; 12-DCC-129 of 5 September 2012, SNCF/Keolis; 13-DCC-102 of 26 July 2013, Glon Sanders Holding-Groupe/Euralis JV; 13-DCC-137 of 1 October 2013, CDC/Transdev; 14-DCC-10 of 28 January 2014, Point P/Wolseley France Bois et Matériaux; 14-DCC-71 of 4 June 2014, Advent International/Nocibé; 14-DCC-79, of 11 June 2014, Bridgepoint/Médi-Partenaires; 14-DCC-141 of 24 September 2014, Ramsay Health Care et Predica/Générale de Santé; 14-DCC-173 of 21 November 2014, Carrefour France/Dia France; 15-DCC-53 of 15 May 2015, UGI/Totalgaz SAS; Decision of the EU Commission M.7283 of 11 August 2014, Kingfisher/Mr. Bricolage (the transaction was subsequently abandoned). Source: Annual Reports 2010 to 2013 of the FCA, websites of the FCA (www.autoritedelaconcurrence.fr) and of the EU Commission (http://ec.europa.eu/competition).
30. See endnote 10.
31. The Macron Bill is available (in French) at: https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=D74A084CF978B44634D558FA43ED28BF.tpdila23v_3?cidTexte=JORFTEXT000030978561&categorieLien=id.

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32. In addition, the Guidelines provide that businesses that implement a high number of annual transactions which must be notified to the FCA, such as investment funds or major players of the retail sector, may provide the FCA at the beginning of the year with a standard form containing all information of a general nature which is likely to be repeated in all following notifications and can then limit the content of the notification form to the information specific to the transaction at issue.
33. For example, Decision 17-DCC-15 of 3 February 2017, Etablissements Labarthe/Eden Auto.
34. For example, Decision 17-DCC-183 of 10 November 2017, Carrefour Group/Faleschini Family.
35. Decision 17-DCC-216 of 18 December 2017, Lilnat, Vetura and Agora Distribution/ Groupe Philippe Ginestet.
36. Decision 16-D-07 of 19 April 2016, Outremer Telecom.
37. Decision 12-D-12 of 11 May 2012, Colruyt.
38. *Conseil d'Etat*, judgment of 24 June 2013, N° 360949, Colruyt.
39. Decision 13-D-01 of 31 January 2013, Réunica and Arpège.
40. Decision 13-D-22 of 20 December 2013, Castel.
41. *Conseil d'Etat*, judgment of 15 April 2016, N° 375658, Castel.
42. *Conseil d'Etat*, judgment of 16 July 2014, N° 375658, Copagef; *Conseil d'Etat*, judgment of 15 April 2016, N°375658, Castel.
43. Decision 16-D-24 of 8 November 2016, Altice.
44. Decision 17-D-04 of 8 March 2017, Altice/SFR.
45. *Conseil d'Etat*, judgment of 28 September 2017, N° 409770, Altice/SFR.
46. Decision 12-DCC-100 of 23 July 2012, Vivendi-Groupe Canal+/TPS-CanalSatellite.
47. *Conseil d'Etat*, judgment of 21 December 2012, N° 362347, 363542 and 363703, Canal Plus.
48. *Conseil d'Etat*, order of 22 October 2012, N° 362346, Canal Plus.
49. Press release of the FCA dated 21 July 2016, website of the FCA (www.autoritedelaconcurrence.fr)
50. Decision 17-DCC-92 of 22 June 2017, re-examination of the injunctions decided in the decision 12-DCC-100 on the exclusive control over TPS et CanalSatellite by Vivendi SA and Groupe Canal Plus.
51. Decision 17-DAG-01 of 18 December 2017, execution of injunction 3c from decision 17-DCC-92.
52. Decision 16-DCC-111 of 27 July 2016, Fnac/Darty.
53. Decision 17-DCC-44 of 11 April 2017, Darty/Boulanger.
54. Source: Press release of the FCA, 11 September 2017, available at www.autoritedelaconcurrence.fr.
55. Source: Press release of the FCA, 11 September 2017, available at www.autoritedelaconcurrence.fr.
56. 17-DCC-215, 18 December 2017, Bricorama France SAS, Bricorama Méditerranée SL and Bricorama Asia LTD/ITM Equipement de la Maison.
57. Decision 12-DCC-100 of 23 July 2012, Vivendi-Groupe Canal+/TPS-CanalSatellite.
58. Decision 17-DCC-92 of 22 June 2017, re-examination of the injunctions decided in the decision 12-DCC-100 on the exclusive control over TPS and CanalSatellite by Vivendi SA and Groupe Canal Plus
59. Decision 12-DCC-101 of 23 July 2012, Vivendi-Groupe Canal+/Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia.

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60. The commitment is similar to the one adopted by the parties in the FCA's Decision 12-DCC-101 of 23 July 2012, Vivendi-Groupe Canal+/Direct 8, Direct Star, Direct Productions, Direct Digital et Bolloré Intermédia. However, the scope of this commitment has been extended to take into account the judgment of the *Conseil d'Etat* of 23 December 2013. Thus, the scope is now extended to any pre-purchase, which makes it possible to cover all the broadcasting windows sold by the producers when they organise the film's financing. Moreover, this new commitment includes any purchases by Groupe Canal Plus, once the film is produced, of the free-to-air broadcast rights to the film up to 72 months after its cinema release, a period that corresponds to the three free-to-view broadcast windows.
61. Decision 17-DCC-93 of 22 June 2017, re-examination of the commitments decided in the decision 14-DCC-50 on the exclusive control over Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi SA and Groupe Canal Plus.
62. Decision 16-DCC-111 of 27 July 2016, Fnac/Darty.
63. Decision 17-DCC-44, of 11 April 2017, Darty/Boulanger.
64. Decision 16-DCC-111 of 27 July 2016, Fnac/Darty.
65. Decision 11-DCC-102 of 30 June 2011, Rubis/Société Antillaise des Pétroles Chevro.
66. Decision 11-DCC-114 of 12 July 2011, Banque Fédérative Du Crédit Mutuel/Est Républicain.
67. Decision 13-DCC-46 of 16 April 2013, Groupe Rossel/Groupe Hersant Media Pôle Champagne Ardennes Picardie.
68. Decision 17-DCC-95 of 23 June 2017, Médipôle Partenaires/Elsan.
69. Out of 45 commitment decisions adopted by the FCA since 2009, 33 decisions relied, at least in part, on behavioural remedies, Concurrences Review, N° 2-2015 pp. 46-53.
70. Decision 17-DCC-12 of 31 January 2017, Anios/Ecolab.
71. Decision 17-DCC-42 of 3 April 2017, Ecofolio/Eco-emballages.
72. Decision 17-DCC-95 of 23 June 2017, Médipôle Partenaires/Elsan.
73. Decision 17-DCC-103 of 3 July 2017, Totalgaz/UGI Bordeaux.
74. *Conseil d'Etat*, judgment of 6 July 2016, N°390457 and 390774, UGI/Totalgaz SAS.
75. Decision 17-DCC-209 of 21 December 2017, La Poste/Suez RV France case.
76. Decision 17-DCC-210 of 13 December 2017, Coopérative des agriculteurs de la Mayenne/Coopérative agricole Terrena.
77. Decision 17-DCC-216 of 18 December 2017, Lilnat, Vetura and Agora Distribution/ Group Philippe Ginestet.
78. Decision 17-DCC-181 of 6 November 2017, five operations in the real estate sector in the Overseas departments.
79. Decision 17-DCC-25 of 16 February 2017, ASDL/Group Océinde
80. See paragraph 537 of the Guidelines.
81. Decision 17-DCC-154 of 21 September 2017 Hub Safe SAS/Samisc SAS.
82. http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=682&lang=fr.

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Germany

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Overview of merger control activity during the last 12 months

In 2017, Germany's Federal Cartel Office ("FCO") reviewed around 1,300 merger filings.[1] A detailed review in Phase II proceedings has been initiated and/or concluded in 10 cases during 2017, and in a further three cases since January 2018. Out of the transactions reviewed in Phase II proceedings, three transactions were cleared unconditionally, and one transaction subject to conditions and obligations. One transaction was prohibited and a further five cases were withdrawn by the parties. At the time of writing this article, three Phase II proceedings are still ongoing.[2]

In comparison to 2016, the number of cases under Phase II control remained the same; there had been 10 cases in Phase II proceedings in 2016 and in 2017. While there had been no prohibition in 2016, there was one prohibition in 2017. Even though only one transaction has been prohibited, a more realistic picture appears if the cases in which notifications have been withdrawn are accounted for as prohibited transactions. Withdrawing a notification is often preferred by the parties to receiving a prohibition decision, since the latter usually generates more (unwelcome) publicity and also would explicitly establish a precedent as regards market definition or other issues that have been contentious during the Phase II investigation. Furthermore, in case of withdrawal, only 50% of the filing fees have to be paid by the parties, thus providing an additional financial incentive.

Since three out of 10 Phase II proceedings completed since January 2017 were cleared unconditionally, while in only one case commitments were deemed necessary for granting clearance, one may conclude that the initiation of Phase II proceedings does not equal "certain death" to the transaction, but that there is a chance of dispelling the FCO's competition concerns.

The only prohibition issued by the FCO concerned the contemplated acquisition by online ticket shop and festival organiser CTS Eventim of the majority of shares of event organiser Four Artists (See more on this case below, under "Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.").

New developments in jurisdictional assessment or procedure

9th Amendment to ARC entered into force

As already described in the latest edition of *Global Legal Insights – Merger Control* 2017, the long-awaited 9th Amendment to the Act Against Restraints to Competition ("ARC") entered into force on 9 June 2017, containing several important changes to German merger control procedures. Most notably, a new merger control threshold, based on the transaction value and deviating from the turnover-only thresholds of the past, has been introduced.

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According to this additional threshold, a concentration will be subject to German merger control if: the consideration for the concentration exceeded €400m, while the participating undertakings generated an aggregate worldwide turnover of more than €500m; at least one participating undertaking generated turnover in Germany of more than €25m; and another undertaking has significant activities in Germany without having generated turnover of more than €5m in Germany. This additional transaction value threshold raised several practical issues, particularly with regard to the terms "significant domestic activities", and "consideration for the concentration". The legislator unfortunately avoided giving sufficient guidance in this regard. At the time of writing this article, the FCO is still in the process of drafting guidelines, in cooperation with the Austrian Federal Competition Authority, to clarify the uncertainties and provide guidance. However, the usefulness of these guidelines will be limited since it will not be possible to cover all conceivable cases. Thus, it has to be expected that the guidelines may not provide the clarity needed by the companies.

Furthermore, the Amendment extended the criteria for assessing the market position of an undertaking with a particular view to multi-sided markets and networks. The Amendment explicitly listed the following criteria: i) direct and indirect network effects; ii) the parallel use of several providers by users (single-homing/multi-homing); iii) economies of scale in combination with network effects; iv) access to competitively relevant data; and v) competitive pressure due to innovation potential. Moreover, the 9th Amendment to the ARC introduced a new provision providing that a market may also exist if a product (or service) is provided free of charge.

Further, the Amendment brought some changes to the procedure of ministerial authorisation after a transaction has been prohibited by the FCO. Such a ministerial authorisation may be granted by the Federal Minister of Economic Affairs and Energy, if, in his or her opinion, the restraints of competition in a particular case are offset by the macroeconomic advantages of the merger, or the merger is justified by an overriding public interest. Most notably, the Amendment speeded up the procedure and now requires the Minister to take a decision within six months. Previously, no fixed deadline existed. The Amendment further required the Federal Ministry of Economic Affairs and Energy to adopt guidelines governing the procedure for a ministerial authorisation. These guidelines have been published by the Ministry on 27 October 2017.[3] The guidelines are meant to ensure that the procedure can be carried out swiftly and efficiently. They only deal with procedural issues and explain *i.a.* the procedure, time periods, investigatory powers, and procedural rights.

Federal Court of Justice – New developments in gun-jumping

As in previous years, the takeover of the regional food retailer Kaiser's Tengelmann by its competitor and market leader, Edeka, continued to be in the spectrum of interest. This time, the German Federal Court of Justice ("FCJ") had to decide whether the Federal Cartel Office, in its prohibition decision in 2015, could legally pronounce several measures to prevent the parties from implementing parts of the intended merger prior to clearance, *i.a.* the prohibition to implement joint purchasing and to close down several stores. These measures have been (mostly unsuccessfully) appealed by the parties. Nonetheless, Edeka even proceeded with its appeal after the ministerial authorisation for the transaction became legally binding in December 2016.

In its decision of November 14, 2017, the FCJ had to decide whether the measures prohibited by the FCO would have violated the so-called 'standstill-obligation', or whether these measures had to be qualified as mere preparation measures. The FCJ clarified that, under German law, the legal implementation of the transaction (e.g. the transfer of shares or assets),

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or a conduct that legally or factually could be qualified as a concentration, is prohibited prior to clearance. Although the prohibited measures did not fulfil these requirements, the FCJ also confirmed that measures which by themselves do not qualify as a concentration may violate the standstill-obligation if they occur in the context of the envisaged merger and are able to – at least partly – anticipate its effects. Previously, such a broad understanding of the standstill-obligation has been controversially discussed in German literature. Interestingly, in a more recent case, Advocate General Nils Wahl presented the opposite view. In his opinion, measures which are taken in the context of a merger, but do not lead to an actual acquisition of control and are severable, are not able to violate the standstill-obligation.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Ticketing systems

The only prohibition decision in 2017 was issued by the FCO in November and concerned the contemplated acquisition of event agency Four Artists by CTS Eventim.[4] CTS Eventim is the operator of the largest ticketing system in Germany and provides ticketing services for event organisers and advance booking offices. Further, it sells tickets via its own online shop "Eventim.de", and is active in the organisation of rock/pop concerts. According to the FCO, a ticketing system is a platform that, on the one side, enables event organisers to sell their tickets via various advance booking offices and online shops, and, on the other side, allows advance booking offices to book tickets for different events. The assessment of the FCO led to the assumption that the planned acquisition of the event organiser Four Artists would have strengthened CTS Eventim's dominant position on the two-sided market for ticketing services.

Prior to the acquisition, already 60-70% of all tickets sold via ticketing services in Germany were sold through CTS Eventim's ticketing system. This position was strengthened by CTS Eventim's own online shop and its tying of a significant share of the total market volume to its ticketing system via its own event organisers and its use of exclusive contracts. Additionally, the FCO relied upon the criteria for market power of platforms and network that were introduced in the course of the 9th Amendment to the ARC. In particular, the FCO came to the conclusion that the ticketing system provided for strong indirect network effects between the event organisers represented on the ticketing platform and the advance booking offices/end-users that are using the platform for their purchases. The FCO further stressed CTS Eventim's possibility to access relevant data competitively via the platform. Moreover, the acquisition of Four Artists would tie an additional number of 500,000 to 1 million tickets to CTS Eventim's ticket system, which might foreclose competitors.

In December 2017, the FCO prohibited exclusive contracts between CTS Eventim and event organisers and advance booking offices in a parallel abuse of dominance proceeding.[5] The respective clauses required CTS Eventim's contract partners to exclusively, and to a considerable extent, sell tickets through its ticketing system. In its assessment, the FCO again stressed the importance of indirect network effects and confirmed that, as the operator of the largest ticketing system in Germany, CTS Eventim holds a dominant position.

Cement and ready-mix concrete sector

In November 2017, Schwenk KG ("Schwenk") abandoned the planned acquisition of a cement plant in Karsdorf (Saxony-Anhalt) from Opterra GmbH after the FCO issued serious competitive concerns.[6] According to the FCO, the acquisition would have led to a dominant position of Schwenk as a cement manufacturer in Thuringia, Saxony-Anhalt

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and Saxony regions. In order to avoid a prohibition decision, Schwenk withdrew its notification. This decision is noteworthy for the reason that the FCO, in its delineation of the relevant geographical market, came to another conclusion as the European Commission in past decisions. Both the FCO and the European Commission conclude that the markets in the cement sector are of a regional scope. However, in past decisions, the European Commission determined the scope of the relevant geographic market by the distance from the plant at which the cement may be sold. In doing so, it considered that the appropriate geographic market should be defined as a circular area of 150km and 250km around the relevant cement plant. In contrast, the FCO – for the first time in a merger control proceeding regarding cement markets – delineated the relevant geographic market by taking into account the actual supply streams and the perspective of the demand side.

One of the competitive concerns of the FCO in the previous case was the disappearance of an active competitor that would have increased the possibilities for parallel and coordinated conduct among the remaining market players. This high risk of possible collusion in the cement sector was one of the key outcomes of the FCO's "Sector inquiry into the cement and ready-mix concrete sector" that had been launched at the end of 2013 and whose final report had been published on July 24, 2017.[7] These findings had been used by the FCO in the review of the aforementioned Schwenk/Opterra merger. In general, sector inquiries allow the FCO to review market conditions, if there are suspicions that competition may be restricted, and make policy decisions without taking measures in specific cases.

Apart from this high risk of collusion, one of the main outcomes of the sector inquiry was that the detected significant price differences between the regional markets result *i.a.* from numerous corporate interlocks between the suppliers. Thus, the FCO announced it would investigate approximately 60 JVs in the market and initiate respective divesture procedures, if necessary. In order for the companies to assess their risk of being subject to such a divesture proceeding, the FCO provided the following criteria: in cases where two shareholders are active in the same product and geographic markets as the JV, the JV has to be dissolved; in cases where only one shareholder is active in the same markets as the JV and another shareholder is active in a neighbouring market, a case-by-case analysis is required. Such divesture proceedings are possible under German law since the cooperative aspects of a JV may be subject to a separate antitrust procedure even after a merger clearance, and also if the JV has not been subject to merger control in the first place, e.g. due to low revenues.

Professional Mobile Radio

On January 29, 2018, the FCO published a case report dealing with the proposed acquisition of the British company Sepura plc ("Sepura") by Chinese-based Hytera Communications Corporation Limited ("Hytera").[8] Both companies are active in the manufacture and supply of Professional Mobile Radio ("PMR") communication systems and solutions to public sector and commercial customers. According to the preliminary assessment of the FCO, the contemplated merger would have impeded competition on the market for end-user devices that are certified for German digital radio for public institutions with security tasks. This case is interesting because the concentration could be implemented without the approval of the FCO, although the FCO had already entered into Phase II proceedings. The parties to the concentration were able to withdraw their notification prior to the decision of the FCO since, under German law, the turnover thresholds have to be fulfilled in the business year prior to the implementation of the transaction.

However, in the case at hand, Sepura's business year ended in the course of the Phase II proceedings, at a point where it no longer met the required turnover thresholds. Notably,

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the contemplated acquisition could not immediately be implemented since, in May 2017, the parties received notification from the German Federal Ministry for Economic Affairs and Energy to review the transaction on public policy and national security grounds relating to Sepura Deutschland. This security review was not terminated until March 2018 and the signing of a public service contract containing the following conditions: Sepura plc in Cambridge remains independent and responsible for the development of end-user devices that are certified for German digital radio for public institutions with security tasks; and Sepura Deutschland continues to exist. This long and thorough review of the transaction has to be seen in the context of an initiative of the German Government to monitor direct foreign investments in German undertakings more closely under the German Foreign Trade and Payments Ordinance, which was amended to this end in July 2017.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In 2017, there were no major developments with regard to economic appraisal techniques applied by the FCO. In general, the FCO follows the same approach as the European Commission in the assessment of unilateral effects and coordinated effects as well as vertical and conglomerate mergers. The FCO's "Guidelines on market dominance in merger control"[9] set out in detail the FCO's – also economic – approach with regard to market dominance, joint market dominance, vertical and conglomerate mergers.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

On May 30, 2017, the FCO issued guidelines on remedies in German merger control, following a respective public consultation.[10] The guidance provides a detailed and comprehensive overview of the FCO's current practice regarding remedies in merger cases, and also illustrates the European Commission's respective practice, as well as existing similarities and differences between the two. The guidelines basically illustrate the *status quo*; however, the FCO elaborates that remedies in cases involving digital markets may have to meet special demands, which may lead to currently unknown remedies in future cases.

Remedies in Phase I investigation

The guidelines confirm that – in contrast to the European Commission – the FCO may not accept remedies within Phase I proceedings, but only within the main investigation proceedings (Phase II). Against this statutory background, the parties to a merger may avoid Phase II proceedings only by structuring the transaction in a way, insofar as possible, by which possible competition concerns are removed prior to notification, and thus ensuring (or rather, increasing) the likelihood of receiving clearance within Phase I. In case the parties face difficulties in identifying the precise nature and scope of potential competition concerns, it is not uncommon to initiate informal pre-notification discussions with the FCO and, respectively, withdraw a notification after the authority's concerns have been identified, in order to take rectifying measures prior to a subsequent second notification.

Remedies in Phase II investigation

As far as remedies within Phase II proceedings are concerned, the guidelines explain that the FCO is in general terms strongly opposed to behavioural ones. However, behavioural remedies are not entirely excluded as long as they are of a structural nature. As a basic concept, German law provides that remedies must not make it necessary to permanently monitor the merging parties' behaviour, which implicitly limits the possibility of behavioural

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remedies. The guidelines present some behavioural remedies that have been accepted by the FCO in the past, e.g. providing access to infrastructure. In contrast, the shutdown of capacity and the building of Chinese walls have been rejected. In general, remedies need to have reasonably verifiable, structural and long-term effects in order to be accepted by the FCO. Thus, the guidelines confirm that, in most cases, the FCO clearly prefers divestitures, whereby up-front-buyer solutions are seen to be better suited to remove competitive concerns than a condition precedent.

More specifically, if the merger is about to remove a significant (close) competitor, as was the case with the acquisition of Kaiser's Tengelmann by Edeka mentioned above, the remedy package offered by the parties must also be strategically meaningful, i.e. provide the potential acquirer(s) with immediate and viable market access. In the opinion of the FCO, this condition was not fulfilled in the Kaiser's Tengelmann/Edeka merger. One major point of criticism was, in particular, that the parties' offer did not sufficiently address the competitive concerns on the level of city districts. For example, the parties' divestment offer included stores in areas where the transaction did not raise any concerns, but did not contain any stores in the problematic areas. Similarly, several of the stores offered for divestment had already been closed by the parties or were due to close in the near future. Only with regard to the purchasing markets was the divestment offer considered to be sufficient. The FCO further stated, though, that it would have possibly granted clearance to the transaction if the remedy package had encompassed a more significant part of Kaiser's Tengelmann's outlets in the areas in which serious competition concerns arose.

Unlike in the case above, a successful remedy package was offered by the parties in the case of the acquisition of CIT Rail Holdings (Europe) S.A.S. – known under the brand name "Nacco" – by VTG Rail Assets GmbH.[11] The FCO expressed the concern that a complete acquisition of Nacco would create a dominant position for VTG in the European market for the lease of rail freight cars. In order to avoid a prohibition order by the FCO, the parties offered to hive off the entire business of Nacco's German and Luxemburg subsidiaries, and a certain number of additional freight cars. Thus, the FCO cleared the acquisition subject to the condition precedent that the parties may only implement the merger once they have sold this essential part of Nacco's core business to an independent third party. Apart from the divesture of this strategically meaningful share of Nacco's business, the FCO required that the purchaser fulfil certain qualifications to ensure that sufficient competitive pressure continues to be exerted on the merged entity.

Remedies after Phase II investigation

Following a prohibition decision, the merger parties have two options if they hope to overcome the FCO's decision. The parties may seek legal redress in court, in particular if they deem the FCO's conclusions to be legally unsound. Alternatively or in addition to that, the parties may ask for an exceptional authorisation of the transaction by the Federal Minister of Economic Affairs and Energy. He may overrule the FCO, if the restraint of competition is outweighed by macroeconomic advantages, or if the concentration is justified by an overriding public interest (see above).

Key policy developments

In November 2017, the FCO published a background paper called "Innovation – Challenges for the Antitrust Law Practice". The publication deals with possible antitrust issues regarding innovation.[12] Since the significance of innovation aspects for antitrust cases has been one of the most controversial topics in European antitrust in 2017, provoked by the

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decision of the European Commission in the merger between Dow/DuPont of 27 March 2017, a positioning of the FCO had been expected. The paper illustrates the challenges and questions that arise from the integration of innovation aspects in competition analysis. The first part of the paper deals with innovation in economic theory. Different types of innovations, such as product and process innovations, are explained and possible incentives for innovation, e.g. monopoly rents, elaborated.

The main section of the first part deals with the interdependence between innovation and market structure. On the one hand, innovations may have an effect on market structure; on the other hand, the existing market structure, changes in market structure as well as antitrust enforcement, may affect innovation. In particular, economic research suggests that there is a positive correlation between intensity of competition and innovation incentives, at least in already concentrated markets, whereas elimination of competition reduces innovation incentives. The FCO concludes that dynamic economic models are better suited to capture these interdependences – whereas existing literature is predominantly based on static economic models – and that further research is necessary in this regard. The second part of the paper illustrates innovation aspects in legal antitrust analysis. Currently, innovations are mainly included in the analysis of existing product markets, future product markets, the assessment of efficiencies, and, as a new development in Europe, competition in innovation unrelated to specific products.

The paper provides an overview of the current antitrust practice of the European Commission and the FCO in this regard. With regard to innovation activities unrelated to specific product markets, the paper refers to the recent decision of the European Commission in the Dow/DuPont case. In this case, the European Commission feared that, post-merger, the companies would consolidate their respective R&D activities – which cannot yet be assigned to a particular product – due to missing incentives to innovate. It is described how the European Commission analysed the effects of the merger without reference to existing or future product markets, by using the terms "innovation competition" and "innovation spaces" instead of product/price competition and product markets, respectively. The FCO states that such a competition analysis of R&D activities unrelated to specific products raises theoretical and practical questions.

The FCO comes to the conclusion that many questions remain unsolved and even provides a catalogue with open questions for further discussion. In general, the paper is meant to provide an introduction to the current discussion regarding innovation aspects in competition law. However, the paper also presents the view of the FCO on how antitrust analysis may be influenced by innovation aspects. Thus, it cannot be excluded that such aspects will face greater scrutiny by the FCO in future cases.

Reform proposals

The main reform proposals of the past years in relation to merger control have concerned the digital markets and the need to adapt the ARC to the new challenges of the internet economy. All these reform proposals (the establishment of criteria for the assessment of market power of online platforms and networks; the introduction of additional merger control thresholds to "catch" mergers in the digital markets; as well as the clarification that non-monetary transactions can also qualify as market activities) have successfully been concluded with the 9th Amendment to the ARC.

Although these changes to German antitrust law came into force only eight months ago, further changes may be expected. In their Coalition Agreement 2018, the Christian

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Democratic CDU/CSU and the Social Democrats of the SPD agreed that "a modernisation of antitrust laws with respect to digitalisation and globalisation is necessary."[13] For this purpose, the Coalition Agreement calls for a "Competition Law 4.0" Commission to develop further reform proposals. However, the extent to which this modernisation may affect the German merger control provisions remains unclear.

* * *

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Hong Kong

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Key features of Hong Kong's merger control regime

In Hong Kong, mergers involving undertakings in the telecommunications sector are subject to merger control under the Competition Ordinance (Cap. 619) (**Ordinance**). Hong Kong does not have a general merger control regime. The Ordinance came into full effect on 14 December 2015 and repealed the previous merger control regime set out in the Telecommunications Ordinance (Cap. 106). Notification is voluntary for proposed and completed mergers.

The Communications Authority (**Authority**) is the principal merger authority and will ordinarily take the role of lead authority in relation to mergers. The Competition Commission (**Commission**) has concurrent jurisdiction with the Authority. The Authority and Commission have jointly published a Guideline on the Merger Rule, which sets out how they intend to interpret and give effect to the merger rule. In this chapter, references to "Authority" also include the Commission where concurrent jurisdiction exists.

The Competition Tribunal (**Tribunal**) has jurisdiction to hear and determine cases brought in relation to the merger control regime in Hong Kong.

<u>Merger Rule</u>

The Ordinance states 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 (**Merger Rule**). The scope of the Merger Rule is limited to mergers in which one or more of the undertakings participating in the merger holds a carrier licence or, directly or indirectly, controls an undertaking that holds a carrier licence. A "carrier licence" is a licence issued under the Telecommunications Ordinance for the establishment or maintenance of a telecommunications network for carrying communications.

The Merger Rule applies to a merger even if the arrangements for the creation of the merger take place outside Hong Kong, the merger takes place outside Hong Kong, or any party involved in the merger is outside Hong Kong. Accordingly, it is possible for purely foreign-to-foreign transactions to be caught.

<u>Merger definition</u>

A merger takes place if:

(a) two or more undertakings previously independent of each other cease to be independent of each other;

(b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or

(c) an acquisition by one undertaking (the **acquiring undertaking**) of the whole or part

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of the assets, including goodwill, of another undertaking (the **acquired undertaking**) results in the acquiring undertaking being in a position to replace the acquired undertaking, or to substantially replace the acquired undertaking, in the business or in part of the business in which the acquired undertaking was engaged immediately before the acquisition.

Control, in relation to an undertaking, exists if decisive influence is capable of being exercised with regard to the activities of the undertaking. "Decisive influence" refers to the power to determine decisions (including the making or vetoing of such decisions) relating to the strategic commercial behaviour of an undertaking, such as the budget, the business plan, major investments or the appointment of senior management. Decisive influence may be exercised, in particular, by:

(a) ownership of, or the right to use all or part of, the assets of an undertaking; or

(b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of any governing body of an undertaking.

The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity, also constitutes a merger.

Safe harbours

The Authority has identified two "safe harbours" to give guidance as to which mergers are unlikely to substantially lessen competition:

(a) Market share safe harbour: Applies where the post-merger combined market share of the four (or fewer) largest firms in the relevant market is less than 75%, and the merged firm has a market share of less than 40%.

(b) Herfindahl-Hirschman Index (**HHI**) safe harbour: the HHI measures market concentration. It is calculated based on the market shares of the firms operating in a market. The safe harbour applies where the post-merger HHI of the relevant market is:

  (i) less than 1,000 (unconcentrated market);

  (ii) between 1,000 and 1,800 (moderately concentrated market) and the merger produces an increase in the HHI of less than 100; or

  (iii) more than 1,800 (highly concentrated market) and the merger produces an increase in the HHI of less than 50.

The Authority notes that meeting one or both of the safe harbour thresholds does not necessarily mean that the proposed transaction complies with the Merger Rule.

Exclusion for economic efficiencies

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. This involves a net economic benefit analysis.

Merger notification

There is no requirement for merger parties to notify the Authority of mergers, and there are no minimum turnover or value thresholds under the Ordinance. However, for a horizontal merger where the post-merger combined market share of the parties to the transaction is 40% or more, it is likely that the merger will raise competition concerns and the Authority is likely to make a detailed investigation of the transaction.

It may be in the interest of the parties to a merger to contact the Authority at an early stage to understand whether the Authority has any concerns about the proposed transaction. Such

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contacts in advance may enable the parties to identify any potential competition concerns and to address the issues in good time, as well as to minimise the risk that proceedings are brought by the Authority before the Tribunal (which may result in the unwinding of a completed merger or stopping the merger process in case of an anticipated merger).

Informal advice

The Authority encourages parties to contact it at the earliest opportunity to discuss a proposed merger that falls within the Merger Rule. The Authority is willing to provide informal advice on a confidential basis. The advice is not binding on the Authority, and is simply a preliminary view as to whether the proposed merger is likely to raise competition concerns. There is no timetable for providing informal advice, but the Authority will try to deal with requests within the parties' requested timeframe.

The Authority expects parties to provide evidence that either a heads of agreement, term sheet, or sale and purchase agreement are in place. Parties may make reference to Form M (available on the Authority's website), which sets out the types of information that may be provided to the Authority when seeking informal advice, including:

(a) a summary of the proposed merger;
(b) ownership structure (pre-merger and post-merger);
(c) details of affected carrier licensees;
(d) strategic and economic rationale for the merger;
(e) competition assessment (including counterfactual, barriers to entry, countervailing buyer power, unilateral effects, coordinated effects, etc.);
(f) internal documents and reports obtained by the parties in connection with the merger; and
(g) any relevant market research reports that are available to the merging parties.

There is no filing fee or cost recovery in respect of a request for informal advice from the Authority.

Decisions

Parties to a merger or proposed merger may apply to the Authority for a decision as to whether or not the merger is, or would be if completed, excluded from the application of the Merger Rule (**Decision**). The Authority is only required to consider an application for a Decision if:

(a) the application poses novel or unresolved questions of wider importance or public interest;
(b) the application raises a question of an exclusion for which there is no clarification in existing case law or decisions of the Authority; and
(c) it is possible to make a Decision on the basis of the information provided.

The time taken by the Authority to make a Decision will depend on the nature and complexity of the transaction and the resources available to the Authority at the time. The Authority will endeavour to process applications in an efficient and timely manner with due regard to the circumstances of the case. The application fee is HK$500,000.

Parties to a merger may apply to the Tribunal for a review of a Decision made by the Authority. An application for review must be made within 30 days after the day on which the Decision was made. This time may be extended at the discretion of the Tribunal. Upon review, the Tribunal may confirm or set aside the Decision.

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Overview of merger control activity during the last 12 months

In October 2017, the Authority announced that it would not commence an investigation under the Ordinance in respect of the acquisition of Hutchison Global Communications Investment Holding Limited (HGCIH) by Asia Cube Global Communications Limited. The acquisition fell within the Merger Rule because HGCIH's subsidiary, Hutchison Global Communications Limited, is a carrier licensee under the Telecommunications Ordinance. The Authority decided that the acquisition was unlikely to have the effect of substantially lessening competition in Hong Kong.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition etc.

Markets covered by Merger Rule

The Merger Rule only applies to mergers involving at least one telecommunications carrier licensee. However, once the "carrier licence" threshold is met, the Authority may consider the effect of the merger on any market in Hong Kong (not just a telecommunications market). To date, the Authority has only considered the effect of mergers on telecommunications markets. However, with the broadening of the Merger Rule under the Ordinance, it is possible that the Authority will consider the effects on competition in non-telecommunications markets.

Market definition

In defining the relevant market, the Authority will consider both product and geographic dimensions. The relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question.

The primary test employed by the Authority for these purposes is the small but significant non-transitory increase in price (SSNIP) test. This test involves a consideration of whether a hypothetical firm with a monopoly in that market (hypothetical monopolist) would be able profitably to impose an increase in price that is small but significant (typically between 5% and 10%) and non-transitory. If enough buyers would switch to substitute products/geographic areas in the face of a SSNIP to make the attempted price increase unprofitable, the candidate market is too narrow. The candidate market is then expanded to include the substitute products/geographic area to which buyers would turn, and the same analysis is performed on this broader candidate market. The relevant market will be that group of products over which a hypothetical monopolist can profitably impose a SSNIP.

In defining the relevant market, the Authority will also consider the areas of overlap in the merging parties' activities. This is particularly the case in differentiated product markets, where the merging parties' products or services may not be identical, but may still be substitutes for each other. The Authority will look at all of the evidence, and the Merger Rule may apply in the absence of substantive overlap.

Telecommunications markets

Telecommunications markets may be characterised by dynamic and rapid technological changes. In such circumstances, market boundaries are not likely to remain constant. In its assessment of the CSL and HKT transaction referred to above, the Authority considered the following markets in the telecommunications sector:

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(a) retail mobile telecommunications services;
(b) wholesale access to mobile networks;
(c) backhaul services;
(d) interconnection services;
(e) international roaming services; and
(f) other services.

Key economic appraisal techniques applied

Substantial lessening of competition

A merger will breach the Merger Rule if it has, or is likely to have, the effect of substantially lessening competition in Hong Kong. The following matters may be considered in determining whether competition is substantially lessened:

(a) the extent of competition from competitors outside Hong Kong;
(b) whether the acquired undertaking or part of the acquired undertaking has failed or is likely to fail in the near future;
(c) the extent to which substitutes are available or are likely to be available in the market;
(d) the existence and height of any barriers to entry into the market;
(e) whether the merger would result in the removal of an effective and vigorous competitor;
(f) the degree of countervailing power in the market; and
(g) the nature and extent of change and innovation in the market.

Market power

In assessing a merger, the Authority will consider whether a merger creates or enhances market power. The Authority will consider that the merger substantially lessens competition in contravention of the Merger Rule if:

(a) there is a reasonable likelihood that prices in the relevant market will be maintained at a significantly greater level than would be the case in the absence of the merger; or
(b) competitive outcomes would be otherwise distorted, such as reduction in consumer choice, product quality or innovation in a relevant market.

Level of competition following merger

In assessing the effect of a merger on competition in a market, the Authority will consider the level of competition following the merger. Concerns under the Merger Rule are unlikely to arise where there are sufficient competitive constraints on the merged entity that will discipline its post-merger commercial behaviour. However, concerns may arise if the merger has the effect of changing the structure of the market in such a way that it diminishes market participants' incentives to compete.

The Authority will take into account:

(a) the market structure (including market shares, market concentration, barriers to entry, vertical integration, buying power and import competition); and
(b) non-structural factors such as the strategic behaviour of firms (e.g. raising barriers to entry).

Counterfactual

The Authority will usually employ an analytical tool called the "with-and-without" test.

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That is, the level of competition that is likely to exist in a market with the merger will be assessed and compared with the level of competition that is likely to exist in the market without the merger. The competitive situation without the merger is referred to as "the counterfactual". This analysis will be applied prospectively, that is, future competition will be assessed with and without the merger.

In most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition, as this may provide a reliable indicator of future competition without the merger. However, the Authority may 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.

Exclusion for economic efficiencies

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. This involves a net economic benefit analysis. The three general types of economic efficiencies are productive, allocative and dynamic. The undertaking claiming the benefit of the exclusion has the burden of proving that it applies.

Approach to remedies

Investigations

The Authority has power to investigate mergers. The Authority may conduct an investigation into a merger or anticipated merger if it has reasonable cause to suspect a contravention of the Merger Rule. In relation to completed mergers, the Authority must commence an investigation within 30 days after the Authority becomes aware, or ought to have become aware, of the merger. There is no fixed timeframe for completing an investigation.

Tribunal proceedings

If the Authority, after carrying out an investigation, has reasonable cause to believe that a merger contravenes the Merger Rule, it may bring proceedings before the Tribunal, seeking orders to stop the contravention. Applications to the Tribunal must be made within six months after the day on which the merger was completed or the Authority became aware of the merger (whichever is the later).

If the Tribunal is satisfied that there has been a contravention of the Merger Rule, it may make any orders it considers appropriate, including unwinding a completed transaction, or stopping the process in relation to a proposed transaction. The Tribunal may also impose pecuniary penalties of up to 10% of the turnover of the undertaking for each year in which the contravention occurred. A decision of the Tribunal made under the Ordinance can generally be appealed to the Court of Appeal.

Commitments

The Authority may accept a commitment from a person to take or refrain from action that the Authority considers appropriate to address its concerns about a possible contravention of the Merger Rule (Commitment). As soon as possible after accepting a Commitment or variation of a Commitment, the Authority must publish the Commitment or variation. The Authority must establish and maintain a public register of Commitments. The Authority may omit confidential information from any entry made in the register.

If the Authority considers that a person has failed to comply with a Commitment, it may apply to the Tribunal for an order. The Tribunal may make orders including directing the person to:

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(a) take such action or refrain from taking such action as is specified in the Commitment;

(b) pay the Government an amount not exceeding the amount of any profit gained or loss avoided as a result of the failure to comply; and

(c) compensate any person for any loss or damage caused by the person's failure to comply with the Commitment.

The Authority may also withdraw its acceptance of a Commitment. Following withdrawal, the Authority may commence an investigation or bring proceedings before the Tribunal.

Insights on Hong Kong's merger control regime

To avoid future complications, parties to a merger that falls within the Merger Rule should consider consulting with the Authority before completion. This would reduce the risk of the Authority investigating the merger or commencing proceedings in the Tribunal in relation to the merger. Parties to a merger may seek informal advice from the Authority as to whether the Authority has any concerns. To facilitate a timely review of a proposed merger by the Authority, merger parties are encouraged to provide as much relevant information as possible regarding the transaction.

Mergers that give rise to economic efficiencies that outweigh the adverse effects caused by any lessening of competition in Hong Kong are excluded from the Merger Rule. Merger parties should consider whether to make arguments to this effect when approaching the Authority.

Reform proposals

The scope of the Merger Rule remains limited to undertakings in the telecommunications sector. However, the Authority has indicated it will seek to extend the Merger Rule in the future to other sectors, after businesses and consumers become more familiar with the competition law regime.

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India

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The Indian merger control regime

The regulation in India of mergers under competition law commenced only on June 1, 2011 when Sections 5 and 6 of the Competition Act, 2002 ("Competition Act") entered into effect. Prior to June 2011, there was no statutory obligation to notify any antitrust authority (or to seek approval from such authority) before concluding an M&A transaction.

Section 5 of the Competition Act prescribes the jurisdictional thresholds (based on assets and turnover of the combining parties) for transactions that must be notified to the Competition Commission of India ("CCI") prior to implementation. Thus, a transaction that satisfies Section 5's jurisdictional thresholds (referred to under the Competition Act as a 'combination') must be notified to the CCI unless the transaction is exempt from the notification requirement either because it falls within: (a) one or more of the safe harbours provided under the Competition Commission of India (Procedure in regard to transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations") issued by the CCI; or (b) notifications issued by the Government of India. In other words, a transaction that qualifies as a combination (that is, it meets the Section 5 thresholds) and is not exempt, must be notified to the CCI; such a transaction cannot be consummated until the CCI grants its approval or the review period of 210 days have lapsed, whichever is earlier.

Section 6 of the Competition Act prohibits transactions that cause or are likely to cause an appreciable adverse effect on competition ("AAEC") in India and makes them void.

In a little less than seven years since the commencement of merger control under the Competition Act, more than 550 combinations have been notified to the CCI. The CCI has rendered orders in respect of more than 500 of the notified combinations, making the Indian competition authority one of the most active in merger control regulation in the world. To date, the CCI has not blocked a single transaction.

Overview of merger control activity and the key industry sectors during 2017-18

During the preceding 12 months, the CCI continued to remain busy in its review and assessment of notified combinations. More than 90 combinations were notified to the CCI since January 2017 and the CCI cleared more than 60 of the notified combinations, including three combinations following a Phase II investigation.

The last year witnessed increased consolidation in the telecommunications, e-commerce and agro-chemical sectors, among others. Some of the important transactions in the telecommunications sector included *Vodafone/Idea* (merger between two of the prominent players in the mobile telecommunications sector) and *Bharti Airtel/Tata* (acquisition of Tata's consumer mobile business by Airtel). The major transactions in the e-commerce

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sector included *EBay/Flipkart* (acquisition of EBay India by Flipkart and EBay Singapore's acquisition of a 6.2% equity interest in Flipkart), *SVF/Flipkart* (SoftBank Group's acquisition of a 20% interest in Flipkart), *Alibaba/SGS* (Alibaba's acquisition of a 25% stake in SGS's food and grocery e-commerce business, Big Basket), and *Amazon/Shopper's Stop* (Amazon's acquisition of a minority non-controlling stake of 5% in Shopper's Stop). Important transactions in the agrochemical sector included *Dow/DuPont* (merger of Dow Chemical Company and DuPont Inc. involving overlaps in their herbicides business), *FMC/DuPont* (divestment of Dow-DuPont's herbicides and insecticides business to FMC as part of Dow-DuPont's global commitments) and *Agrium/Potash* (the merger of two of the largest suppliers of potash in India).

New developments in the merger control regime

In the past year, the Government of India introduced significant changes in merger control to streamline the merger review process with a view to enhance the ease of doing business in India. Thus, for example, the Government removed the 30-day time deadline for notifying a combination to the CCI. As a result, parties to a transaction are now free to notify a proposed combination to the CCI at any time after execution of the binding documents that trigger the obligation to notify the CCI, but before consummation of the transaction. This comes as a relief for transacting parties, many of whom have been penalised in the past for failing to notify a notifiable transaction within the 30-day time deadline.

Furthermore, all transaction structures (i.e., acquisitions, mergers and amalgamations) now benefit from the *de minimis* exemption, which was earlier available only to transactions structured as acquisitions. The Government also clarified the availability of the *de minimis* exemption and has declared that only the value of assets of, and turnover attributable to, the target's division or business being transferred will now be taken into account, and not the entire assets or turnover of the seller. Previously, there was confusion as the CCI, while considering the applicability of the *de minimis* exemption, had taken into account the entire assets and turnover of the seller, making the *de minimis* exemption both illogical and of limited use. The Government has also reduced the CCI's strength from seven members (comprising one chairperson and six members) to four members (comprising one chairperson and three members).

During the preceding 12 months, the Supreme Court of India, the highest appellate authority, has for the first time rendered judgments on critical matters relating to merger control. In both the appeal cases argued before the Supreme Court, the Court upheld the CCI's findings in respect of the notification of composite combinations and the CCI's powers to impose fines for non-compliance with the merger control rules. It is notable that neither the Competition Act nor the Combination Regulations define the term 'composite combinations'. The Combination Regulations, however, make it clear that where a proposed combination comprises a number of inter-connected transactions, all such transactions must be notified to the CCI as long as at least one such transaction exceeds the Section 5 thresholds (even if one or more of these transactions, on a standalone basis, benefited from a notification exemption or did not meet the Section 5 jurisdictional threshold).

Specifically, in the *Thomas Cook Appeal*, the Supreme Court clarified that the question of whether or not certain individual transactions form part of one viable business transaction (thus, constituting a composite combination) depends on the "*facts and circumstances of the cases*" and, therefore, require a case-by-case assessment. In upholding the CCI's findings on the various transactions engaged in by Thomas Cook, the Court considered, among other

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factors, that the market purchases took place almost contemporaneously with the preparation and finalisation of the scheme (of demerger and amalgamation). The Supreme Court observed that it "*was evident in the facts and circumstances of the case [that] .. TCISIL [Thomas Cook] would not have made market purchase in the absence of any one transaction. Thus, [the] market purchases could not have been termed to be independent transactions*."

Applying the "*ultimate objective*" test, the Court found that the "*market purchases were within [the] view of the scheme that was framed*". The Court also rejected the claim that the market purchases benefited from the *de minimis* exemption (applicable at that time) and observed that: "*…When [a] series of transactions [are] envisaged to accomplish a combination, all the transactions have to be taken into consideration by the Commission, not an isolated transaction. While it is open for the parties to structure their transactions in a particular way, the substance of the transactions would be more relevant to assess the effect on competition irrespective of whether such transactions are pursued through one or more step/transactions. Structuring of transactions cannot be permitted in such a manner as to avoid compliance with the mandatory provisions of the Act.*" This judgment of the Supreme Court makes it abundantly clear that, ultimately, whether or not a transaction should be notified under the Competition Act must be tested having regard to the 'anti-avoidance rule', and the notification requirement must be assessed based on the substance of the transaction and not on its formal presentation to the CCI or as described formally in an agreement.

Again, in the *SCM Soilfert Appeal*, the Supreme Court considered all the facts and circumstances surrounding the combination and rejected the parties' claim that the transaction involving the acquisition of 24.46% of Mangalore Chemicals and Fertilisers Limited's issued equity shares was not a notifiable transaction as it benefited from the 'investment only' exemption. Among other things, the Court relied on a contemporaneous press release filed by the appellant with the stock exchanges which indicated that the intent was not to deploy funds solely as a passive investment, but rather for making a strategic investment. Accordingly, the Court held that both the transactions involving the acquisition of 24.46% shares and 1.7% shares, respectively, of Mangalore Chemicals and Fertilisers Limited, were notifiable to the CCI prior to their consummation.

As regards penalties, the Supreme Court rejected the claim that no penalties could be imposed since there were no *malafides*. The Court clarified that "*there was no requirement of mens rea under section 43A or intentional breach as an essential element for levy of penalty.*" Accordingly, the penalties imposed by the CCI in both the Thomas Cook Appeal and the SCM Soilfert Appeal were upheld.

During the past year, the CCI has penalised a number of companies for not only late filings, but also failure to notify transactions that should have been notified in line with its past practice. In a number of instances, the CCI has also rejected notices as invalid notifications, including on the basis that the notification contained incomplete information and that the notification form did not conform to the Combination Regulations. Parties to a notifiable transaction should note that once a notice is invalidated by the CCI, the CCI's review timelines will commence afresh with the subsequent filing of another notification in respect of the same transaction. In addition, the invalidation of a notification by the CCI may also result in forfeiture of filing fees, and the notifying parties will then have to deposit the filing fees once again.

Review of combinations

The combination review process under the Competition Act envisions an assessment of the likely competitive effects of a proposed combination, with the result that identification of

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the relevant market becomes the first step in the review process. The CCI has adopted a pragmatic approach to market definition and has left the market definition open in cases where the notified combination does not raise competitive concerns. For identifying the relevant product market, the CCI considers primarily the nature of the product, its characteristics, demand-side substitutability and supply-side substitutability. In relation to the geographic scope of the relevant market, the CCI has considered smaller (localised) markets to assess the impact of the notified combination in the smallest possible market, but in most cases, the CCI has considered a pan-India market (even if the market may be wider than India).

The framework for determining whether the notified combination is likely to cause AAEC in the relevant market in India is provided under Section 20(4) of the Competition Act. In practice, the CCI has largely focused on the following factors:

(a) In relation to horizontal overlaps, the CCI frequently focuses on the individual and combined market shares of the parties to the notified combination (including incremental market shares), structure of the relevant market, level of competition remaining after consummation of the transaction, combinations resulting in acquisition of a potential competitor, or elimination of a maverick player. Where relevant, the CCI also takes into account countervailing buyer power to assess the competitive effects of a proposed combination.

(b) In relation to vertical relationships, the CCI reviews the extent to which the parties to the proposed combination are vertically integrated; that is, whether the vertical relationship of the combining parties would result in market foreclosure, including suppliers not being able to launch or maintain the supply of products/services in the market and consumers not being able to procure the relevant products/services from other suppliers.

The CCI generally considers efficiency-enhancing arguments on a transaction-specific basis, but only if they are credible and verifiable, even if not specifically quantifiable.

Review process

As noted above, the parties to a notifiable transaction are obligated by the Competition Act to suspend the closing/consummation of the transaction until the receipt of the CCI's approval or the expiry of 210 calendar days from the date of notification, whichever is earlier. The CCI's review may involve the following two steps, depending on the nature and complexity of the notified combinations:

Phase I review – Upon receipt of a notification, the Combination Regulations provide the CCI a self-imposed time limit of 30 business days within which the CCI is required to form a *prima facie* opinion on whether the combination is likely to cause or has caused an AAEC in India. The CCI may also require the parties to clear defects, furnish additional information and even accept modifications (offered by the parties) before forming a *prima facie* opinion on the notified combination. The time taken by the parties to remove defects, furnish additional information or make modification offers is excluded from the review timeline of 30 business days. In addition, the CCI may consult third parties in respect of the notified combination.

If the CCI forms a *prima facie* opinion that the proposed combination does not cause (and is not likely to cause) an AAEC, the combination is cleared by the CCI with or without modifications (if offered by the parties).

Phase II investigation – If the CCI forms a *prima facie* opinion that a combination causes or is likely to cause an AAEC, it will 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

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parties are given 30 calendar days to respond to the show cause notice. After the response is filed by the parties, the CCI may either clear the combination or may conduct a detailed investigation (on its own or through the DG) if the CCI is not satisfied by the response provided by the parties.

If the investigation is being conducted by the CCI, the parties will be directed, within seven business days from the receipt of the parties' response to the show cause notice, to publish within ten business days the details of the notified combination. If the investigation is being conducted by the DG, the parties will be directed within seven business days from the receipt of the investigation report of the DG to publish within 10 business days the details of the notified combination. The published information must include information relating to: (a) parties to the combination; (b) nature of the notified combination; (c) business activities of the parties to the transaction; (d) relevant market; and (e) competitive assessment.

The CCI will invite any person or member of the public who is affected or likely to be affected by the combination to file their written objections with the CCI within 15 business days from the date on which the details of the combination are so published.

After the 15-business day period for the filing of written objections by members of the public has ended, the CCI has 15 business days to ask the parties to furnish additional information and the parties must comply within 15 calendar days of the request.

Outcome of the Phase II Investigation – Within 45 business days from the date that all requested information is received, the CCI will pass an order either approving or prohibiting the combination outright, or approving the combination with modifications.

Approach to remedies: (i) to avoid Phase II Investigation and (ii) following Phase II investigation

The question of whether or not a particular combination would warrant imposition of remedies is determined on a case-by-case basis after a thorough assessment of the surrounding facts and circumstances.

Where the parties anticipate that the CCI will likely form an opinion that a proposed combination causes or is likely to cause an AAEC, the parties have the option to propose remedies (behavioural or structural) during the Phase I review so as to obtain the CCI's clearance in the Phase I review itself. Thus, for example, in *Abbott/St. Jude*, the parties proposed structural remedies in the Phase I review and the transaction was cleared by the CCI in Phase I itself.

Where the CCI forms a *prima facie* opinion that the proposed combination causes or is likely to cause an AAEC and, as noted above, issues a show cause notice to the parties, the parties may offer remedies (behavioural or structural) to the CCI in their response to the show cause notice. For example, in *Nippon/Kawasaki*, the CCI accepted the behavioural remedies proposed by the parties in their response to the show cause notice and cleared the transaction.

Following the Phase II Investigation (noted above), if the CCI is of the opinion that the proposed combination is likely to cause an AAEC but such adverse effects could be eliminated through appropriate remedies, the CCI may propose remedies to the parties. If the parties do not accept the CCI-proposed remedies as proposed by the CCI, the parties may submit amendments to the remedies proposed by the CCI. If the CCI does not accept the amendments to the CCI-proposed remedies submitted by the parties, the parties will then have to accept the modifications previously proposed by the CCI.

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Key policy developments – Issuance of any formal or informal guidance on key assessment procedure

Last year in August, the CCI, for the first time, issued a 'guidance note on non-compete restrictions' typically found in sale-purchase and joint venture agreements ("Guidance Note"). The Guidance Note is largely based on the (European) 'Commission Notice on restrictions directly related and necessary to concentrations', and provides guidance for assessing the reasonableness of non-competes for joint ventures and outright sale of control transactions.

In terms of the Guidance Note, for a restraint to be directly related to the transaction, it must not only be closely linked to the combination, but must be ancillary or subordinate to its main object. The restraint must also be economically related and intended to allow a smooth transition from the *status quo* to the new state of business affairs. A non-compete restriction would be considered 'necessary' if, in the absence of such a non-compete restriction, the combination could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably more difficulty. Also, the non-compete covenant must be reasonable in terms of its duration, subject matter, geographic outreach and scope of application, and must be the least restrictive among equally effective alternatives.

In the Guidance Note, the CCI has clarified that even if the CCI is of the opinion that the proposed non-compete restrictions are not 'directly related and necessary to the implementation of the combination', the notified combination would be independently assessed and cleared if the combination itself does not raise competitive concern. In such a scenario, the CCI would approve the notified transaction, stating that the non-compete restriction is not 'ancillary' to the notified transaction, and the non-compete would be subjected to scrutiny and assessment under Section 3 (prohibition of anti-competitive agreements) and Section 4 (prohibition of abuse of dominance) of the Competition Act. Recently, in *Daichi-Life*, while approving Daichi-Life's acquisition of 39.62% shareholding in Union Asset Management Company Private Limited, the CCI noted that "*the non-compete covenant, to the extent it relates to the scope of products or services of the proposed combination, is* ***beyond what is necessary for the implementation of the proposed combination and therefore, is not ancillary to the proposed combination***" in terms of the Guidance Note. This means that the non-compete covenant will be susceptible to the CCI's review for any violation of the provisions of Sections 3 and 4 in the future.

Reform proposals

While the CCI has issued the Guidance Note to provide guidance on the assessment of non-compete covenants accompanying a combination, there is no published guidance for other forms of ancillary restraints, such as IP licences and supply and distributorship arrangements. Contractual restraints accompanying a notifiable transaction that are found not to be ancillary will be assessed by the CCI under Section 3 (anti-competitive agreements) of the Competition Act. While in the case of exclusive, long-term IP licences, Section 3(5) of the Act, which provides an exception to the Section 3 prohibition, should have provided a natural safe-harbour, the CCI's overly restrictive interpretation of this exception has limited its guidance value. Given the CCI's significant experience of over seven years in merger control, the time has come for it to provide published guidance to improve legal certainty on all of the above types of ancillary restraints that accompany a joint venture or sale of control transaction.

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Mr Pathak has practised law for more than 25 years. Prior to joining P&A Law Offices, he was a lawyer in Brussels, Cleveland and Palo Alto. He is admitted to practise law in India and the states of Ohio and California in the United States. He is a graduate of Cambridge University and Yale University and has worked at both the European Court of Justice and in the Competition Division of the Legal Service of the European Commission. He has received several awards for M&A and competition law, including 'Best M&A Lawyer in India in 2008'; 'India M&A Legal Counsel of the Year' in 2009; 'India M&A Lawyer of the Year' in 2011; 'India Competition Lawyer of the Year' in 2012; 'India M&A Lawyer of the Year–2012'; and 'India Competition Lawyer of the Year' in 2013, 2014, 2015 and 2016.

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Indonesia

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Overview of merger control activity during the last 12 months

According to its website, the Indonesian Business Competition Supervision Commission (the "KPPU") received 90 merger notifications in 2017, which is a significant increase from the previous year, when the KPPU received 65 notifications. This increase can at least partly be explained by the KPPU's increased enforcement efforts (as discussed in further detail below).

While the number of merger notifications has increased, in many cases the KPPU is still to issue an opinion. At the time of writing, 35 of the 2017 notifications have not yet been reviewed, because the KPPU is still verifying whether the submission is complete. 26 notifications were not reviewed by the KPPU, as the underlying transaction was not notifiable under Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unhealthy Business Competition (the "Indonesian Competition Law" or "ICL"). 10 transactions that were notified in 2017 are in the process of being reviewed by the KPPU and an opinion is expected shortly. Finally, the KPPU has issued opinions regarding 19 transactions that were notified in 2017.

The low number of opinions that were issued so far illustrates that the KPPU is currently struggling with a capacity issue. The authority has experienced an outflow of staff in recent years. Only a handful of officials are currently working for the Directorate of Mergers to handle merger notifications.

Merger notification procedures are not only lengthy because of the KPPU's lack of staff, but also because the authority expects parties to always make a full submission, even if it is clear from the outset that there is no market overlap between the acquiring party and its affiliates on the one hand, and the target company and its affiliates on the other hand. Note that the Indonesian Competition Law also does not make a distinction between first stage and second stage clearances.

New developments in jurisdictional assessment or procedure

Merger control in Indonesia is governed by the Indonesian Competition Law, Government Regulation No. 57 of 2010 on Mergers, Consolidations and Acquisitions of Shares that May Result in Monopoly or Unfair Business Competition Practices, and four KPPU regulations which set out guidelines, the last of which was issued in 2013. Since then, there have been no amendments to the legislation relating to merger control.

Based on the above legislation, a transaction – even if foreign-to-foreign – should be notified to the KPPU if:

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- *The transaction constitutes a merger, consolidation or an acquisition within the meaning of Indonesian competition law.*

  According to the KPPU Guidelines, an acquisition within the meaning of Indonesian competition law would involve a change of control, i.e., the acquiring party owning more than 50% of the shares and voting rights or holding factual control, i.e. the ability to influence or direct the company's policy and/or management. This occurred, for instance, in the acquisition of shares in PT Asuransi Dharma Bangsa by AXA SA in 2011. Although AXA SA acquired only 40% of the shares in the target, while the remaining 60% of the shares were acquired by Bank Mandari, the KPPU considered that AXA SA gained control over the target, as: (i) AXA SA had the power to nominate two out of three directors, including the President Director; and (ii) AXA SA's core business is in insurance, while Bank Mandiri's core business is in banking.[1]

  While the law is unclear, one conservative interpretation is that there could also be a change of control if there is a change from sole to joint control. Based on information from a KPPU official, we understand the notification requirement was triggered by a change from sole to joint control in a purchase of shares in PT Putra Sinar Remaja by Reco Kris Private Limited in 2017.[2]

  The acquisition can be realised through an acquisition of shares, private or public takeover, or share subscription.

  A merger, consolidation or an acquisition involving a joint venture would also need to be notified. However, no notification is required if two or more shareholders create a Greenfield joint venture. Asset transactions are also exempted and do not need to be notified to the KPPU. However, there is now a tendency for the KPPU to require parties to also make a notification in case of non-share transactions that are similar to share transactions, such as capital interest transactions.[3] See also our comments below under 'Reform proposals'.

- *The transaction meets the thresholds:*
  - the combined asset value exceeds IDR 2.5 trillion (approximately US$ 185 million at current exchange rate) (for banking businesses, the threshold is IDR 20 trillion or approximately US$ 1.48 billion); and/or
  - the combined sales value exceeds IDR 5 trillion (approximately US$ 370 million).

  The KPPU Guidelines provide that the assets and/or sales value must be calculated based on the latest annual financial reports, unless there is a difference in value of more than 30% compared to the previous year, in which case the calculations must be based on the average assets value and/or sales of the last three years.

  Relevant for the calculation are the assets and/or sales value of: (i) the target; (ii) the acquiring party; (iii) the ultimate shareholders of the target/the acquiring party; and (iv) all controlled direct and indirect subsidiaries of the ultimate shareholders, the acquiring party and the target. Even if a company is part-owned, the entire assets and sales value should be considered when calculating the threshold. However, only assets or sales within Indonesia will be counted to establish whether the threshold has been met. Revenue accruing from export activities should be excluded from the calculation. Note that the assets and/or sales of a single entity, e.g. only the target, may trigger the notification requirement.

  In case a transaction would involve a change from single control by an existing shareholder to joint control by the existing shareholder and the acquiring party, it would

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be prudent to not only take into account the assets and/or sales value of the acquiring party and target, but also the assets and/or sales value of the existing shareholder, its ultimate shareholders (which are also the ultimate shareholders of the target), and all controlled direct and indirect subsidiaries of these ultimate shareholders.

It is common to use historical exchange rates when calculating the thresholds. However, where the exchange rate is worse at the time of closing of the transaction and as a result, the thresholds would be met, it is prudent to use this exchange rate.

- *The target is an Indonesian business actor (e.g. an Indonesian limited liability company (perseroan terbatas or PT) or the transaction otherwise has a direct impact on the Indonesian market, i.e.:*
  - all parties involved in the transaction are conducting business in Indonesia, whether directly or indirectly (the KPPU Guidelines give an example of "conducting business" through controlled subsidiaries in Indonesia), or
  - one of the parties to the transaction is conducting business in Indonesia while the other party is conducting sales in Indonesia, or
  - one of the parties to the transaction is conducting business in Indonesia while the counterparty has a sister company conducting business in Indonesia.

  The KPPU's authority to assess foreign-to-foreign transactions is based on the definition in the Indonesian Competition Law of the term "business actor", which is an individual or a business entity established and domiciled in, or conducting activities within the Indonesian jurisdiction. Since the 2007 Temasek case, the KPPU applies the Single Economic Entity doctrine to determine whether a business entity is conducting activities within the Indonesian jurisdiction. In this case, the KPPU argued that a group of companies should be deemed to constitute a Single Economic Entity if the subsidiaries cannot independently determine its policies. This implies that where the holding company is just a passive investor, i.e. with no voting rights, no representatives in the management of the company, no ability to determine company policies or company management, no access to confidential information, a group of companies should be deemed to constitute a Single Economic Entity.[4] The KPPU arrived at a similar conclusion in the 2010 Pfizer case.[5]

  According to the KPPU Guidelines, other mergers, consolidations or acquisitions involving a foreign party are assessed by the KPPU on a case-by-case basis, where the KPPU will look at whether: (i) the transaction has any effect on local competition; and (ii) its authority can effectively be applied – likely using the Single Economic Entity doctrine, as discussed above. This occurred, for instance, in a 2013 transaction involving the acquisition of KUFPEC Indonesia (Pangkah) (BV) (KUFPEC) by PT Saka Energi Indonesia, a subsidiary of PT Perusahaan Gas Negara. In this case, albeit being a Dutch limited liability company, KUFPEC was deemed by the KPPU to conduct business in Indonesia because it held a 25% participating interest, through direct investment, in the Pangkah Block, off the coast of Surabaya.[6]
- *The transaction is conducted between non-affiliated companies: If the transaction is conducted between affiliates, the transaction is exempted (regardless if other criteria are met).* According to the KPPU Guidelines, a company is an affiliate of another if:
  - it either directly or indirectly controls or is controlled by that company;
  - both it and the other company, directly or indirectly, are controlled by the same parent company; or

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- there is a "main principal shareholder" relationship with the counterparty (*pemegang saham utama*).

If the target is foreign, the aforementioned should be determined on the basis of the law applicable in the jurisdiction in which the target is established and domiciled.

While Greenfield joint ventures and asset transactions are exempted, the KPPU is closely following market developments and may issue a warning where it feels that a transaction may have anticompetitive effect, even though no merger notification is required. This occurred, for instance, at the end of 2016, when PT Indosat Tbk and PT XL Axiata Tbk, two major players in the Indonesian telecommunication sector, announced plans to establish a joint venture. The KPPU issued a warning to the parties, stating that it had concerns the joint venture would be used as a facilitating device to exchange confidential information for price-fixing, market allocation and output restriction. We understand that following a meeting with the KPPU, the parties decided to put the joint venture plans on hold.

The KPPU also commonly sends letters to parties, requesting them to make a notification, where it is not clear from market information whether or not the transaction meets the criteria for notification. This occurred, for instance, in April 2018, when Grab and Uber announced their plan to join forces.

To avoid any misguided statements from the KPPU and resulting negative public perceptions, or worse, the KPPU imposing fines for late notification or initiating a formal investigation because a transaction is suspected to result in monopolistic practices or unhealthy business competition, it may be advisable to do a formal pre-merger consultation or otherwise clarify the transaction and ask for guidance from the KPPU prior to completion of the transaction.

There can be certain other advantages to doing a pre-merger consultation, including:

- A pre-merger consultation would allow the merging parties to know in advance what remedies may need to be offered. Based on this information, they could decide not to implement the merger if they feel that the remedies to be offered cause more harm than the benefit the merger promises. Under these circumstances, the parties also have more leverage to negotiate remedies with the KPPU.
- If the merging parties, prior to the completion of the transaction, have performed a pre-merger consultation, the relevant antitrust legislation provides a chance for the KPPU to accelerate the post-merger notification process, regardless of the types of merger. The KPPU has asserted that in case a pre-merger consultation has been conducted, it will not conduct a reassessment except if there are substantial changes to the information submitted during the pre-merger consultation or there is material change to the market condition when the post-notification is conducted, compared to the market situation before the merger is completed.

The parties doing the consultation are the acquiring entity and the target, while in case of a post-merger notification, it is the acquiring entity that is responsible for making the notification.

Upon a complete submission of a request for consultation, the KPPU should complete its initial assessment of the transaction within 30 business days, and its comprehensive assessment within 60 working days. However, as discussed in further detail below, in practice it will take several months before the KPPU deems the submission complete. Therefore, a pre-merger consultation would only be useful if closing of the transaction is not foreseen in a few months' time. If during the consultation the transaction is closed, the consultation process will stop, rendering the process useless, although a pre-merger consultation may somewhat speed up the post-merger notification process.

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Irrespective of whether the parties have done a pre-merger consultation, the acquiring party should submit a post-merger notification to the KPPU within 30 business days after the transaction becomes legally effective. In the event of a failure to notify within 30 business days, the KPPU may impose sanctions in the amount of IDR 1 billion (approximately US$ 70,000) per day, up to a maximum of IDR 25 billion (approximately US$ 1.75 million). A fine may even be imposed if the acquiring party has done a pre-merger consultation, but failed to submit the post-merger notification with 30 business days.[7]

To date, the KPPU has imposed fines for late notification of transactions in nine cases.[8] The KPPU has to date never imposed the maximum daily fine of IDR 1 billion or the total maximum fine of IDR 25 billion. However, there is no clear correlation between the number of days of delay and the size of the fines that have thus far been imposed, resulting in a high degree of legal uncertainty for companies that fail to notify their transactions within the prescribed period.

A KPPU decision to impose a fine for late notification may still be appealed to the courts. However, based on existing case law, there appears to be little chance that these KPPU decisions would be overruled on appeal: public records reveal that to date, all such court appeals have in the end been dismissed.[9]

As part of the notification, the acquiring party (in case of an acquisition) will need to submit: a notification form and additional documents, consisting of a power of attorney (if the notification is submitted by the party on behalf of a third party, e.g. a law firm); constitutional documents; company profiles; financial statements of the last three years, and schemes of ownership of the relevant parties; documents evidencing that the transaction is legally effective; a summary of the acquisition; and a business plan for the next three to five years. The KPPU may, and commonly does, ask parties to submit additional documents.

Before initiating its assessment, the KPPU will normally ask the notifying party to submit a summary of notification. This document should summarise the relevant facts as stated in the notification form and additional documents earlier submitted. In addition, the KPPU will normally invite the notifying party and/or its representatives to a clarification meeting, during which the officials handling the notification may already raise certain questions for clarification and request the notifying party to submit additional documents/information.

Upon the submission of a complete notification, the KPPU should complete its assessment of the transaction within 90 business days. To meet the legally prescribed deadline of 90 business days after complete submission of a notification for the review of a merger notification, the KPPU will normally only declare that the submission is complete when it is sure that the deadline can be met. Based on our review of the notifications in 2017 that were declared complete by the KPPU, it takes 193 days on average for the KPPU to declare a submission complete. In case the notification involves a foreign acquiring party and/or foreign target, this can even take 227 days. This is probably still a low estimate, considering that the notifications in 2017 that were not yet declared complete by the KPPU have not been taken into consideration when calculating this average.

Once a notification has been declared complete, the KPPU normally manages to meet the deadline and issue its opinion within 90 business days. However, in all, notifying parties should expect to only receive an opinion from the KPPU regarding their notified transaction a year after completion of the transaction, or even later. Apart from the uncertainty, the delays should have no impact on the transaction as such, as Indonesian competition law does not impose waiting periods or suspension of the completion of a transaction pending the issuance of an opinion by the KPPU.

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Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

The KPPU has reviewed a variety of industry sectors in the framework of merger control in the past 12 months, ranging from mining to petrochemicals, consumer packaging, food commodity trading, and the cinema business. Looking at its enforcement efforts (outside the realm of merger control), it appears that the authority is taking a particular interest in food commodities. However, the KPPU's focus will likely broaden in the coming years (see our comments under 'Key policy developments', below).

The approach adopted to market definition is set out in separate KPPU guidelines that were issued in 2009.[10] In accordance with the guidelines, the KPPU will look at product markets and geographical markets. To determine product markets, the KPPU looks at demand-side and supply-side substitution. For this it applies the SSNIP (Small but Significant, Non-transitory Increase in Price) test. To determine geographic markets, the KPPU looks at transportation costs, travel time, tariffs and regulations that may restrict the trade between cities/regions. In practice, the KPPU usually determines that the geographical market of a product is nationwide. This is always the case if products are sold online.

Given the limited number of notifications submitted in recent years, to date the KPPU has defined only a limited number of markets. When submitting a post-merger notification, it may therefore be helpful to share copies of decisions of competition authorities from other jurisdictions to give the KPPU some guidance in determining market definitions. Nonetheless, the KPPU sometimes likes to use its own market definitions in deviation from definitions used by competition authorities in other major jurisdictions.

In addition to using its own market definitions, the KPPU prefers to take a national approach and will generally not consider the nature of international competition when assessing transactions in the framework of merger control.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In case the transaction is notifiable, the KPPU will look at five different aspects to assess the transaction:

- *Market concentration*: To determine market concentration, the KPPU applies the Hirschman-Herfindahl Index (HHI), Delta HHI, or if no data available, other approaches to measure concentration, e.g. CR_4. Only if HHI > 1800 or Delta HHI > 150, does the KPPU look at other aspects below.
- *Entry barriers*: 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.
- *Potential for anti-competitive behaviour*: Apart from entry barriers, the KPPU will also assess the potential of anti-competitive behaviour by the relevant parties, looking at potential unilateral effect, coordinated effect, and market foreclosure.
- *Efficiency*: The KPPU will assess a transaction more positively if it has potential efficiency effects, benefiting customers. Efficiency gains should be compared against the anti-competitive effects of the transaction.
- *Bankruptcy*: Finally, the KPPU will assess a transaction more positively if the transaction can prevent one of the relevant parties from bankruptcy. Decrease of market players

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by bankruptcy would be deemed less beneficial than decrease of market players by the transaction.

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

Unlike in other jurisdictions, a merger notification in Indonesia does not result in the KPPU approving, conditionally approving or rejecting the acquisition. Instead, the KPPU will render an opinion, which can be:

- no allegation of monopolistic practice or unfair business competition;
- an allegation of monopolistic practice or unfair business competition; or
- a conditional no-allegation of monopolistic or unfair business competition.

In view of the above, even in case the KPPU renders an opinion in the form of an allegation of monopolistic practice or unfair business competition, the parties can still proceed with the acquisition. However, in such case the KPPU will likely initiate a formal investigation, which can result in certain sanctions.

Based on historical records, notifying parties should have little fear that their transaction needs to be unwound or assets need to be divested, a particular concern given that Indonesian merger control regime is a post-merger regime. In all 2017 cases, the KPPU concluded that the notified transaction was not suspected to result in monopolistic practices or unhealthy business competition. Before 2017, the KPPU only imposed remedies in a handful of cases. To the best of our knowledge, in all cases, the remedies consisted of behavioural remedies, instead of structural remedies.[11]

Key policy developments

New KPPU Commissioners were installed in May 2018. Only two out of nine Commissioners are incumbent Commissioners. We understand that the new Commissioners intend to be friendlier towards businesses and aim to prioritise mediation rather than enforcement measures in handling antirust issues. In addition, they will focus on certain latent and periodic issues, i.e. relating to food commodities, education, healthcare, energy, telecommunication, logistics, banking & finance and sectors that are controlled by State Owned Enterprises. In addition, the KPPU will focus on current and strategic issues, i.e. relating to e-commerce, e-payment, use of big data, and online transportation applications.[12] Otherwise there are no key policy developments relating to merger control to note at this stage.

Reform proposals

The Indonesian Parliament is current deliberating over a competition bill that is to replace the current Indonesian competition law.

The latest version of the bill that we reviewed introduces a mandatory pre-merger regime. It also imposes the pre-merger notification requirement on companies establishing a joint venture or engaged in an asset-acquisition transaction. The KPPU no longer issues opinions, but directs that a transaction should be approved. The KPPU is deemed to have approved a transaction if it has not completed its assessment of the proposed transaction within 25 business days. However, we understand that some stakeholders are now arguing that the current post-merger regime should be maintained, as Indonesia is said not to have the resources to apply a pre-merger regime.

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Fines are increased in the bill to be calculated as a percentage of the parties' turnover, ranging from minimum 5% (five per cent) to 30% (thirty per cent).

The bill does not contain clear transitional provisions, raising concerns that in case a pre-merger regime is introduced, transactions that are not yet closed at the time of enactment of the new law, cannot be closed pending approval of the transaction by the KPPU.

The bill is planned to be enacted this year. However, political processes in Indonesia are unpredictable, so the Parliament may need more time to conclude its deliberation.

* * *

Endnotes

1. KPPU Opinion No. A13911, point 20.
2. The KPPU Opinion has yet to be published.
3. See KPPU Opinion No. 21/KPPU/PDPT/VII/2015. The transaction in this case involved participation in a Vietnamese limited liability company in the form of capital interest. We understand that a Vietnamese limited liability company does not issue shares.
4. KPPU Decision No. 07/KPPU-L/2007, point 151. The decision was upheld by Supreme Court Decision No. 496K/PDT.SUS/2008 and No. 128PK/PDT.SUS/2009.
5. KPPU Decision No. 17/KPPU-I/2010. However, the decision was annulled by District Court of South Jakarta No. 05/Pdt.KPPU/2010/PN.Jkt.Pst. The District Court decision was upheld by Supreme Court Decision No. 294 K/PDT.SUS/2012.
6. KPPU Opinion No. 14/KPPU/PDPT/V/2014.
7. This is illustrated by KPPU Decision No. 07/KPPU-M/2014 (acquisition shares PT HD Finance, Tbk by PT Tiara Marga Trakindo), in which case PT Tiara Marga Trakindo did conduct a pre-merger consultation, but submitted the post-merger notification only 41 business days after closing of the transaction.
8. KPPU Decision No. 09/KPPU-M/2012 (acquisition shares PT Austindo Nusantara Jaya Rent by PT Mitra Pinasthika Mustika); KPPU Decision No. 01/KPPU-M/2014 (acquisition shares PT Tandan Abadi Mandiri by PT Muarabungo Plantation); KPPU Decision No. 03/KPPU-M/2014 (acquisition shares PT Sukses Abadi Karya Inti by PT Dunia Pangan); KPPU Decision No. 07/KPPU-M/2014 (acquisition shares PT HD Finance, Tbk by PT Tiara Marga Trakindo); KPPU Decision No. 02/KPPU-M/2014 (acquisition shares PT Subafood Pangan Jaya by PT Balaraja Bisco Paloma); KPPU Decision No. 17/KPPU-M/2015 (acquisition shares Woongjin Chemical Co. by Toray Advanced Materials Korea Inc.); KPPU Decision No. 16/KPPU-M/2015 (acquisition shares PT Binsar Natorang Energi by LG International Corp.); KPPU Decision No. 02/KPPU-M/2017 (acquisition shares PT. Citra Asri Property by PT. Plaza Indonesia Realty, Tbk.); KPPU Decision No. 08/KPPU-M/2017 (acquisition PT Mutiara Mitra Bersama by PT Nirvana Property)
9. See Supreme Court Decisions No. 679 K/Pdt.Sus-KPPU/2014 and No. 29 PK/Pdt.Sus-KPPU/2017; Supreme Court Decisions No. 687 K/Pdt.Sus.KPPU/2014 and 51 PK/Pdt.Sus-KPPU/2016; Supreme Court Decision No. 95 K/Pdt.Sus-KPPU/2015; and Supreme Court Decision No. 310 K/Pdt.Sus-KPPU/2017.
10. KPPU Regulation No. 3/2009 regarding Interpretation Guidelines on Relevant Markets.
11. Opinion KPPU No. 18/KPPU/PDPT/VII/2013 (the acquisition of Wyeth (Hong Kong) Holding Company Limited by Nestlé S.A.); Opinion KPPU No. 03/KPPU/

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PDPT/II/2014 (the acquisition of PT. Axis Telekom Indonesia by PT. XL Axiata Tbk.); Opinion KPPU No. 24/KPPU/PDPT/IX/2014 (the acquisition of PT Medika Sarana Traliansia by PT Koridor Usaha Makmur).

12. See: https://epaper.kontan.co.id/news/528219/Komisioner-KPPU-Baru-Janji-Ramah-ke-Pengusaha.

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Israel

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Overview of merger control activity during the last 12 months

The number of mergers notified to the Israel Antitrust Authority (the "IAA") decreased in the past year: from 192 merger notifications filed in 2016, to 159 merger notifications filed in 2017 regarding which decisions were rendered. This figure is much lower than the average number of mergers filed in the years 2006 and 2007, at around 240 mergers. The high figures from those times, and the significant drop in the number of mergers filed in the years thereafter, can be explained by the large amount of economic activity that occurred prior to the 2008 financial crisis and its impact on the economy. Additionally, at that time, the IAA had yet to publish the Antitrust General Director's Pre-merger Filing Guidelines of 2008, which, among others, clarified that certain types of transactions which were previously notified did not in fact require filing to the IAA.

* * *

The Restrictive Trade Practices Law (the "Antitrust Law") provides a general procedural framework which applies to all mergers. The investigatory process is not formally divided into phases, and all mergers must be reviewed by the General Director up to 30 days from the date merger notifications are filed. The term may be extended by the Antitrust Tribunal or by consent of the merging parties. If the General Director does not render a decision within the prescribed time period, consent to the merger is deemed to have been given. The average review process in 2016 lasted 26.3 days upon submission of merger notifications. This review time is slightly shorter than the 2014 review time, which lasted on average 27 days. It is difficult to predict whether the average review time during 2017 was shorter or lengthier than that of 2016 (official 2017 data has not been published at the time of the publication): on the one hand, the fast-track procedure for competitively benign mergers (discussed below) has been in place for a full year. On the other hand, in cases that seem complicated to the IAA, it started seeking the parties' consent in advance for an extension of several months of the review process.

On 8 May 2016, the IAA launched a three-month trial of a fast-track procedure for mergers that clearly do not raise a reasonable concern of causing significant harm to competition, called the 'Ultra Green Merger Procedure' (the IAA internally classifies mergers either green, yellow, red, and now – also ultra green, in accordance with their expected complexity and potential competitive effects). Following the trial period, the IAA concluded that the Ultra Green Merger Procedure was successful and significantly shortened review periods for mergers reviewed under the procedure. In fact, from the beginning of the trial period

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until the end of 2016, mergers reviewed under the Ultra Green Merger Procedure were cleared within 3.6 days on average.

According to the procedure's terms, if a transaction clearly does not present a threat to competition and, within the framework of the merger filing, parties provide the IAA certain information (which is somewhat greater than the level of disclosure required in a standard merger filing), it will be internally classified as an 'Ultra Green Merger' by the IAA with the intent of issuing a clearance well before expiration of the 30-day investigation period. The decision to classify a transaction as "ultra green" is based primarily on the information provided by the merging parties. Thus, a full merger notification form is required, rather than the completion of an abbreviated merger notification. As a takeaway from the three-month trial period, the IAA decided to require that merging parties provide holding charts that fully detail direct holders of interest of each party, and the controlling parties of each such direct holder of interest.

* * *

According to the Antitrust Law, the General Director has the power to either approve the transaction, block the transaction (if there is a reasonable likelihood that the merger will significantly harm competition in a relevant market), or approve the transaction subject to conditions (if such conditions can eliminate the harm to competition). Of the 159 mergers regarding which the IAA issued a decision in 2017:

- 97.5% of the mergers were cleared without conditions.
- 2.5% of the mergers were approved with conditions.
- No mergers were blocked by the General Director.
- Two transactions were withdrawn by the parties before a decision was rendered to avoid a formal IAA objection to the merger.

An analysis of the IAA's track record during the last decade shows that the relative share of mergers that are blocked is stable, ranging from 0% to 2% at most, with another 1–3% of notifications withdrawn. These figures jumped sharply in 2012, with nearly 10% of mergers blocked or withdrawn, dropping back to average numbers in 2013 and 2014 and even further below in 2015. There has been an increase in the number of mergers blocked in 2016, a typical trend in the first year of a new General Director's tenure. In 2017, no mergers were blocked. In 2018 the General Director has blocked, at the time of the publication, only one merger.

Over the years, there has been an evident decrease in the use of remedies by the IAA. While in the years 2000–2005 approximately 18% of merger decisions included remedies, the number decreased to only 6%–8% in recent years, to 0.6% in 2015 (the lowest share ever for such decisions), 1.6% in 2016 and 2.5% in 2017. The decline in use of remedies is in line with the IAA's new guidance on remedies – see "Key policy developments", below.

New developments in jurisdictional assessment and procedure

The main policy document regarding merger procedure has remained the "**Antitrust General Director's Pre-merger Filing Guidelines**" published in 2008 ("the Pre-merger Guidelines"). In addition, the IAA published several years ago a detailed Q&A document relating to merger control procedure. In 2014, the IAA published an additional Q&A

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document, which contains detailed examples taken from pre-rulings filed to the IAA regarding merger control procedure.

* * *

Continuing in its goal to increase efficiency in the merger review process, in April 2017 the IAA announced that merger notifications (and requests for exemption for restrictive arrangements) would no longer need to be submitted to the IAA in hard copy form. Following a successful trial period, the IAA decided to allow parties to submit all of the relevant filing documents in electronic form, thereby increasing savings in resources for the business sector and the IAA, and decreasing environmental impact.

An important development in the area of merger enforcement was the July 2012 publication of the IAA's Guidelines Regarding the Use of Enforcement Procedures of Financial Sanctions, which stated that the illegal execution of non-horizontal mergers would normally result in a financial sanction (an administrative tool) rather than criminal penalties, which could also be applied under the law. Illegal horizontal mergers are still subject to criminal enforcement.

In October 2016, the IAA published revised guidelines on the calculation of financial sanctions, which may also be relevant to parties who fail to notify a non-horizontal merger.

The first financial sanction decision regarding a "gun-jumping" violation was published by the IAA in 2015. Taking into account that competition was not hindered by the violation, as well as several other attenuating circumstances, the IAA considered that fines of around US$ 20K on the acquirer and US$ 1K on the seller would suffice. However, these figures were largely influenced by the very limited turnover of the parties involved. Higher amounts, ranging around US$ 100K, were imposed upon larger corporations, even absent harm to competition, as part of consent decrees.

The level of financial sanctions for merger control violations that had the potential to significantly harm competition is expected to be much higher.

In 2017, the IAA published a letter of intent regarding a planned imposition of financial sanctions on the Yenot Bitan supermarket chain, for Yenot Bitan's alleged breach of the merger conditions in its recent acquisition of certain branches of the Mega supermarket chain. In March 2018, the IAA reached a consent decree with Yenot Bitan according to which Yenot Bitan will pay an amount of NIS 2m (approximately US$ 550k) for the alleged breach.

* * *

The General Director's decisions in merger cases are subject to judicial review by the Antitrust Tribunal.

Once the General Director consents to a merger application, whether conditionally or unconditionally, any person who may be harmed by the merger, a trade association, as well as any consumers' association, may appeal to the Antitrust Tribunal against the General Director's decision. In the event that the General Director blocks a merger or stipulates conditions to his consent, each of the merging parties may appeal to the Antitrust Tribunal.

Section 22(c) of the Antitrust Law grants the Antitrust Tribunal the power to approve, revoke or amend the General Director's decisions. This section was traditionally interpreted by

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courts starting from the Tnuva case (CA 2247/95 **General Director v. Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel Ltd. (1995)**) as giving the Antitrust Tribunal a right to hold a *de novo* judicial review, unbound by the analysis, factual findings or legal interpretations of the General Director. This interpretation was later narrowed in a line of decisions rendered by the Antitrust Tribunal and Supreme Court.

In **Antitrust Authority v. Dor Alon Energy Israel (1998) Ltd**, the Supreme Court disagreed with the Antitrust Tribunal's stand that since the Tribunal's review was *de novo* there was no significant weight to the conclusions reached by the General Director at the administrative level. While the Supreme Court did recognise the *de novo* review of the Tribunal, it decided that the General Director's decision should form the basis and starting point for the Tribunal's review, which should also take into account the knowledge, expertise and experience of the IAA's personnel, who are highly professional specialists in various fields including law and economics. Therefore, the Antitrust Tribunal should attribute special importance to the General Director's professional opinion. The Antitrust Tribunal can indeed deviate from the General Director's decision, but it should not review the case as if it were a new proceeding, absent a General Director's opinion.

In AT 36014-12-10 **Caniel Packaging Industries Ltd. v. The General Director (2011)**, the Antitrust Tribunal mentioned the Supreme Court decision in *Dor Alon* and clarified that it was not the Supreme Court's intention to narrow the scope of the Tribunal's judicial review over the decisions of the General Director to a purely administrative standard of review (which is more focused on the decision-making process rather than the merits). However, the Tribunal explained that the *Dor Alon* decision prevents an appeal process which is not directly linked to the original decision. Moreover, the Antitrust Tribunal stated that the *Dor Alon* decision may have influence over which party carries the burden of proof, although the issue was left undecided and for that specific case (Caniel) the burden of proof was placed on the General Director.

In addition to raising the bar for successful challenges of the General Director's merger decisions, the judicial review is fairly limited in its applicability for practical reasons. Normally such appeal proceedings span between two to four years. Merger transactions are normally carried out relatively swiftly and parties are usually unwilling to freeze their business development plans for years, waiting in uncertainty for a court decision. Therefore, merging parties who are informed by the General Director that he intends to block their transaction, often withdraw their application before the General Director grants his final and public decision.

A 2013 Supreme Court ruling, CA 6426/13 **Azrieli Group v. Antitrust Authority (2013)**, halts a gradual erosion in the scope of judicial review of the General Director's merger decisions. In this case, a party to the merger (the seller) notified the Tel Aviv Stock Exchange that the merger agreement had expired, since the General Director did not approve the merger. Furthermore, the seller did not join the appeal filed by the buyer to the Antitrust Tribunal. The Antitrust Tribunal decided that given that the merger agreement had expired, the appeal was theoretical and was therefore dismissed. Azrieli (the purchaser) appealed against the Antitrust Tribunal's decision, and the Supreme Court sustained the appeal, overturning the Tribunal's decision and reinstating Azrieli's challenge against the General Director's decision. The Court held that despite the seller's cancellation of the merger transaction, the challenge had not become theoretical; and that the Tribunal had erred in concluding that it had no practical significance, given that the seller stated it was reasonably probable that it would re-enter the transaction, should the General Director's

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decision be overturned. The Court further accepted Azrieli's argument that the parties will not be required to re-file the transaction, should they enter a new merger agreement following the Tribunal's approval. No less importantly, the Court ruled that the Tribunal can consider the competitive landscape at the time of the litigation, indicating that a broad *de-novo* assessment by the Tribunal is expected.

* * *

Section 30(a) of the Administrative Courts Law, 5752-1992 (the "Administrative Courts Law"), establishes the basic principle regarding a potential petitioner's right to review and copy documents in the public authority's case file, relating to the authority's decision. This principle constitutes the source of an appellant's right to view those documents held by the General Director relating to the decision under appeal. A party wishing to deviate from this rule bears the burden of proving that there is a valid ground for claiming that it is privileged. Once such a ground has been proven, the appellant's review regarding these materials may be restricted, but only to the most minimal degree that is required.

Section 30(b) of the Administrative Courts Law specifies several types of privileges. This is the case, for example, when the documents have no relevance to the appealed decision; when the documents contain trade secrets; when the documents contain internal information such as minutes of meetings or decision drafts; or when disclosing the documents might infringe a right or a personal matter of a third party. Nevertheless, in accordance with the general principle that the file should be accessible to the appellant, the Section provides that reserving the right to review is allowed, "provided that review is not prevented for the reasons listed in this sub-section more than is required due to that reason".

In general, the Supreme Court held in CA 4524/01 **Ma'ariv Hotza'at Modi'in Ltd. v. the Antitrust General Director** [2003] IsrSC 57(4) 521 that an appellant's interest in viewing the public authority's documents on which the decision in its case is based, and the public interest in the "conduct of an exhaustive, just and complete process", will prevail over the interest of those seeking to claim privilege in the preservation of their trade secrets. This is particularly true when it is possible to reduce potential harm regarding trade secrets by having privileged documents disclosed only to counsel (see also the decision of the Antitrust Tribunal regarding the same matter in AT (Jerusalem) 1/99 **Yediot Ahronot Ltd. v. Antitrust General Director** (2001)).

However, it seems that in recent years this balance has shifted towards protecting the interests of third parties who seek to prevent the exposure of sensitive information, even at the expense of appellants' ability to process and analyse the information contained in the IAA's documents. On several occasions, review of certain documents was completely denied. Other documents were accessed by a restricted number of counsels and experts and only in a location allocated for this purpose in the IAA's offices, subject to severe confidentiality undertakings ("data room"). This trend further diminishes the ability of parties to contest the General Director's decisions.

In AT (Jerusalem) 12407-10-13 **Siemens AG v. the Antitrust General Director** (2015), the Antitrust Tribunal rejected an attempt to erode further the rules established in the Ma'ariv case. The Antitrust Tribunal ordered that some of the internal documents of a third party, the Israel Electric Corporation (IEC), should be made available to the appellants' counsels for review. The Tribunal rejected the argument that appellants' counsels review should be

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restricted to the documents at the core of the IAA's decision, as well as the claim that special protection should be afforded to IEC which, according to the IAA's decision, was a victim of the appellants' wrongdoing. The Supreme Court upheld the Tribunal's decision.

In November 2016, the IAA published a draft amendment to the Antitrust Law dealing with, *inter alia*, discovery proceedings in appeals on the General Director's decisions. The IAA explains that such amendment is required in order to make the discovery process more efficient. Under the applicable legal regime, a potential petitioner may review and copy documents in the IAA's case file that relate to the IAA's decision. However, if such documents are subject to a certain privilege, the petitioner is not entitled to review the documents, unless he obtained an approval by **the Antitrust Tribunal**. In appeals conducted before the Antitrust Tribunal, petitioners oftentimes submit motions to review privileged documents, while deliberating such motions may take substantial judicial resources and harm the efficiency of the appeal proceedings. Consequently, the draft amendment proposes that the power to grant access to certain privileged documents (mostly documents that contain confidential information of third parties') will be vested **in the General Director**, subject to appeal before the Antitrust Tribunal. If the General Director decides to grant access to a certain privileged document – the document, as a default, will not be presented to the petitioner itself, but rather only to its counsel and expert.

Key industry sectors reviewed, and approach adopted, to market definition, barriers to entry, nature of international competition, etc.

In recent years, the IAA has blocked several mergers in industries characterised by high concentration and a significant degree of product or market heterogeneity. These mergers illustrate the importance attributed by the IAA to a more detailed economic analysis, which goes beyond market definition and a simple assessment of market shares. These cases also demonstrate the IAA's tendency to adopt rather narrow market definitions in branded goods and to adamantly preserve market independence of maverick firms.

In April 2016 the IAA blocked the proposed merger between mobile telecommunications carriers, Cellcom and Golan Telecom. For many years, the local mobile telecommunications market was dominated by three carriers: Partner, Cellcom and Pelephone. A government reform executed in 2011/12 successfully increased competition in the mobile telecommunications market and led to significant price decreases of services to consumers. New entrants, Golan Telecom and Hot Mobile, were seen as mavericks in the market. The IAA determined that the disappearance of Golan, a typical maverick, would likely significantly reduce incentives to compete, leading to the pre-reform days in which cellular operators demonstrated low oligopoly competition.

In April 2016 the IAA also blocked the acquisition of Electra-Bar by Mei Eden. Both companies are active in the area of importing and marketing filtered water dispensers, related maintenance services and the sale of water filters. According to the IAA, the two parties are direct competitors in their filtered water dispenser activities. The IAA further argued that the market entry by both companies facilitated competition to incumbent monopoly, Strauss-Tami4. Given the high level of product heterogeneity and the importance of branding, non-branded competitors could not have mitigated the expected adverse effect resulting from the 3-to-2 decrease in the number of branded players.

* * *

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In recent years, numerous Israeli startup companies have been acquired by foreign companies. For reasons related to the fact that most acquisitions were made by foreign firms that lacked sufficient Israeli nexus, as well as the fact that most startup companies do not meet the filing thresholds, normally no filings were made in these cases. Notwithstanding, the General Director is not blind to these acquisitions of Israeli companies and their potential effect on local competition. In past years, the IAA reviewed several startup acquisitions, such as the acquisition of the navigation startup Waze by Google, and the acquisition of Mobileye by Intel.

Key economic appraisal techniques applied

The substantive test under Section 21(a) of the Antitrust Law is "reasonable likelihood that, as a result of the proposed merger, competition in the relevant market may be significantly harmed or that the public would be injured".

In assessing the possible competitive outcome of a merger, the IAA usually applies the same methodology as the relevant US and EC authorities. The IAA would normally define the relevant market and then, if necessary, assess the relevant market shares of the parties, the existence of barriers to entry and expansion in the market, as well as other economic factors which may indicate how likely it is that the merger would result in either unilateral or coordinated effects.

The definition of the relevant market is mostly based on qualitative evidence, usually obtained by conversations with the merging parties and other market participants, internal documents, surveys, public records, information from other governmental agencies, and much more. In cases where the qualitative analysis is not sufficiently informative, the IAA may seek to strengthen it with quantitative analysis (critical loss analysis, price correlations, etc.).

The IAA has increased the use of econometric analysis in recent years, but the analysis is still fundamentally qualitative. In January 2017 the IAA published a study on the methodology for defining markets utilising econometric models of demand. The study demonstrates the use of an econometric model for the evaluation of demand elasticity on the basis of consumer behaviour in order to define markets. The IAA notes, however, that the form of analysis demonstrated in the study is remarkable in its complexity and breadth and falls outside the scope of the IAA's resources in its day-to-day operations.

The IAA attributes special importance in merger investigations to direct evidence, such as natural experiments, internal documents, and market surveys.

In 2011, the IAA published the "**Guidelines for Competitive Analysis of Horizontal Mergers**", which describe the theoretical economic and legal foundations upon which the IAA's merger review is based.

According to these guidelines, the core purpose of merger review is to prevent the creation or enhancement of market power. The guidelines further explain that such market power can be exercised either unilaterally ("merger to monopoly") or collectively. Moreover, the guidelines explain that, in order to assess the competitive effects of a contemplated merger, the following steps will be carried out:

First, the IAA will identify the relevant product and geographical markets in which the merging companies operate. The definition of the relevant market is based on the hypothetical monopolist test, which is implemented using practical indices such as differences in the functional use of the products, price differences, price correlation, the perspectives of market participants, differences in quality, etc.

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Second, the IAA will identify the players in the market, their market shares, and the level of concentration before and after the merger.

The guidelines stress that the merger investigation does not rest solely on static analysis. Therefore, when the initial assessment yields that the merger raises significant concerns, the IAA will enter a more detailed analysis of the "dynamic aspects", i.e. the possibility that the new entry or expansion of existing players in the market will mitigate the immediate and potentially harmful effects of the merger.

The analysis of entry and expansion will focus on a variety of entry and switching barriers, including regulatory barriers, scale economics, network effects, strategic behaviour by incumbent firms, branding, access to essential inputs, and much more.

If the analysis results in a conclusion that the merger is anticompetitive, the IAA will examine whether there are available remedies that can eliminate the potential harm to competition.

If such remedies are unavailable, the IAA will block the merger, unless one of the following rare situations is proven by the parties:

- **Efficiency defence** – If the IAA is convinced that there are efficiencies directly resulting from the merger that outweigh the potential harm to competition, the merger will be approved. In order to enjoy the efficiency defence, one must meet certain conditions: (a) the efficiency must be merger-specific, in the sense that the parties cannot obtain similar efficiencies in any other way; and (b) the efficiency must be significant, timely and such that the benefits will mostly be passed on to the consumers and outweigh the harm inflicted on them by the loss of competition.
- **The failing firm doctrine** – This doctrine refers to situations by which the acquired entity is financially unsustainable and will likely exit the market, even absent the merger. In such cases, there is no causal link between the merger and the injury to competition. In 2010, the IAA published guidelines detailing the legal basis and the practical requirements to meet the defence.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

As aforementioned, the merger control procedure in Israel does not have a formal classification method. However, it is not uncommon for parties seeking swift approval for complicated mergers to offer upfront remedies, attempting to expedite the review process. An excellent example for such an approach is the *Bezeq-012smile* merger.

In that case, the parties identified several overlapping areas which were seemingly meaningful and would possibly have required a lengthy review. In order to avoid such lengthy proceedings, the parties suggested divestment of the overlapping activities at the outset.

However, it is more common that remedies are discussed only if the IAA reaches a tentative conclusion that the proposed merger may significantly lessen competition in the market. In such cases, the parties may propose remedies that will eliminate the harm to competition or, alternatively, the IAA may stipulate the conditions that are required in order to have the merger approved, and these can then be discussed with the parties.

In 2011, the IAA issued guidelines for merger remedies detailing key principles of its remedies policy – see "Key policy developments", below. In a nutshell, the new guidelines express a preference for structural remedies over behavioural remedies. Interestingly, the clear majority of remedies imposed until 2011 were behavioural, while in 2011 most cases involved structural remedies.

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Key policy developments

In 2011, the IAA published the "**Guidelines on Remedies for Mergers that Raise a Reasonable Concern for Significant Harm to Competition**".

The document outlines the governing legal principles of merger remedies, two of which stand out: (a) the IAA is authorised to request remedies only if the merger, as it was originally proposed, presents a concrete danger that competition will be significantly harmed. In other words, the IAA may impose conditions only for mergers that it can otherwise block; and (b) remedies are preferable whenever they are capable of mitigating the harm to competition.

The guidelines explain that the decision on whether remedies are suitable in a particular case and if so, what sort is based on the specific circumstances. Among the considerations that serve an important role in such analysis are: the theory of harm to competition; how effective is the remedy; the ability to enforce the remedy and to monitor deviations of the parties from such remedy; the remedy duration; and the ability of the merging parties to comply with the remedy.

The guidelines explain that the IAA will generally prefer structural remedies over behavioural remedies. The IAA alleges that structural remedies are generally more effective as they deal with the proverbial disease rather than the symptoms. Moreover, they do not require complex and constant monitoring, demand fewer public resources, and are executed within a defined and often brief time period. However, the IAA acknowledges that in certain instances behavioural remedies, or a mix of behavioural and structural remedies, would be more appropriate.

A change in the direction of the IAA's approach towards applying stricter criteria to proposed mergers seems to have occurred in 2012. This impression was supported by the large number of blocked mergers and withdrawals of merger notifications in that year. Further insights can be gathered based on explicit remarks made by the former General Director, Prof. Gilo, such as those made in the 2012 to 2014 annual IAA conferences. These statements demonstrate that the IAA intends to block not only mergers that significantly harm competition, but also mergers in markets leaning towards higher concentration, as well as mergers that raise less concrete concerns for diminished competition, whether actual or potential. The notion that the policy has changed seems to explain the lower number of transactions blocked in 2013 and 2014, as complex transactions were likely terminated while on the drawing board. The current General Director blocked four mergers in 2016, most of them in her first few months in office, signalling that mergers will continue to be closely monitored by the IAA. At the same time, the General Director's introduction of several reforms to the merger control process show a clear interest in increasing efficiency, however her decisions thus far indicate that she will continue to apply a rather strict approach.

In 2014, the IAA published the "**Guidelines Regarding Information Exchange in the Course of Due Diligence Prior to a Transaction Between Competitors**". The guidelines provide theoretical principles and a procedural framework for conducting due diligence in transactions that require the transfer of sensitive information. While the guidelines characterise certain types of competitively sensitive information and suggest ways to transfer such data legally, they confer the ultimate discretion regarding the due diligence process, and the potential liability that comes with it, to the merging parties.

The premise of the guidelines which is economically and empirically controversial is that, in general, parties' uncertainty as to market conditions and their competitors' capabilities and plans contributes to competition; hence, any reduction in uncertainty can harm competition.

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Accordingly, the guidelines define "competitively sensitive information" very broadly.

The General Director does not establish a sweeping categorical rule regarding the exchange of such information, and presumably there are certain circumstances in which the exchange of such information would not pose a real competitive hazard.

The guidelines present a number of rules for due diligence that are aimed at minimising harm to competition in a manner that is consistent with the Antitrust Law, such as: the identification of competitively sensitive information; the evaluation of the necessity of information disclosure; the disclosure of information subject to a confidentiality undertaking; and the external review, or review by employees who are not involved in pricing, marketing, and sales, in fields where there is a competitive overlap and documentation requirements. Furthermore, a preference should be displayed for aggregate, outdated and non-concrete information.

In August 2015, the former General Director, Prof. Gilo, who adopted hard-line policies during his tenure, resigned from his post amid disagreement with government officials over competition regulation in the natural gas market. Prof. Gilo was replaced by an antitrust practitioner, Michal Halperin, who formerly served as chief legal counsel of the IAA during the years 2002–2006.

General Director Halperin blocked four transactions in her first year in office, three of which were blocked within the first three months of her term. The contentious *Golan Telecom-Cellcom* transaction, a 5-to-4 merger in the cellular services market, triggered public discourse and was blocked in April 2016. Several weeks earlier, a merger between *Elektra* and *Mey Eden* in the in-home water bar market (a 3-to-2 merger) was blocked. The General Director also blocked mergers that received less public attention. In May 2016, a merger between parties active in online restaurant indices, online reservation services and restaurant accommodation software services, was blocked (*Click to Eat* and *Zap Group*), due to both parties having significant market shares in the relevant markets and significant barriers to entry and expansion in such markets. In October 2016, a merger between manufacturers of white and printed envelopes was blocked (*Gvaram* and *Emka*). In January 2018 the acting General Director blocked a high-profile merger in the aviation industry – between El Al, Israel's national carrier, and Israir which is one of three (including El Al) Israeli airlines.

Reform proposals

In late 2017, the IAA published a memorandum of legislation calling for an overall amendment of the Antitrust Law. The amendment was published as a formal bill by the government in April 2018 (the "Bill"). The Bill reflects the IAA's attempt to expand the application of merger control in some respects, while decreasing the number of mergers that are subject to compulsory filing. The Bill consists of several key aspects:

- The Bill suggests a significant increase in the turnover threshold which triggers merger filing. The Bill proposes to increase the turnover threshold, such that the joint sales turnover of the merging parties which triggers merger control will be increased from NIS 150 million (approximately US$ 42 million) to NIS 360 million (approximately US$ 100 million). Another requirement – that the turnover of at least two of the merging parties will be at least NIS 10 million (approximately US$ 2.8 million) – remains unchanged. There are two other filing thresholds based on market shares, that will not change: (a) as a result of the merger, the market share of the merging firms will exceed 50% in a relevant market; or (b) if one of the parties to the merger already has more than 50% share in a relevant market.

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- The Bill also proposes to subject not-for-profit associations to the merger control regime.
- In addition, the Bill proposes to provide power to the General Director to extend the merger review period from 30 days to 150 days, by a reasoned administrative decision. Currently, the General Director must render a decision within 30 days, which can be extended only by a judicial decree or the consent of the parties.

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Dr. Tadmor served as the General Director of the Israel Antitrust Authority (IAA) between 1997 and 2001. As General Director, David introduced the IAA to the competition committee of the OECD, and was also the driving force behind the cooperation agreement between the United States and Israel in the area of competition.

As a leading lawyer in the area of government regulations, David has represented major clients before governmental bodies and legislative committees in many of Israel's major regulatory and legislative reforms.

David has more than 20 years of experience in the area of mergers and acquisitions. He was a senior partner at Caspi & Co., a leading mergers and acquisitions firm in Tel Aviv, and a corporate attorney with the New York law firm of Wachtell, Lipton, Rosen & Katz from 1988 to 1993.

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Shai Bakal is the head of the firm's antitrust/competition group.

Shai regularly advises and represents leading corporations in Israel and abroad with respect to complicated antitrust matters, including complex mergers, joint ventures, restrictive trade practices and abuse of dominant position proceedings. He is well acquainted with the different sectors of the Israeli economy, particularly the pharmaceutical, food, energy, retail, and banking sectors. Shai has created and implemented antitrust compliance programs for large Israeli companies and multinational corporations.

Shai represents clients in complex antitrust litigation before the Antitrust Tribunal and in civil litigation, including class actions and appeals before the Supreme Court. Shai also represented clients before various Israeli regulators, as well as in administrative petitions to the Israeli Supreme Court.

In the past, Shai practised law in the legal department of the IAA (2002-2007), where he was in charge, among others, of the food sector, retailing, and intellectual property. He was later appointed as the head of the IAA's mergers team. During his term at the IAA, Shai drafted several key policy documents, including the "Antitrust General Director's Premerger Filing Guidelines", and the "Antitrust General Director's Position on Commercial Arrangements among Suppliers and Retail Chains".

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Italy

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Overview of merger control activity during the last 12 months

The number of concentrations notified in Italy in the last 12 months (13 May 2017–10 May 2018) (61) is in line with the number of concentrations submitted in the previous 12 months (May 2016–31 May 2017) (59). In absolute terms, the numbers of concentrations are quite low.

This is the consequence of the 2012 reform of the merger control rules, which amended the turnover thresholds, and the heavy economic crisis in Italy (started in 2008 and still not ended), which significantly reduced the number of M&A, and private equity transactions in Italy.

Recently Italian law has amended the turnover threshold regime (we refer to the last section of this article), however, this amendment has not substantially resolved the problem of the Italian merger control regime, which is not the low number of cases filed, but the risk that certain transactions that could give rise to antitrust concerns may not trigger the Italian merger control regime thresholds.

In more detail, the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, the "ICA") has reviewed 61 mergers in the last 12 months.

In 47 cases, the ICA cleared the notified transactions in "Phase I" (i.e., the ICA issued a decision declaring that no Phase II investigation was required because the notified transaction did not create or strengthen a dominant position, as a result of which effective competition would have been significantly impeded).

In nine cases, the ICA stated that the notified transactions did not fall within the scope of the Italian merger control regulation (i.e., a decision regarding the notified transaction) because the transaction: (1) was not a concentration under the meaning of Article 5 of the Italian Antitrust Law L. 287/90 ("IAL"); (2) did not meet the turnover thresholds set forth in Article 16 of the IAL; or (3) was withdrawn by the notifying parties (Decision 14 February 2018; C12148 – FINARVEDI/PALOMA).

In five cases, the ICA opened an in-depth investigation ("Phase II"), because the notified transaction could have been prohibited under Article 6 IAL. Two of these are still pending; three have been cleared with conditional clearances.

The ICA has not carried out any proceedings for failure to notify a concentration pursuant to Article 19(2) IAL (two in the previous period) in the period in reference. The ICA may open a Phase I investigation related to an un-notified merger at any time.

No request for amendments of commitment has been submitted in the reference period (three cases in the previous period).

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The European Commission has referred to the ICA one proceeding, pursuant to art 4.4 of EU merger Regulation 139/2004 in the period in reference.

New developments in jurisdictional assessment or procedure: amendment of turnover thresholds

New turnover thresholds have entered into force on the 29 August 2017. Prior to these changes, a concentration had to be notified to the ICA if two cumulative thresholds were met:

- the aggregate Italian turnover of all the undertakings involved exceeded €499 million in the previous fiscal year; and
- the Italian turnover of the target exceeded €50 million in the previous fiscal year.

The revised text maintains a set of two cumulative thresholds but slightly reduces the amount of the first one and modifies the second one, requiring notification of a merger to the ICA if:

- all the undertaking's concerns' combined Italian turnover exceeds €492 million; and
- the individual Italian turnover of each of at least two undertakings concerned by the transaction exceeds €30 million.

These thresholds will be adjusted each year to reflect the increase in the Gross National Product price deflator.

The decision of 6 September 2017, C12108 – CHEQUERS PARTENAIRES-NB RENAISSANCE PARTNERS HOLDING/BIOLCHIM, is the first merger case regulated after the amendment of the turnover threshold amendment. The ICA, in order to ascertain if the previous or new merger thresholds regime has to be applied in the case at-hand, clarified that the new regime has to be applied if the parties have agreed upon final binding provisions ("*contratto definitivo*") after the date of 29 August 2017.

The new thresholds may seem not significantly different from the previous ones; the aggregate threshold of €492 million (domestic turnover) is not so easily exceeded in Italy by a single undertaking, even in combination with a target with a significant turnover, since the majority of Italian undertakings are smaller businesses; thus the risk cannot be entirely excluded that transactions which could significantly affect competition may not fall within the Italian merger control rules, even under the new rules.

New thresholds and joint venture

The new rules may have an impact in the case of joint ventures, or the joint acquisition of a target company. On the basis of the new rules, such transactions may meet the filing thresholds if they involve at least two parent companies with a significant turnover in Italy, irrespective of the size of the target. It is not impossible either that greenfield transactions, where no existing undertaking is acquired and the parties merely combine part of their assets or decide to develop a common undertaking from nil, could fall within the meaning of the Italian merger regulation.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition etc

The ICA, in all the last 12 months' decisions, has adopted product and geographic market definitions in line with EU Commission merger control cases.

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Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The authority has not adopted any collective dominance test in problematic mergers, with the exception of the ITALCEMENTI/CEMENTIR ITALIA case. In the INTESA SANPAOLO/ BANCA POPOLARE VICENZA/VENETO BANCA cases, certain failing firm defence principles seem to have been partially applied by the ICA.

Definition of concentration – transaction in two steps

In the decision of 7 June 2017, C12093B – SONEPAR /SACCHI, the ICA considered the acquisition of control of a target which started with a purchase of 35% of the target's capital stock and was completed with the purchase of the remaining capital shares six months later, as a single transaction.

The general manager of a fund as a controlling entity

In the decision of 14 June 2017, case C12096 – BCEC MANAGEMENT X/DP MIDCO, with regard to investment funds, the ICA clarified that an entity which manages a fund controls all the companies owned and controlled by such a fund under the meaning of merger control.

The acquisition of bare ownership of an ongoing concern

In the decision of 21 February 2018, C12150 – COOP CENTRO ITALIA-TERRE DI MEZZO/RAMO TOSCANA, the ICA clarified that the sale of the bare ownership of an ongoing concern which will become fully owned by the purchasing entity after four years, does not give rise to any immediate acquisition of control. The ICA clarified that close to the end of the four-year period, the parties will be able to notify the transaction (when the purchaser is going to own the full property of the ongoing concern); the ICA will be able to evaluate the transaction at that time.

Companies controlled by Ministero dell'Economia e delle Finanze "MEF" are not part of the same group

The decision of 18 October 2017, case C12107 MEF/MPS, concerns the rescue of a bank (Monte dei Paschi di Siena, "MPS") put in place by the Italian state using the Italian Ministry of Finance (*Ministero dell'Economia e delle Finanze*, "MEF"). MEF directly and indirectly owns several companies on behalf of the Italian State (like ENI and ENEL and Cassa Depositi e Prestiti).

With this transaction, MEF (following the BCE request for a capital increase of €8.8bn by MPS) increased the MPS capital stock accordingly, acquiring control over MPS. The Commission stated that this transaction does not infringe any EU state aid rule.

The transaction has been cleared by the ICA in Phase I without any commitment. It is relevant that the ICA stated that not all the companies controlled by MEF could be considered as part of the same group. Although the MEF holds and controls several companies, the ICA said, the administrative bodies of each controlled company have autonomy with regard to the strategic and operational decisions. The ICA believes that the companies controlled by MEF are not part of a coordinated group of companies.

This case is quite peculiar (and probably not in line with the principles set forth in the Commission jurisdictional notice on merger control) because the ICA ascertained that an entity could control, under the meaning of merger regulation, several other companies, but these companies could not be part of the same group. It is unclear how the ICA evaluated possible market share overlap between the parties in the MEF/MPS merger case.

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Bank-insurance agreement not ancillary to a concentration

In the merger clearance related to the decision of 21 March 2018, case C12151 Cattolica Ass/ Popolare Vita AVIPOP, concerning the bank-life insurance distribution business, the ICA stated that an agreement of 15 years which allows the target (insurance company) to use the bank branches for the distribution of insurance products, is not ancillary to the concentration, and can therefore be autonomously evaluated pursuant to art. 101 or 2 of the IAL.

Clearance in Phase I

Commitments given in Phase I are not binding and, in case of violation, the ICA 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 (this could entitle the ICA to open a Phase II investigation because the parties provided incorrect information in Phase I, e.g. an incorrect factual scenario described by the parties).

Stability of the banking system and competition, a workable compromise – failing firm defence?

In the decision of 5 July 2017, case C12103 – INTESA SANPAOLO/BANCA POPOLARE VICENZA/VENETO BANCA, the ICA gave an unconditional clearance in Phase I, to a rescue banking merger plan. This transaction concerns the merger of one of the biggest Italian banks, Intesa Sanpaolo (ISP) with two regional banks, Banca Popolare di Vicenza (BPV) and Veneto Banca (VB). These two regional banks fell into bankruptcy at the time and the transaction was part of a rescue project managed by the Italian Minister of Economy and Finance in cooperation with the European Central Bank.

According to the ICA, the ISP acquisition of BPV and VB would not threaten competition, considering that, amongst other things, the targets are failing firms with declining market shares over the past years. The notified planned merger affected several retail banking and financial markets in many local areas.

Despite the transaction giving rise in certain retail banking markets to market share overlap higher than 50–60%, the ICA cleared the transaction without commitments for the following reasons:

(i) The competitors affected by the transaction in several local markets are big major banking groups which are capable of exerting strong competition pressure.

(ii) How many branches are owned by a bank, does not constitute a valid proxy of the market power of this bank, comparing the running costs of such branches with the revenues generated by them.

(iii) The market shares of the merged parties had been declining over the past years preceding the merger.

(iv) No operators other than ISP had any interest in buying the merged entities which would otherwise fall into bankruptcy and liquidation, reducing the supply of banking services, especially in the North-East of Italy.

The ICA, in the evaluation of this merger, attached great relevance to the needs of guaranteeing the continuity of merged banking activities in order to prevent systemic risks to the national banking system.

In our view, without the pressure of the banking stability problems, and had the ICA used its normal standard evaluation (as applied, in the period of reference, for example, in the cases C12113 – ITALCEMENTI/CEMENTIR ITALIA, C12109 – PROFUMERIE DOUGLAS/LA GARDENIA BEAUTY-LIMONI, and C12139 – NOAH 2/MONDIAL PET

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DISTRIBUTION), it would had cleared this transaction with commitments (for example, divestiture of branches in certain local areas).

The ICA has not applied the defence test precisely in the case of the failing firm to clear the merger. Many commentators agreed with this approach, saying that *de facto* the merger has no real impact on competition, considering also that in a "… counterfactual scenario, absent the rescue merger, BPV and VB would be likely to leave the market. And the market exit of BPV and VB would have a more serious competition impact than the consummation of the planned merger" (Giannino, in *Competitions Bulletin*, July 2017).

Commitment in Phase II

- *A merger after a collusion investigation in the same affected market – the cement case – an implicit joint dominance concern?*

  On 8 November 2017 (case C12113 – ITALCEMENTI/CEMENTIR ITALIA) the ICA cleared with severe commitments the acquisition of Cementir Italia by Italcementi. The transaction concerns several local markets for the supply of cement.

  The ICA stated that the transaction gave rise to antitrust concerns considering: i) the parties' high combined market shares in a post-merger scenario; ii) the significant closeness of competition between the parties; iii) the high level of homogeneity of cement products; and iv) the geographic proximity of the parties' plants.

  The ICA also feared that the transaction might have facilitated tacit collusion among suppliers, considering the nature of the product and the level of concentration of several local markets.

  Thus, the completion of the transaction was made conditional upon divestiture of some cement plants in southern Italy.

  It is relevant to note that on 25 July 2017, the ICA fined 13 cement companies, and their trade association AITEC, over €184 million for collusion in violation of Article 101 TFEU. This case could potentially lead the ICA to be more severe in the evaluation of the merger at-hand.

- *Commitment imposed by the ICA in Phase II in addition to the commitments proposed by the parties*

  The decision of 17 January 2018, case C12109 – PROFUMERIE DOUGLAS/LA GARDENIA BEAUTY-LIMONI, was a transaction of EU dimension that the Commission referred to the ICA pursuant to art. 4, par. 4 of the EU Merger Reg. (n. 139/2004). The ICA cleared the acquisition of control of La Gardenia and Limoni by the CVC group, to which Profumerie Douglas also belongs. This transaction is a merger between the first- and second-biggest competitors in several markets for retail distribution of selective luxury cosmetic products. The ICA imposed on the acquiring company the transfer of certain stores to third independent parties in the local markets where the combined parties' market shares were particularly high.

  The ICA also took into consideration the distance of the merged entity stores from another competitor's stores of luxury cosmetic products (multi-brand national chains, department store corners, local chains and independent perfumeries) in all relevant local areas.

- *Structural and behavioural commitments in Phase II (competition in tenders concerning the Natural Gas "NG" distribution services)*

  In the decision of 25 January 2018, case C12125 – 2I RETE GAS/NEDGIA, the ICA cleared the acquisition of control of Nedgia S.p.a. from 2I Rete Gas S.p.a. The transaction

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concerns local NG distribution markets. The ICA feared that the transaction could create a dominant position in NG distribution in certain local areas (access to this service is allowed, with tenders managed by local territorial entities).

The ICA imposed commitments such as: i) divestment of total natural gas distribution activities in certain local areas; and ii) certain behavioural commitments aimed at reducing financial and information barriers against competitors that need to participate in future tenders concerning the management of local NG gas distribution in certain local areas.

- *Product market definition and impact on parties' overlap calculation*

  On 14 February 2017, case C12139 – NOAH 2/MONDIAL PET DISTRIBUTION, the ICA opened a Phase II investigation of a concentration concerning the pet food retail market. The notified transaction concerned the acquisition, by Noah, of exclusive control of Mondial Pet. The ICA's main antitrust concerns related to certain market share overlaps in local areas concerning the retail distribution of products for feeding and caring for domestic animals. The first impression is that the ICA market definition seems to be quite narrow, considering that other channels (such as supermarkets) also sell these kinds of products (especially animal food).

- *Merger control and regulation of the Cooperative bank, the impact of regulation on the antitrust analysis of the transaction*

  In the decision of 14 March 2018, case C12138 – CASSE RAIFFEISEN, the ICA opened a second-phase investigation of a merger among several cooperative banks which operate in an area of the north of Italy (Trentino Alto Adige). The Italian law n. 49 of 2016 provides that the Italian local cooperative banks (Banche di credito Cooperativo – BCC) should be transformed into a S.p.a. (a limited liability stock company) or should belong to a group of cooperative banks with certain minimum aggregated capital thresholds indicated by law.

  Thus this transaction has been implemented on the basis of Italian law provisions which require the aggregation of small, single BCCs within the whole group. The transaction mainly concerns retail banking services in the Trentino Alto Adige area.

  The combined market share at province level in several local markets is roughly 50%, but it must be stressed that each BCC is obliged to mainly operate within a single municipality. Specific Italian laws and regulations provisions impose these territorial restrictions on the activities of BCCs.

  This pending Phase II investigation is strongly influenced by the banking regulations and by the conflict of a law which, on one side, induces small BCC banks to merge while on the other side, merger control could lessen or impede this BCC concentration process if the transaction is deemed to harm competition (presumably in certain local retail banking services).

  In 2015, the ICA fined several Raiffeisen BCC for exchange of sensitive information and for collusion (art. 101 of the Treaty on the Functioning of the European Union, TFEU). This decision was annulled by the first instance administrative tribunal (TAR Lazio Sez. I, 20 April 2017, n° 4743/2017). The appeal before the first instance tribunal is pending before the Supreme Administrative court.

Cooperative versus concentrative joint ventures

The old EU law distinction between cooperative and concentrative joint ventures remains applicable under Italian competition rules. Accordingly, all joint ventures (including full-

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function ones) whose main object or effect is the coordination of their parent companies' behaviour do not constitute a 'concentration' within the meaning of Article 5 of Law No. 287/1990. The ICA, in the case C/12069 Admiral Lottomatica and C/12090, stated that the transaction (creation of a joint venture) did not give rise to a concentrative JV.

The case is interesting because in ascertaining the cooperative nature of the JV, the ICA did not use the full functionality test of the Commission Consolidate Jurisdictional notice, but the test regulated by art. 5.3 of the IAL which states that: "Operations which have as their main object or effect the coordination of the actions of independent undertakings, shall not constitute concentrations."

The ICA presented a reform proposal to the government, through Recommendation No. AS988 of 2 October 2012, suggesting adding into Article 5 an explicit reference to the applicability of merger control rules also to full-function cooperative joint ventures. The proposal has not yet become law.

Pre-merger filing

With regard to the procedural rules, the ICA is implementing the instrument of the pre-merger filing more than in the past. In particular, the ICA allows pre-filing to be submitted roughly 15 days before the scheduled day for formal submission of the filing.

The information for the pre-filing concerns the identity of the parties to the transaction to be notified, a brief description of the transaction, information on the markets affected by the transaction, parties and competitors' market shares, and information concerning possible filing duties in other jurisdictions.

The pre-filing is not mandatory but appreciated by the ICA for transactions which, on the basis of a first assessment, seem to give rise to potential antitrust concerns.

It is worth noting that the Italian merger control regime does not provide any waiting period; the transaction can be closed after formal submission of the filing.

Simplified filing

The ICA is also considering the introduction of simplified filing and procedural rules for non-problematic mergers.

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Overview of merger control activity during the last 12 months

The implementation of policies related to merger control falls under the jurisdiction of the Japan Fair Trade Commission (the "JFTC"), which was established pursuant to the 1947 Japanese Antimonopoly Act (the "AMA"), and consists of a chairperson, four commissioners, and a staff of around 800. The AMA also introduced Japan's first anti-competition rules, including merger control provisions. The JFTC is an autonomous administrative body with broad enforcement powers.

The Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (JFTC, May 31, 2004, updated most recently as of June 14, 2011) (the "Merger Guidelines") provide overall guidelines related to merger control. According to the latest statistics published by the JFTC in June 2017, 319 notifications were made in FY 2016 (*i.e.*, between April 1, 2016 and March 31, 2017) with a breakdown showing 250 notifications for share acquisitions, 26 for mergers, 16 for company splits, three for joint share transfers, and 24 for business transfers. Of the 319 notifications, eight notifications were withdrawn before the JFTC's first-stage (Phase I) review was completed and 308 cases were received clearance in the first-stage review process (96.5% of all notifications). Three cases moved to the in-depth, second-stage (Phase II) review. Three transactions were closed during the second-stage review, each of whose merger clearance was conditioned on taking certain remedial measures. No cease-and-desist order prohibiting a proposed transaction was issued. The number of notifications was around 289 to 319 in these three years (2014 to 2016). In each fiscal year, the JFTC announces the major business combination cases with a brief explanation of its decisions on its website (http://www.jftc.go.jp/en/). For the fiscal year 2016 (announced on June 14, 2017), 12 major cases were announced which the JFTC reviewed in the in-depth second stage.

New developments in jurisdictional assessment or procedure

Abolition of former "Prior Consultation mechanism"

The JFTC announced that the Prior Consultation mechanism for M&A transactions would be discontinued beginning July 2011. Prior to this announcement, M&A transactions could be submitted to the JFTC on a voluntary consultation basis pursuant to the Prior Consultation Guidelines, before submitting an official statutory filing of the contemplated M&A transaction. As a general matter, the JFTC would render an "unofficial" opinion about a contemplated transaction at this preliminary stage, which opinion could generally be relied upon. In practice, the JFTC's opinions in formal notification cases rarely

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deviated from its early-stage opinions. As a result of this major shift in internal workings at the JFTC, the JFTC would no longer make any determinations or provide guidance on substantive issues prior to the filing of the official statutory notice. The official review would commence only after the official filing was made. The Prior Consultation mechanism was originally introduced so that companies could learn the JFTC's determinations before the official proceedings would begin. However, in practice, the Prior Consultation was time-consuming, its procedures lengthy, and it was criticised for lack of transparency as the JFTC was not required to disclose its decisions. Addressing these concerns, the JFTC abolished the Prior Consultation mechanism altogether.

Availability of "Consultations Prior to Notification" in regard to formalities

The JFTC is still open to voluntary "Consultations Prior to Notification", but only for enquiries on how to complete the notification form. For example, as the notification form has a section in which the position of the notifying corporation in the domestic market must be described, it can consult with the JFTC about its view of a particular field of trade before submitting the notification.

In addition, the notifying company can submit with the JFTC materials it believes necessary for receiving appropriate explanations concerning the consultation prior to notification. In this regard, the notifying company can also submit documents to demonstrate that the planned transaction is not problematic under the AMA. In fact, the JFTC announced in its second reviews that it had received opinion letters stating that the proposed transaction was unlikely to significantly restrain competition and other documents related to the proposed transaction from the notifying party before receiving the notification, and disclosed that it had meetings with the notifying party before the notification was made. This indicates that the JFTC still thinks it is important to communicate with the notifying party before the official proceeding begins.

Although the former Prior Consultation mechanism was abolished, it is still very important for a company in a complex case to provide sufficient information to the JFTC before filing an official notification to facilitate the procedure and get a feeling for how the JFTC views the transaction.

Threshold summary requiring notification by business combination type

(a) Acquisition of shares (Article 10, AMA)
    (i) A company with total domestic sales (total domestic sales means the aggregate domestic sales of companies, etc., belonging to a group of combined companies (a group consisting of "the ultimate parent company" of the notifying company and its subsidiaries)) exceeding 20 billion Japanese yen acquires shares of another company whose total domestic sales, including those of its subsidiaries, exceed 5 billion Japanese yen,
    (ii) resulting in, as a proportion of voting rights held (a proportion of voting rights held here refers to the proportion of voting rights held by the group of combined companies to which the notifying company belongs), accounting for more than 20% or 50% of the company.
(b) Merger (Article 15, AMA), Joint share transfer (Article 15-3, AMA), Demerger (Article 15-2, AMA)
    (i) A company with total domestic sales exceeding 20 billion Japanese yen and another company with total domestic sales exceeding 5 billion Japanese yen merge (or conduct a joint share transfer) or demerge.

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(c) Transfer of business (Article 16, AMA)

(i) A company with total domestic sales exceeding 20 billion Japanese yen acquires all the businesses transferred from another company with domestic sales exceeding 3 billion Japanese yen; or

(ii) a company with total domestic sales exceeding 20 billion Japanese yen acquires any substantial part of a business with domestic sales exceeding 3 billion Japanese yen (or all or any substantial part of the fixed assets used for business).

First stage review – Phase I (Primary Review)

The AMA provides for a 30-day waiting period after a party submits the notification form to the JFTC ("waiting period"), during which the contemplated transaction may not be consummated. During this time, the JFTC will normally either: (1) determine that the given business combination is not problematic in light of the AMA; or (2) determine that a more detailed review is necessary and request submission of necessary reports, information or materials. This will move the case to the in-depth review of the second stage (Phase II). The first-stage review undertaken from the date of receipt of the notification until the day preceding the date of either of the above-mentioned determinations is referred to as the "primary review". Normally, there is an ongoing discussion between the JFTC and the notifying party, which tends to expedite the JFTC's review and often results in early clearance of the contemplated transaction, thereby avoiding requests for additional information and extended review periods. This ongoing discussion can include briefings on substantive issues by notifying parties or even interviews by the JFTC of interested parties, such as customers and competitors. The Merger Guidelines permit the JFTC to shorten the 30-day waiting period in cases where it is clear that the contemplated transaction is unlikely to significantly restrain competition in the relevant market. The notifying party may also make a written request with the JFTC for an expedited disposition.

Second stage review – Phase II (Extended Review)

The second stage (Phase II) begins when the JFTC requests the notifying party to submit necessary reports, information or materials ("request for reports") and continues for a 90-day period following receipt of all requested reports and information (or 120 days following the date of receipt of the notification, whichever date is later). Once the second stage begins, the JFTC will make a public announcement to that effect and gather opinions from third parties regarding the proposed transaction.

Most cases that move to the second stage have two common characteristics: (1) the notifying party has participated in the "Consultations Prior to Notification"; and (2) it usually took several months for the requested reports and information to be submitted by the notifying party (thus the second-stage 90-day period did not start until after all those documents were submitted to the JFTC). This would indicate that the notifying parties involved in complex transactions that moved to the second stage engaged in significant ongoing discussion with the JFTC using the preliminary consultation mechanism – "Consultations Prior to Notification" – even though, technically speaking, this mechanism is for consultation in regard to formalities of the notification. Furthermore, the notifying parties also use the period between the end of first stage and the official beginning of the second-stage review to adjust the timing of submitting all the requested reports.

Outline of the review procedure

The outline of the JFTC's review procedure is as follows:

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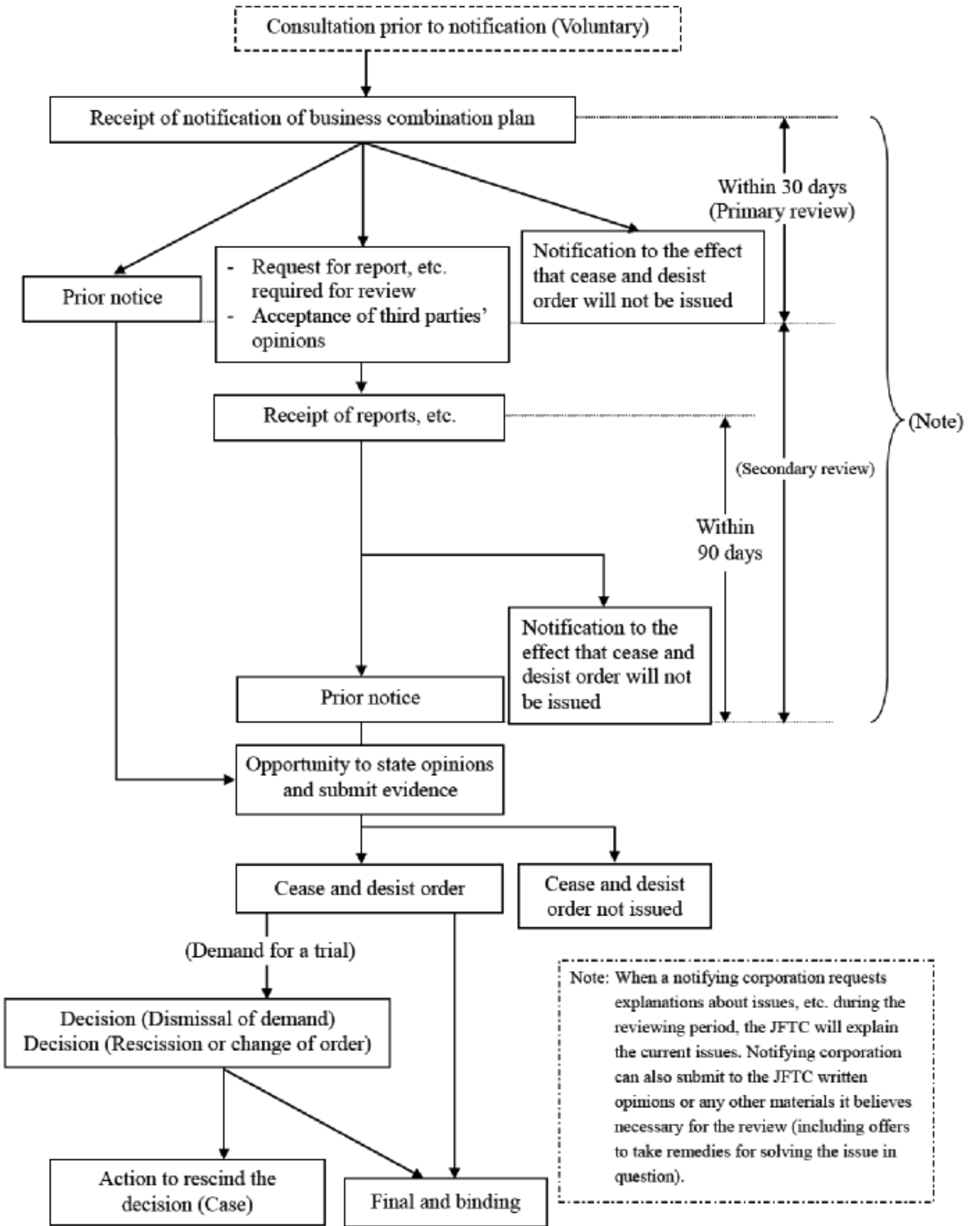

Source: *abstracted from "Policies Concerning Procedures of Review of Business Combination" (Japan Fair Trade Commission, June 14, 2011)*

Sanctions for improper or insufficient notices

Although rarely used, the AMA gives the JFTC the discretion to impose a criminal fine of up to two million Japanese yen for failure of a party to comply with legal requirements for notice of a proposed merger. In practice, the JFTC will request the notifying party to

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provide a letter explaining the reasons for deficiencies in the notice rather than imposing the fine immediately.

Minority shareholders' reporting requirements

Under the Merger Guidelines, only the transaction that will form a "joint relationship" will be reviewed. Thus, potential lack of a "joint relationship" works as a safe harbour for the necessity of merger review.

Under the Merger Guidelines, a joint relationship will be deemed established:

(i) When the ratio of the total number of voting rights pertaining to shares held by companies that belong to the group of combined companies to which the shareholding company belongs, to all of the voting rights of the share issuing company, exceeds 50%.

(ii) When the ratio of the total number of voting rights pertaining to shares held by companies that belong to the group of combined companies to which the shareholding company belongs, to all of the voting rights of the share issuing company, exceeds 20% and the said ratio ranked as top by itself.

(iii) If the ratio of voting rights held (the ratio of the voting rights pertaining to shares held by the shareholding company to all the voting rights of the share-issuing company) is more than 10%, and the shareholding company is ranked among the top three holders of voting rights, the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened:
   - (a) the extent of the ratio of voting rights held;
   - (b) the rank as a holder of voting rights, differences in and distribution of the ratios of voting rights held among the holders, and other relationships between holders;
   - (c) cross-holding of voting rights (the share-issuing company concurrently holds voting rights of the shareholding company) and other mutual relationships between the companies involved;
   - (d) whether officers or employees of one of the parties are officers of the other parties;
   - (e) trading relationship between the parties (including financial relationship);
   - (f) relationships between the parties based on business alliances, technical assistance, and other agreements; and
   - (g) items (a) through (f), when including companies that already have joint relationships with the parties.

In a case announced in 2015, in which Oji Holding's purchase of Chuetsu Pulp & Paper Co., Ltd.'s shares, which would have resulted in Oji Holding's holding of 20.9% voting rights in Chuetsu Pulp & Paper Co., the JFTC cleared the proposed transaction in the second-stage review on condition that, among other things, one party keep its business operations independent of the other party. In that case, Oji Holding's ratio of voting rights ranked at the top.

That case indicates that the JFTC is certainly concerned about minority shareholdings, even if they slightly exceed 20% of voting rights.

Public access to JFTC filings and challenge to mergers

As a general rule, the public does not have any right to access merger notification filings. Pursuant to the Policy for Merger Review, the JFTC discloses brief summaries

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of notification filings of proposed mergers only if the review moves to the second stage (Phase II). Thus, third parties are not aware of proposed transactions until such disclosures. Otherwise, if a transaction received merger clearance in the first-stage review (Phase I), third parties could learn about it only from the notifying party's disclosure.

Once the case moves into the second stage, and the JFTC gathers information from third parties for opinions and comments in regard to the proposed transaction, third parties may submit challenges to the merger with the JFTC, by submitting opinions that the proposed transaction would result in a significant restraint of competition in a particular field of trade. However, the AMA does not give third parties any express right to intervene. Otherwise, anyone could notify the JFTC of possible violations of the AMA with respect to the notifying party's breach of notifying requirements.

Key industry sectors reviewed and approach adopted to define market, barriers to entry, nature of international competition, etc.

Key industry sectors reviewed

The JFTC does not officially target any particular industry sector for enforcement and compliance. Indeed, the 22 publicly announced cases in 2016 and 2017 involved businesses such as manufacturers, pharmaceuticals, healthcare products, web service providers, banks and insurance companies.

Revisions of Merger Guidelines in 2011

Under the amendment of the Merger Guidelines in July 2011, the JFTC also slightly revised its standards of review by announcing that it would review transactions from the perspective of: (i) clearer market definition if the market's geographical scope crosses borders; (ii) competitive pressure when market demands are continuously and structurally shrinking; and (iii) more flexible consideration of competitive pressure from overseas imports and entry.

Cross-border market definition

The Merger Guidelines state that if users of a certain product, both inside and outside Japan, are conducting business without segregating domestic and foreign suppliers, even if the prices have been raised in Japan, users in Japan will be able to substitute those products with products from overseas suppliers, which may result in lowering of prices in Japan. In such a case, the geographical scope has been determined across the border. For example, in the case of Nippon Dynawave Packaging's acquisition of Weyerhaeuser NR Company's business of manufacturing and sales of liquid packaging board ("LPB") (announced in 2017), the JFTC defined the geographic range of the LPB market as being worldwide, on the ground that users of the LPB are able to purchase such products from all over the world without much cost or import duties, and that the distance factors have only a minor impact on LPB price.

Competitive pressure under the Shrinking Market Condition

The Merger Guidelines state that the presence of competitive pressure from customers, deriving from the fact that the quantity of the product demanded is continuously and structurally falling well under the quantity supplied as a result of a decrease in demand for the product, may possibly work as a factor to prevent the company group from freely exerting an influence on the price of the product, to some extent. Thus, the JFTC may take into consideration the shrinking market condition as one of the factors which prevents the transaction from restraining competition.

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Imports and entry from overseas

The Merger Guidelines state that in the presence of sufficient competitive pressure from imports, the possibility that business combinations will substantially restrain competition in a particular field of trade is usually small. If users can easily switch from a product of the company group to an imported product and the switchover becomes more likely if the company group raises the price of the product, the company group would be unlikely to raise the price on the grounds of a potential loss of sales due to the imported goods. The Merger Guidelines also point out that even if importation is currently not being conducted, the JFTC may consider a potential increase in imports over a period of around two years. In the past, competitive pressure from imports and entry from overseas were rarely considered unless already present. The change in the JFTC's perspective to consider future competitive pressure from overseas is likely to result in more practical determination of competitive pressures in the market.

In the case of subsidiary of Mars, Inc.'s acquisition of P&G Japan's pet foods business (announced in 2015), the JFTC considered future competitive pressure from overseas in the pet foods market.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and coordinated effects, and the assessment of vertical and conglomerate mergers

Consistent with the growing trend by the JFTC of aggressively using economic analyses in review of merger transactions, the JFTC has increased the number of economists among staff who analyse economic data provided by notifying parties and third parties. The JFTC may also initiate its own economic analysis in complex cases in the second-stage review.

In the case of acquisition of shares of C&H Co., Ltd. ("C&H") by Daiken Corporation ("Daiken") (announced in 2013), in order to define the product range, the JFTC used questionnaire surveys with users and competitors, asking whether users would switch to other products if the product prices increased by around 10%. And the JFTC took those answers into consideration. The use of economic appraisal techniques in retail business is also quite likely as POS (point of sales) data would be comparatively available.

In the case of merger of UNY Holdings Corporation ("UNY") and FamilyMart Corporation ("FamilyMart") (announced in 2016), both of which are categorised as convenience stores, the JFTC also used questionnaire surveys with the consumer public in which it questioned how many times consumers use a convenience store depending on the number of the competitive convenience stores located within 500 metres or 1 kilometre. Then, the JFTC used the GUPPI (Gross Upward Pricing Pressure Index) to determine whether the parties' convenience stores would have incentives to raise prices.

In the case of acquisition of the shares of Showa Shell Sekiyu K.K. ("Showa Shell") by Idemitsu Kosan Co., Ltd. ("Idemitsu"), and the acquisition of shares of Tonen General Sekiyu K.K. ("Tonen General") by JX Holdings, Inc.("JX Holdings") (announced in 2017), where both Idemitsu group and the JX Holding group would have ended up with a 25% stake in the same company, in which both Showa Shell and Tonen General had a 25% stake, respectively, on each primary LP Gas distributor's retail price of propane, the JFTC conducted a simulation economic analysis using the PCAIDS (Proportionally-Calibrated AIDS), which is a simplified model of the AIDS (Almost Ideal Demand System) as the demand model.

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Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Timing of remedy proposal

In the first-stage (Phase I) review period, the notifying party generally has broad latitude to offer its own remedies, which may be accepted by the JFTC as a means of avoiding an extended second-stage review. After the commencement of a second stage, the notifying party enjoys the same right to propose remedies. In the original notification file, the notifying party will include a report of change and any remedies agreed to by the notifying party and the JFTC.

Early-stage acceptance of remedies offers the strategic advantage of avoiding a second-stage investigation. For transactions involving coordination of notification and review of deadlines in multiple jurisdictions, legal practitioners should bear in mind that the initial review period and the second-stage review period may not be extended even if remedies are still under discussion. The JFTC has no discretion to extend the deadlines. Accordingly, as noted above, using the preliminary consultation and taking advantage of the period between the end of the first stage and the submission of all the requested reports, ongoing discussion with the JFTC is critical to avoid running out of time.

Regulation of conduct

In addition to the final approvals that are subject to structural remedies, the JFTC also has the latitude to condition a merger by imposing certain conduct between the parties or requiring certain actions to be taken, including incorporating these obligations in a written contract between the parties to the merger transaction. In the case of a merger between Zimmer, Inc. and Biomet, Inc. (announced in 2015), the JFTC approved the transaction by accepting the condition proposed by the parties of: (i) transferring tangible assets and intellectual property rights of the leading brands in which they had 50% and 20% of the market share in particular fields; (ii) reporting after executing the transfer agreements with the third party and acquiring approval of the JFTC; and (iii) agreeing that an independent third party transfer such assets and intellectual property rights referred to above to a third party upon the JFTC's approval in the event that the transfer agreements were not executed within a certain period. The JFTC's approval of ASML US Inc.'s acquisition of Cymer Inc. (announced in 2013), is a case in point, where ASML's proposed remedy of imposing mutual non-disclosure obligations on certain confidential information was adopted. These cases illustrate one common remedy that regulates behaviour between the parties. The use of independent monitoring tests, to measure compliance with remedies, is yet another example of the increasing acceptance of conduct-based remedies. In fact, the JFTC accepted this very concept as proposed by the notifying party in the ASML/Cymer merger.

In the case of acquisition of Nisshin Steel Co., Ltd. shares by NIPPON STEEL & SUMITOMO METAL CORPORATION (announced in 2017), where the market share would be 100% for a certain steel sheet product, the JFTC cleared its merger control by accepting the remedies including licensing patents, know-how and information to Kobe Steel, the competitor, supplying the licensed product to Kobe Steel until it becomes able to produce such products, and the consideration paid in relation to above would be, in principle, an amount that is based on the full cost of licensed products produced by the parties, allowing Kobe Steel to newly enter the relevant market.

Warning on gun-jumping

The parties may be subject to the criminal penalty of fines and/or the JFTC's cease-and-

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desist orders if the merger contemplated in the notification filing is closed during the 30-day waiting period, or the 90-day period if it moves to the second stage. In most cases, the timing of the contemplation of the transaction would be clear to see, but in some cases there would be a grey zone regarding whether the transaction is contemplated or not.

The most noteworthy case in 2016 (announced in 2017) was the acquisition by Canon Inc. ('Canon') of shares of Toshiba Medical Systems Corporation ('TMSC'). In that case, before submitting the notification to the JFTC, Canon acquired options in respect of common shares of TMSC and, as consideration, Canon paid Toshiba Corporation (Toshiba) an amount equal to the value of the underlying common shares; furthermore, a third party other than Canon and Toshiba came to own voting shares of TMSC prior to Canon's exercise of the options. Even though the JFTC cleared the proposed transaction, it stated that "[T]his series of actions is likely to give rise to the formation of a certain joint relationship between Canon and TMSC through the above-mentioned third party, comprising part of a structure premised on Canon ultimately acquiring the voting shares of TMSC subject to approval being obtained in the business combination review under the AMA. Given that this series of actions had been undertaken before Canon made a notification to the JFTC, they are likely to lead to activities that could violate the provisions of Article 10(2) of the AMA by undermining the intent behind the prior notification system."

Accordingly, the JFTC cautioned Canon not to conduct such actions in the future and also urged Toshiba, who engaged in the implementation of the above structure, not to engage in the future in activities that might be inconsistent with the purport of the prior notification system.

The JFTC also warned prospective companies planning a business combination involving a similar structure in the future to file a notification with the JFTC prior to implementing any part of such a structure.

Therefore, in cases where a planned transaction consists of several phases that could be construed as implementation of the transaction, it would advisable to consult with the JFTC using a preliminary consultation mechanism before actually taking the first step.

In addition, in the case of mergers between competitors, as the competition will continue until the merger closes, the parties should be very careful about the exchange of information while conducting due diligence. The parties should minimise the exchange of information, and limit persons who are aware of the information to non-sales and marketing divisions.

Penalties for failure to implement remedies

The AMA does not expressly authorise the JFTC to monitor compliance by the notifying party with the agreed remedies; nor does the AMA grant the JFTC the right to proactively provide instructions or guidance to the notifying party on how to implement approved remedies. The only real leverage that the JFTC has is the right to penalise the parties for breaches of the accepted remedies contained in the original notification, if the failure causes a substantial restraint of competition in any of the relevant markets.

Key policy developments

Cooperation between the JFTC and foreign competition authorities

Cooperation between the JFTC and antitrust agencies in other countries has been on the rise in recent years, reflecting not only the increasing harmonisation of antitrust schemes but also Japan's integral role in international markets. In 2016 alone, the JFTC became a party to bilateral cooperation agreements with antitrust agencies in Canada, the United States and the European Union. Japan also signed a memorandum of understanding with the Chinese

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Ministry of Commerce in April 2016 concerning antitrust cooperation. These protocols provide a general framework for information exchanges and ongoing discussion between the participating parties. In addition to these bilateral agreements, the AMA also provides a legal basis for the JFTC to exchange information with authorities in other jurisdictions, subject to certain conditions and, where applicable, waivers by notifying parties.

As the JFTC's coordination of merger control work with foreign authorities is becoming more frequent and detailed, coordination of work among Japanese and foreign attorneys representing notifying parties is gaining importance. Moreover, to support the JFTC's coordination of work with foreign competition authorities, discussions between attorneys should be encouraged. Recent examples where the JFTC launched a joint investigation and engaged in information exchanges with foreign antitrust authorities (such as the US FTC and the European Commission) include the following cases announced in 2016: Intel/Altera case; NXP Semiconductors/Freescale Semiconductor case; and Denali Holdings Inc./EMC Corporation case.

Regulation on foreign-to-foreign mergers

The January 2010 AMA amendment requiring notification to the JFTC with respect to foreign-to-foreign mergers (i.e., mergers between two or more entities with no corporate presence in Japan) that meet the substantial domestic turnover requirement is evidence of the JFTC's continuing aggressive stance *vis-à-vis* international mergers with a potential anti-competitive effect on the Japanese domestic market.

Recent reform

The AMA amendment bill passed in December 2013 and, effective as from April 2015, basically aims to abolish the former administrative hearing procedure exercised by the JFTC and replace it with a judicial appeal process. The outline of the bill is as follows:

(i) Abolition of the JFTC's hearing procedure for administrative appeals.

(ii) Introduction of a system in which any appeals pertaining to cease-and-desist orders are subject to the exclusive jurisdiction of the Tokyo District Court, and a panel comprising three or five judges of the Tokyo District Court will hear the cases, with a view to ensuring expertise of the court.

(iii) With a view to ensuring due process, development of procedures for a hearing prior to issuing a cease-and-desist order:

- providing the expected recipient of the order with an explanation of the content of the order;
- providing an opportunity for the expected recipient to present opinions and/or submit evidence; and
- stipulating the inspection of and/or opportunity to copy evidence relied on by the JFTC.

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Korea

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Introduction

In Korea, the primary law that governs antitrust issues, including mergers, is the Monopoly Regulation and Fair Trade Act (the "Fair Trade Act" or the "Act"). Pursuant to this Act, the Korea Fair Trade Commission (the "KFTC") oversees and controls mergers that may interfere with or limit fair and free competition in the market. Article 7 of the Act lays out the types of business transactions that may be restricted or controlled by the Act and the KFTC, such as share acquisition, interlocking directorate, merger, transfer of business, and participation in the establishment of a new company, which are collectively referred to as a "**business combination**". Please note that the word "business combination" is an official legal term used in Korea which corresponds to the word "merger" as commonly used in the world of business and that, for the sake of a better reading flow, they will be used interchangeably in this article. Article 12 of the Fair Trade Act imposes a merger reporting obligation on certain types of business combinations, and this requirement functions as a primary merger control in Korea.

Overview of merger control activity during the last 12 months

<u>The trend of business combination activities in 2017</u>

According to the statistics announced by the KFTC on February 14, 2018, the KFTC reviewed 668 business combinations in 2017, the total monetary values of which amounted to KRW 509.4 trillion (these are the statistics of the business combinations that were subject to the reporting obligation under the Fair Trade Act and thus reviewed by the KFTC, not the statistics of the total business combinations that occurred in 2017). The number of business combinations increased by 3.4% from 2016 (646 business combinations reported), and the total monetary value decreased by 14.2% from 2016 (KRW 593.6 trillion).

Influenced by the recovery of the domestic economy and continuous global economic growth, the business combinations among domestic businesses tended to increase both in their numbers and in their total monetary values. The increases of M&As in the electrical/electronics sector and the wholesale and retail sector stood out especially. Notably, M&As among large business conglomerates in the business sectors relating to the 4th industrial revolution, such as the semi-conductor industry and the artificial intelligence speaker industry, increased remarkably. On the other hand, the business combinations by foreign companies (between foreign companies, and between foreign companies and domestic companies) decreased both in their numbers and their total monetary values, although the monetary value of the acquisitions of domestic companies by foreign

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companies increased. The business combinations by foreign companies were brisk in certain sectors, such as the cosmetics industry and the bio-medical industry, as well as the business sectors relating to the 4th industrial revolution.

The trend of the KFTC's business combination reviews in 2017

Among the 688 business combinations in 2017, the KFTC issued conditional approvals for four business combinations, holding that such business combinations could possibly interfere with fair and free competition in the market. It also imposed penalties amounting to KRW 577 million in total for 28 business combinations in 2017 for violations of merger reporting requirements, such as delayed reporting and failure to report.

The number of approvals of business combinations to which the KFTC attached specific conditions, and the amount of penalties imposed by the KFTC in the past five years, are as follows:

Conditional approvals by the KFTC

Year	2013	2014	2015	2016	2017
Number of Conditional approvals	5	2	8	4	4

Amounts of penalties imposed by the KFTC

Year	2013	2014	2015	2016	2017
Number of cases in which penalties were imposed	16	38	16	19	28
Amount of penalties	277,000,000	570,000,000	336,600,000	385,600,000	577,000,000

To provide a better understanding of the type of mergers the KFTC deals with, the four business combinations for which the KFTC granted conditional approvals are as follows:

1. The Dow Chemical Company ("Dow") and E.I. du Pont de Nemours and Company ("Dupont"), the multinational chemical companies, entered into an M&A contract that established DowDupont Inc. and filed a merger notification to the KFTC on May 4, 2016. The relevant market in this merger was the acid co-polymer industry, which is the market that Dow and Dupont used to compete against each other. The acid co-polymer market is a market with a high technology entry barrier, and an oligopoly by a few manufacturers was established in the market. Among the few manufacturers, Dupont took first place and Dow took third place in terms of their market shares. After the merger between Dow and Dupont, the competition between the two would have been eliminated, and the market share of the top three companies would have become 77%, which would have substantially interfered with fair and free competition in the market. Plus, considering the difference in the market shares between DowDupont Inc. and a few other competing companies, it was highly likely that the competing companies would have followed the price of DowDupont Inc., which would have resulted in price increases and hurt consumers in the market. Thus, the KFTC decided to grant a conditional approval of the merger on May 10, 2017 with the condition that one of the companies sell its assets in connection with the development, production, and sales of acid co-polymers within six months from the completion of the merger.
2. Esmeralda, a waste heat supplying company, and DS Power, a collective energy supplying company, entered into a stock acquisition contract, in which Esmeralda

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would acquire 45.13% of the shares of DS Power, and filed a business combination notification to the KFTC. The KFTC determined that the relevant market was the waste heat supply market in the city of Osan, Korea. In Osan, one of the subsidiaries of Esmeralda supplied 42.4% of the market, while one of the subsidiaries of DS Power supplied 57.6% of the market, which created an oligopoly market by the two companies. Thus, the business combination of Esmeralda and DS Power would have created a complete monopoly in the waste heat supply market in Osan, which was likely to have resulted in an increase in the price of steam energy sold in Osan. Therefore, the KFTC granted a conditional approval with a prohibition of an increase in the price of steam energy that exceeded the steam producer price index rate announced by the Bank of Korea.

3. Maersk, a Danish shipping company, entered into a stock acquisition contract with HSDG, a German shipping company, in which Maersk would acquire 100% of the shares of HSDG. The relevant product market was determined to be the container shipping market, in which Maersk and HSDG had a competitive relationship, and the relevant geographic market was determined to be the 10 shipping routes between Far East Asia and the Central America-Caribbean Ocean. After the merger, Maersk and HSDG would have had a strong market dominance with a combined market share of more than 50%. Also, the merger would have enabled Maersk to tie with the members of the Consortium that HSDG was in, which would have further eliminated the competition in the relevant market. Therefore, in November 2017, the KFTC granted the merger under the conditions that the companies secede from the consortium and that they would not participate in another consortium of the same kind for the next five years.
4. CJ Hello Vision and Hana Broadcasting entered into a stock acquisition contract in which CJ would acquire 100% of the shares of Hana, and the Ministry of Science and ICT requested a KFTC review on the anti-competition issues of the acquisition. The KFTC determined that the relevant market was the broadcasting market in Gyeongnam, Masan, Tongyeong, Geoje, and Goseong areas, where CJ and Hana operate their broadcasting businesses. After the merger, the two companies would have 53.63% of the market shares, which is 21.98% higher than that of the second-place runner, which would give the CJ and Hana market enough dominance to arbitrarily lower the number of channels provided to consumers and force consumers to subscribe to more expensive services with more channels. After determining that the merger would have anti-competitive effects, the KFTC approved the merger with a condition that prohibited a price increase for two years and mandated the companies to provide enough information regarding all the products provided to consumers.

As shown in the above statistics and the examples of business combinations in which conditional approvals have been granted, there are not many cases in which the KFTC has denied a business combination entirely. Since the focus of the KFTC review is to determine whether a business combination restricts fair competition in the market, the KFTC has been approving business combinations with conditions to be satisfied, such as ordering companies to transfer certain businesses, limiting price increases, etc., rather than denying the business combination in its entirety. The KFTC's position is to conduct thorough reviews and investigations on business combinations that may interfere with fair and free competition and to attach appropriate conditions, and at the same time to promptly approve business combinations without the possibility of anti-competition.

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New developments in jurisdictional assessment or procedure

Revision on the merger filing thresholds

Like other countries, Korea determines which business combinations should be subject to the filing requirement of the merger notification based on the size of the companies, which can indicate the impact of a merger on the Korean market. The Fair Trade Act, through its enforcement decree, imposes an obligation to file a business combination notification with the KFTC if the revenue or total assets of a company exceed a threshold set by the decree. As of October 19, 2017, the KFTC increased the threshold that triggers the merger filing. To adjust the standard of the notification filing according to the economic growth of the country, the threshold amounts of the total amount of assets or revenue of the companies that are subject to the notification obligation (hereinafter referred to as "acquiring companies") increased from KRW 200 billion to KRW 300 billion, and the amounts of the total assets or revenue of target companies increased from KRW 20 billion to KRW 30 billion. The threshold amount in the case where both an acquiring company and a target company are foreign companies, or where an acquiring company is a domestic company and the target company is a foreign company, also increased from KRW 20 billion to KRW 30 billion in terms of the revenue from a domestic sales basis.

The change in the thresholds of the filing obligation

	Before change	After change
Total assets or revenue of Acquiring Company	KRW 200 billion	KRW 300 billion
Total assets or revenue of Target Company	KRW 20 billion	KRW 30 billion
Revenue from domestic sales in case of Foreign Company	KRW 20 billion	KRW 30 billion

It is worth noting that, when calculating the total assets or revenue of an acquiring company, the total assets or revenue of companies that have maintained the status of subsidiaries or affiliates to the acquiring company before and after the business combination are also included. However, according to Article 12 (2) of the Act, the total assets or revenue of subsidiaries or affiliates are not included when calculating the total assets or revenue of the acquiring company, if the form of the business combination is a transfer of business. Therefore, one might consider planning a merger using the form of transfer of business to avoid a triggering of the filing requirement.

Strategic issues for review period

According to Article 12 (7) of the Act, the KFTC must examine whether a business combination interferes with fair and free competition and notify the company of the result within 30 days from the filing of the notification of the business combination. However, if the KFTC deems it necessary, the review period can be extended by 90 days from the day following the expiration date of the 30-day period. That is, at the discretion of the KFTC, the review period may be extended to 120 days. Furthermore, according to Article 18 (5) of the Enforcement Decree of the Act, the KFTC may order an amendment of the documents in the event that the submitted notification report or relevant materials are incomplete, and in that case, the time that it takes for the amendment is not included in the above periods, which means that an amendment order from the KFTC further extends the review period.

The prolonged period of review can be very burdensome as parties of the business combination will be in a position of uncertainty during the review period. In the case of a

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business combination that is subject to pre-event notification, the companies can be exposed to the uncertainty that the deal may be broken off for external reasons during the period the KFTC review is pending, the burden of financing may increase as the review delays, and it is not possible to engage in post-merger integration during the pending review, which is a critical part of an M&A deal. Also, in the case of business combinations subject to post-event notification, the companies are left with the uncertainty that the KFTC might order corrective measures that can damage the original purpose of the deal. Therefore, it is desirable to contact the KFTC before submitting the notification form and confirm the details of the information to be included in the notification and relevant supporting materials to be attached. It is also recommended that the parties of the business combination submit as much relevant materials and information as possible to reduce the review period and avoid potential amendment requests from the KFTC.

Another strategic move the parties of a business combination can take to reduce the hassles related to the review period is to apply for discretionary advance review by the KFTC before the filing period. Pursuant to Article 12 (9) of the Fair Trade Act, companies can request the KFTC to review the anti-competition issues of the proposed business combination in advance. If the KFTC reviews and determines that the proposed business combination does not have any potential anti-competitive effects, then such pre-approved business combination becomes eligible for the Streamlined Review process at the time of the official filing period, in which case the companies can be notified of the result of the review within 15 days from the filing. Any companies seeking a speedy completion of the business combination are recommended to actively implement this procedure.

Key industry sectors reviewed and approach adopted to market definition

Although the KFTC reviews all business combinations and examines whether they limit market competition regardless of sector, there are certain sectors in which business combinations need approval from other regulating bodies under relevant statutes in addition to the KFTC review under the Fair Trade Act. Those specific industries include:

1. **Banks:** According to the Banking Law, if a bank wants to merge or transfer business, it must be approved by the Financial Services Commission (the "FSC").
2. **Financial providers:** Under the Capital Markets Act, a financial investment company must obtain approval from the FSC when it intends to merge or transfer business.
3. **Insurance companies:** Under the Insurance Business Act, insurance companies must be approved by the FSC for mergers.
4. **Financial institutions:** A merger between financial institutions, such as banks and insurance companies, must be approved by the FSC in advance under the Act on the Structural Improvement on the Financial Industry.
5. **Business operators under the Collective Energy Business Act:** In case of merger or acquisition of the businesses licensed under the Collective Energy Business Act, the acquiring company must notify the Minister of Industry, Commerce, and Resource within 30 days from the merger or transfer of business.
6. **Business operators under the Electricity Business Act:** For merger or acquisition of businesses licensed under the Electricity Business Act, the acquiring company must obtain the approval of the Minister of Commerce, Industry and Energy.
7. **Business operators under the Broadcasting Law:** In the case of merger or acquisition of businesses, Broadcasters, Cable Broadcasters, Music Cable Broadcasters

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and Electronic Display Broadcasters should obtain approval from the Korea Communications Commission (the "KCC") for any changes.

8. **Corporations subject to the Special Act for Enhancing Corporate Viability (the "One Shot Act"):** In the case of the industries that are expected to continuously decline, considering domestic and global market conditions (e.g. the steel industry and shipbuilding industry), the procedure for business combinations can be shortened upon the government's approval.

Although the KFTC reviews and examines business combinations regardless of industries, as noted below, according to Article 12 (3) of the Fair Trade Act, there are certain types of business combination that are exempt from the merger filing obligation:

1. Business combinations under the Support for Small and Medium Enterprises Establishment Act: If an investment company for the establishment of a small or medium enterprise or a small or medium enterprise establishment investment association under this Act owns 20% or more of the shares of a business starter or a venture business (15% in the case of a listed company) or becomes the largest shareholder by participating in the establishment of the business starter or the venture business jointly with another company, it is excluded from the reporting obligation.
2. Business combination under the Specialized Credit Finance Business Act: If a new technology venture capitalist or a new technology venture capital fund established under this Act holds 20% or more of the shares of a new technology business entity (15% for listed companies) or becomes the largest shareholder by participating in the establishment of the business starter or the venture business jointly with another company, it is excluded from the reporting obligation.
3. Business combination of investment companies: If a company subject to the business combination reporting obligation owns 20% or more of the shares of the following companies, it is excluded from the reporting obligation: 1) an investment company defined in the Financial Investment Services and Capital Markets Act; 2) a company designated as a concessionaire of a public-private partnership project for infrastructure pursuant to the Act on Public-Private Partnerships in Infrastructure; 3) an investment company established for investing in a company under the Corporate Tax Act; or 4) a real estate investment company subject to the Real Estate Investment Company Act.

Key economic appraisal techniques applied

In general, the KFTC investigates the market dominance (market share) of companies and the concentration ratio of the market when determining whether a business combination will interfere with fair and free competition in the market. It typically finds a possibility of the business combination being anti-competitive in situations that meet the following categories: 1) one company's market share is 50% or more; 2) three companies' combined market shares are 75% or more; 3) the parties of a business combination become first in rank in terms of market share; and 4) the difference between the combined market shares of the parties to a business combination and the market share of the second dominant player in the market is more than 25%. It also finds a possibility of an anti-competitive business combination when a large corporation enters into a business combination in a market, in which small to medium companies have more than two-thirds of the market shares, and goes on to own more than 5% of the market share as a result of the business combination.

In addition to the market share and concentration ratio analysis, the KFTC also uses the Herfindahl-Hirschman Index ("HHI"), which is the measure of the market concentration

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that is calculated by squaring the market share of each firm competing in a market and summing the resulting numbers. The HHI points range from 0 to 10,000. In the case of horizontal business combinations in which competing companies in the same market merge, the KFTC determines that there is no anti-competitive effect if: 1) HHI is less than 1200; 2) HHI is less than 2500 and the increase in HHI after the business combination is less than 250; or 3) HHI is 2500 or more and the HHI increase is less than 150. In the case of vertical business combinations, combinations of companies in adjacent stages in the process of production and distribution of goods, and (in the case of hybrid business combinations), combinations of companies that have no relationship between their products, the KFTC determines there is no anti-competitive effect when HHI is less than 2500 and the market share is less than 25%, or when each of the parties of a business combination is ranked lower than fourth in terms of market share.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

There is no second-stage investigation of the KFTC in Korea. To cure the anti-competitive effect of a business combination and make the transaction healthy, the KFTC orders various types of corrective measures, such as suspension of the anti-competing acts, disposal of certain stocks, resignation of executives, transfer of business, and any other actions necessary to prevent an anti-competitive method of business and limit the scope of such a business.

It is a policy of the KFTC that such corrective measures must be able to remedy the anti-competitive effect, to the minimum extent necessary, and be clear, specific, and implementable.

The types of corrective measures ordered by the KFTC are as follows:

Type	Measures
Structural Corrective Measures	Measures that change the assets or the ownership structure of the transacting companies, such as prohibition and sale of assets. • Prohibition: A measure to prohibit a business combination or to nullify a business combination and restore it back to the original state. • Sale of Assets: A measure that mandates transacting companies to separate certain assets and sell to third parties. Intellectual Property measure: A measure that imposes restrictions on ownership and use of IP by forcing transacting companies to sell or assign their IP rights to third parties.
Behavioural Corrective Measures	Measures that restrict the business conditions, methods of operation, scope of business, internal management, etc. of transacting companies for a certain period of time.

According to the Standard for Imposing Corrective Measures on Business Combinations announced by the KFTC, the KFTC's preference is to order structural corrective measures, and it is a principle that the KFTC orders behavioural measures only in cases where structural measures cannot remedy the anti-competitive effects. It is the KFTC's position that, unlike behavioural corrective measures that necessitate continued monitoring and costs, the structural measures can create a more sound market structure, which enables more efficient restoration and maintenance of competition.

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Key policy developments

Sangjo Kim, the Commissioner of the KFTC, announced in the Congressional Status Report of the Special Committee for the 4th Industrial Revolution held on January 30, 2018 that the KFTC will change its direction and policy in a way that promotes and activates mergers and acquisitions. For decades, the KFTC's key policy for large corporations has been to restrict their reckless diversifications of business, and the KFTC has been focusing on suppressing the concentration of economic powers of large corporations in the market. It is thought that this change in the position of the KFTC was largely influenced by rapid developments in the field of the 4th industrial revolution, and that the KFTC expects the large corporations to secure core competencies and improve the corporate structure through active M&A that are necessary to survive in this global market/industrial change. Kim also stated that the KFTC will expedite its review process for business combinations that have a lower risk of an anti-competitive effect, and promote M&A of small to medium-sized companies and venture companies.

The KFTC's previous amendment to the standard for the business combination reporting requirement, dated December 20, 2017, seems to be connected with this policy change. The amendment enables a joint venture company established in a foreign country that does not affect the domestic market to go through the Streamlined Review process, which is significantly faster and easier than the regular review process, which can take up to 120 days. In the Streamlined Review process, the subject business combinations are deemed to have no anti-competitive effect, and the review result is notified within 15 days.

As a side note, the KFTC also released the amended Business Combination Reporting Guidebook on March 28, 2018 (in Korean). The amended Guidebook includes past amendments to the relevant laws, review cases, interpretation of the laws, etc. The KFTC expects that this new Guidebook will provide companies with more detailed information relating to the KFTC regulations and reporting obligations so that the companies can be better prepared when considering a business combination in Korea.

Reform proposals

The amended Enforcement Decree of the Fair Trade Act, which increased the threshold amounts of the total assets and revenue of companies that trigger merger filing, has been in force since October 19, 2017. There is no other reform proposed or currently under review.

* * *

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Malta

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Overview of merger control activity during the last 12 months

The year 2017 was an interesting year in terms of merger control for Malta's Office for Competition, as it initiated its first Phase II investigation, with respect to a three-to-two telecoms merger. The transaction was eventually abandoned as the parties proposed remedies, although these were ultimately insufficient to alleviate the Office's competition concerns. The Office also issued three decisions concerning the insurance, shipping and apparel retail sectors. As in the previous year, these concentrations were authorised under the simplified procedure regime available under Regulation 12 of the Control of Concentrations Regulations 2002, issued in terms of the Competition Act, 1994 (Cap. 379 of the Laws of Malta).

New developments in jurisdictional assessment or procedure

There have been no new developments in jurisdictional assessment or procedure.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

In May 2017, Vodafone Group Plc and Melita Limited announced their intention to combine Vodafone Malta with Melita, ultimately resulting in the merged entity being 51% owned by Melita's shareholders, Apax Partners and Fortino Capital, while Vodafone Europe – a wholly owned subsidiary of UK-based Vodafone Group – would hold the remaining 49%. The transaction would have essentially allowed for the combination of Malta's leading mobile operator and its principal cable, broadband and TV provider, effectively culminating in a market duopoly between the combined entity on the one hand, and the incumbent quad-player provider Go plc, on the other.

The Office had serious concerns that the transaction could *prima facie* limit competition, mainly in the mobile telephony market and possibly in the fixed markets, without providing sufficient pro-competitive effects. This concern was primarily based on the fact that the transaction would significantly curtail the possibility for three players to operate in the relevant markets, as it would instead create a dominant player within a duopolistic set-up. According to the Office, furthermore, there were serious concerns with regard to the horizontal effects of the transaction in the mobile-only market and the potential for co-ordinated and foreclosure effects in the mobile-only and multi-play market. Ultimately the Office did not issue a decision on the lawfulness of the concentration or otherwise. Since the parties were unable to satisfy the Office's requirements, they announced the termination of the transaction.

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Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

There have been no key economic appraisal techniques published in this sense.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

To date, there have been no published decisions on the approach to remedies by the Office. It is assumed that during the Phase II investigation of the Vodafone Melita merger described above, the Office closely followed EU merger control practice in assessing remedies in mobile network operator (MNO) mergers, including an upfront buyer arrangement on the terms of an approved reference offer.

Key policy developments

There are no key policy developments.

Reform proposals

There are no reform proposals.

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Mexico

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Overview

The Mexican Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*, "COFECE") has been increasingly rigorous in its review of merger control cases and in the exercise of its investigation and enforcement authority, and 2017 was no exception. The number of merger control cases was lower than in 2016, but the level of scrutiny and analysis of cases continues to be increasingly thorough. The level of activity of COFECE in investigations and in the application of fines also shows a clear increasing trend; competition law and antitrust is becoming an increasingly active and visible field in Mexico and COFECE is more and more of an active, independent voice in the Mexican regulatory and media landscape.

The legal framework also continues to be refined, as the guide for the notification of concentrations was amended to include the criteria of COFECE in respect of non-compete provisions (which will be described herein), and amendments to the regulatory provisions to the Mexican Federal Law of Economic Competition (*Ley Federal de Competencia Económica*, the "Competition Law") were published in the *Official Daily* of the Federation on February 14, 2018 in order to further refine and clarify the legal framework and strengthen the authority of COFECE. COFECE has also continued to confidently promote competition by means of constantly publishing high-quality statistical and other information of its activities, as well as in-depth analysis and opinions on current competition topics and new legal developments, such as the opinion COFECE published in respect of the draft new Mexican so-called "Fintech law", which was recently enacted. The website of COFECE is very robust in terms of information and functionality, and COFECE is an active participant in social media and in Mexican and international specialised conferences. The commitment of COFECE towards technological efficiency is also reflected in its decision to create a system to process merger control filings electronically; the basic rules for such system have been issued and will be also described herein.

In 2017, COFECE received a total of 452 merger control notifications; an average of approximately 38 merger control notifications per month. In 2016, the annual number was 490 and the average monthly notifications were approximately 41. Based upon the number of cases so far in 2018, it seems that 2018 is going to be an active year (in January 2018, a total of 49 cases were submitted to COFECE and in February, a total of 58 cases were submitted).

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In our experience, in the majority of cases, COFECE requests additional basic information and therefore the formal admission of each case by COFECE takes more time in most cases. We have seen a growing trend of requesting more information from the parties, the transaction and the markets involved, depending upon the complexity of each transaction. For instance, there is a tendency to request official translations into Spanish of more sections of the non-Mexican transaction agreements governing the transaction, and of the non-Mexican constitutive documents of the economic agents involved in each transaction (and not only of material provisions thereof), and COFECE increasingly analyses in more detail the direct and indirect ownership structures of the parties involved in notified transactions (which can be complex, for example in the case of investment funds). In general, parties to concentrations notified to COFECE in Mexico should be prepared to disclose detailed direct and indirect ownership structures.

In terms of fines, COFECE continues to be active in imposing fines on the parties to transactions which it considers were required to be notified to COFECE and were not so notified thereto. In such cases, COFECE has the right to impose fines ranging between the equivalent of currently US$22,000.00 up to 5% of the income of the economic agents who participate in the transaction (as income is defined in the Competition Law and in the regulations thereunder). The obligation to notify a transaction is applicable to all direct participants thereof, so fines and other penalties are applicable to all parties of a transaction and not only to the purchaser. The Competition Law also allows COFECE to impose fines on public notaries who do not comply with their obligations not to formalise or otherwise participate in transactions that are required to be approved by COFECE, and such approval is not proved to the public notary (the Competition Law allows such fines to be for an amount of up to the equivalent of currently US$790,000.00).

In this respect, in 2017, COFECE announced that it had imposed such a fine on a public notary for the amount of the equivalent of currently US$465,000.00, alleging a breach of such obligation. COFECE also imposed a fine in the Panasonic-Ficosa case, which will be discussed in the next section of this article. We understand that some of such fines are being contested in court. The activity of specialised competition courts is also increasing in tandem with the increasingly vigorous enforcement stance of COFECE. It is important to note that COFECE is allowed to publicise the imposition of fines, even though the fined parties are legally entitled to challenge the legality of such fines in competent courts.

In respect of specialised competition courts, an important development is that in 2017 Magistrate Jean Claude Tron Petit was removed from the First Collegiate Tribunal Specialised in Economic Competition, Radio and Telecommunications, where he was previously appointed to serve until 2020. The official communication announcing his removal simply stated that he was reassigned to the Fourth Federal Administrative Tribunal, where he previously served.

The website of COFECE also reports one case in 2017 where a transaction was not approved by COFECE, which was the concentration between REA Magnet Wire Company and Xignux. The public information on this case mentions that COFECE considered that the company resulting from the concentration would have an important market share in terms of sales which would facilitate possible price increases without other participants being able to counter such market power.

COFECE also was active in imposing conditions on transactions that it approved. For instance, it conditioned the cooperation agreement between Delta and Aeroméxico by requiring the allocation of slots at Mexico City airport to other airlines. Also in the

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acquisition of Boehringer Ingelheim International by Sanofi Aventis, COFECE required the transaction not to include three products in the portfolio of the target.

As mentioned above, COFECE is also actively involved in relevant regulatory developments and in the discussion of new products and services; for instance, COFECE issued in 2017 its opinion regarding the draft Mexican so-called "Fintech" law, and in 2015 it issued its opinion regarding transportation services via mobile platforms such as Uber and Cabify, arguing strongly in favour of competition and innovation.

In general, the field of merger control continues to be very active and COFECE is increasingly thorough in its analysis and vigorous in the exercise of its authority. COFECE and practitioners are quickly learning and working constructively to build practices, arguments and precedents which will contribute to clarify the legal framework and create a more predictable path for transactions that are reviewed by COFECE. As is the case in other jurisdictions, COFECE and international regulators, as well as the Mexican and international bar, continue to be very active in international competition forums and conferences. This has helped the development of the Mexican legal framework and practice, and international experience is relevant in Mexican cases, as COFECE is mindful of international legal developments and has good working relationships with the antitrust authorities of the world's most active jurisdictions.

Developments in jurisdictional assessment

In accordance with the Competition Law, concentrations (which are broadly defined and include mergers and acquisitions) that trigger any of the three statutory thresholds contemplated in Article 86 thereof, are required to be notified to COFECE and are not allowed to close without the prior written approval of COFECE (i.e. our jurisdiction does contemplate a bar on closing). The obligation to notify a transaction that triggers the thresholds is not only applicable to the purchaser but to all the direct parties of a transaction, which sometimes, in practice, creates tension between parties in cases when there is disagreement between the parties as to whether the transaction triggers the obligation to notify COFECE.

Failure to comply with the obligation to notify a transaction that is required to be notified to COFECE entails various serious consequences: (i) the transaction will not produce any legal effect (the implications of this in practice are sometimes very complex and difficult to implement, such as when, for instance, a sale of an asset has been fully consummated and the asset has been re-sold to a good faith third party); (ii) the imposition of fines on the parties to the transaction (which can range between the equivalent currently of approximately US$22,000.00 and up to 5% of the income of the economic agents who participate in the transaction (as income is defined in the Competition Law and the regulations thereof)); and (iii) the imposition of criminal liability in cases where fraud is alleged by COFECE.

The risk of imposition of liability refers not only to the economic agents who participate in the transaction but to directors, managers, officers, executives, agents or representatives of economic agents who participate in illicit concentrations, as well as to any person who assists, propitiates or induces illicit concentrations, including public notaries. As mentioned above, COFECE imposed a fine on a Mexican public notary in 2017 which further evidences the commitment of COFECE to deter breaches by agents that participate in concentrations by vigorously exercising its enforcement authority. COFECE publishes on its website when it imposes a fine – which immediately produces a reputational consequence on the fined parties despite their ability to challenge the legality of any such fines in competent courts.

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The severity of the consequences of not notifying a transaction that is legally required to be notified, and the fact that all the parties to a transaction have the obligation to notify, creates tension in transactions where there are differences of opinion between the parties as to whether a transaction triggers any of the statutory thresholds. In practice, it is possible to discuss such questions of interpretation with officers of COFECE but often, a verbal opinion of an officer of COFECE does not suffice and the alternative of a formal consultation or other request for a written opinion of COFECE is impracticable, since such consultation processes are regulated and also imply a substantial amount of time. This context often leads to the decision to notify, and parties who are of the opinion that the transaction is not legally required to notify often request that the filing be made on a voluntary basis. This situation is limited to those cases that are controversial as to whether they trigger the obligation to be notified to COFECE, and are not the general rule.

So-called "greenfield" projects, or transactions that imply a succession of acts executed over a period of time in the future, often raise questions as to whether and when they trigger the thresholds, depending upon the terms and conditions of each particular transaction; the Competition Law establishes that in the case of transactions that imply a succession of acts, the transaction is required to be notified before the consummation of the act that triggers the threshold. In cases that involve a succession of acts in the future and where the threshold to notify will be triggered by one of such acts in the future, we have encountered cases where the parties decide to notify the transaction at the outset in order to avoid delays in the execution of the transaction in the future, but the possibility and advisability of such a strategy would depend upon the facts of each specific transaction.

A prominent case in 2017 was the imposition of a fine on the parties to a transaction among Panasonic Corporation, Panasonic Europe, Ltd., Ficosa Inversión, S.L., Pindro Holding, S.L. and Pertacol Holding which was consummated in 2015. COFECE alleged that the parties to such transaction did not obtain the prior approval of COFECE when the transaction triggered one of the statutory thresholds. COFECE alleged that the transaction triggered the statutory thresholds since it involved the acquisition of more than 35% of the assets of the target which had Mexican annual sales with a value in excess of the threshold applicable at the time. COFECE fined: (i) each of Panasonic Corporation, Panasonic Europe, Ltd., Ficosa Inversión, S.L. and Pindro Holding, S.L. for the amount of the equivalent currently of approximately US$774,000.00; and (ii) Pertacol Holding for the amount of the equivalent of currently approximately US$10,000.

Article 65 of the Competition Law establishes that transactions that have obtained the prior approval of COFECE may not be investigated thereby except if the approval was granted based on false information or if the conditions imposed by COFECE were not complied with; such provision also establishes that transactions that are not legally required to be notified to COFECE may be investigated by COFECE, but only within one year after the consummation thereof. However, transactions that have not been notified to COFECE when they were legally required to be notified, may be investigated by COFECE for a period of 10 years after the date of consummation thereof. COFECE has the authority to impose fines as a result of the failure to obtain its approval when it was legally required, and also has the authority to impose fines and other remedies if, in addition, it determines that the concentration was illegal; such fines and remedies include the correction or suppression of the illicit concentration, total or partial divestiture, and fines of up to 5% of the income of the parties that were party to the illicit concentration (as income is defined in the Competition Law and its regulatory provisions). In the Panasonic case, COFECE imposed the aforementioned fines for the failure to notify the transaction but,

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after reviewing the substance of the transaction, it found that it did not constitute an illicit transaction and therefore it did not impose any additional penalties or remedies applicable to illicit concentrations.

In general, COFECE is increasingly thorough in its review of transactions, even if the merits do not raise any anticompetitive issue. COFECE has a period of 60 business days, counted as of the date a filing is admitted to issue its approval, which term can be extended by COFECE for 40 additional business days in cases it considers are justified in light of the complexity of the case. COFECE has worked to improve the time it takes to approve mergers and it has consistently improved on average, although, as mentioned above, the key to minimise the risk of delays is a complete initial filing. As mentioned above, the clock to review a transaction begins when COFECE admits the filing because it is considered complete, and therefore it is key for parties to present a very complete filing at the outset. Also, the time for review depends on the complexity of the case and the workload of COFECE. Our Competition Law does not allow for an expedited review in the case of urgent cases, such as, for instance, impending bankruptcy or government intervention; in our experience, however, COFECE endeavours to assist the parties to the extent practicable with a timely review when the parties prove that there is an objective, justified reason to merit such a review (for instance, in the case of extreme financial distress of a party). The Competition Law does contemplate an expedited process for cases where it is "notorious" that the transaction will not have an adverse effect on competition; however, such expedited process continues not to be an alternative in practice, since the time and work it takes for the board of commissioners of COFECE to confirm such "notoriety" (plus the fact that COFECE is very strict in acknowledging such "notoriety") makes pursuing this option impracticable.

The Competition Law requires the parties to explain the objective and motive of the transaction, and to provide evidence in support of such explanation. The recent amendments to the regulatory provisions of the Competition Law elaborated on the kinds of documents that COFECE can consider as evidence of such objective and motive, and includes documents such as board resolutions, press releases, prospectuses and other information. The parties to notified transactions in Mexico should include in the filing such justifying documents, which are required by the Competition Law and the regulatory provisions thereof, and this information is an item that COFECE is increasingly focusing on, as reflected in the latest legal amendments. In connection with confidentiality, our legal regime allows the parties to request the confidential treatment of information, but such request has to be duly justified by the requesting party.

Substantive developments

In general, the current administration of COFECE continues to consolidate its operating and investigative practices and its administrative policies, as well as to put into practice its stated objectives – which are to sanction any illegal conduct, prevent the creation of illicit concentrations, and to be observant of the markets that most matter to Mexican consumers and impact the growth of Mexico. COFECE has also stated that it is committed to the promotion of competition and to the correct application of the law.

As mentioned above, additions to the Guide for the Notification of Concentrations (*Guía para la Notificación de Concentraciones*, the "Guide") were published in 2017 to express COFECE's posture on non-compete obligations. The draft of such additions was submitted to public review on the website of COFECE; submitting draft rules and guides to public

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review is a practice that COFECE generally follows. Such additions are generally regarded as reflecting a long-standing practice of COFECE and its predecessor under the Competition Law and its predecessor statute in connection with non-compete obligations (a paragraph in the annual report of the predecessor to COFECE described some of the basic elements of the posture in respect of such obligations). In our experience, COFECE is increasingly strict in the analysis of non-compete provisions and rarely allows departures from the views stated in the Guide, even though it is, by its terms, a non-binding document and it explicitly states that in some duly and strongly justified cases, COFECE can consider departure from the parameters set forth therein.

The Competition Law and its regulatory provisions do not establish the requirements that such non-compete obligations are required to comply with. However, the Guide, which is not binding, does set forth the criteria that guide the behaviour of COFECE in concentration proceedings which, as mentioned above, was amended recently to incorporate the criteria applicable to such non-compete obligations.

Section 7.9 of the Guide establishes that the first action that COFECE will take is to evaluate if the obligation falls within any of the following definitions:

> "*1. **Non-competition clause**: agreement whereby any of the participants of a contract or agreement (generally the selling party) assumes the obligation not to compete, directly or indirectly, with the acquiring party. This is, not to sell, distribute or produce certain merchandise or property, develop certain commercial activity or provide certain services within certain time, in a limited geographic zone.*
>
> *2. **Shareholders' agreement**: agreement whereby the shareholders or partners of a joint venture agree not to participate, for their own account, in activities that are the same or directly related to those developed by the joint venture. Its rationality is found in generating incentives for the participants in the joint venture to make their best effort in the development of the business.*
>
> *3. **Agreements not to hire or not to solicit**: agreement whereby one of the notifying parties (generally the seller or both) agrees not to hire those persons that already work or provide professional services to the company that is the subject matter of the transaction or that will work in the company resulting from a joint venture. These agreements have as a purpose to protect the knowledge, human capital and value of the transferred business or of the subject matter of the joint venture*."

Thereafter COFECE will evaluate on a case-by-case basis the justification presented by the parties, and confirm that the corresponding non-compete provision has a small probability of affecting competition and free concurrence considering four dimensions: (1) persons subject to the obligation; (2) coverage of the products or services involved; (3) duration; and (4) geographic coverage.

In respect of non-compete obligations, the Guide "explains the manner in which COFECE has performed the analysis of this type of agreements, in light of the principles of economic competition and free concurrence", as follows:

As a general matter, the first element involved in the analysis as to whether a non-compete obligation is justified is to verify that the transaction effectively involves the transfer of assets that do not have ownership rights or legal protection and that, therefore, need the protection afforded by means of a non-compete clause. After the parties justify the need to contemplate a non-compete provision in the transaction documents, COFECE evaluates

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whether it will have a small probability of affecting competition and free concurrence in the aforementioned four dimensions, and establishes the following parameters within which any such provisions generally are considered acceptable:

- Persons subject to the obligation. When the persons subject to the restriction are the seller and the companies of the economic group to which the seller belongs, as well as their successors and assignees in the case of companies. They may additionally include an economic agent that shall have been created as a vehicle to effect the notified transaction and that remains part of the economic group of the seller.
- Coverage of the products or services involved. The provision: (a) shall be limited to products and/or services offered by the business that is the subject matter of the transaction; (b) may include products or services that are at an advanced phase of development by the acquired business at the time of the notification; and (c) may include products or services that have been fully developed but are yet to be commercialised by the acquired business at the time of the notification. In global transactions, the provision may cover all of the products or services offered worldwide by the acquired business even if not all of them are offered in Mexico. The Guide mentions that generally, it is not considered justified to include products and services that are not produced, distributed or sold by the transferred business.
- Duration. When the duration of the provision is for up to 3 (three) years after the closing of the transaction and such duration is justified.
- Geographic coverage. COFECE will only analyse the effects of the provision in Mexican territory. It has been considered that a provision has a small possibility of affecting competition and free concurrence when: (a) it covers the territory served by the business, or assets that are the subject matter of the transaction before it is consummated; and (b) when it includes regions in which the acquired business is at an advanced phase of expansion, investments shall have been made or any other action related to the expansion of territory shall have been executed.

The Guide establishes that a non-compete obligation approved by COFECE may not be modified by the parties and if they do, they shall be required to obtain a new approval from COFECE. The approval of a non-compete provision does not affect the authority of COFECE to investigate collusion or any other anti-competitive behaviour under applicable law.

The parties should bear the aforementioned criteria in mind since, as mentioned above, any departure from any of them has to be strongly argued and supported, and COFECE rarely departs from such criteria. In addition, the parties should be aware that in case the parties and COFECE engage in a discussion of any element of a non-compete provision, the process for review may be delayed. From a formal perspective, if COFECE identifies a risk in the non-compete provision, COFECE can notify the parties formally that it has identified such a risk, calling them to a meeting where it explains the risk, allowing the parties a period to provide a remedy which can be proposed until the day after the transaction is listed for approval of the board of commissioners of COFECE. The parties always have the right to ask COFECE for a meeting with the commissioners of COFECE to present their arguments in defence of their position or their proposal for remedies, which meeting with the commissioners has to occur before the meeting of the board of commissioners that will formally review the case.

At these meetings with the commissioners, parties usually present their arguments to commissioners, and the director of concentrations and the technical secretary of COFECE are usually present at these meetings. This process has raised due process concerns for some

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practitioners since often, the parties do not have access to the full position and arguments presented by the concentrations department to the board of commissioners, so parties have to present their arguments without having full access to the opposing view. Also, when the board of commissioners of COFECE approves a transaction but conditions the non-compete or imposes another condition, the only remedy available to the parties is to challenge the resolution of the board of commissioners in competent courts, which is a burdensome and time-consuming procedure that is often impracticable for mergers and acquisitions.

Key industry sectors

On October 19, 2017 COFECE published an opinion in connection with the proposed Law to Regulate Financial Technology Institutions (*Ley Para Regular las Instituciones de Tecnología Financiera*, the "Fintech Law"), which was published in the Mexican *Official Daily* of the Federation on March 9, 2018. The draft of the Fintech Law had been circulating among various organisations in the Mexican financial sector and there was concern as to the balance that the statute would achieve between innovation and protecting the Mexican consumer, and also as to whether it would be biased in favour of the existing traditional banking industry.

The Fintech Law was of interest to COFECE as the kind of legislation designed to regulate a new market and new technological platforms and services are of interest to competition regulators around the globe. The Fintech Law generally covers the services that may be provided by financial technology institutions (*Instituciones de Tecnología Financiera* or "ITFs"), various types of crowdfunding, and cryptocurrencies. In light of the fact that the Fintech market is a rapidly changing market, the Fintech Law was designed to allow regulators to issue rules to govern particular aspects of the services regulated by the Fintech Law. Therefore, additional rules are expected shortly, some of which will address delicate topics such as measures to ensure non-discriminatory access to traditional banking services, which are likely to be controversial and therefore are still expected to take time.

In its opinion, COFECE expressed that burdensome government licensing requirements of new participants could hinder the competitive potential of new activities. COFECE also expressed that it will be essential for all market participants to have equal access to essential facilities such as customer data, as well as to traditional banking services on a non-discriminatory basis. The interaction of new entrants and the traditional banking industry is likely to raise important competition issues in the future.

In 2017, there were many merger control filings involving the Mexican real estate industry, since the Mexican real estate market is quite active. The geographical scope of the Mexican real estate market is local, although COFECE increasingly reviews the different segments of the markets in more detail, and the various properties of participants in their real estate portfolios. The activity of the Mexican real estate market is likely to continue to cause an increase in filings related to this market in 2018. Perhaps in light of the increasing number of filings related to this market and the fact that they often do not raise any substantive antitrust concern, the draft amendments to the regulatory provisions of the Competition Law that were published in 2018 contemplated a new exception to notify transactions regarding undeveloped real estate, but this exception was not included in the final published amendments, since it seems that it is difficult to craft a workable exception in light of the increased activity in the market and the variety of legal and financial design of such real estate transactions.

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Legal amendments

In addition to the amendments to the regulatory provisions to the Competition Law and the amendments to the Guide for the Notification of Concentrations, which were discussed previously, on December 8, 2017, the board of commissioners of COFECE published the regulatory provisions regarding the use of electronic means before COFECE. Such provisions establish the creation of an electronic notification system, which will allow economic agents not only to submit notifications of concentration electronically, but to substantiate the entire notification process via electronic means. It is important to note that this electronic procedure is optional and the parties can elect to handle the process by means of the physical submission of information at the offices of COFECE. The viability and success of such electronic process remains to be seen; some practitioners are concerned about data privacy and protection issues and issues of evidence in the case of judicial proceedings, but the initiative is viewed as a positive contribution to COFECE's efforts to make the process more efficient.

Participation in the electronic process requires the parties to register in the system by providing basic information as well as evidence of their representation of the corporate entities that they represent. The rules establish that the economic agents that use the system are responsible for the information uploaded to the system, as well as for the use and misuse of their personal information. COFECE will be liable for safeguarding the integrity, confidentiality, and inalterability of all of the information that is uploaded to the system. COFECE is expected to issue technical specifications and instructions to use the system and upload information.

The rules contemplate the effects of interruptions or failures of the system on the notification process; parties are required to advise COFECE of any such interruptions or failures and COFECE will review the situation; the clock will be stopped for the time any interruption lasts and only if the interruption lasts more than six hours continuously on the last day of a time period, will the deadline be extended for an additional day.

The rules establish that the system will also include an electronic board where parties and duly authorised parties may consult the status of a particular file. As mentioned above, the success of the system remains to be seen but it is an important step towards the use of technology for the benefit of users of the services of government agencies in Mexico.

On March 6, 2018, COFECE announced the initiation of an investigation of an illicit concentration in the market of diesel and gasoline, which is a new market as a result of the extensive energy reform. Such markets are likely to generate a lot of activity in the antitrust field and COFECE has been a key player in the design and implementation of such reform.

The field of competition and antitrust in Mexico continues to develop consistently, in line with international trends. COFECE is a modern independent regulator supported by a sophisticated and experienced team, a strong legal framework and specialised courts, as well as a by an increasingly sophisticated and specialised Mexican bar.

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Netherlands

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Overview of merger control activity during the last 12 months

The Dutch Competition Authority (the 'Authority for Consumers & Markets', hereinafter: '**ACM**') has dealt with a total number of 105 merger notifications in 2017, 104 of which were cleared in Phase I. There was just one merger which was referred to Phase II. This concerned the merger of two hospitals in the Eindhoven region that are both active in the market for general hospital care: the Catharina Hospital and the St. Anna Hospital.

The numbers, therefore, are stable compared to 2016 and slightly higher than in 2015. It is remarkable how low the number of Phase II merger control cases is. A Phase II merger investigation constitutes an in-depth investigation of an intended concentration by the ACM, if the ACM foresees significant impediments of effective competition in the Netherlands as a result of the notified transaction which require closer investigation.

New developments in jurisdictional assessment or procedure

There have been no remarkable new developments in the concentration control procedure or jurisdictional assessment of mergers in the Netherlands in 2017. Currently, there are also no foreseen changes in this regard in the Netherlands. The topic of key policy developments will be addressed under a separate heading ('Key policy developments').

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

The ACM remains focused on the healthcare sector; mergers concerning hospitals are especially within the direct focus of ACM. In September 2017, the ACM approved a merger between the Academic Medical Center ('**AMC**') and the VU Medical Center ('**VUmc**') in Amsterdam. The ACM conducted in-depth research, especially into the consequences of the merger for (highly) complex hospital care (top-level care). This showed that both hospitals together have a market share of (only) between 30% and 40% in this market **and** that other hospitals in the region, such as the OLVG and the Antoni van Leeuwenhoek Hospital, offer alternatives for both insurers and patients.

During this merger investigation, the ACM received signals that the hospitals (AMC and VUmc) would use their position on the market of unique care (where little or no competition exists) in order to strengthen negotiations with health insurers regarding services on the markets of basic care and top-level care where competition is indeed possible. However, this issue was unrelated to the consequences of the merger between AMC and VUmc, and hence not part of the merger review. The ACM and the National Health Authority have jointly started an exploratory investigation into this competition risk on the basis of other

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enforcement powers that they have (i.e. enforcement instruments related to dominance and market power).

In November 2017, the ACM determined that two hospitals in the Eindhoven region, the Catharina hospital and the Sint Anna hospital, are not yet allowed to merge and have to apply for a permit (***Phase II***) if they want to continue their merger plans. The ACM found that after the merger, few options would remain for patients and health insurers in the Eindhoven region for general hospital care. This could lead to an increase in healthcare costs for insured parties.

In addition, the ACM has focused its attention on the media sector. In July 2017, Talpa Holding received approval for the acquisition of Sanoma Image from the ACM. The television channels SBS6, Net5, Veronica and SBS9 are part of Sanoma Image. Sanoma Image also sells airtime for TV ads and provides online marketing. The ACM saw no downsides in the takeover for the choices of consumers and advertisers. In addition, the ACM decided that Talpa cannot substantially harm its competitors by offering combined radio-television advertising space to advertisers.

In May 2017, the ACM decided that Mediahuis is allowed to take over the Telegraaf Media Groep ('**TMG**'). With the takeover of TMG, a single company is created with a few of the largest Dutch national newspapers: *NRC Handelsblad* and *De Telegraaf*. The two parties also have various regional newspapers, free local papers, magazines and websites. They sell advertising space in these magazines and online media. The ACM investigation showed that there were no major consequences for competition in the field of national and regional newspapers and (online) advertising space. More and more advertising budgets from companies are allocated to online advertising, for example via Google or Facebook. As a result, the influence of newspapers on the advertising market is decreasing, according to the ACM.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The test the ACM uses is whether the concentration in question significantly impedes effective competition. The test is in accordance with the SIEC test which the European Commission uses in its concentration control practice. It covers all competition issues raised by concentrations, including unilateral effect cases. The ACM applies the same theories of harm that the European Commission uses.

Key indicators that the ACM takes into account are the position of the undertakings compared to their competitors; the dependency of suppliers and customers; and the barriers to entry into the market.

The ACM is hesitant to accept economic efficiencies as a justification for restricting competition. The ACM will only accept these efficiencies if they positively affect consumers. The focus will therefore be on the question of whether the efficiency gains are passed on to consumers.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

In order to avoid a second stage investigation, an undertaking can offer remedies. Such an offer is possible if the competition problem is clear, the remedies clearly remove or remedy the problem in question, and they do so before a certain deadline. It is also possible for

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undertakings to make amendments to the intended concentration, and hence their ACM notification.

The ACM's guidelines on remedies are similar to the approach the European Commission takes towards remedies. Both structural and behavioural remedies are possible. In practice, the ACM favours structural remedies, logically because this type of remedy provides structural changes and a structural solution for the competition problems which the ACM has identified. Only with regard to hospitals do behavioural remedies seem more likely to be accepted.

In the second stage investigation, the ACM can impose conditions and/or restrictions to change the transaction. Most undertakings then consider remedies by way of divestments. For divestments, undertakings must show that a prospective purchaser, independent from the companies in question, with sufficient expertise and financial resources, is ready to acquire the part of the business that is to be divested. Furthermore, the undertakings must ensure that competition is not otherwise impeded by the divestment (for instance, because the prospective purchaser has a dominant position in the relevant market where the business part would fall into). The ACM can deal with divesture issues itself. The ACM can also appoint a trustee, who will supervise the divestment.

Key policy developments

At the end of 2017, the ACM announced that it would intensify its review of competition risks related to hospital concentrations. This means that ACM may identify competition problems more often, and prohibit hospital concentrations more quickly than before. This will take place on the basis of the existing competition test and the current concentration control rules. So there will be no modification of the existing legal (concentration control) framework.

Furthermore, ACM's focus for 2018 and 2019 will be on four more topics that may also be reflected in concentration control: (i) the digital economy; (ii) the transition in the energy market; (iii) transport (and more specifically, harbours); and (iv) medicine prices.

In the **digital economy**, the ACM seeks to let innovation strive by keeping markets open. The ACM will focus on the infrastructure of internet. It will monitor dominant undertakings with regard to (the handling of) data and algorithms. The ACM will also strive to create transparency for online consumers.

For the **energy market**, the ACM will supervise the transition to sustainable energy which is a key policy objective in the Netherlands in the coming years. This objective has become even more important with the decision of the Dutch government (for safety reasons) to reduce the extraction of gas from the northern province of Groningen in about a decade to zero in 2030, hence completely changing the energy landscape in the Netherlands. This energy landscape could until recently be characterised as being based on a strong (over) dependence on gas from the Netherlands' own soil.

The ACM will carry out its supervision by ensuring that the process of competition will continue to exist and function in the Dutch energy market. The focus will be on the price of energy and access to energy networks. The ACM will also closely monitor the precondition of reliability of energy supply to consumers in the switch to a sustainable energy market.

Harbours are a recurring topic for the ACM. The ACM wants to continue the enforcement approach it has set out regarding this market (i.e. preventing market allocation, price collusion, etc.) by stimulating healthy competition and countering collusion.

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As for **medicine prices**, the ACM aims to tackle abuse of market power or strategies aimed at excluding competition or impeding entry, as it regards this type of behaviour as disadvantageous for the consumer. The ACM sees competition in the pharmaceutical sector as a contributor to innovation and the affordability of medicines. In some cases, the ACM does not reject close(r) cooperation between health care actors. It will allow hospitals, health insurers and other parties to join forces in the purchase of expensive medicines. In the ACM's view, that is one of the keys to keeping affordable and accessible medicines, as well as an affordable total package of care. At the same time, the ACM wants to preserve and stimulate innovation in the pharmaceutical sector, including the development of new medicines. In its supervision, the ACM will therefore take into account the preservation of innovation incentives.

Reform proposals

In the Netherlands currently two different tests apply regarding concentrations in the healthcare sector. Both the NZa (this is the Dutch healthcare regulator) and the ACM must be notified of an intended merger or acquisition in the healthcare sector. The agencies carry out their supervisory tasks on the basis of separate laws with their own distinctive aim and purpose. The Dutch *Competition Act* (and its concentration control paragraph) lays down the legal framework for the ACM; the Dutch *Health Care Market Regulation Act* lays down the legal framework on the basis of which the NZa acts.

According to the current legislation, the NZa tests intended concentrations in healthcare by reviewing whether the parties involved have taken due account of the interests and opinions of the stakeholders (such as the staff of the healthcare providers involved and their patients). The ACM subsequently checks whether intended concentrations may significantly impede effective competition in the health care market. So the supervisory objectives of both legal regimes vary. Furthermore, they use different application thresholds to define their scope: (i) the concentration control regime in the Dutch *Competition Act* uses turnover thresholds; while (ii) the concentration control regime in the Dutch *Health Care Market Regulation Act* uses a threshold revolving around the numbers of staff members that are employed by the health care organisations involved (but this threshold may be changed in the near future).

The initial reason for a separate test on behalf of the NZa was to maintain quality and due process in the healthcare sector. On the other hand, two different enforcement agencies are involved in the assessment of one health care concentration time and again, which is not in favour of the efficiency of control and the processing speed of the application(s). Therefore the Dutch legislator has taken the initiative of placing total (concentration) control regarding the health care sector in the hands of the ACM. A new bill transfers the supervision on the care-specific concentration control paragraph in the Dutch *Health Care Market Regulation Act* to the ACM. The rationale behind this modification is that the ACM is also better equipped to supervise markets, including the health care market, since it monitors all sectors of the economy. The bringing together of supervisory tasks will contribute to the consistency of control as well.

The transfer means that in the near future there will be only one authority for merger control issues in the healthcare sector (namely the ACM). The new bill that brings about this change is still pending in Dutch parliament. It is expected that the bill will be passed and take effect some time in 2018, but there is no certainty on this yet.

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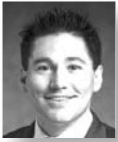

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New Zealand

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Overview of merger control activity during the last 12 months

New Zealand's change of government in September 2017 ended nine years of centre-right government emphasis on growth and stability for business. Six or so months on, the regulatory environment reflects a shift towards the Labour-led coalition government's priorities: broadly, less certainty in the solutions of economic liberalism; policymaking driven by pragmatism along with greater confidence in government intervention; and a stronger focus on environmental and social sustainability. Global trends, like the focus on inequality and the future of work, a retreat into economic nationalism, and the opportunities and risks around technical disruption, are also having an impact. The most striking practical example of this shift is the recent announcement that there will be no new permits granted for offshore oil and gas exploration. The regime for approving investments by overseas parties is also being increasingly tightened.

Still, New Zealand remains an attractive place for global firms to invest. The Treasury forecasts growth at just over 3% over the next four years, and the next Budget is expected to record low unemployment at 4.6%, and inflation around 2.0%. The rebuild of Christchurch continues, with the earthquakes now seven years ago. There is continued capital investment in the ultra-fast broadband network, and new commitments to increase residential housing stock and catch up with population trends, particularly in Auckland.

Turning to competition law, the new government is actively pursuing reform, most notably criminalising cartel behaviour and introducing market studies. In addition, the Commerce Commission's resourcing, and its practical ability to promote competition, is receiving greater attention.

The Commission's business acquisitions register records a total of seven merger clearance decisions in 2017. That figure is largely consistent with recent years, with nine decisions in 2016 and 10 in 2015 (2014 was an outlier, with 16 decisions). There have been no applications for merger authorisations (which allow deals that would lessen competition to be authorised on public benefit grounds) since 2016.

The Commission's average timeframe for deciding merger clearance applications for the three years to December 2017 was 65 working days. Although New Zealand does not have a formal division of its process into phases, it is illustrative to refer to the average times for complex (130 days) and simpler (46 days) applications (based on the authors' own categorisation). The only authorisation application, a media merger, was declined after 222 days (*Fairfax/NZME*, discussed further below).

A series of high-profile declines in calendar year 2017 (in the media, telecommunications/broadcasting, and insurance sectors), as well as one other decline, suggest that the Commission

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is increasingly difficult to satisfy. Four declined mergers in 2017 compares with one in each of the previous five calendar years, which illustrates the extent of this perceived shift. 2017 saw some large transactions in sensitive and/or concentrated markets, which may at least partially explain these statistics (*Sky/Vodafone, Vero/Tower* and *Fairfax/NZME* are all discussed further below). However, there is no doubt the Commission is displaying a high level of confidence.

New developments in jurisdictional assessment or procedure

There have been no recent legislative changes to the test prescribed by the Commerce Act applied by the Commission, and ultimately the Court, when assessing if a merger or acquisition would be likely to have the effect of substantially lessening competition in any market. Nor have there been any formal changes to Commission procedures.

There have, however, been some significant developments in practice which have ongoing implications for the merger control regime, notably:

- Application of the "real chance" counterfactual test in fast-changing markets, which have shown the challenges that standard poses for applicants.
- Increased activity in enforcement of non-notified mergers, which suggests the Commission may be focusing more on this aspect of its role, and has highlighted the alternative scenarios for merger parties in a voluntary regime.
- Enforcement activity in relation to a minority shareholding, which has highlighted the breadth of the statutory test in New Zealand.
- Increased transparency, with implications for merger parties and interested third parties alike.

Under New Zealand competition law, a substantial lessening of competition can be "likely" even when the chance of it occurring is less than 50%. So, the Commission often assesses mergers against multiple scenarios without the merger, any one of which may form the basis of a decline. The Commission must decline a merger where it is left in doubt, and is unable to exclude a "real chance" of a substantial lessening of competition. There is no significant difference between uncertainty associated with deficiencies in the evidence and uncertainty associated with the impracticality of predicting future events. For changing and converging industries (for example, media, telecommunications and broadcasting) the level of uncertainty will be higher. It will therefore be harder for the Commission to become positively satisfied that a proposed merger would not lessen competition.

In 2017, two high-profile merger decisions demonstrated the significance of the "real chance" threshold:

- *Sky/Vodafone* was a vertical/conglomerate merger of the largest Pay TV provider (with an unrivalled position in premium live sports rights) and the second-largest telecommunications provider. The Commission was unable to exclude the real chance the merged entity would have the incentive to use its market power over premium live sports rights to bundle Pay TV, broadband and mobile services, foreclosing a substantial share of telecommunications customers from rivals, who would be unable to effectively compete.
- *Vero/Tower* was a merger of the second and third general insurance providers in a context where there would have been only one other substantial player, IAG. Tower had not been a particularly effective competitor of recent times, but the Commission concluded in part that there was a real chance Tower's competitive position would be significantly enhanced under third-party ownership.

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In each case, the prospect of competition in the counterfactual was not at all obvious, but was nevertheless sufficient to meet the "real chance" threshold and cause the clearance to be declined.

On the enforcement side, four merger investigations were opened between March and July 2017, which was unusual given the Commission has reportedly only completed seven such investigations since 2012. As part of its general push for greater transparency (discussed further below) the Commission has also set up a register to display information on merger enforcement matters. Previously, the fact of such investigation was not made public unless the Commission issued proceedings or chose to make an announcement.

The Commission commenced one investigation after it had granted clearance for the same transaction in 2015. The *Staples/OfficeMax* acquisition did not take place within the statutory 12-month window provided by the clearance, and when Platinum (the new owner of Staples, now named Winc) sought to complete the transaction in 2017, the Commission sought an injunction to prevent it. The investigation was closed after Platinum undertook to divest Winc to a purchaser approved by the Commission.

The Commission also investigated Vero's acquisition of a 19.99% stake in publicly listed rival, Tower. Vero's acquisition of 100% of Tower was the subject of a clearance application at the time (discussed above). The investigation focused on whether the minority shareholding endowed Vero with a "substantial degree of influence" such that there was reduced competitive constraint between the parties, or whether the stake could operate to block alternative transactions that would have enhanced competition. The 19.99% was sold after the clearance application for the full acquisition was declined, so the Commission decided not to pursue pecuniary penalties. However, the case highlighted the Commission's willingness to engage with the full potential breadth of its governing legislation, which encompasses any acquisition of assets of a business or shares.

Another feature of *Vero/Tower* and other recent merger clearance matters has been the Commission's focus on the transparency of its procedures. It is now publishing as a matter of course any "letter of issues" or "letter of unresolved issues" sent to applicants, in some cases along with third-party submissions in response. Historically, the Commission's practice around the documents published on the public register has not been consistent. The application, statement of preliminary issues (the initial "shopping list" statement of all the issues the Commission intends to canvas) and eventual determination were always made public. However, any interim procedural steps were not typically made public. Most significantly, it generally did not publish any "letter of issues" (a letter addressed to the applicant following initial investigations, which outlines remaining concerns and inviting further information) or a "letter of unresolved issues" (a letter to the applicant where residual concerns remain following the response to the letter of issues). Statistically, the probability of decline increases as each of these procedural steps is reached (although neither indicates decline is inevitable), so the increased transparency has implications for market confidence, particularly for publicly listed entities, as well as potentially providing greater opportunity for third parties (particularly opponents) to become involved in the Commission's processes.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

As mentioned above, 2017 saw the Commission decline high-profile applications in the media, telecommunications/broadcasting, and insurance sectors.

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The *Fairfax/NZME* authorisation application related to a transaction which would have merged the two largest news producers in New Zealand and involved arguments about media convergence that competition authorities have been grappling with in recent years. The parties argued a merger would better enable them to continue to invest in journalism and content while adapting to the changing environment. The Commission determined that the deal would be likely to result in a substantial lessening of competition for readers and/or advertisers for each of online content, Sunday newspapers, and certain community newspapers. So the relevant legal question became whether the transaction would nevertheless result in a net benefit to the public.

The Commission found that the net quantifiable benefits – essentially, efficiencies – were significant (between NZD40 and NZD200 million over five years). However, it identified detriments in the form of likely losses in media plurality and news quality, which it could not quantify but considered likely to be substantial. The Commission found the detriments would outweigh the benefits and although the detriments could not be quantified, this conclusion "was not finely balanced". The parties have appealed the decision, in part on whether the Commission had jurisdiction to consider loss of media plurality as a detriment. The High Court found that it could and the case is now before the Court of Appeal. In the meantime Fairfax (now "Stuff") has announced the closure or sale of 28 community and rural publications.

The *Sky/Vodafone* merger also required the Commission to undertake competition analysis in the context of fast-changing technology. As noted above, the Commission could not exclude a real chance that the merged entity would leverage its power over premium live sports content to foreclose competition in the relevant broadband and mobile services markets. The Commission noted that rapid change in both telecommunications (broadband and mobile) and Pay TV markets meant it was particularly difficult to consider what might happen in future. The adverse scenario the Commission considered involved the merged entity using its market power over premium live sports to foreclose customers from rival telecommunications providers (via bundling offers), which could prevent those providers from competing effectively. Interestingly, broadcasting rights for the Rugby World Cup 2019 have subsequently been won by a partnership of telecommunications provider Spark and free-to-air television provider TVNZ. This development casts some doubt over Sky's market power, which was a central premise of the Commission's decision to decline.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

By law, the Commission can only accept undertakings to divest shares or assets of a business; it has no jurisdiction to accept "behavioural" undertakings. If such divestments are insufficient to mitigate competition concerns, the alternative is to seek authorisation on public benefit grounds.

The Commission does not necessarily require an upfront buyer for these shares or assets, but it does consider (among other things) whether a purchaser acceptable to the Commission is likely to be available – as part of which, it may insist on approving the purchaser – and whether the scope of an undertaking is too constrained or inappropriately configured to attract a suitable purchaser. Evidence of an interested purchaser will, of course, make it easier to deal with this "composition risk".

This legislative background may have some impact on the prospects for certain transactions. For example, in respect of vertical deals (such as *Sky/Vodafone*), the Commission could

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not have regard to any commitment to supply downstream on a non-discriminatory or equivalent basis. This raises the hurdle to secure approval as compared with jurisdictions with a more flexible approach to remedies. The Commission is tasked with monitoring behavioural undertakings in the telecommunications context (legislated in various stages as part of the break-up of the former monopoly provider), but there has been no strong push by the Commission or stakeholders for broader remedies in the merger clearance sphere.

Key policy developments

The Commerce (Cartels and Other Matters) Amendment Act came into force in August 2017. It contained three important changes to the Commerce Act's merger clearance regime.

Controlling interest by an overseas person

Previously, while the prohibitions in the Commerce Act applied to an acquisition outside New Zealand "to the extent that the acquisition affects a market in New Zealand", practically, there were difficulties enforcing orders made against offshore companies.

The Commission is now able to apply to a New Zealand Court where an overseas person acquires a controlling interest in a New Zealand body corporate and the acquisition takes place outside New Zealand. The Court may declare that the acquisition has, or would be likely to have, the effect of substantially lessening competition in a market in New Zealand. Its powers in respect of the New Zealand body corporate are significant: it can require that entity to cease carrying on business in the relevant New Zealand market, or to dispose of shares or other assets. The Court will revoke or vary an order, on application by the Commission, the overseas acquirer or the New Zealand body corporate, if it is satisfied of a material change of circumstances.

Default timeframe extended

The statutory timeframe for responding to clearance applications was previously 10 working days. Given that timeframe was invariably considered insufficient, in practice the Commission would ask for an extension (that parties were in no position to deny) at the outset of the process. The recent legislative change has extended the statutory timeframe to 40 working days. This may be a realistic timeframe for straightforward applications, and aligns with the Commission's internal goal for addressing clearance applications (published in the Mergers and Acquisitions Guidelines). However, for more complex matters, it will still be the case that the Commission will seek an extension early in the process to allow time to conduct a robust investigation.

Appeal rights

Appeal rights have been altered for both clearance and authorisation decisions; while they have been narrowed for clearance applications, they are arguably broader for authorisations.

For clearances, it is no longer the case that any person who participated in a Commission "conference" relating to a clearance is able to appeal the eventual determination. Now, only the parties (i.e. the acquirer and the target) may appeal. In theory, this should reduce the scope for tactical appeals by third parties, but in practice the Commission has not typically held conferences for clearances so these appeal rights did not usually arise. It remains to be seen whether removing the link between conferences and third-party appeal rights will result in the Commission holding more conferences in clearance processes.

As far as authorisations are concerned, an appeal may be made by any person with a direct and significant interest in the application, and who has participated in the Commission's processes leading up to the determination. This is likely to have broadened the category, as

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the Commission's "processes" are wider than a conference, and include interviews or other discussions with interested parties.

Despite ratcheting up other penalties, the amendment Act does not change penalties for non-compliance with the Act's merger control regime, which remain at NZ$5 million for bodies corporate and NZ$500,000 for individuals.

Reform proposals

There have been no recent policy developments in relation to the merger clearance regime. More generally, in addition to cartel criminalisation coming back into focus and the Commission being anticipated to have market studies powers by the end of 2018, reform may be on the cards, depending on a report due for release later in 2018 on "section 36" (New Zealand's prohibition on monopolisation). An obvious starting point for any such reform would be the "effects test" recently adopted in Australia.

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Romania

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Overview of merger control activity during the last 12 months

In a snapshot, 2017 was fairly similar to previous years in Romania when it comes to merger control activity. The Competition Council (CC) – which is primarily in charge of "merger control activity" – had 60 merger cases on the table.[1] There was a slight decrease in the total number of merger decisions, from 63 in 2016 to 60 in 2017.[2] Based on the CC's preliminary activity report, the merger decisions issued by the CC represented 77% of all 78 decisions issued by CC.

To explain the CC's activity, we can think of several factors that influenced and will most likely continue to determine the number of mergers falling under the CC's scrutiny. The most important and straightforward ones would be the features displayed by the Mergers & Acquisitions (M&A) market, complemented by macro-economic, financial and political events at local, regional and global levels. If we take a closer look at what happened during the last 12 months on the M&A market, we can say Romania enjoyed a pretty full year of M&A activity, showing that it continued on the ascending path similar to previous years. In 2017, the M&A market increased in value by 15% compared to 2016.[3] In other words, bigger M&A deals were concluded in 2017. Also, the number of transactions of between €100 million and €500 million reached 15 which, according to financial specialists, is a record performance in the past 10 years.[4]

From a merger control complexity standpoint, apparently the CC has not faced great challenges. A quick review of the publicly available merger clearances shows that the CC issued all of its merger decisions in Phase I of the notification procedure. This means that overall, the economic concentrations submitted for CC's review were, so to speak, "competition rules-friendly" as they posed no risks to effective competition on the concerned, relevant and affected markets. It follows thus that the merger cases examined by the CC in 2017 basically did not raise serious doubts as regards their compatibility with a normal competitive environment. However, the CC did issue four decisions that had commitments attached:

- Lactalis Group, a company active in the market for manufacture and sale of dairy products, acquired Covalact SA and Lactate Harghita SA, on the condition they assign the butter trademark "La Dorna" as well as all subsequent contracts concerning the butter commercialised under "La Dorna".[5] Indeed, by acquiring Covalact, Lactalis Group would have strengthened its position in the manufacturing and commercialisation of butter. The CC worried that this could affect competition and lead to higher prices.
- In order to acquire Payzone SA, Pay Point Services SRL proposed a behaviour commitment, undertaking not to raise prices for providing invoice collection services.[6]

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In addition, the company took a series of commitments in order to ensure that competitors operating networks of payment terminals can obtain access in the commercial premises necessary for installing payment terminals situated in the countryside. The CC will monitor over a period of three years that the company complies with its commitments. In this respect, the company will send the CC annual reports.

- Afideea, a medical clinic, has acquired the imaging clinic Hiperdia, and undertook a structural divestment commitment: assigning the activity of five clinics situated in geographic areas where the concentration was likely to affect competition.[7]
- Family Radu has acquired control over Postmaster SRL and Zoto Investments BV. The buyer took a series of behavioural commitments, such as limiting the duration of services supply contracts, not including exclusivity clauses or obligations to acquire minimum quantities, and the structural commitment not to conclude another transaction on the relevant market during the next three years.[8] Compliance with the commitments will be monitored by the CC during a three-year period.

Worth noting as well, is that in 2017, almost 66% of the notified concentrations published on the CC's website[9] received the CC's clearance after undergoing the so-called simplified assessment procedure. This "simplified assessment procedure" is in fact a fast track to clearance, applicable only to economic concentrations that do not raise any potential competition law concerns. It is for mergers that do not affect the markets (relevant ones, upstream and downstream) either because, for example, there is no overlap in parties' activities on the relevant markets (including upstream and downstream markets) or, where any horizontal overlap or vertical integration exists, it remains below 20% or 30% respectively.

New developments in jurisdictional assessment or procedure

Strategic and policy aspects

Some rules governing the jurisdictional assessment of mergers under the Competition Law and the Regulation on economic concentrations (**Merger Regulation**) have changed in 2015 and once more in 2017.[10] The new Merger Regulation entered into force on September 4, 2017.[11] However, this revision has no impact on substantive law as the main modifications brought by the new provisions concern only matters of wording and numbering aimed at harmonising secondary legislation with the Competition Law. Also, there were some formal changes brought to the notification forms (complete notification form and simplified notification form).

The two-level turnover thresholds for notifying economic concentrations to CC have been the same since 2003 (i.e. the aggregated turnovers of all involved parties must exceed €10m in the year preceding the transaction and each of at least two involved parties should have obtained in Romania a turnover exceeding €4m). Since 2015, the Competition Law expressly allows the CC to change the thresholds if it deems it necessary, with prior approval of the Ministry of Economy and Commerce. The new thresholds must afterwards be approved by decision of the Plenum of the CC, which will be implemented by order of the President of the CC. The new thresholds will become applicable following the lapse of a six-month period as of the publication in the Official Gazette of Romania. However, until now, the CC has not used the opportunity to change the thresholds for notifiable economic concentrations.

Other criteria which give us an overall image of potentially significant items that are worth considering when assessing economic concentrations are the micro and macro perspectives

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of the economic, financial and political environments. This is basically interrelated with the first criteria and it refers, for example, to economic health and growth, political upcoming events, local currency and euro projected variations for the medium to long term, etc.

Worth noting as well is that along with the CC, the SCND is another administrative body that can intervene in merger control cases that may raise national security risks. This would be the case for mergers (notifiable or not to CC) that involve companies active in national security domains[12] such as financial, fiscal, banking and insurance safety, agriculture and environment protection, energy safety, industrial safety, etc. When it finds it necessary, the SCND conducts its own assessment of merger cases which feature potential national security risks. If the SCND believes that the merger should be prohibited, it must inform the Romanian Government and the CC. The Competition Law provides that the proceedings before the CC will be suspended from the moment the SCND notifies it that the economic concentration is likely to present a risk to national defence. The suspension effect ends when the SCND decides whether a risk to national defence exists or not. In case SCND issues a prohibition decision, the procedure in front of the CC will end and the CC will inform the notifying party in this respect.

“Warehousing” or “parking” structures versus “standstill” obligation

Although the CC has not yet ruled on the validity of so-called “warehousing” structures, the expected approach of the CC would be in line with the relevant rules in the Merger Regulation that basically transpose the European Commission’s Consolidated Jurisdictional Notice. These transaction structures, where the target is “parked” or “entrusted” with a bank based on an agreement between the seller and the ultimate buyer on the future onward sale of the target to the ultimate buyer (while the ultimate buyer also secures antitrust approval), are expressly dealt with in the Merger Regulation and other secondary pieces of legislation.

The approach in the Merger Regulation is to discuss them in those sections that detail the scenarios in which a change of control occurs “on a lasting basis”. And the view is that the ultimate buyer of the “warehoused” target will be considered as the acquirer of control. So the entire structure will, in fact, represent a single economic concentration, including the temporary “pass” of control to the interim party, which will be just a preparatory step in one overall arrangement that will be completed when the ultimate buyer gains control over the target.

This naturally leads us to the conclusion that a notification of the “full” transaction will be necessary from the outset. Otherwise, based on the currently applicable version of the Merger Regulation, the CC might find that the entire scheme amounts to classical “gun-jumping” and that the acquirer of control has breached the obligations to standstill and not implemented the control rights before obtaining clearance from the CC.

This rather formal take on the “warehousing” deal structure displayed by the Merger Regulation basically runs against the interests of businesses when it comes to transaction planning. The possibility to “park” the target does not have an unlawful objective, as it does not tend to avoid or somehow escape the obligation to apply for merger clearance, it just delays it. The issue here is much simpler: it is essentially about flexibility for businesses, which is justified by commercial grounds when some few weeks’ delays or conditional purchases are not an option in practice.

Approach to mergers which must be notified, but which do not raise concerns

The rule under the Merger Regulation is that economic concentrations that exceed the turnover thresholds set by the Competition Law must seek the CC’s approval before

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implementation. It is irrelevant if the transaction might raise concerns or not; any concentration above the notification thresholds has to be notified to the CC. We have no "*de minimis*" escape clause under our local Merger Regulation in the pre-notification phase. Although the obligation to notify stays for economic concentrations above the turnover thresholds, merger cases may enjoy a simplified assessment procedure provided that they do not raise concerns. This basically translates into insignificant effects on the competitive environment and is the case, for example, when there is no overlap in parties' activities on the market or no vertical integration, or where any horizontal overlap or vertical integration exists, it remains below 20% or 30% respectively. Even if these conditions are fulfilled, CC may, at its discretion, require a full notification. Accordingly, it is recommended to discuss with CC what type of notification procedure is to be followed. The notification form is attached to the Merger Regulation.[13]

Merger notifications made under the simplified procedure are subject to an expeditious assessment by the CC. Simplified notifications mean a shorter merger notification form, with less information to be provided by the involved parties, especially when it comes to competitive conditions on the relevant markets (suppliers, clients, competitors etc.) and description of the relevant market(s) structure(s).

Procedural aspects

The Competition Law and the Merger Control Regulation advise the parties to seek the CC's guidance before submitting the notification form in the so-called pre-notification phase. Basically, parties meet with CC representatives in order to clarify important aspects related to the concentration. In order to do so, parties provide the CC with information regarding the parties involved, the relevant market and market shares as well as a description of the way in which the concentration will be realised.

Further, the parties submit the notification form and, if necessary, the CC requests additional information and clarifications to the involved parties in order to assess the economic concentration.

The deadline for the CC to issue the clearance in case of economic concentrations is 45 days as of complete notification. Practice shows us that when it deals with simplified assessment merger cases, the CC issues the clearance in approximately two to three weeks. Even in more complex cases, where clearance has been granted with commitments, the CC issues its decision in approximately one month.

Decisions concerning fines, or those establishing authorisation taxes for economic concentrations, are automatically qualified as executory titles within 30 days from their communication.

The parties to the merger may appeal the decision issued by the CC before the Court of Appeal of Bucharest in 30 days from the communication of the decision. The Competition law provides expressly that the decisions issued by the CC must be notified to the parties in a maximum of 120 days from their deliberation

"Gun-jumping" and applicable sanctions

Similar to the European Commission Merger Regulation and rules in other European jurisdictions, the Romanian Competition Law and the Merger Regulation impose the "standstill obligation" for economic concentrations that must be brought before the CC because they qualify for merger control.

"Standing still" means to abstain from effectively using any rights of control before the CC issues the clearance. So, the implementation of any powers to direct or influence

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targets' commercial behaviour on the market is prohibited. This basically means no joint marketing, transfers of shares, conclusion or termination of contracts with suppliers or clients, etc.

Breaching the obligation to notify an economic concentration and implementing a transaction that exceeds the turnover thresholds can be sanctioned by the CC with fines ranging from 0.5% to 10% of the firm's last year turnover. In 2017, the CC published on its website two other decisions concerning companies that failed to notify their economic concentration and have implemented the economic concentration.[14]

Key industry sectors reviewed and approach adopted to market definition

Economic concentrations that made it to the CC's working agenda in 2017 concerned several industries that correspond to the economic sectors where dealmakers were mainly active. To this end, the majority of the CC's decisions were made in the real estate market, financial and banking, energy, food and non-food retail and wholesale sectors, and pharma. In fact, the concerned sectors were basically the same as those in 2016.

When it comes to relevant market definition, especially from a geographic perspective, the traditional CC approach, which has been reinforced over the years, is to stay within national boundaries. This means that the CC is quite reluctant to discuss and accept geographical markets that go beyond the national territory and extend to the European Economic Area or at global level.

But, as we have noticed since 2015, it seems that the CC is willing to change its views when it assesses relevant geographic markets. In 2017, the CC issued several decisions in which the CC stated that the relevant geographic market could be considered the European Economic Area, or even global.[16] For instance, the CC left open the exact definition of the relevant geographic market of manufacture and sale of turbo-blowers for cars, and of manufacture and sale of coating materials for interior surfaces of cars, saying they have at least a Community dimension[15] or even global. By defining the relevant geographic market at the European Economic Area level, or even wider at a global level, the overall competitive assessment of the impact of the transaction on the relevant markets became more relaxed, as it was less likely that competition concerns would arise given the size of the geographic market.

When conducting its assessment in a particular merger case, the CC may take into account various economic or social aspects that are relevant in a certain transaction, and may allow the acquirer of control to implement its controlling rights before obtaining formal approval from the CC. This is done in a special procedure, i.e., the so-called request for derogation. The aim of the derogation is to obtain a green light from the CC for implementing the economic concentration before the CC has finalised the assessment of the operation from a merger control perspective. Derogations are granted by the CC only in exceptional cases, when there are real risks for huge financial losses or harmed social interests that will take place unless the transaction is immediately implemented. Of course, the parties have the duty to obtain the merger control clearance and thus file the notification before or after the request for derogation.

Based on the information made public until now, the last time the CC granted a derogation decision was in 2015, in the context of the envisaged acquisition by Banca Transilvania of sole control over Volksbank Romania SA and Volksbank Romania Services SRL.[17] The main reasons considered by the CC when approving the derogation were the continuous financial losses of the target companies (i.e., Volksbank) during the past three years in an

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activity with medium to high risks involved, together with the social unrest around the CHF loans crisis triggered by the huge increase of the exchange rate. In this context, Volksbank's clients, both legal persons and individuals, especially those that had contracted loans in CHF, were unable to reimburse the loans and thus the acquirer (i.e., Banca Transilvania) had to take control over the target with the purpose of immediately implementing feasible solutions to avoid even worse financial and social consequences.

Key economic appraisal techniques applied

Similarly to the European Commission, the CC employs the so-called "classic" economic appraisal techniques as substantive tests, both when it defines relevant markets and when it makes measurements of the concentration levels on affected markets.

For relevant market definitions, the CC uses the re-formulated Significant Impediment to Effective Competition Test (**SIEC Test**). According to the substantive SIEC Test, an economic concentration will be cleared as being compatible with the normal competitive environment if it does not restrict effective competition. This translates into the envisaged operation not entailing a risk of creating or consolidating a dominant position on the Romanian market or a substantial part thereof.

Supplementary to the traditional test, the CC takes into careful consideration several other aspects directly linked to the relevant market(s): market structure; actual and potential competition; alternatives available to suppliers and users; access to supply sources or markets; legal and other regulatory barriers to market entry; supply and demand trends for the relevant goods or services, etc.

When the CC examines the effects of an economic concentration that might lead to actual or future changes in the concentration levels of the market(s), it uses the Hirschman-Herfindahl Index Test (**HHI Test**). The HHI Test is the tool used by the European Commission for measuring the level of a firm's concentration in the market, as a potential indicator of market power. The HHI Test is relevant in cases of horizontal mergers in order to evaluate the potential effects of a merger on market concentration. The HHI Test gives a "before" and "after" snapshot of the competitive landscape on the affected markets.

Our Merger Regulation does not set thresholds for the change in the HHI in order to determine whether a horizontal merger has the potential to generate market power and reduce competition. So, in its decisions, the CC refers directly to the HHI thresholds applied by the European Commission and detailed in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

In this respect, one of the high-profile cases concerned the acquisition of control by ALPLA Plastic over the assets of Amraz Romania.[18] The transaction implied a horizontal overlap on the PET pre-forms production and commercialisation market. In this case, the degree of concentration on the market after the transaction was rather high (i.e. HHI of 1932 very close to 2000, an amount which most likely raises competition concerns). In addition, there was a rather important increase in the degree of concentration, as before the transaction the HHI was of 1403 (i.e. a variation of the HHI of 529). In spite of the above, the CC authorised the transaction by taking into consideration certain elements that proved that the transaction would not cause negative effects on the market (e.g. other producers are still on the market; there are no barriers to entry to the market; and the producers have an important capacity of production that could satisfy demand, etc.)

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Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Approach to remedies to avoid Phase II investigation

The CC usually follows the principles set out in the European Commission Notice on remedies acceptable under Council Regulation (EC) 139/2004 and under Commission Regulation (EC) 802/2004. Structural remedies are usually preferred by the CC as: (i) they are more effective for remedying competition concerns; and (ii) unlike non-structural/ behavioural remedies, they do not usually require subsequent monitoring. This is expressly stated in the CC's Guidelines, according to which the divestment structural remedy is one of the most effective remedies.[19] In 2017, the CC cleared three transactions subject to structural remedies. The Competition Law gives the parties to a notified economic concentration the option to propose commitments during the first phase of the merger control procedure. In fact, it is highly advisable to initiate discussions on potential remedies as early as possible in complex and potentially problematic transactions. This way, the length of the proceedings before the CC would be shorter and the parties would have a real chance to take into careful consideration and conduct a comprehensive assessment of all available potential remedies in order to identify the most appropriate commitments.

So, the notifying party already has the possibility to offer remedies (behavioural and/or structural) together with the notification and, following discussions and "negotiations" with the CC, the notified transaction may receive a conditional clearance already in Phase I.

It is essential to start the planning of the pre-notification procedure from the outset in those cases where the notifying party intends to propose commitments in the early stage (Phase I) of the merger control assessment procedure. This way, the parties to the economic concentration will benefit from enough time to thoroughly discuss and agree upon the most suitable and commercially acceptable remedies.

At the same time, it would be better for the parties effectively to have contacts with the CC before filing the notification form, because this will allow them to really understand the competition concerns, with a view to identifying together with the CC the best options to properly eliminate the CC's concerns.

Approach to remedies following Phase II investigation

The CC may decide to start a Phase II investigation in a merger case by means of a notice within 45 days after receiving the complete notification of the economic concentration.

This would happen when the CC takes the view that the notified merger raises serious doubts when it comes to the operation's compatibility with the normal competitive environment; provided, of course, that the "competition damage concerns" have not been eliminated in Phase I of the merger control proceedings.

The notice that informs the parties of the CC's intention to take the merger case in the second-phase investigation usually indicates the competition concerns that should be remedied. Although the CC brings to the parties' attention the potential "concerns" it has identified, it has no power whatsoever to impose commitments. At the best, the CC will discuss with the parties various potential commitments in order to determine the ones capable of answering all potential competition issues. It is therefore the parties' prerogative to offer commitments.

There is no "recipe" for what remedies would be acceptable to the CC in a particular merger case. Because each transaction has its particularities that are shaped by the specific sector or industry, goods and services involved in the transaction, the type of commitments (behavioural and/or structural) will be determined on a case-by-case basis.

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If the parties do not respect the commitments they have undertaken, the CC may sanction them with fines from 0.1% to 1% of their turnover, or even impose daily penalties up to 5% of their average daily turnover. The CC can also order the dissolution of the entity resulting from the concentration or any other adequate measure in order to re-establish competition.

Key policy developments

In the 2014 report released by the Organization for Economic Co-operation and Development (**OECD**) on the policy and competition law in Romania, the OECD expressly confirmed that the overall Romanian Competition Law and secondary legislation was in line with European standards, while merger control proceedings were found to follow the standards meant to ensure an effective and efficient merger review regime.[20]

The same 2014 report issued by the OECD recommended a revision of the turnover thresholds used for separating "must notify" economic concentrations from mergers that do not need to be scrutinised by the CC. The main reason behind the recommendation was that almost one third of notifiable economic concentrations basically qualify for the simplified assessment procedure. Moreover, this is a clear indication that the number of notifications of economic concentrations can be limited by increasing the quantitative thresholds. A limitation on the number of merger cases that must be assessed by the CC would, in fact, lead to cost reductions for the body, for example.

Romania had a positive and visible reaction to the OECD's recommendation and in 2015 changed the Competition Law by adding the CC's right to change the quantitative thresholds for merger control. We gave more details and commented on this legislative change in our 'Overview of merger control activity', above. However, until now, the CC never used the possibility of changing the thresholds.

In 2017, the CC issued a report regarding the evolution of competition in which it identifies the relevant markets which are concentrated and facilitate infringements of competition law.[21] In its analysis, the CC used the aggregate index of competitive pressure, which depends on a series of different criteria (barriers to entry on the market, transparency on the market, prices, evolution of demand, degree of innovation, etc.) The conclusions of this report are important mainly for transactions envisaged in the economic sectors qualified by the CC as being concentrated/highly concentrated, i.e. mainly for the cases where the transactions lead to the consolidation between the companies already active in this market. As an example, some of the most concentrated markets identified by the CC are the markets for banking services, production of natural gas, notary services, wholesale and retail of medicine, and manufacture and sale of cement.

Reform proposals

Recently, the President of the CC announced in a public conference that the CC is planning to amend the secondary legislation (basically the Merger Regulation) in order to simplify the procedure applicable to merger control and thus ensure a faster procedure. However, up until now no official proposal of the amended version of the Merger Regulation has been published.

We are not aware of any other reforms or developments in the pipeline at this moment that would concern the merger control domain.

* * *

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Endnotes

1. According to its preliminary activity report available here: http://www.consiliulconcurentei.ro/uploads/docs/items/bucket13/id13110/bilant_2017_ian_2018.pdf.
2. However, only after the CC publishes its final activity report will we see clearly if other decisions will be added. Indeed, last year the preliminary report mentioned 59 decisions, and in the final report 63 decisions were mentioned.
3. http://www.romaniajournal.ro/ma-market-up-to-eur-4-4-5bn-in-2017-2/.
4. https://www.romania-insider.com/deloitte-romania-ma/.
5. Decision no 29/26.06.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12909/decizie_bsa_cu_covalact_site.pdf.
6. Decision no 49/11.09.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12996/decizia49.pdf.
7. Decision no 24/2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12857/decizie_affidea_angajamente_pt_site.pdf.
8. Decision no 13/22.03.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12176/decizie_13_22_03_2017_radu-pm_tp_cu_angajamente.pdf.
9. From the total of 60 decisions, only 44 have been published until now on the CC's website.
10. Regulation regarding economic concentrations of August 5, 2010 published in the Official Gazette Part 1, no 553 *bis* of August 5, 2010 amended by Regulation for the amendment of the Regulation regarding economic concentrations, published in the Official Gazette Part 1, no 683, September 8, 2015.
11. Merger Control Regulation of July 20, 2017, published in the Official Gazette, Part I, no 713/04.09.2017.
12. SCND's Decision no 73/27.09.2012.
13. http://www.consiliulconcurentei.ro/uploads/docs/items/id6510/formular_concentrari_economice.pdf.
14. http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12297/decizia_55.pdf.
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16. CC, Decision no 78/15.11.2016.
17. Decision no 20/03.05.2017 – http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12268/decizie_20_2017_tch-cimos_neconf.pdf;
18. Decision no 9/23.02.2017 – http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12108/decizie_site_concentrare_contitech_21032017.pdf.
19. CC, Decision no 5/27.01.2015.
20. Decision no 42/24.08.2017, http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12851/decizie_amraz_pentru_site.pdf.
21. CC, Guidelines regarding the remedies in economic concentration field of December 9, 2010.
22. Published in the Official Gazette, Part 1, no 1, January 3, 2011.
23. http://www.oecd.org/daf/competition/Romania-Competition-Law-Policy-2014-RO.pdf.
24. http://www.consiliulconcurentei.ro/uploads/docs/items/bucket12/id12990/sinteza-raport-2017-cu-coperta.pdf.

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Singapore

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Overview of merger control activity during the last 12 months

The merger regime under the Competition Act, Chapter 50B of Singapore (the "**Act**") came into force in 2007. As of 1 April 2018, the Competition and Consumer Commission of Singapore[1] (the "**CCCS**") has received 66 merger control notifications, of which, the CCCS had proposed to move to a Phase 2 review for 15 transactions, and commitments were considered for no fewer than six transactions.

The CCCS has also exercised its powers to issue Provisional Decisions to prohibit mergers, arising from horizontal and non-horizontal (i.e. vertical and conglomerate) effects – the most recent being in 2015, when the CCCS issued a provisional decision to block Parkway Holdings Ltd's ("**Parkway**") proposed acquisition of RadLink-Asia Pte Limited ("**RadLink**") in the healthcare sector in Singapore in view of, among others, vertical effects. The CCCS had also, in the past 12 months, cleared a merger conditional on Singapore-specific behavioural commitments.

Statistics on merger filings with the CCCS: 1 July 2007 to 1 June 2017				
Merger filings lodged with the CCCS	Merger filings which the CCCS had proposed to move to Phase 2	Merger filings where commitments were considered	Merger filings where the CCCS took a decision to block	Merger investigations by the CCCS*
66	15	No fewer than 6	2	Undisclosed

* *Where the CCCS probes or challenges a merger which has not been notified, such a process is confidential.*

In addition to the review of notified mergers, the CCCS has also been actively investigating transactions which have not been notified. Such investigations may be triggered by the CCCS through its market intelligence function or by third party complaints.

On 19 March 2018, the Competition (Amendment) Bill (the "**Bill**") was passed in Parliament. Amongst other amendments, the new section 55A formalises the CCCS' provision of confidential advice on anticipated mergers, in a situation where information about the merger is not yet in the public domain. In the spirit of confidentiality, the CCCS will base its assessment of the anticipated merger on the information provided by the merging entities. The CCCS will not request information from any third party, such as the applicant's main customers or competitors, or conduct any public consultation to assist in their assessment. As such, the advice that the CCCS issues under the new section 55A is not binding on the CCCS.

This approach is consistent with practices in Australia and the United Kingdom, which operate voluntary notification regimes similar to Singapore (see "Key policy developments" below). Although passed, the Bill is not yet in force.

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With respect to merger control, the CCCS has amplified its enforcement activity and is likely to:

- initiate an increased incidence of Phase 2 reviews;
- increasingly focus on commitments for merger remedies with an emphasis on Singapore-specific effects and countervailing commitments. In this regard, the CCCS is likely to encourage commitment negotiations at the end of Phase 1 reviews, early discussions with the Commitments and Remedies Unit (the "**CRU**"), market testing of proposed commitments, and require upfront named buyers for divestiture commitments; and
- increase merger probes in relation to unnotified mergers where there are likely to be effects on any markets affecting Singapore, as the CCCS has demonstrated increasingly aggressive enforcement towards merger control in Singapore through its horizon-scanning mechanisms to proactively detect unnotified mergers, and the formation of the CRU to consider commitments and remedies required.

It is crucial that moving forward, potential merger parties continue to consider the Singapore competition law implications for all aspects of the structuring of transactions with an effect on any market affecting Singapore.

New developments in jurisdictional assessment or procedure

Voluntary merger regime

Under the Singapore merger control regime, a merger notification to the CCCS is voluntary, but advisable and expected if the merger may potentially result in a substantial lessening of competition ("**SLC**") in any relevant market or a market segment (defined in accordance with the rules set out in the gazetted CCCS Guidelines on Market Definition).

In the absence of a filing, the merger parties bear the antitrust risk as there is no limitation period on the timeframe after which the CCCS may cease to have the power to investigate a transaction. There is accordingly an evergreen risk of an investigation and subsequent divestments or other remedies to the transaction, even where the transaction has been implemented for some time.

On 23 March 2018, the CCCS initiated an investigation into a merger which had been completed more than five years ago under Section 62 of the Act. The CCCS has stated that it will generally not consider the costs of divestment which the merger parties would have to incur, as it would have been open to the merger parties to notify the merger to the CCCS for a decision. The only way to close off the antitrust risk is to undertake a merger notification and obtain a clearance decision from the CCCS.

Risks of not filing: investigation risk

As part of its statutory remit in the context of merger control, the CCCS keeps markets under review to ascertain which mergers and acquisitions are taking place.

Where the CCCS identifies transactions that it considers may potentially raise concerns, the CCCS will approach the merger parties and third parties to gather further information about the transaction and the effect on competition. A formal investigation may be triggered under Section 62 of the Act if there are reasonable grounds for suspecting that a merger has infringed, or that an anticipated merger, if carried into effect, will infringe the prohibition under Section 54 of the Act. Where the CCCS investigates a transaction, the CCCS may publish the fact of its investigation on its website.

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The CCCS may be prompted to investigate:

- following consistent complaints, or one or two substantiated complaints, from third parties;
- where there are preliminary indications that the CCCS' indicative market share thresholds are likely to be crossed;
- where customers in Singapore appear, post-merger, to have limited choice; or
- for vertical mergers, where there is a possibility of competitors being foreclosed.

The CCCS has previously raised serious doubts as to the compatibility of transactions with Section 54 of the Act even where:

- mergers by the same parties, or involving the same industry, had received clearances in other jurisdictions;
- there are no significant issues identified within the wider defined relevant markets, but the CCCS has reviewed whether there may be competition issues within narrower market segments, on a global or Singapore-specific basis; or
- the CCCS' indicative market share thresholds are not crossed.

Risks of not filing: closing risk

A CCCS investigation may be triggered at any point pre- or post-closing of the transaction. There is no administrative timetable for an investigation, and the investigation can take several months. This may adversely affect the timeline for closing of the transaction or for implementation of the transaction post-closing.

Risks of not filing: burden of proof risk

Where the CCCS investigates, the CCCS would already have formed its theories of harm and the burden of proof will be on the merger parties to demonstrate why the CCCS is wrong. From our experience, this burden of proof is significantly harder to discharge.

The temperament of the merger review process is also materially harsher in cases of investigations. The extent and volume of documents requested also tends to be much wider.

Mandatory self-assessment

While merger notifications to the CCCS are voluntary, the CCCS requires all parties to mergers to conduct a self-assessment on whether a merger filing is necessary, in accordance with the methodologies in the guidelines published by the CCCS, read with its decided cases. Where the CCCS investigates a merger which was not notified, the CCCS would expect the parties to explain why the merger was not brought to their attention and why a merger filing was not made.

In the event of a CCCS finding that the transaction gives rise to an infringement of the prohibition under Section 54 of the Act, it will consider whether the infringement was intentionally or negligently committed in determining whether financial penalties should be levied on the parties, apart from other directions and remedies. The CCCS may impose financial penalties of up to 10% of the turnover of the undertaking in Singapore for each year of infringement, up to a maximum of three years, and remedies on parties to the transaction, such as a direction for the merger to be unwound or for divestments to be carried out. A contemporaneous self-assessment documented at the time of the transaction would be considered as a first line of defence to the CCCS that the infringement was not entered into intentionally or negligently.

In the context of cross-border transactions, the prohibition under Section 54 of the Act

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may apply even where the merger takes place outside of Singapore, or where any party is located outside Singapore, so long as the merger has effect on any market affecting Singapore (whether as part of a global, regional or local market). In its assessment of the potential impact of global mergers, the CCCS will also consider Singapore-specific factors. It is accordingly necessary to include an assessment of any Singapore-specific effects in the self-assessment as to whether the merger may give rise to a SLC within any market affecting Singapore.

New developments

Gun-jumping

Since 2012, the CCCS has taken a stricter approach to gun-jumping. In the Guidelines on Merger Procedures 2012, the CCCS stated that parties to an anticipated merger should exercise due caution when exchanging commercially sensitive information (such as prices and customer details) in the context of the merger negotiations and the application and review process. In cases of mergers being terminated or abandoned, the CCCS has, in its acknowledgment letter, highlighted gun-jumping risks.

Ancillary restrictions

The CCCS has also been stepping up its enforcement of specifically, issues related to ancillary restrictions, such as non-compete obligations and supply restrictions, in the merger context. For example, the CCCS had, in CCS No.400/005/12 – *Heineken/APB* found that certain restrictions agreed to in connection with the transaction did not qualify as ancillary restrictions. The CCCS had, in particular, subsequently investigated the non-compete clause raised in *Heineken/APB* and ceased its cartel investigation against the clause pursuant to voluntary undertakings provided. The CCCS had also, in other cases, required restrictions to be modified before accepting such restrictions as ancillary restrictions in a merger control context.

Acquisition of assets constituting a notifiable merger under the Act

Another significant development is that on 24 August 2016, the CCCS announced that it had cleared the proposed acquisition by Samwoh Premix Pte. Ltd. ("**SWPPL**") of the property together with the building and asphalt premix manufacturing plant, together with all plant equipment in connection therewith situated at 55 Kranji Crescent, Singapore 728662 (the "**Disposal Assets**") from competitor Ley Choon Constructions and Engineering Pte. Ltd. ("**LCCE**"). Notably, this is the first transaction in which the CCCS considered the acquisition of real property and a manufacturing plant to constitute a notifiable merger under the Act.

The CCCS took the view that the proposed transaction constituted a merger within the meaning of Section 54(2)(c) of the Act, as the acquisition of the Disposal Assets (which forms a substantial part of the assets of LCCE) would place SWPPL in a position to replace LCCE in the part of the asphalt production business attributable to the Disposal Assets immediately before the proposed transaction, and that the Disposal Assets were, on their own, revenue-generating business.

Minority shareholders

Under the revised CCCS Guidelines on the Substantive Assessment of Mergers 2016, the CCCS has also clarified that minority shareholdings may give rise to an acquisition of control based on factors such as historical attendance at shareholders' meetings and voting patterns, and the wide dispersion of shares.

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Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition etc.

In general, industry sectors of keen consumer concern, such as health and transport, or with strategic impact to the Singapore economy, are of interest to the CCCS, and the CCCS may look closely into such sectors.

On 13 March 2015, the CCCS took a provisional decision to block the proposed acquisition by Parkway, through its wholly owned subsidiary, Medi-Rad Associates Ltd, of RadLink and its subsidiaries from Fortis Healthcare Singapore Pte. Limited ("**Fortis**"). The provisional decision by the CCCS to block the proposed acquisition represents the second-ever provisional decision by the CCCS to block a merger on the basis that it could result in a SLC in the affected markets and could infringe Section 54 of the Act. The CCCS also recently concluded a market inquiry into the Supply of Formula Milk for Infants and Young Children in Singapore, given the public interest in the prices of Formula Milk in Singapore in recent years.

The CCCS is also increasingly looking into e-commerce and disruptive technologies, and studying its implications on competition policy in Singapore.

One of the e-commerce-related mergers that the CCCS has looked at is the acquisition by SEEK Asia Investments Pte. Ltd. of 100% of the online recruitment business assets of JobStreet Corporation Berhad, including JobStreet.com Pte. Ltd. (the "**Transaction**"). The clearance is notable for the first-ever market testing of proposed commitments offered by merger parties, and the first conditional clearance subject to local commitments offered in Singapore. Mergers cleared in Singapore by the CCCS previously pursuant to commitments had been on the basis of global commitments offered by merger parties in other jurisdictions. The Transaction is also ground-breaking in that it is the first merger review where the CCCS has considered two-sided platform markets, network effects, and the emerging divide between print media and online media in a dynamic market.

Most recently, the CCCS has set its sights on disruptive technologies in another two-sided market in the chauffeured personal point-to-point transport passenger and/or booking services ("**CPPT Services**") market, specifically in relation to the Uber-Grab merger, which is also a sector of keen consumer concern. In a seminal move on 13 April 2018, the CCCS issued Interim Measures Directions ("**IMD**") to the merging parties, in an attempt to ensure the market remains open and contestable, and for the purposes of preserving the pre-merger *status quo*, up until the CCCS had fully reviewed the merger or if there were material changes to the conditions of the market that rendered the IMD otiose.

The high-profile status of the Uber-Grab merger was underpinned by substantial public interest in the matter and the large number of stakeholders, which is testament to the pervasiveness of the disruptive technology itself. Multiple agencies and governmental regulators, such as the Land Transport Authority and the Ministry of Transport, have taken a keen interest, further adding to the furore of public interest. All in all, the CCCS has had to engage in multi-agency consultation and cooperation in what appears to be a historical and seminal case in Singapore, and the CCCS' history.

Turning to CCCS' approach to market definition, the CCCS has regard to international competition as part of its market definition analysis. Close to 70% of all mergers notified to the CCCS are on the basis of global/worldwide market definitions. Of these, the CCCS has focused on the worldwide market shares in more than 50% of mergers.

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Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

Thresholds

There are no jurisdictional safe harbours where mergers which do not trigger specified quantitative thresholds are exempted or excluded from Section 54 of the Act. Generally, if a merger results in the following indicative quantitative thresholds being crossed, the CCCS is likely to give further consideration to the merger before being satisfied that it will not result in a SLC:

- the merged entity has a market share of at least 40%; or
- the merged entity has a market share of at least 20%, and the post-merger combined market share of the three largest firms is at least 70%,

(the "**Quantitative Thresholds**").

The Quantitative Thresholds are based on the relevant markets defined in accordance with the rules set out in the gazetted CCCS Guidelines on Market Definition, and can be broadly defined as local (i.e. Singapore), regional, or global.

As a general rule, mergers involving companies where the turnover in Singapore in the financial year preceding the transaction of each of the parties exceeds S$5 million or the combined worldwide turnover in the financial year preceding the transaction of all of the parties exceeds S$50 million, are likely to be of more concern (the "***De Minimis* Thresholds**").

The CCCS has stressed that it may also investigate transactions that fall below the indicative Quantitative Thresholds and the *De Minimis* Thresholds. Merger parties should nonetheless conduct a self-assessment to assess if their merger may give rise to a SLC within any market in Singapore, and merger situations should be notified to the CCCS if there is a risk that the merger may result in a SLC within any market in Singapore.

Substantive issues

Apart from market shares, the CCCS will also assess how the dynamics of competition are affected by the merger and will examine qualitative factors such as entry and expansion, countervailing buyer power, market volatility, supply-side substitution, market transparency, and cost stability in the market.

The CCCS will also consider whether the SLC may be offset by other factors, such as:

- **efficiency gains**: whether such efficiencies may increase rivalry in the market or enhance rivalry among the remaining players in the market; and
- **the failing firm/division defence**: in the case of a failing firm, where one of the parties to the merger is genuinely failing and likely to exit the market in the absence of the merger, the counterfactual scenario may need to be adjusted to reflect the likely loss of rivalry which will happen in any event in the market, given the failure of one of the merger parties.

There are broadly three types of mergers which may give rise to the following concerns:

Horizontal mergers (between undertakings that operate in the same economic market)

- **non-coordinated effects**: non-coordinated effects may arise where, as a result of the merger, the merged entity finds it profitable to raise prices (or reduce output or quality) as a result of the loss of competition between the merged entities;
- **coordinated effects**: coordinated effects are concerned with the changes to the existing structure of competition brought about by a merger such that it is easier or more likely

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for firms in the same market to coordinate their competitive behaviour (i.e. to raise prices, or reduce quality, or output);

Non-horizontal mergers (vertical mergers)

- **vertical effects**: vertical effects occur between firms that operate at different, but complementary, levels in the chain of production and/or distribution. Vertical integrations may result in a SLC where market power exists at one of the affected functional levels; and

Non-horizontal mergers (conglomerate mergers)

- **portfolio effects**: portfolio effects involve firms operating in different product markets. A firm may be said to have portfolio power when the market power derived from a portfolio of brands exceeds the sum of its parts.

In practice, mergers may involve a combination of elements from the above three types of mergers. The CCCS may consider a combination of the above types of effects in its overall assessment.

In CCS No.400/010/14 – *Parkway/RadLink*, the CCCS took a provisional decision to block the proposed acquisition by Parkway, through its wholly owned subsidiary, Medi-Rad Associates Ltd, of Radlink and its subsidiaries from Fortis, after making provisional findings that:

- post-merger, Parkway would become the only commercial supplier of radiopharmaceuticals in Singapore, through its 33% shareholding of Positron Tracers Pte Ltd and the acquisition of 100% of RadLink. The CCCS' market inquiries indicated that no potential new entrant would enter the market in the next two to three years to compete with the merged entity;
- in the provision of radiology and imaging services for private outpatients in Singapore, evidence suggests that Parkway and RadLink are each other's closest competitors pre-merger, entry barriers in the market are moderate to high, and the bargaining power of customers is weak. Further, the CCCS noted that post-merger, the merged entity would have substantial market share; and
- a SLC is also likely to arise from the vertical integration of Parkway's and Fortis' operations between the upstream market for the supply of radiopharmaceuticals and the downstream market for the provision of radiology and imaging services. The CCCS' market inquiries indicated that the merged entity would be able to restrict competition in the market for radiology and imaging services by controlling the supply, the prices and/or the range of radiopharmaceuticals available to its downstream competitors.

This is the second merger in which the CCCS has taken a decision to block a proposed transaction.

CCS' revised Guidelines on the Substantive Assessment of Mergers 2016

The revised Guidelines on the Substantive Assessment of Mergers 2016 generally formalise the positions which the CCCS has taken in its merger decisional practice to date, and elaborate on the CCCS' assessment methodology for mergers.

For example, in relation to control, the CCCS has clarified that venture capitalists and private equity investors may raise possible competition concerns, particularly if they result in coordination of conduct among firms in their portfolios in the same market in which they have stakes and are able to influence their commercial behaviour.

As for efficiencies, when parties are asked to supply quantified estimates of the potential loss

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of competition in the relevant markets, the CCCS has clarified that such estimates include an estimate of the net changes to price and/or output, taking into account the SLC and efficiency factors. The CCCS has also elaborated that for evidence for efficiencies analysis, post-announcement merger planning and strategy documents, including those prepared with the assistance of external consultants and experts, may be considered probative evidence.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

At any time during the Phase 1 or Phase 2 review process, the parties (which may not be limited to the applicant, if a sole filing is made) may offer commitments to the CCCS to remedy competition concerns on the adverse effects of the transaction.

Where the CCCS proposes to make an infringement decision at the end of the Phase 2 review, it will issue a notice to the applicant setting out its provisional statement of decision. The applicant's written response to the provisional statement of decision will be its last opportunity to propose commitments or give its views on the remedies proposed by the CCCS. However, even where the parties propose commitments, the CCCS may consider and impose alternative remedies.

In relation to commitments and remedies, the CCCS' starting point is to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of the merger. There are broadly two types of remedial action which the CCCS may consider – structural and behavioural.

The CCCS prefers structural remedies to behavioural remedies, as they tend to address the competition concerns more directly and require less monitoring.

The CCCS has formed the CRU to independently assess the suitability of proposed commitments and remedies.

Structural remedies

Typically, structural remedies require the sale of one of the overlapping businesses that have led to the competition concern. The sale should be completed within a specified period and the CCCS must approve the proposed buyer before the sale of any business in order to ensure that it has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace.

Where appropriate, the CCCS may also consider other structural or quasi-structural remedies – for example, divestment of the buyer's existing business (or part of it) or an amendment to IP licences. To date, the CCCS has not required upfront buyers to be provided in divestiture commitments.

Behavioural remedies

The CCCS will consider behavioural remedies in situations where divestments are considered to be impractical or disproportionate to the nature of the concerns identified. Where appropriate, the CCCS may also implement behavioural remedies to support structural divestment.

In CCS No.400/004/14 – *Proposed Acquisition by Seek Asia Investments Pte. Ltd. of the Jobstreet Business*, the CCCS took the view that the significant market power possessed by the merged entity could give rise to non-coordinated effects post-merger. The CCCS accepted the following behavioural commitments, in addition to structural commitments, to address the CCCS' competition concerns:

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CCS' competition concerns	Commitments accepted
(a) Merged entity has the ability and incentive to provide loyalty rebates, exclusive contracts or bundling and tying of its products across its two brands which would prevent – or would be likely to prevent – customers from switching away.	Not to enter into exclusive agreements with employer and recruiter customers for a period of three years.
(b) Merged entity has the ability and incentive to impose price increases.	To maintain the current pricing of services capped at present-day rate cards or current-day negotiated prices, subject to Consumer Price Index changes for a period of three years.

In CCS Case No.400/003/15 – *Proposed Acquisition by ADB BVBA of Safegate International AB*, the CCCS took the view that the proposed acquisition may significantly reduce the level of competition in the affected markets, and may lead to price increases and deterioration in quality and/or technical support. Following public consultation, the CCCS accepted the following behavioural commitments to address the CCCS' competition concerns:

CCS' competition concerns	Commitments accepted
(a) Significant post-merger price increase due to substantial reduction of competition in the short to medium term.	Certain products and spare parts of the parties sold directly or indirectly to any airport operator for use in Singapore will be, for specified periods, subject to pre-merger prices and adjusted for inflation.
(b) Reduced supply of spare parts and technical support to customers.	The parties commit to supply all required spare parts for specific products sold to any airport operator for use in Singapore for a period of 10 years from the completion of the proposed acquisition. The parties will also supply any technical support required for these products to the airport operators.
(c) Possible 'lock in' of third party contractors and suppliers in Singapore using exclusive agreements	To facilitate entry by competing airfield lighting system suppliers into the Singapore market, for a period of four years commencing from the completion of the proposed acquisition, the parties commit not to enter into any agreements with any third party contractor or supplier in Singapore which expressly prevent or have the effect of preventing third party contractors or suppliers from carrying, promoting or offering alternative competing products and services.
(d) Possible retroactive termination of, or jeopardising of, agreements concluded before the completion of the proposed acquisition	The parties will ensure that any contracts or agreements relating to the sale of specific products entered into between the parties or a third party and an airport operator in Singapore on or before the completion date of the proposed acquisition shall continue in full force and effect post-transaction.
(e) Ensuring compliance with the proposed commitments	The parties will regularly provide the CCCS with an independent audit report.

Key policy developments

On 21 December 2017, the CCCS issued a consultation paper on proposed changes to the Act. The consultation closed on 11 January 2018.

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The proposed changes to the Act had been introduced after taking into account the CCCS' practical experience in enforcing the Act. The key aims of the amendments are to provide the CCCS with appropriate enforcement tools, in line with international best practices and to streamline existing processes.

These developments signal the CCCS' strengthening of its capabilities and expectations on increasing enforcement activity of the Act. This follows on the back of a record year for the CCCS in proceeding to three Phase 2 merger reviews, two market studies with wide-ranging impact on commercial practices, three infringement decisions (including proposed infringement decisions), and two public consultations on commitments in 2017.

Following the consultation, on 19 March 2018, the Competition (Amendment) Bill (B08/2018) (the "**Bill**") was passed after the second reading in Parliament.

This Bill seeks to amend the Act for the following main purposes:

- to empower the CCCS to accept commitments for cases involving:
    - agreements, decisions or concerted practices that may have the object or effect of preventing, restricting or distorting competition within Singapore ("**section 34 prohibition**"); or
    - conduct on the part of one or more undertakings that may amount to abuse of a dominant position in any market in Singapore ("**section 47 prohibition**").

  Allowing the CCCS, once a commitment is accepted, to make a decision that the section 34 prohibition or section 47 prohibition under the Act, as the case may be, has not been infringed;
- to empower the CCCS to issue confidential and non-binding advice on the likely effect of an anticipated merger, if carried into effect; and
- to empower enforcement officers entering any premises for the purposes of an investigation to conduct interviews with persons on the premises without having to issue a notice to any of such persons.

Reform proposals

The new CCCS was officially launched on 9 April 2018. The Competition Commission of Singapore was renamed the Competition and Consumer Commission of Singapore after taking on an additional function of administering the Consumer Protection (Fair Trading) Act with effect from 1 April 2018, pursuant to the Enterprise Singapore Board Act 2018.

* * *

Endnote

1. With effect from 1 April 2018, the Competition Commission of Singapore ("**CCS**") was renamed the Competition and Consumer Commission of Singapore.

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Elsa is Co-Head of the Firm's Competition & Antitrust practice. She regularly assists clients on complex antitrust matters, including merger control, global cartel and abuse of dominance investigations. Elsa was recognised by *Who's Who Legal* as "the top merger control practitioner in Singapore" and "a leading name in the Singaporean market", and was one of the only two economists named as a thought leader in North America and the rest of the world. Featured in the 100 elite women globally by *Global Competition Review* (GCR) in multiple Women in Antitrust peer-nominated surveys, Elsa was also named amongst the 10 competition economists globally in *GCR*'s Women in Antitrust 2016: Economists. A pioneer member of the Competition Commission of Singapore, now known as the Competition and Consumer Commission of Singapore ("CCCS"), Elsa has assisted on close to 90% of complex CCCS merger reviews requiring commitments.

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Scott is a competition law specialist, and his experience spans nearly 11 years in Singapore. With extensive experience in relation to contentious and non-contentious competition law matters, he was involved in the first set of appeals made to the Competition Appeal board in respect of a cartel matter, and in the appeal of the first ever abuse of dominance case. Scott has also assisted on multiple leniency filings made to the CCCS, and has assisted clients during dawn raids by the CCCS. Recognised as a leading competition lawyer by *Chambers Asia-Pacific*, *The Legal 500 Asia Pacific* and *Who's Who Legal*, a client noting that he "brings out the perspective of a former competition regulator to the table, which is very valuable" (*Chambers Asia-Pacific*). Scott is qualified as an advocate and solicitor of Singapore, and a barrister and solicitor of the High Court of New Zealand.

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South Africa

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Overview of merger control activity during the last 12 months

In line with global forecasting, the last 12 months have seen a steady flow in merger activity generally in South Africa. Despite recent turbulent political and economic times, firms continue to invest in South Africa. The South African Competition Commission (**Commission**) received 418 merger notifications during its financial year ended 31 March 2017 and finalised its investigation in relation to 385 of the notified transactions. This represents a 7% increase from the 391 mergers received in the 2015/2016 financial year. Of the finalised mergers, 109 were large, 270 were intermediate and six were small mergers. The vast majority of mergers therefore continue to be intermediate in size. During this period, 349 mergers were approved without conditions, while 31 were approved subject to conditions. In number, this is a slight decrease from the 37 mergers approved subject to conditions in the 2015/2016 financial year, and an even further decrease in number from the 43 conditional approvals in 2014/2015. In addition, there were five prohibited mergers in the 2016/2017 financial year.

A merger is notifiable to the South African competition authorities if it falls within the definition of a "merger" in terms of the Competition Act, 1998 (**Act**), and if it meets the monetary thresholds for compulsory notification.

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. A person controls a firm if that person:

- beneficially owns more than one half of the issued share capital of that firm;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes;
- is able to appoint or to veto the appointment of a majority of the directors of that firm;
- is a holding company, and that firm is a subsidiary of that company as contemplated in terms of the Companies Act, No. 61 of 1973;
- in the case of a firm that is a trust, has 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 that trust;
- in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in that close corporation; or
- has the ability to materially influence the policy of that firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the sub-paragraphs above.

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Only mergers which exceed certain thresholds are required to be notified in terms of the Act. These are so-called intermediate and large mergers. Small mergers are not required to be notified, although parties can voluntarily notify a small merger at any time. The Commission issued a practice note in April 2009 indicating that small mergers should be notified in circumstances where either party to the merger, or firms within their group, are the subject of a complaint investigation or a complaint referral by the Commission. In terms of the Act, the Commission can, however, require a small merger to be notified within six months of it having been implemented if the Commission is of the view that the merger will give rise to a substantial prevention or lessening of competition or public interest concerns.

From 1 October 2017, the financial thresholds for notification were increased. According to the revised thresholds, an intermediate merger is one where:

- the combined asset value or annual turnover in, into or from South Africa of the acquiring and target firms amounts to R600 million or more; and
- the asset value or annual turnover in, into or from South Africa of the target firm amounts to R100 million or more.

There was no change to the large merger thresholds. A merger is classified as a large merger if it meets the following thresholds:

- the combined asset value or annual turnover in, into or from South Africa of the acquiring and target firms amounts to R6.6 billion or more; and
- the asset value or annual turnover in, into or from South Africa of the target firm amounts to R190 million or more.

In addition to an increase in the monetary thresholds, the filing fees payable to the competition authorities for their assessment of a transaction also increased on 1 October 2017. The filing fee payable for an intermediate merger is now R150,000 (from R100,000) and the filing fee payable for a large merger is R500,000 (from R350,000).

The Commission investigates and makes a final decision in relation to intermediate mergers, while it only investigates and makes a recommendation in relation to large mergers. The South African Competition Tribunal (**Tribunal**) makes a final decision in relation to large mergers after convening a public hearing.

New developments in jurisdictional assessment or procedure

Control is a once-off affair

The question of whether or not a party is required to notify the acquisition of control where it already has a form of control is a vexed question in South African competition law. The question was answered on 30 October 2017 by the Competition Appeal Court (**CAC**) in the matter between Hosken Consolidated Investments Ltd (**HCI**), Tsogo Sun Holdings Ltd (**Tsogo Sun**) and the Commission.

Before addressing the findings of the CAC in the HCI matter, it is prudent to consider the development of this question over the years.

The Tribunal has previously found (as early as 19 April 2001) that the forms of control mentioned in section 12(2) of the Act merely lists instances of control, and that the list is not exhaustive. The Tribunal stressed that whether or not control is, in fact, acquired is a factual question. The very fact that a transaction may not give the acquiring firm more than a 50% shareholding in the target firm does not mean that there has not been a change in control. As the CAC noted on 27 November 2001 in the *Distillers* case:

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> "*…the Act was designed to ensure that the competition authorities examine the widest possible range of merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation of the Act…. For this reason, the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of market structure and in particular reduces the level of competition in the relevant market.*"

This approach is embodied in section 12(2)(g) of the Act, which refers to a person acquiring control when he or she '*has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)*'.

In *Ethos*, the Tribunal held on 3 October 2003, following *Distillers*, that:

- more than one party may simultaneously exercise control over a company for the purposes of section 12 of the Act;
- a firm may at the same time be subject to joint and sole control; and
- a change from joint to sole control triggers the obligation to notify a transaction.

In *Caxton*, the CAC in its 25 November 2015 decision made some useful remarks regarding the ambit of section 12(2)(g):

- the 'policy' that is being materially influenced must relate to issues of strategy, which is usually guided by the board or the shareholders;
- the issue of 'materiality' of influence relates to the range of matters over which the power extends rather than the decisiveness of each matter; and
- 'ability' refers to both a power to do something and a power to prevent something from being done.

It has also been confirmed by the Tribunal on 4 August 2014 that the structure of an entity can be such that none of its shareholders or trustees control it, in that none of them have the power to influence the strategy and commercial policy of the firm. In the *Tiger Equity One* decision, it was established that:

- when no "bright line" of control (i.e. above 50% shareholding, or the right to appoint the majority of directors or vote the majority of the shares) had been crossed;
- where no individual shareholder had relevant minority protections that they could effect on their own; and
- where there were no shareholders that voted *en bloc*, either in terms of a formal agreement, or factually,

then none of those shareholders exercised any form of control over the target firm.

The Commission argued that Tiger Equity One must be controlled by someone, and therefore suggested that all the shareholders jointly controlled Tiger Equity One. The Tribunal did not agree, and noted, for example, that:

- In the case of "joint control", the distinguishing feature of such an arrangement is the ability of each of the joint controllers to enjoy a veto right over issues that are strategic to the firm. The Tribunal referred to the EC Guidance that joint control over a company may exist where two or more shareholders have the "*…possibility of exercising decisive influence over another undertaking… and that decisive influence is normally understood to mean …the power to block actions which determine the*

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strategic commercial behaviour of an undertaking."

- In the *Tiger Equity One* case, no single shareholder was able to block either an ordinary or special resolution. Even the largest shareholder at 28%, would be unable, on its own, to veto the passing of a special resolution. Nor would the director nominee of any single shareholder be able to block the board from passing a board resolution for which a simple majority was required.

The Tribunal therefore found that taken collectively, the shareholders of Tiger Equity One cannot be found to control that entity based on the provisions of the existing shareholders' agreement.

Finally, in the recent *HCI* case (30 October 2017), the question to be considered was whether the acquiring firm, being HCI, having obtained prior approval from the Commission to acquire sole control of an entity over which it exerts control, must still obtain merger approval when it crosses a bright line (i.e. when its shareholding increases to more than 50%).

Prior to 2014, Tsogo Sun was jointly controlled by HCI and SABMiller plc (**SABMiller**). In 2014, SABMiller announced that it was divesting itself of its shareholding in Tsogo Sun which would have the effect of leaving HCI as the sole controller of Tsogo Sun. In the same year, HCI sought merger approval from the competition authorities for the acquisition of sole control of Tsogo Sun. The Tribunal unconditionally approved the merger on the basis of sole control even though HCI only owned 47.61% of the shares.

HCI then sought to increase its shareholding from 47.61% to more than 50%. The Commission issued an advisory opinion to HCI in which it expressed the view that the proposed transaction was notifiable. One of the reasons provided for requiring notification was that the proposed transaction would result in the crossing of a bright line, as HCI would increase its shareholding in Tsogo Sun from the current 47.61% to more than 50%, resulting in HCI beneficially owning more than half of the issued share capital, a form of control specified in section 12(2)(a) of the Act.

HCI did not agree and ultimately appealed to the CAC. In explaining sole control, the CAC referred to a helpful test in the *Official Journal of the European Union* C95/16 which states that:

> *"Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking... determine the strategic commercial decision of the other undertaking and where one shareholder can veto strategic in an undertaking."*

HCI and Tsogo Sun contended that the acquisition of sole control is a "once-off" affair and accordingly that, once they have received approval for HCI to acquire sole control over Tsogo Sun, there is no requirement for HCI to obtain any further permission to increase its shareholding in Tsogo Sun over 50%.

Based on this, the CAC confirmed its finding in previous cases where it held that a change of control is a once-off affair. The CAC found that where a shareholder already has sole control by virtue of the ability to materially influence the policy of a firm, for example, that firm will not need to re-notify a merger if it crosses a bright line (i.e. by acquiring more than 50% of the shares, for example). On the facts, the CAC found that pre-merger, HCI exercised sole control over Tsogo Sun by virtue of sections 12(2)(g) (the ability to materially influence the policy of the firm) and 12(2)(c) (the ability to appoint or veto the appointment of the majority of the directors to the board) of the Act. HCI did not therefore need to obtain approval from the competition authorities to increase its shareholding to more than 50%.

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Key industry sectors and interventionist approach to merger control

The last 12 months has seen a steady flow of mergers being notified to the competition authorities. Along a similar vein to the previous financial year, the competition authorities continue to be confronted with several large complex transactions which gave rise to significant competition and public interest concerns. In response, the competition authorities have taken an increasingly interventionist approach in order to ensure the mergers are not implemented or that the issues arising from these mergers are appropriately addressed with conditions.

Priority sectors

In its 2016/2017 annual report, the Commission identified seven priority sectors on which it would focus in the coming financial year. These sectors are:

- food and agro-processing;
- infrastructure and construction;
- healthcare;
- banking and financial services;
- energy;
- intermediate industrial inputs; and
- information communication and technology.

In a presentation by the Commission to the Portfolio Committee on Economic Development on 17 April 2018, the Commission again reaffirmed its commitment to focus on these seven priority sections. These priority sectors therefore illustrate the areas that are of particular interest to the competition authorities.

Public interest

On 2 June 2016, the Commission published its final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation (the **Public Interest Guidelines**). The Public Interest Guidelines provide guidance on how the Commission will assess public interest factors when considering a merger. The trend to take an interventionist approach, especially with regard to public interest, continued in the 2016/2017 financial year, with the Commission imposing public interest conditions in 15 merger cases.

Of the 15 merger cases, 11 cases had conditions imposed related to employment. The employment-related conditions include: moratoriums on retrenchments for a fixed period after the approval or implementation of the merger (eight mergers); obligation to restrict retrenchments (one merger); obligation to invite affected employees to apply for vacant positions in the merged entity (one merger); obligation to provide options to relocate and set up training funds for employees who do not relocate (one merger); and obligations to reskill employees (one merger). The Commission contends in its annual report that its intervention resulted in a net saving of 48,403 jobs. This is largely as a result of the merger between Parentco (Pty) Ltd and Edcon Limited, in which 41,151 people stood to lose their jobs. Ultimately, this merger was not implemented.

Other public interest conditions imposed in the 2016/2017 financial year included: an obligation to subcontract at least 40% of orders to previously disadvantaged black economic empowerment individuals and small, medium and micro-sized enterprises (one merger); an obligation not to relocate manufacturing facilities for a fixed period (two mergers); obligations to source locally (two mergers); and the creation of a fund to benefit small business and society (one merger).

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Creative remedies have therefore been imposed or agreed to by the merging parties in a number of mergers that the Commission has been faced with over the last financial year. Going forward, it is likely that this trend will continue.

In order to highlight some of the key decisions during the 2016/2017 financial year, we focus on those mergers that have taken place in the Commission's priority sectors.

Healthcare

In the pharmaceutical industry, the Tribunal imposed a number of public interest and behavioural conditions in approving the merger between Clicks Retailers (Pty) Ltd (**Clicks**) and the retail pharmacy business carried on by Netcare Pharmacies 2 (Pty) Ltd within Medicross Clinics (the **Medicross Pharmacies**) and the front shops of the in-house retail pharmacies operated by Netcare Pharmacies (Pty) Ltd within Netcare hospitals (the **Front Shops**).

In this merger, the Commission engaged with relevant trade unions and the Minister of Economic Development, who raised a concern that the proposed transaction may result in potential retrenchments. In order to address these concerns, the merging parties undertook not to retrench employees as a result of the transaction for a period of five years after implementation.

From a public interest perspective, the Minister of Economic Development also raised concerns relating to local procurement and training. The merging parties made certain undertakings in order to allay these concerns, which included a condition requiring the merging parties to use reasonable endeavours to maintain their local procurement levels, and a condition requiring the merging parties to provide 100 learnership opportunities and 80 to 100 bursaries in pharmacy over the course of five years.

In addition to conditions imposed to address public interest concerns, conditions were also imposed to address a concern arising from co-ordinated effects and a right of first refusal for any new Medicross and front-shop areas. The behavioural conditions included an obligation not to exchange commercially sensitive information (to address the cross-shareholding concern) and an obligation to amend the current lease agreements to limit Clicks' right of first refusal.

Food and agro-processing

In the poultry industry, the Commission approved a merger with conditions between Sovereign Food Investments Limited (**Sovereign Food**) and Country Bird Holdings (Pty) Ltd. (**Country Bird**). This transaction took place by means of a hostile takeover, since Country Bird made an unsolicited offer directly to the shareholders of Sovereign Food. The Commission assessed the proposed merger for its competition and public interest effects and ultimately imposed conditions to address employment and empowerment concerns. Country Bird agreed to two conditions, which included a condition to ensure that there would be no merger-related retrenchments, and to propose and support an empowerment deal.

Sovereign Food, as the target firm, then applied to the Tribunal for a reconsideration of the merger approval. The Tribunal found that the Commission had made a mistake of fact as to which acquisition of control it was approving, i.e. whether it was *de facto* or *de jure* control. It was found that this was not a point of technicality, as the conditions which had been imposed would only be triggered if there was an acquisition of *de jure* control. The Tribunal therefore made an order to set aside the Commission's decision to approve the merger and referred the merger back to the Commission to reconsider and make a decision whether it should be approved.

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In addition, in the beverage industry, agreement was reached between the Minister of Economic Development and the parties in the proposed transaction between SABMiller plc and Anheuser Busch Inbev SA/NV (**AB InBev**) to set up a R1 billion development fund, to be used to support smallholder farmers as well as to promote enterprise development. The agreement also includes commitments by AB InBev to support the participation of small craft-beer producers in domestic markets. Other terms dealt with economic empowerment, and access for small brewers to fridges and cooler space. The transaction was ultimately approved subject to these and other extensive conditions, including a divestiture of SABMiller's shareholding in Distell, a competing cider producer, supply conditions, information-exchange-prevention mechanisms, employment and other conditions.

Infrastructure and construction

In the merger between Robor (Pty) Ltd (**Robor**) and Mine Support Products (Pty) Ltd. (**MSP**), the merging parties agreed to a condition in terms of which the employees of MSP would be granted an option to relocate to Robor's plant. In addition to this, Robor and MSP undertook to set up a training fund for employees who elect not to relocate to Robor's plant.

Behavioural and structural conditions

In addition to the extensive public interest conditions imposed, a number of behavioural and structural conditions were imposed in 16 mergers in the 2016/2017 financial year. Remedies aimed at limiting the extent to which directors sit on the boards of competing companies, and limiting the exchange of commercially sensitive information between competitors with common shareholders and directors, were imposed in several transactions.

In the merger between Southern Sun Hotel (Pty) Ltd (**Southern Sun**) and Hospitality Property Fund Ltd (**HPF**), competition concerns related to information exchange and input foreclosure were raised by third party hotel operators. The Commission proposed conditions aimed at addressing these concerns; however, the merging parties opposed the conditions.

Prior to the hearing before the Tribunal, the merging parties and the Commission reached agreement on the conditions to be imposed. The initial conditions proposed by the Commission were aimed at keeping the operations of the acquiring and target firms separate. This included physical separation and requiring that there be no cross-directorship on the boards of Southern Sun and HPF. On review, the Commission submitted that it would be more pertinent to prevent exposure of third parties' competitive information to Southern Sun. The conditions that were ultimately imposed included:

- the merging parties will ensure that HPF has its own executive management team which will be responsible for day-to-day operations of HPF such as marketing and pricing;
- the executive management of HPF will not include any person employed in an executive management capacity at Southern Sun, save for the provision of central services;
- HPF management and directors will ensure strict compliance with any confidentiality obligations contained in the lease agreements with third party hotel operators in respect of confidential information provided to HPF, including that the confidential information will not be disclosed to employees of Southern Sun;
- Any directors appointed to the board of HPF will comply with their fiduciary duties in respect of HPF and will not disclose any confidential information relating to any hotels which are leased from HPF by third party hotel operators to employees of Southern Sun;

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- HPF will not seek to enforce any specific term of any existing lease agreement to the extent that it requires any third-party hotel operator that currently leases and/or operates hotels located at properties owned by HPF, to provide it with any third party information. This condition will not limit HPF's ability to procure information other than third-party information which is specifically relevant to the management and operations of the particular hotels which are owned by HP and which are leased to and/or operated by third-party hotel operators.

In addition to behavioural conditions, the competition authorities can also impose structural conditions. In the merger between Media24 (Pty) Ltd (**Media24**) and Novus Holdings Ltd (**Novus**), the transaction had already been implemented by the time the competition authorities considered the transaction. The transaction has a long history, with Media24 (part of the Naspers group) acquiring joint control from the Retief Family in 2000. In 2014, Media24 and the Retief Family entered into a further transaction in terms of which Media24 would acquire sole control over Novus (Paarl Media and Paarl Coldset at the time). This transaction was, however, abandoned.

Following on from the abandoned merger, Novus announced its intention to list its shares on the Johannesburg Stock Exchange (**JSE**). In terms of the JSE listing requirements, Media24 and Novus had to implement an agreement (the **Restated Management Agreement**) which would give Media24 sole control. Caxton, a competitor, brought an application to the Tribunal arguing that the transaction should be notified as a merger. Ultimately, on appeal, the CAC found that the transaction ought to be notified. This decision is therefore as a result of the CAC's finding that the transaction should be notified as a merger.

As part of the merger notification, Media24 offered to divest part of its holdings in Novus from 66.5% to 19%. In light of the fact that Media24 could still have control by virtue of the Restated Management Agreement and director appointments, further conditions in addition to the divest condition were imposed. These included:

- the termination of the Restated Management Agreement;
- Naspers will not appoint any members to the executive committee or board of directors of Novus; and
- the divested shares would be acquired by the existing shareholders of Novus which are not related to the Naspers Group.

Prohibitions

No transactions have been prohibited on public interest grounds alone in South Africa to date, however, and as demonstrated above, employment, and the effect on small business, is increasingly a key focus of the competition authorities.

In the financial year (ended March 2017), the Commission prohibited five transactions, which is down from the seven mergers prohibited in the financial year ended March 2016.

The following transactions represent some of the mergers that were prohibited by the Commission over its last financial year, largely due to concerns that arose as a result of the horizontal and/or vertical overlaps between the activities of the parties:

- In the intermediate merger between Much Asphalt (Pty) Ltd (**Much Asphalt**) and five asphalt plants owned by Roadspan Holdings (Pty) Ltd (**Roadspan**), the Commission was concerned that the merged entity would be dominant and as such would not face strong competition from any other competitor, which would result in higher prices and reduced quality of asphalt which is used in the laying of roads. The Commission also raised concerns that the structure of the market would make it easier for companies to

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collude. The Commission could not agree conditions that would minimise the anti-competitive effects and prohibited the merger. The parties applied for a reconsideration to the Tribunal but ultimately abandoned the reconsideration application.

- The intermediate merger between Imerys South Africa (Pty) Ltd. (**Imerys**) and Andalusite Resources (Pty) Ltd. (**Andalusite Resources**) followed a two-year battle but ultimately ended when the CAC confirmed both the Commission and Tribunal's decision to prohibit the merger.

  Imerys and Andalusite Resources are the only two producers in South Africa who mine andalusite. Andalusite is a mineral from which refractories are made. Refractories are used to line furnaces, kilns and other containers exposed to high temperatures, abrasion and chemical attack in the course of manufacturing iron, steel, cement, ceramics and other products. Within South Africa, the merger is a two-to-one and would thus give rise to a monopoly.

  The condition that the merging parties proposed to address concerns of price increases and increased exports was not sufficient to address the change in the structure of the domestic market from a duopoly to monopoly. The CAC found that in the absence of countervailing pro-competition gains or public interest considerations, prohibition rather than conditional approval is a legitimate choice of remedy.

  This is the first intermediate merger that the CAC has prohibited and demonstrates that transactions resulting in the creation of a monopoly will face fierce scrutiny by the competition authorities unless adequate conditions can be provided to address the competition concerns.

Key policy developments

Information exchange

On 14 July 2017, the Commission published its draft guidelines on the exchange of information between competitors under the Act (**Draft Guidelines on the Exchange of Information**). The Draft Guidelines on the Exchange of Information set out the general approach that the Commission will follow in determining whether information exchange between firms that are competitors amounts to a contravention of section 4 of the Act (the section dealing with restrictive horizontal practices).

Given the Commission's increasing concern with cross-shareholding and cross-directorships where a firm acquires an interest in a competitor, the Draft Guidelines on the Exchange of Information are applicable in the merger context.

The Draft Guidelines on the Exchange of Information provide high-level principled guidance. Whether or not the exchange of information will give rise to concerns from a competition law perspective will, however, need to be assessed on the facts of each case.

Where a transaction involves a joint venture or the acquisition of an interest in a competitor, careful attention will need to be paid to the level of information that is intended to be exchanged. Legal advice, including whether ring-fencing arrangements are appropriate, should be sought.

Prior implementation

On 17 February 2017, the Commission published draft guidelines for the determination of administrative penalties for failure to notify a merger and implementation of mergers contrary to the Act (the **Draft Guidelines for Failure to Notify a Merger**).

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The Draft Guidelines for Failure to Notify a Merger are aimed at presenting a general methodology that the Commission will follow in determining administrative penalties for the purposes of concluding consent or settlement agreements and seeking administrative penalties in prior implementation referrals.

The Commission has indicated that as a general approach, it will apply the following methodology when determining the administrative penalty that a firm will be liable to pay:

- Step 1: determination of the nature or type of contravention;
- Step 2: determining the range of the administrative penalty;
- Step 3: considering factors that might mitigate and/or aggravate the amount reached in step 2; and
- Step 4: rounding off this amount if it exceeds the cap provided for in section 59(2) of the Act (i.e. 10% of turnover).

The Commission has recorded in the Draft Guidelines for Failure to Notify a Merger that the minimum penalty for prior implementation of an intermediate merger will be double the applicable filing fee for such merger and the maximum penalty will be R5 million. Prior implementation of a large merger will attract a minimum penalty of double the applicable filing fee for a large merger and the maximum penalty will be R20 million. The filing fees are currently R150,000 for an intermediate merger and R500,000 for a large merger. The Commission does, however, specifically note that the Draft Guidelines for Failure to Notify a Merger will not fetter the discretion of the Commission to impose the maximum penalty permitted in the Act, being 10% of total turnover.

In April 2016, the Tribunal imposed the largest administrative penalty to date on a firm for a failure to notify a merger to the competition authorities. The Tribunal imposed a penalty of R10 million on Life Healthcare South Africa Group Proprietary Limited and Joint Medical Holdings Limited in terms of a consent order. This decision comes after the competition authorities issued stern warnings to firms who implement transactions prior to notifying the competition authorities, that harsher penalties will be levied.

More recently, however, on 21 February 2018, the Tribunal confirmed a consent order in terms of which Macsteel and Unique Ventilation agreed to pay an administrative penalty of R1 million for failure to notify a merger.

Given the inconsistency in penalties that have been imposed over the years, the Draft Guidelines for Failure to Notify a Merger provide some welcome clarity on the approach that will be taken by the Commission in cases of this nature.

Firms looking to make acquisitions that have an effect in South Africa must seek legal advice in order to establish whether the transaction is notifiable before proceeding to implement it.

Reform proposals

On 1 December 2017, The Minister of Economic Development published the Competition Amendment Bill (the **Draft Bill**) for public comment. The Minister of Economic Development and the Commission have expressed concerns that the current provisions of the Act do not adequately allow the competition authorities to address issues created by the large number of highly concentrated markets in South Africa.

The background note to the Draft Bill specifically mentions that strengthening the provisions related to mergers is one of the Draft Bill's five priorities.

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The Draft Bill provides for, among others, scrutiny of market concentration and the racially-skewed spread of ownership of the South African economy and the proposed amendments seek to empower the competition authorities to create more opportunities to advance transformation of ownership of the economy. The most significant changes are aimed at addressing concerns that concentrated markets inhibit new entrants and exclude large numbers of black South Africans from the opportunity to run successful enterprises.

The changes proposed will have a substantial impact on all business operating in South Africa and will increase the complexity associated with complying with the Act. The proposed amendments will, if implemented, radically change the way that prohibited practices and mergers are investigated and prosecuted by the competition authorities.

The Draft Bill confirms the now settled position that the competition and public interest tests for the approval of a merger are equal in status. It also seeks to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.

The proposed amendments also seek to prevent creeping concentration and strategic barriers to entry created by mergers and cross-shareholdings. These changes are intended to address situations where each merger on its own is not problematic but when considered holistically, may have an anticompetitive effect. In particular:

- Amendment 7(b) of the Bill proposes that several additional factors are included in the consideration of whether or not a merger is likely to result in a substantial prevention or lessening of competition. In particular, consideration must be given to "*the extent of shareholding by a party to the merger in another firm or firms in related markets*" in the merger assessment. This amendment codifies the current position in that the competition authorities have already been able to, and have indeed chosen to, consider cross-ownership in merger assessments, on a number of occasions. However, specifically mentioning this consideration elevates this factor, without fully reflecting that cross-ownership is, in most cases, unlikely to give rise to harm to competition, and in many cases can have a benign or even pro-competitive rationale.
- Amendment 8 of the Bill proposes the addition of section 12B to the Act, which provides for the assessment of "mergers by way of a series of transactions". In particular, this will allow the Commission to treat a series of transactions that either allow a firm to gain control of another firm, allow that firm to control the other firm to a greater degree, or constitute a direct or indirect step towards enabling that firm to control another as if they occurred simultaneously. This amendment is likely to have the effect of significantly increasing the uncertainty associated with merger assessment, since it may result in the prohibition or unwinding of transactions that took place up to three years previously, and which may not have any merger specific effect.

There has been significant public comment on the Draft Bill by business as well as the legal fraternity, and it remains to be seen in what form the Draft Bill will be finally implemented.

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She has assisted clients to obtain clearance in several large, complex merger transactions in South Africa and other sub-Saharan African jurisdictions. Since inception of the merger regulations by the COMESA Competition Commission, she has advised clients trading in the region on merger filings. Marianne regularly designs and implements training programmes and competition law compliance audits for clients, as well as dawn raid readiness. She has particular experience in designing compliance programmes for industry associations.

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Candice has provided a comparative analysis of the European Merger Regulation in an exclusive chapter in the 2014 *International Economic Law and African Development Guide*. The chapter deals with the jurisdiction of the COMESA Competition Commission for merger transactions.
She also presented a paper at the Seventh Annual Conference on Competition Law, Economics & Policy comparing the approach taken by COMESA and the European Union to jurisdiction over mergers and thresholds, and is a contributor of articles on competition law and related issues to legal journals, including the Competition Policy International's *Antitrust Chronicle*, the *Global Antitrust Compliance Handbook*, the *Private Competition Enforcement Review*, the *Public Competition Enforcement Review* and the *Merger Control Review*.

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Sweden

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Overview of merger control activity during the last 12 months

Introduction

The current substantive legislation concerning mergers is contained in the Competition Act (2008:579) (the "**Competition Act**"), which entered into force on 1 November 2008. The Competition Act has been drafted to, as far as possible, assimilate EU competition law in substance, and the interpretation of the concept of "concentration" at EU-level acts as a framework for the meaning of the Swedish concept. Hence, a concentration arises when there is a change in control of an undertaking on a lasting basis. This includes an acquisition of the whole or a part of an undertaking and joint ventures categorised as "full-functioning". There are also other types of changes to the structure of ownership which may similarly lead to a change of control and therefore also constitute a concentration.

If the undertakings concerned trigger the turnover thresholds,[1] the contemplated transaction must be notified to the Swedish Competition Authority ("**SCA**") prior to implementation. A notification obligation always arises when the turnover thresholds are met. Whether or not the concentration gives rise to a substantive overlap is therefore irrelevant for the purpose of the obligation to notify the concentration to the SCA.

The SCA is the central administrative authority for the administration and enforcement of competition law in Sweden. The SCA plays a key role in the competition field and is entrusted with investigative powers as well as intervention and, to some extent, decision-making powers. The SCA is the competent authority for the review of merger notifications in Sweden and assesses whether a notified concentration risks significantly impeding effective competition within the country as a whole or a substantial part thereof. In line with EU practice, the SCA particularly looks at whether a dominant position is reinforced or created and uses the SIEC-test applied by the European Commission ("**Commission**") in its assessment.

As of 1 January 2018, the Competition Act was amended to grant the SCA extended decision-making powers in merger control cases. The SCA has been provided with the power to prohibit mergers and impose sanctions on undertakings not complying with the merger control rules, e.g. imposing an administrative fine in case of non-compliance with the stand-still obligation. A SCA prohibition decision may be appealed to the Patent and Market Court ("**PMC**"), which is a division within the Stockholm District Court ("**SDC**"). Following a judgment or decision from the PMC, the parties may appeal the PMC's ruling to the Patent and Market Court of Appeal ("**PMCA**"). There are several underlying reasons for the legislative amendments. The reform will harmonise the procedure in merger control matters and create greater conformity with the decision-making powers available to the

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Commission and other national competition authorities in the European Union. According to the legislative initiative, efficiency reasons also support a reform. As a result of the reform, the SCA has adopted certain adjustments to its organisation and working methods which aim to strengthen the authority's internal quality assurance. See below for a more detailed account of the changes to the SCA's internal functions and procedures.

Merger notifications in 2016 and 2017

The amended and slightly higher turnover thresholds introduced in the Competition Act in 2008 resulted at first in a decrease of the number of notifications to the SCA in Sweden.[2] However, the downward trend of fewer notifications to the SCA may have been turned around and in comparison to previous years, the number of notifications to the SCA has been increasing. In 2017,[3] 80 concentrations were notified to the SCA. The vast majority of these were unconditionally cleared during the SCA's preliminary investigation period ("**Phase I**"), i.e. within 25 working days, and in cases where there was an absence of vertical links and horizontal overlaps, the matters were often prioritised by the SCA and decisions were often given more swiftly.

Each year, only a few of the notified cases are subject to in-depth investigations by the SCA. Two in-depth investigations were initiated in 2017; four in 2016; six in 2015; three in 2014; three in 2013; two in 2012; and four in 2011. In 2017, two in-depth investigations ("**Phase II**") were initiated by the SCA: *Arla/Gefleorten* and *Ahlsell/Viacon VA*.

The statutory timetable for the SCA to make a decision in Phase I is 25 working days and, following a decision to carry out a Phase II investigation, an additional three months. In unproblematic cases, i.e. where there is absence of vertical links and horizontal overlaps, the SCA's stated ambition is to take a decision within 15 working days. In 2017, the average handling time of a notification was 14 days in Phase I and 70 days in Phase II. In unproblematic cases, the average handling time was 10 working days.

During the first part of 2018, no in-depth investigations have been initiated.

Water and sewer construction material[4]

In June 2017, Ahlsell, a wholesale provider of a wide range of tools and building products, notified its intention to acquire Viacon VA, a wholesale provider of water and sewer materials, a market that both companies were active in. During the Phase I review, the market investigation showed that Viacon VA exercised competitive pressure on the market leaders Ahlsell and Dahl and that it would disappear as a result of the merger. Furthermore, the market investigation indicated there existed barriers to entry and expansion in the form of accessibility to suppliers' products on favourable contractual terms and that it was mainly Ahlsell, Dahl and Viacon VA that could meet the customers' demand of a nationwide wholesale full assortment solution. Therefore, the SCA decided to initiate a Phase II investigation. However, the SCA's Phase II investigation indicated that the merger would not significantly impede the existence or development of effective competition, and was unconditionally cleared.

Dairy market[5]

In June 2017, Sweden's largest dairy products manufacturer, the cooperative association Arla, notified its intention to acquire Gefleorten, a regional dairy products manufacturer. As the parties' respective businesses overlapped and as the Phase I investigation could not entirely rule out the risk that the merger would impede competition in the form of increased prices, reduced production and supply or deteriorated product quality, the SCA initiated a Phase II investigation. Despite Arla's dominant position on the relevant market and the

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fact that the concentration would strengthen that position, the SCA noted that Gefleorten exercised almost no competitive constraint on Arla and that Gefleorten's sales were weak with a declining trend. The SCA concluded that the concentration would not significantly impede the existence or development of effective competition on the market. The matter was closed in October 2017 and was unconditionally cleared.

Confectionery products[6]

In March 2017, Cloetta, a producer and wholesaler of confectionery products and natural snacks, notified its intended acquisition of Candyking, wholesaler of bulk confectionery products and natural snacks. Both Cloetta and Candyking are wholesalers of bulk confectionery products and natural snacks. The investigation also showed a vertical relationship between the parties, as Cloetta produced and supplied Candyking and other wholesalers downstream with bulk confectionery products, which in turn were used by Candyking in their wholesale concept offer to customers. The SCA segmented the relevant market into: (i) wholesale of bulk confectionery products to food retailers and the convenience store sector; and (ii) wholesale of natural snacks to food retailers and the convenience store sector.

The SCA's review of the transaction found that the new entity would acquire significant market shares on the market for wholesale of bulk confectionery products; however, the investigation also showed that the market is characterised by tenders by the large retail chains and that, as a consequence, the market shares may fluctuate. In addition, the SCA held that the new entity would, post-transaction, experience competitive pressure from various competing wholesalers, that the market is not characterised by barriers to entry or expansion, and that the customers are large retail chains holding significant buyer power. In relation to the market for wholesale of natural snacks, the SCA held that the parties' combined market shares did not exceed such a level where competition concerns could be presumed and the remaining competitors would still exercise competitive pressure on the new merged entity.

As to the vertical relationship between Cloetta and Candyking, the SCA identified two hypothetical theories of harm. The first was whether Cloetta would have incentives to refuse to supply its own-produced confectionery products to competing wholesalers or sell these on substantially deteriorated contract terms. The SCA's investigation showed that Cloetta's sales to competing wholesalers accounted for a considerable part of Cloetta's revenue as to bulk confectionery products; a refusal to supply would therefore result in a significant loss of revenue. The second theory of harm concerned whether Cloetta would foreclose other producers of confectionery products from the market or limit their access to a significant pool of customers by (wholly or partially) excluding competing producers' products in Cloetta's wholesale offer. The SCA investigated the market conditions and found that wholesalers have certain confectionery products that have to be included in their bulk confectionery assortment in order to be sufficiently attractive for customers. Against this background, the SCA concluded in Phase I that the concentration would not significantly impede the existence or development of effective competition and the matter was unconditionally cleared.

District heating pipes[7]

In October 2015, the SCA initiated a Phase II investigation to closer examine the notified acquisition by Logstor of Powerpipe. The relevant market was the market for production and sale of district heating pipes. The SCA expressed concern, as it concluded that Logstor and Powerpipe were the largest competitors on the market for sale of district heating pipes

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in Sweden. The SCA's investigation showed that the market only had four influential suppliers for district heating, as well as four buyers. Logstor was expected to obtain a market share of around 65%, whereas the closest competitors would have no more than a 15% market share combined.

In February 2016, the SCA filed suit before the SDC, requesting that the concentration be prohibited. The SCA found that Powerpipe was an effective competitor on the Swedish market and exercised considerable competitive pressure on Logstor. Powerpipe was the only competitor with its own production facilities in Sweden. According to the SCA, the remaining competitors were not able to provide an equally competitive offering as the parties to the concentration, as the offering of the parties were to some extent superior. As close competitors, Logstor and Powerpipe had been exercising price discipline on each other, rather than the remaining competitors filling this role. The SCA also made a comparison to the Danish market, where Logstor is the market leader, and pointed to how higher prices and margins in Denmark seem to indicate that Danish competitors, although better placed to compete, do not seem to be able to affect Logstor's pricing. The SCA highlighted the limited countervailing power in the market by pointing out how the buyers had tried to attract new suppliers to the market, but with little success. The SCA concluded that the possible entrants on the market should not be seen as potential competitors in the light of the major buyers' failed attempt to attract them to the market.

The SDC found that the merger would not significantly impede the existence or development of effective competition on the market for production and sale of district heating pipes and dismissed the SCA's action in its entirety. The judgment was appealed by the SCA to the PMCA, where the key issue was the definition of the relevant geographic market. The SCA argued that the relevant geographic market solely covered the Swedish market. The PMCA found that the relevant geographic market comprised the EEA and Switzerland. The PMCA concluded that the newly merged entity would neither acquire a dominant position on this market, nor that there existed other circumstances that proved that the concentration would significantly impede the existence or development of effective competition. Consequently, the PMCA dismissed the SCA's action in its entirety. It is highly uncommon that the SCA loses an action to prohibit a concentration due to the definition of the relevant (geographic) market, this has never occurred in previous cases.

Heating products[8]

In November 2016, the SCA initiated a Phase II investigation to examine Nibe's notified acquisition of Enertech. Both Nibe and Enertech are manufacturers of heating products and energy efficiency solutions for residential and commercial use. The SCA's initial investigation indicated that the market for production of heating products was characterised by barriers to entry, particularly in the form of brand preferences by end consumers, and that distributors/installers are hesitant to change suppliers. Taking into account that Nibe and Enertech are close competitors, the SCA was concerned that the new entity would acquire high market shares and thus gain a strong position in relation to wholesalers, which potentially could result in higher prices and impair the quality of the marketed products or reduce the undertakings' incentives to invest in research and development, thus harming consumers.

Following the SCA's Phase II investigation, the SCA segmented the relevant market into: (i) primary heating systems for residential use (further segmented based on the type of heating system); (ii) primary heating systems for commercial use; and (iii) complementary heating systems. The SCA found that the new entity would acquire high market shares in some sub-

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segments on the market for primary heating systems for residential and commercial use, respectively, and that the new entity would have incentives to increase prices. However, the Phase II investigation did not indicate that the merger would significantly impede the existence or development of effective competition. The SCA focused on the conditions of competition post-transaction and found that wholesalers would still have the ability to change suppliers, and competitors had the capacity and technical know-how to increase production if needed. In addition, the SCA analysed the barriers to entry and expansion on the market and held that the new entity would not enjoy any technical or regulatory advantages, nor have access to essential facilities or intellectual property rights which could make it difficult for competitors to enter and/or expand on the market. Against this background, the SCA concluded that the concentration would not significantly impede the existence or development of effective competition, and the matter was unconditionally cleared.

New developments in jurisdictional assessment or procedure

The SCA has in recent years made more use of its power to review concentrations that do not meet the mandatory merger notification thresholds. Historically, the SCA has rarely used this possibility to order the submission of a notification, although the SCA had these powers even under the previous competition act. Pursuant to the Competition Act, a concentration is subject to a mandatory notification requirement to the SCA only if both of the thresholds are met:

(i) the combined aggregate turnover in Sweden of all the undertakings concerned in the preceding fiscal year exceeds SEK 1 billion ("**combined turnover threshold**"); and

(ii) each of at least two of the undertakings concerned have a turnover exceeding SEK 200 million in Sweden ("**individual turnover threshold**").

However, if only the combined turnover threshold is met (but not the individual turnover threshold), the SCA may order the submission of a notification if there are particular grounds. The parties may also voluntarily submit a notification in such a case. The SCA has issued a guidance in this regard and explains that a voluntary filing should be considered if the transaction can be expected to awaken fears and criticism from customers or competitors. Although the preparatory works of the Competition Act state that orders to submit a notification should be used only in exceptional situations, the practice of the SCA seems to indicate that the authority gives the concept of particular grounds a rather wide interpretation and can request notifications as soon as there is a mere *prima facie* risk of effective competition being impeded. As a result, more voluntary notifications are made to the SCA, although there is no exact data regarding the number of these. The feature of voluntary filing is a particular mechanism in Swedish merger control.

An example of a matter where a concentration was not subject to a mandatory merger notification requirement, as the individual turnover threshold was not met but later on received an order to submit a notification from the SCA, is the case of *Swedbank/Svensk Fastighetsförmedling*. In December 2013, Swedbank's Fastighetsbyrån, a real estate agency, acquired its closest competitor, Svensk Fastighetsförmedling. The agencies are by far the two largest players on the market for real estate in Sweden. In addition to being competitors, both undertakings are jointly owners of the largest web page for real estate advertisements, Hemnet.com. The parties closed the transaction without prior seeking clearance from the SCA, as neither of the parties had turnover exceeding SEK 200 million (the individual turnover threshold). However, the threshold of a combined turnover of

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SEK 1 billion was exceeded and once announced, the merger was subject to significant media attention, which led the SCA to look into the merger. Swedbank therefore voluntarily submitted a notification to the SCA after the transaction's implementation whereby the company had already taken control over of the shares.

The SCA's investigation indicated that the transaction would result in Swedbank, in essence, acquiring control of the whole market for the sale of real estate, giving Swedbank as high a post-transaction market share as >95% on certain local markets. Subsequently, the SCA filed a complaint to the SDC requesting the SDC to prohibit the concentration subject to a fine of SEK 250 million.

The SDC ruled in favour of the SCA and prohibited the concentration, subject to a fine of SEK 100 million. The case was appealed by the parties to the Market Court, but during the proceedings the parties were able to reach an agreement with the franchisees in Svensk Fastighetsförmedling. The franchisees jointly acquired all shares in Svensk Fastighetsförmedling, allowing the parties to withdraw from the Market Court.

The Swedbank case is unusual as very few merger cases reach the SDC and the Market Court. The case shows what far-reaching consequences an order from the SCA to review a merger that does not reach the threshold of a mandatory notification may have. Parties to a particular transaction should therefore more thoroughly consider the impacts on competition once it falls below the individual turnover threshold but the combined turnover threshold is exceeded. In such circumstances, the parties may always voluntarily submit a notification to the SCA. It is worth noting that the Swedbank case is unusual, as very few merger cases reach the SDC and the Market Court. In this case, the parties had already closed the transaction prior to the notification to the SCA, which made it more difficult to unwind.

Moving agencies[9]

On 14 July 2014, the SCA filed proceedings before the SDC against NFB Transport Systems AB ("**NFB**"), ICM Kungsholms AB ("**ICM**") and Alfa Quality Moving AB ("**Alfa**"). The alleged infringement involves an agreement not to compete on the market for international household removal services, and took place in connection with Alfa's acquisition of NFB's and ICM's international removal service business. Prior to the acquisition, the three companies used to offer both domestic and international (cross-border) removals. The SCA requested the imposition of a fine totalling of more than €4.5 million for the companies' infringement of Chapter 2, Article 1 of the Swedish Competition Act and Article 101 TFEU.

In 2006, Alfa acquired NFB's international operations. The transfer agreement contained a non-compete clause which prevented NFB from competing with Alfa in the international removals market for a period of five years. At the time of acquisition, NFB, ICM, and Alfa were three of the four leading national players on the Swedish removal services market.

In 2010–2011, NFB acquired ICM, and its international operations were subsequently transferred to Alfa. As per the previous agreement, this also contained a non-compete clause which prevented ICM from competing with Alfa on the international removals market for a period of five years.

In the proceedings before the SDC, the SCA argued that the non-compete clause in the two transaction agreements went beyond what was reasonably necessary for the implementation of the two transactions. Clauses lasting for three years are permitted in circumstances where "goodwill and know-how" are transferred (i.e. they are ancillary to the transaction). The SCA estimated in the current case that a period of two years would be reasonably necessary and that the agreements were therefore not ancillary to the respective transactions.

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On 16 May 2016, the SDC handed down a decision in the matter where it refused to impose fines, as argued by the SCA. In its decision, the court held that the SCA was incorrect in claiming that the acceptable duration was two years, as the transaction was to be characterised as a transfer of only goodwill, making the three-year duration applicable. The SDC also affirmed that non-competes with a duration exceeding three years can rarely be considered ancillary.

The court then went on to assess the object and effect of the non-compete clauses and found that the parties to the transaction were not potential competitors and that the non-compete clause therefore could not have as its object the restriction of competition. In assessing the effect of the non-compete clause, the court found that there was uncertainty regarding the definition of the relevant market, and that it was therefore unable to assess whether the non-compete obligation could, in fact, restrict competition. The SCA decided to appeal the decision to the PMCA, which held that for the successful implementation of a transaction, non-compete clauses may be necessary as long as they are directly related to the merger. The PMCA ruled that such clauses are a form of "loyalty guarantee" between the seller and the purchaser, providing the buyer with a certain degree of security. The SCA argued that the moving companies had knowingly planned on non-compete clauses exceeding the three-year period outlined in the Commission's guiding notice on ancillary restraints. However, the PMCA found that the three-year timeframe only reflects the duration under which companies normally can assume to be protected under the Commission notice instead of the maximum duration for a non-compete clause. The court did not find any evidence to support a claim that the non-compete clauses were automatically anticompetitive by object. The PMCA further concluded that the SCA did not provide any evidence proving that the clauses had anticompetitive effects. Consequently, the PMCA dismissed the SCA's appeal and fully upheld the SDC ruling.

Further, in 2015, the SCA introduced further guidance for notifications and the assessment of concentrations. The guidance is an update of the earlier guidance issued in 2010 and contains more accurate and updated information on merger control, based on previous experience from the SCA. The purpose of the guidance is to improve awareness of the investigations of the SCA, contribute to greater predictability, and ensure good conditions for cooperation between the parties and the SCA, contributing to a more efficient and effective investigation.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition etc.

The SCA does not have any predefined key sectors or key policy areas in merger control which it is more likely to review. Rather, any transaction that meets the statutory thresholds will be investigated by the SCA. In its assessment of notified concentrations, the SCA generally focuses on national and regional competition. The authority generally seeks guidance from EU case law, taking into account the national specifics of the market. In respect of the geographic market, the SCA typically defines markets as national or regional.

Naturally, the SCA tends to pay closer attention to mergers which involve companies active in market areas in which competition may be diminished for various reasons. In general, such areas have historic ties to regulated sectors. As such have become deregulated, competition on those markets tends to be low, with a few large players holding market positions close to dominance. Examples of such deregulated areas in Sweden are the telecommunications sector and the pharmacy sector.

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In 2017, the SCA published a report[10] where it analysed the Swedish e-commerce and sharing economy sectors, and concluded that the emergence of these industries has resulted in increased price transparency and competition in pricing, which is beneficial for consumers. Swedish e-commerce companies are facing increased foreign competition, as these sectors have grown significantly over the past few years, largely due to the development of secure digital payment solutions. The technical development of digital payment infrastructure and digital identification services has made it more secure for consumers to purchase products and services online. The SCA's investigation found that a large majority of the sales in the retail sector are still made in physical stores, but that e-commerce constitutes a competitive restraint for trade through physical stores. The SCA concluded that the increased digitalisation and technical improvement of the e-economy has resulted in new challenges for competition authorities to tackle: for instance, the higher degree of price transparency facilitates the possibilities for companies to concert their pricing policies. Geo-blocking practices make it more difficult for consumers to make online purchases of goods and services from other EU Member States. The SCA indicated that the increased digitalisation of companies' business models in the e-commerce and sharing economy sectors will require the SCA to implement more advanced and sophisticated investigation routines.

The investigation found that the sharing economy sector is largely based on digital platforms, which give rise to network effects. The services provided within the sharing economy increase the supply on the market, which results in lower prices and increased choice for consumers. A platform can decide to offer its services for a low price or without charging for its services at all, in order to expand more rapidly. A large number of users, and collection of user data, can give a platform significant market power, which might not be reflected by its turnover figures. The SCA's investigation found that there is a risk that the current merger control regime does not cover concentrations between platform companies with low revenue but which have significant market power and the potential to impede or hinder the development of effective competition. The SCA indicated that one solution could be to complement the current turnover thresholds with a "size of the transaction" system.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

There has been a clear trend towards increased use of formal economic theory and quantitative methods in merger case analysis in Sweden during recent years. In 2013, the SCA used economic analysis and effect-based tests as standard procedure in its merger case investigations. Further, it should be noted that the authority, in 2013, accepted the "failing firm defence" following detailed counterfactual analyses.

In general, it should be noted that, pursuant to the Competition Act, a concentration is prohibited if it would significantly impede the existence or development of effective competition in Sweden as a whole or in a substantial part thereof, particularly as a result of the creation or strengthening of a dominant position. When assessing a notified concentration, the SCA applies the "Significant Impediment of Effective Competition Test" ("**SIEC test**"), in line with the SIEC test applied by the European Commission.

In recent years, formal economic theory and quantitative methods have come to play a significant role in the SCA's assessment of concentrations' effects on competition. When assessing concentrations and relevant markets, the SCA has particularly used the upward pricing pressure method ("**UPP**"),[11] diversion ratio analyses and critical loss analyses to determine the effect on competition. The tests are based on quantitative (e.g. market shares,

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sales data and turnover) and qualitative (e.g. product properties, distribution networks, market researches and competitor analyses) information, provided by the concerned parties and/or the SCA. There has hence been a shift away from concentrating the competition analysis on market definition and market shares towards considering the degree of rivalry between the companies, including identifying the closest competitors. The UPP method focuses on the assessment of the parties' incentive to increase or decrease prices after the concentration, with emphasis on the following variables: diversion ratios (i.e. how close competitors the merging parties are); gross margins and efficiencies.

As of 2016, the SCA has used the UPP-test and diversion ratio analysis in one case, *Visma/Fortnox*, in order to estimate future pricing. Visma AS ("**Visma**") and Fortnox AB's ("**Fortnox**") provide Enterprise Resource Planning systems ("**ERP**"), which is a business software for managing resources such as employees, assets and finances. The SCA's initial investigation indicated that the market could potentially be much narrower than the parties' estimates, consisting of small and medium-sized businesses which have the potential to be further segmented into locally installed ERP systems and cloud-based systems in Sweden. Furthermore, both companies have strong ties to accounting firms which, to some extent, act as sales channels for ERP accounting systems. The case was subject to a Phase II investigation and, following the SCA's communication to the parties of its preliminary assessment and intention to file a summons application to the SDC in order to prohibit the concentration, Visma decided not to complete the transaction.

In the earlier case of *Swedbank/Svensk Fastighetsförmedling*, the SCA used critical loss analysis for the purpose of investigating how large the share of sales lost to the private market would be if all real estate agents increased their commission by 10%.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Undertakings can offer remedies to address competition concerns and avoid the prohibition of the concentration. The remedies will be accepted if the SCA considers them sufficient to eliminate the adverse effects on competition. Remedies can be offered at any stage in the notification process; during Phase I investigation in order to avoid a Phase II investigation, or later (once a Phase II investigation has been initiated). Generally, remedies are offered at the end of the Phase II investigation and after the notifying undertakings have received the SCA's draft summons application (i.e. statement of objections).

Although both structural and behavioural remedies may be considered and accepted, structural remedies, particularly divestments, are often considered to be more appropriate and effective than behavioural remedies. For remedies to be accepted during Phase I, the adverse effects on competition and the way to address those effects must be sufficiently clear-cut. Therefore, to be accepted in Phase I, it is advisable to offer remedies as early as possible in the Phase I period.

Generally, compliance with remedies or commitments may be enforced through a fine, to be imposed in the event of the breach of such remedies/commitments (i.e. fine for non-compliance).

Key policy developments

The SCA has indicated that the authority is continually working on quality assurance in order to meet the requirements for legal certainty, effective and sound proceedings.

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As a result of the SCA's enhanced decision-making powers in merger control cases, the SCA published a paper in October 2017 setting out various considerations on the administration of the new decision-making powers, and identified reasons to strengthen the SCA's internal functions and processes in the handling of merger control cases. The aim is to give an account of routines and working methods to carry out investigations, make well-founded decisions and ensure legal certainty.

There are two main elements to the changes to the SCA's procedures. The first is that the roles of the SCA's chief legal officer and chief economist will be concentrated on providing quality assurance and advice to the director general prior to a decision being made. The chief legal officer and the chief economist will no longer take part in the actual investigation process, e.g. participate in interviews or examinations, make decisions on investigatory measures or undertake analytical work. Rather, their roles will be placed on quality assurance by critically assessing the supporting documentation put forward by the case team at different points in the decision-making process.

The other aspect is that the SCA has introduced oral hearings in merger control cases. In connection to the parties receiving a draft prohibition decision, they will also be offered an oral hearing to be held at the SCA. Oral hearings are already used by the SCA but in other types of cases. One difference in oral hearings in merger control cases is that the director general will be in attendance. The oral hearing will function as a forum for the parties to supplement and develop their argumentation. The oral hearing will be held shortly after the parties have submitted their written observations on the SCA's draft prohibition decision.

Reform proposals

As of 1 September 2016, a new court system for intellectual property, competition law and merger control proceedings was established. The PMC was established as a division within the SDC as the first instance in intellectual property, competition law and merger control matters. Decisions and judgments by the PMC can be appealed to the PMCA, which replaced the Market Court as the highest instance. The reorganisation of the court system was deemed necessary due to the complex and comprehensive nature of intellectual property and competition law cases. The intention is to obtain a more uniform examination and handling of these kind of cases and thereby increase legal certainty and reduce the risks of discrepancies in how the relevant legal provisions are interpreted.

The SCA has advocated that the current turnover thresholds for the assessment of concentrations should be reviewed and that other criteria may be introduced, e.g. a size-of-the-transaction threshold. The background is the increased importance of companies active in e-commerce and the sharing company which may not generate sufficient turnover to trigger any of the current turnover thresholds but may have more significant market power, for instance due to network effects, than their turnover figures demonstrate. It remains to be seen whether the turnover thresholds in Swedish merger control will be reassessed.

* * *

Endnotes

1. (a) the combined aggregate turnover in Sweden of all undertakings concerned exceeds SEK 1 billion; and (b) each of at least two undertakings concerned have a turnover in Sweden exceeding SEK 200 million.

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2. In 2016, there were in total 74 notifications; in 2015, there were in total 63 notifications; in 2014, there were in total 67 notifications; in 2013, there were in total 48 notifications; and in 2012, there were in total 36 notifications.
3. 1 January 2017 – 31 December 2017.
4. Case No 383/2017.
5. Case No 393/2017.
6. Case No 122/2017.
7. Case No 578/2015.
8. Case No 630/2016.
9. Case No 511/2014.
10. The SCA's report series 2017:2.
11. The UPP test has explicitly been applied by the SCA in a number of recent cases, such as *Office Depot/Svanströms* (2011), *Arla/Milko* (2011), *Cloetta/Leaf* (2012), *Eniro 118 118/Teleinfo (118 800)* (2012) and *Assa/Prokey* (2013) cases. *Office Depot/Svanströms* and *Cloetta/Leaf* were unconditionally cleared in Phase I, whereas the *Arla/Milko* case was cleared in Phase II subject to commitments. In the *Eniro 118 118/Teleinfo* case, the parties withdrew their notification due to SCA's intention to prohibit the concentration. In the *Assa/Prokey* case, the parties decided to abandon the planned acquisition after the SCA filed a suit to the District Court to block the concentration (see also above, under "New developments in jurisdictional assessment or procedure"). In addition, in the *Komplett/Webhallen* case (2013), the SCA used a number of economic analyses and unconditionally cleared the concentration in Phase II.

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Switzerland

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Overview of merger control activity during the last 12 months

Statistics

In 2017, a total of 32 notifications of company mergers were filed with the Swiss Competition Commission (the ComCo). This constitutes a clear increase in notifications compared to 2016 (22 notifications), but is still a relatively low number compared to other jurisdictions. This rather low number of notifications is due to the high turnover thresholds in Switzerland. A long-term comparison shows an average of around 28 notifications of mergers per year, as illustrated by the ComCo's statistics over the past five years: 22 notifications in 2016; 29 notifications in 2015; 30 notifications in 2014; 32 notifications in 2013; and 28 notifications in 2012.[1] The number of notifications filed with the ComCo in 2017 is above the average of the past five years.

The vast majority of mergers are generally cleared within the one-month deadline of the preliminary examination (phase I). Of 32 notifications in 2017, 27 concentrations were cleared after the preliminary examination (phase I), since the ComCo came to the conclusion that none of these concentrations would lead to the creation or the strengthening of a dominant position and, therefore, did not open an in-depth examination (phase II). In 2017, an in-depth examination was opened in three cases, as follows:

- The first case concerned a merger between two hospitals, the University Hospital Basel and the cantonal hospital of Basel-Land. The ComCo concluded that, although in the area of acute stationary care the merged entity will have a strong market position in the Basel region, there was no possibility of elimination of effective competition in said area. The merger was thus cleared without commitments.
- The second case involved the acquisition by Galexis AG of Pharmapool Aktiengesellschaft. The acquirer Galexis AG is a subsidiary of Galenica AG, a group of companies active in the pharmaceutical and logistics sector (in particular, in the purchase and distribution of pharmaceutical products). The ComCo opened a phase II investigation in this case since it considered that there was evidence for the creation or strengthening of a dominant position in several markets, such as the wholesale market for pharmaceutical products for self-dispensing doctors as well as for pharmacies in Switzerland. The phase II review was terminated in 2017. However, the results of the in-depth review have not been published yet (presumably due to differences as to the publication of business secrets).
- The third case related to the planned merger between two ticketing companies, Ticketcorner and Starticket. Both companies offer ticketing services for organisers of events, such as shows, concerts, etc. Following an in-depth investigation, the ComCo

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found that, on the market for the physical and online sale of tickets, there was clear evidence that Ticketcorner already held a dominant position before the merger. The proposed merger would have allowed the companies to control the Swiss market for the physical and online sale of tickets and eliminate effective competition. Therefore, the merger was ultimately prohibited by the ComCo. This is only the third prohibition of a notified transaction in the 22 years of existence of the ComCo.

In 2016, only one notified transaction was not cleared in phase I. The transaction concerned the pharmaceuticals sector. It involved the planned acquisition of control by Galexis AG over Pharmapool AG. This transaction was cleared by the ComCo without commitments. In 2015, the ComCo conducted three in-depth examinations, all related to the media sector. The first case, in view of a concentration regarding a planned joint venture between Swisscom AG, the Swiss Radio and Television Corporation (SRG) and Ringier AG, combining their activities in the field of "*Targeted Advertising*", was finally cleared without commitments in December 2015. A second case concerned Tamedia acquiring control over Ricardo. The third case related to an entity named JobCloud, which is a subsidiary of Tamedia, acquiring control over JobScout24, a subsidiary of Ringier. The latter two in-depth examinations concerned the dominant position of Tamedia in the field of job classifieds. Both concentrations were cleared at the end of 2015 without commitments. In 2014, only one in-depth examination occurred and in 2013 and 2012, the ComCo did not conduct any in-depth examinations (see section 'Procedure' below).

<u>Key industry sectors examined in 2017</u>

- Infrastructure:
  - electricity, engineering and installation services; and
  - oil and gas exploration.
- Services:
  - IT and telecommunications services;
  - identity and certificate services;
  - hospital services;
  - ticketing and ticketing software;
  - logistics and transportation (cargo rail transport; container shipping);
  - media and advertising; and
  - sustainable mobility services.
- Product markets:
  - IT products and consumer electronics;
  - automotive industry; and
  - convenience food and stores.

<u>Procedure</u>

The examination is divided into two phases that are comparable to the procedure under the EU regime:

- *Phase I* (*preliminary* examination): Phase I starts on the day following receipt of the complete notification. The ComCo is then required to notify the parties within one month as to whether it intends to initiate an in-depth examination. In most cases the ComCo will issue a so-called comfort letter. It can also authorise a concentration subject to *conditions and obligations* in the form of a formal decision (see section,

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‘Approach to remedies to avoid second stage examination’ below). Finally, the law states that a concentration is deemed to be cleared if no notice is given within the period of one month.[2] This is a rather theoretical case, because in practice the ComCo always informs the notifying party that there is no reason to open an in-depth examination.

- *Phase II* (*in-depth* examination): The decision to enter phase II is officially published and the subsequent in-depth examination has to be completed within an additional four months. Phase II may be terminated as follows: (i) unconditional authorisation; (ii) authorisation subject to conditions and obligations; (iii) prohibition; and (iv) withdrawal of notification.[3]

New developments in jurisdictional assessment or procedure

No significant developments in jurisdictional assessment or procedure regarding merger control can be reported. The most recent developments are outlined in an updated version dated November 8, 2017 of the ComCo’s *Merger Control Communication*.[4] It should be noted that the updated version of the ComCo’s *Merger Control Communication*, as described below, mainly contains editorial changes which do not seem to affect the ComCo’s substantive assessment of concentrations.

Mandatory notification for joint ventures

A joint venture company is subject to merger control if the general jurisdictional thresholds are met and if it exercises all functions of an independent business entity on a permanent basis. Newly formed joint ventures are only subject to merger control if, in addition, some business activities of at least one of the controlling undertakings are included in the joint venture’s business. According to Art. 9 CartA, the jurisdictional thresholds consist of the following two tests that must be fulfilled cumulatively for the last business year prior to the concentration:

- the undertakings concerned must have reported an aggregate turnover of at least two billion Swiss francs worldwide or 500 million Swiss francs in Switzerland; and
- at least two of the undertakings concerned must have reported individual turnovers in Switzerland of at least 100 million Swiss francs.

In principle, the Cartel Act is applicable whenever a specific conduct or a proposed concentration has effects on the Swiss market (*effects doctrine*).[5] The Swiss Federal Supreme Court has decided that any merger reaching the jurisdictional thresholds is deemed to have effects in Switzerland, irrespective of its actual effects.

In respect thereof, a joint venture that meets the thresholds mentioned above, only via its parent companies exercising joint control, used to be subject to the notification requirements even if it did not have any further relation to Switzerland. In 2009, however, the ComCo revised its practice:[6] the notification requirements no longer apply: (i) if the joint venture itself does not have any activities or turnover in Switzerland (in particular, no deliveries into Switzerland); and (ii) if no such activities or turnover are planned or may be expected in the future. Such transactions are no longer considered to have effects on the Swiss market.

Reduction of the intermediate time period in case of interdependent transactions

According to the ComCo’s practice, a transaction that is carried out in several steps may be considered and notified as a single economic transaction if the following conditions are met:

- joint control during a start-up period;

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- transformation of joint control into sole control based on a legally binding agreement; and
- a maximum start-up period of one year, in which all transaction steps must take place.

The start-up period used to be three years until the ComCo decided, in 2011, to reduce the period to one year in order to strive for harmonisation with the European Commission's practice.[7]

Geographical allocation of turnover:

As already mentioned,[8] the Cartel Act is only applicable if the thresholds set out in Art. 9 (1) CartA are reached. The relevant turnover only consists of the amount that is realised in Switzerland. Yet, it is not required that the undertakings concerned maintain subsidiaries or branches in Switzerland. Since neither the Cartel Act nor the Merger Control Ordinance contain rules on how Swiss turnover shall be allocated, the ComCo applies Art. 5 (1) EC Merger Regulation[9] by analogy.[10] In terms of this practice, the Merger Control Communication outlines that turnover (for the sale of goods and for the provision of services) should usually be allocated to the state in which the customer is located (i.e. the place where the product must be delivered or where competition with alternative suppliers occurs). The invoicing address is not relevant for the allocation. This regulation results from the fact that Switzerland has established itself as a popular centre for commodity trading. Numerous commodity trading companies are domiciled in Switzerland that ship goods between the continents without having any connection to Switzerland other than the invoicing address. Such turnover shall not be allocated to Switzerland unless goods are actually delivered to a customer located in Switzerland.

The Merger Control Communication further foresees that this rule applies to the supply of goods, and that exceptions for the provision of services may apply.

Definition of affected markets without market share additions (stand-alone affected markets)

The Merger Control Communication specifies, having regard to the practice of the European Commission, the information requirements for markets with a market share of at least 30% (as referred to in Art. 11 *lit.* d MCO) affected by concentrations without overlaps. In such a case, a market will be deemed to be affected if:

- an undertaking involved is already active in an upstream or downstream product market or in a neighbouring market closely linked to the product market in which the relevant undertaking holds a market share of at least 30%, or;
- an undertaking involved plans to enter the respective product market or has pursued this objective in the past two years, or;
- an undertaking involved holds important intellectual property rights in this affected market, or;
- an undertaking involved is active on the same product market, but not on the same geographic market.

Hence, the undertakings involved may, if possible, issue a statement in their merger notification by which they explicitly confirm that none of the above criteria are fulfilled. If such statement cannot be issued, the undertakings concerned most likely may not avoid providing the fully-fledged information required for affected markets.

In any event, even if none of the above criteria are fulfilled, the ComCo generally requests the undertakings involved to enumerate the stand-alone affected markets (without, however, having to provide the same detailed information as for affected markets resulting from market share additions, for example).

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Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Key industry sectors reviewed in 2017 were the ticketing, hospital care and automotive industry sectors. Before addressing these sectors in more detail, it is interesting to consider the broader context and tendency of the ComCo's recent decisional practice concerning merger control.

In 2016, the ComCo cleared concentrations in the media sector that partly led to high market share overlaps and created dominant positions. Clearance was granted based on the consideration that the concentrations would not eliminate effective competition in light of the potential competition from foreign major competitors such as Google. However, one should not derive from these clearances that the ComCo's approach to merger control has become more lenient. In fact, in 2017 and for the third time only in its existence, the ComCo prohibited a notified transaction (*Ticketcorner / Starticket* case). The prohibition of this transaction deserves further comments:

In the *Ticketcorner / Starticket* case, both parties were active in the distribution of tickets for concerts and shows, through physical and online channels (primary ticketing), as well as advertising on media channels and social network platforms. Both parties also provide software solutions for the direct sale of tickets (ticketing software). The ComCo held that the ticketing market could be divided into two separate submarkets, i.e. the primary ticketing market and the ticketing software market. Through the planned transaction, Starticket would have become a wholly owned subsidiary of Ticketcorner. Following an in-depth review of the notified transaction, the ComCo concluded that the proposed merger would not have been problematic in the market for ticketing software. However, in the primary ticketing market, there were strong indicators that Ticketcorner already had a dominant position before the merger. The proposed merger would have allowed both companies to control the national market for primary ticketing and eliminate effective competition. Furthermore, the merging parties are directly and indirectly owned by two Swiss media groups, i.e. Ticketcorner by Ringier and Starticket by Tamedia, and the merger would have strengthened their respective market position (conglomerate effect). In its assessment, the ComCo took into consideration the development and role of firms such as Spotify, Facebook and Google. The ComCo concluded that actual and potential competitors, along with a greater use of new technologies, would not have exerted sufficient competitive pressure on the new entity. As the ComCo could not identify any adequate remedies, the proposed merger was prohibited in May 2017. An appeal against this prohibition decision is currently pending before the Federal Administrative Tribunal.

Other than the ticketing market, the ComCo reviewed the hospital treatment sector in the planned merger of *University Hospital Basel / Cantonal Hospital of Basel-Land*. The parties to this merger, both public hospitals, planned to create a hospital group. The ComCo did not clear this transaction in phase I, but opened an in-depth investigation (phase II). It eventually concluded that the parties will hold, upon completion of the transaction, a strong market position in the area for acute stationary care in the Basel-region. However, despite this strong market position, the ComCo held that there was no possibility of elimination of effective competition through the planned merger. The transaction was cleared without commitments in September 2017.

In the automotive industry sector, the ComCo examined the proposed purchase by Peugeot S.A. of the automotive business of Opel from General Motors (*Peugeot / Opel* case). There was only one affected market in Switzerland, namely the market for the production and

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distribution of passenger cars and commercial vehicles of very small size ("*Kleinstwagen*"). The ComCo considered that the planned merger did not lead to the creation or strengthening of a dominant position since there were sufficient other strong competitors and none of the parties' car models in the segment for very small cars were ranked in first place in terms of sales in Switzerland. As a result, the transaction was cleared in phase I. In another case in the automotive sector (*BMW / Daimler / Ford / Porsche*), the ComCo cleared in a phase-one review the planned creation of a joint venture (JV) between BMW, Daimler, Ford and Porsche, equally held at 25%. The purpose of the planned JV was the development, set-up and maintenance of a high-power charging infrastructure (HPCI) all over Europe for battery electric vehicles. In this context, the ComCo considered a separate relevant product market for the production and promotion of battery electric vehicles. As to the HPCI, the ComCo left the exact market definition open since the JV constituted a "*greenfield*" investment. Given the dynamics of the market for HPCI, which was considered to be growing quickly, and the strong competition in this field, the ComCo did not see any competitive concerns.

In the logistics and transportation sectors, the ComCo examined two cases in 2017. In the first case (*BLS / Transport Ferroviaire Holding*), the ComCo examined the acquisition of joint control by BLS, a Swiss railway company, and Transport Ferroviaire Holding, a subsidiary of the French State-controlled company SNCF Mobilités, over the Swiss rail cargo transport company BLS Cargo. Despite two affected markets in Switzerland, the ComCo found that there was sufficiently strong competition by the competitor SBB cargo. Due to the lack of significance of SNCF Mobilités in the Swiss markets at issue, the creation or strengthening of a collectively dominant position with SBB could be excluded. The proposed transaction was cleared without further investigations. In a second case (*HSDG / Maersk Line*) relating to the transportation sector, the company Maersk Line, a fully-owned subsidiary of Maersk Group, planned to acquire the Hamburg Südamerikanische Damfschiffahrts-Gesellschaft (HSDG), a fully-owned subsidiary of the company Dr. Oetker. In this case, the ComCo analysed in detail the competitive situation in regard to various trade routes for container shipping, harbour tug services and other services. Ultimately, the ComCo considered that the proposed transaction did not raise any competitive concerns, which resulted in a phase-one clearance.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The substantive test is based on a dominance test supplemented by an additional test on the remaining degree of competition.[11] Pursuant to this so-called *dominance-plus test,* concentrations may only be prohibited:

(i) if the transaction creates or strengthens a dominant position;

(ii) if the dominant position is liable to eliminate effective competition in the relevant market;[12] and

(iii) if the transaction does not strengthen competition in another market, which outweighs the negative effects of the dominant position.

In its assessment of the effects of a concentration, the ComCo considers market dynamics as well as the parties' market position at an international level.[13] According to the current practice, notably the following factors may be taken into account: market shares of the undertakings; structure of the relevant markets; barriers to entry; alternatives to suppliers and buyers; conditions of access to supplies and outlets; and future prospects for supply and demand. Generally, under the current law, the ComCo does not take efficiencies into consideration as a mitigating factor. However, efficiencies may be taken into consideration if they are likely to

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prevent the elimination of effective competition.[14] Furthermore, the undertakings concerned have the possibility to show an improvement in the competitive situations in *another* market that might offset the disadvantages of a dominant market position.[15]

Not only can the Swiss turnover thresholds be regarded as relatively high compared to international standards (see section above, 'New developments in jurisdictional assessment or procedure'), but Swiss law also provides for a substantive test with an unusually high threshold to prohibit concentrations compared to other jurisdictions. Serious doubts as to whether a concentration actually could eliminate effective competition can hardly ever be excluded. Public policy issues are not considered, but if the ComCo refuses clearance for a concentration, the undertakings concerned may seek exceptional approval from the Federal Council for reasons of public interest.[16] In such a case, the Federal Council may take into account both competition-related and non-competition-related issues in assessing a concentration. Up to now, such authorisation has never been granted.

It should be noted that the Federal Government is presently considering a reform proposal consisting, *inter alia*, in the adoption of the SIEC-test ("*Significant Impediment to Effective Competition*") instead of the currently used dominance-plus test (see section below, 'Reform proposals').

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to Art. 10 (2) of the Cartel Act, the ComCo may authorise a concentration subject to conditions and obligations. Generally, the ComCo may ask the undertakings concerned to make binding proposals with a view to re-establishing effective competition within a given deadline. The parties can also propose remedies for potential competition issues. There is, however, no right to have a particular remedy considered. If the ComCo does not receive any proposals or rejects them, it may impose the remedies to be implemented by the undertakings in its decisions. The Cartel Act does not specify the types of conditions or obligations and, contrary to the EU law,[17] Switzerland does not have a specific remedy regulation. Therefore, remedies are negotiated with the ComCo on a case-by-case basis. In practice, remedies may involve both behavioural and structural undertakings, yet the ComCo generally prefers structural undertakings (i.e. divestitures), but is more liberal in accepting behavioural remedies than the European Commission. The most appropriate moment for the commencement of remedy negotiations has to be determined in each case depending on the specific circumstances, whereby it often may be advisable to start early on, i.e. prior to, upon or shortly after the notification.

According to the statistics (see section above, 'Overview of merger control activity during the last 12 months'), the ComCo did not decide on any conditions or obligations in 2017. However, the ComCo prohibited the *Ticketcorner / Starticket* merger since it considered that there was no adequate remedy.

Key policy developments

Market definition in merger control versus abuse of dominance cases

In a judgment of September 14, 2015 regarding Swisscom AG, the Federal Administrative Court reviewed an alleged abuse of its dominant position in the wholesale grid-bound broadband internet market. The Court held that the definition of the relevant market depends on the protective purpose of the applicable norm. In the context of the assessment of concentrations (Art. 10 CartA), the authorities will, therefore, generally not apply the

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same market definition criteria as in the context of the assessment of unlawful practices by dominant undertakings (Art. 7 CartA).[18]

Bilateral cooperation agreement between Switzerland and the European Union

On December 1, 2014, the bilateral agreement between Switzerland and the European Union concerning cooperation in the application of their competition laws (the Agreement) entered into force.[19] Apart from the Bilateral Agreement on Air Transport,[20] which entitles the European Commission to conduct examinations on Swiss territory on the basis of EU competition law, it is the only agreement that allows formal cooperation with foreign competition authorities. Since Switzerland is neither a member of the EU nor of the EEA, the ComCo is not part of the European Competition Network (ECN). Before the Agreement came into force, the ComCo was, due to this lack of a statutory basis, not permitted to exchange information that is subject to official secrecy with other jurisdictions. In order to directly liaise with other jurisdictions, in particular with the European Commission, the ComCo used to request a so-called *waiver letter* from the investigated companies. This situation has been exposed to criticism in recent years, since globalisation is increasing and many anticompetitive practices have cross-border effects on trade between the EU and Switzerland.[21]

The Agreement regulates cooperation between the Swiss and the European competition authorities. It is a purely procedural agreement and does not provide any substantive harmonisation of competition laws. Thus, both competition authorities retain complete autonomy in the application of their competition laws. The purpose of the Agreement is described in Art. 1 as follows: "*The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each Party through cooperation and coordination, including the exchange of information between the competition authorities of the Parties, and to avoid or lessen the possibility of conflicts between the Parties in all matters concerning the application of the competition laws of each Party*."

The Agreement establishes a framework for general information duties to facilitate coordination and cooperation of transnational procedures. The competition authorities shall notify each other of their enforcement activities if such activities could significantly affect important interests of the other party (*negative comity*). Furthermore, the other competition authority may be asked to initiate or expand enforcement activities (*positive comity*). The main part of the Agreement is the exchange of case-specific information between the ComCo and the European Commission, especially provisions regarding the discussion, transmission and use of information, and provisions on the protection of the information discussed or transmitted. Finally, the Agreement allows the disclosure of information transmitted under certain limited circumstances.

Since the Agreement came into force, the competition authorities in Switzerland and the EU have cooperated extensively. According to the ComCo's annual report 2016, the Secretariat has contacted the Directorate-General for Competition of the EU Commission in relation to various parallel examinations and merger cases in order to discuss issues of procedure and substantive law (Art. 7 (2) Agreement) to avoid inconsistencies between Berne and Brussels. Statistics for 2017 are not available yet.

Reform proposals

Failure of the partial reform of the Cartel Act in the Swiss parliament

By its decision of September 17, 2014 not to enter into deliberations on the proposed amendment of the Cartel Act,[22] the Swiss National Council, one of the two chambers of

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the Swiss parliament, put an end to the proposed reform, as initiated by the Swiss Federal Council in its draft bill proposed on February 22, 2012.

While other aspects, such as the prohibition of certain agreements ("*Teilkartellverbot*"), have dominated the debate and ultimately led to the proposal's failure, the proposed legislation had also contained amendments of the merger control regime. First and foremost, the amendment had targeted a harmonisation of the Swiss merger control system with EU merger control, and the implementation of a modern substantive test with regard to the prohibition of concentrations. Thus, the amendment had comprised the implementation of the SIEC-test ("*Significant Impediment to Effective Competition*") as it is presently used under the EU merger regime. With the partial reform having failed, the dominance-plus test under the Swiss merger control regime as described above[23] remains in force.

Further, the failed reform had aimed at facilitating cross-border proceedings by either eliminating duplicate proceedings or by providing more flexible review periods (request for extension of time limit) in order to improve the coordination of parallel proceedings.[24]

Adoption of the SIEC-test?

After the failure of the amendment of the Cartel Act in 2014, the modernisation of merger control procedures continued to be discussed. In 2016, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research to prepare a consultation bill by the end of 2017, taking the view that the current merger control regime takes too little account of negative and positive effects of mergers, and that the test for market dominance currently provided for in the Cartel Act could be replaced by the SIEC-test.[25]

In the context of preparing a reform proposal, the State Secretariat for Economic Affairs (SECO) mandated the consulting firm Swiss Economics to analyse the economic consequences of a change from the currently applicable dominance-plus test to the SIEC-test. On October 27, 2017, Swiss Economics published the results of this analysis in a report,[26] which contains the following key findings. The report highlights the positive effects of a potential introduction of the SIEC-test based on the EU-model. First, with the SIEC-test, the intervention threshold would be lower than with the currently applicable dominance-plus test, which would enable the ComCo to efficiently counteract any merger control-related concentration tendencies (as they have appeared in the food retail industry in the past). Thus, unilateral effects (namely price increases) could be avoided, which would contribute to the fight against the "*Swiss island of high prices*" ("*Hochpreisinsel Schweiz*"). Second, it results from the report that the introduction of the SIEC-test would allow a more appropriate and empirical control of mergers in terms of economic consistency. Third, the merger control regime in Switzerland would be harmonised with the system applicable in the EU and its member states, which would facilitate cross-border merger control. In order not to jeopardise the benefits resulting from harmonisation, it is suggested in the report that a so-called "*Swiss Finish*" to the SIEC-test be avoided.

The report also assessed the necessity to revise the merger notification threshold currently in place in Switzerland. The report concludes that a modification of such thresholds is only advisable if the SIEC-test is actually introduced. In fact, under the current dominance-plus test, lower merger notification thresholds would simply result in a higher number of mergers being notifiable, and thus unnecessary additional expenses. Moreover, the introduction of alternative thresholds triggering merger notifications (such as thresholds related to the value of a transaction) was considered. However, the report concludes that, for a relatively small national economy as the Swiss one, the introduction of transaction

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values as alternative merger notification thresholds is unnecessary. Finally, the possibility to harmonise the Swiss review periods with those applicable in the EU was considered. Such harmonisation was not deemed to be vital, but also not seen as detrimental.

Based on the report of Swiss Economics, the Federal Council is expected to draft its explanatory message accompanying the draft bill to be voted in parliament. The draft bill is expected to be published in the course of 2018.

* * *

Endnotes

1. The Annual Reports are available on the ComCo's website: https://www.weko.admin.ch/weko/en/home/documentation/annual-press-conference.html.
2. Articles 10 (1) and 32 (1) Federal Act on Cartels and other Restraints of Competition of October 6, 1995, CC 251 (Cartel Act, CartA); Articles 14 and 20 Ordinance on the Control of Concentrations of Undertakings of June 17, 1996, CC 251.4 (Merger Control Ordinance, MCO).
3. Articles 10 (2) and 33 (1|3) CartA.
4. Neue Praxis bei Zusammenschlussverfahren: https://www.weko.admin.ch/weko/de/home/dokumentation/bekanntmachungen---erlaeuterungen.html.
5. Article 2 (2) CartA.
6. LPC 2010|3, p. 562 N 6, Ringier AG | Springer AG.
7. See the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139|2004 on the control of concentrations between undertakings, N 34.
8. See section, 'New developments in jurisdictional assessment or procedure'.
9. Council Regulation (EC) No 139|2004 of January 20, 2004 on the control of concentrations between undertakings. See also the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139|2004 on the control of concentrations between undertakings, N 195 ff.
10. LPC 2007|4, p. 631 N 12, Dnata | Jet Aviation Handling AG.
11. Article 10 (2) CartA.
12. According to the Swiss Federal Supreme Court, the elimination of competition has to be satisfied as a separate element.
13. Article 10 (4) CartA.
14. LPC 2010|3 p. 559 N 409, France Télécom SA | Sunrise Communications AG.
15. Article 10 (2)(b) CartA.
16. Article 36 CartA.
17. Commission Notice on remedies acceptable under Council Regulation (EC) No 139|2004 and under Commission Regulation (EC) No 802|2004.
18. Decision of the Federal Administrative Court of September 14, 2015, B-7633|2009, c. 274: http://www.bvger.ch/publiws/?lang=en.
19. Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, OJ 2014, L 347|3: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:347:TOC.
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22. http://www.parlament.ch/ab/frameset/d/n/4915/445960/d_n_4915_445960_445961.htm.
23. See section, 'Key economic appraisal techniques applied'.
24. Dispatch of the Federal Council of February 22, 2012, p.3929 f.: http://www.news.admin.ch/NSBSubscriber/message/attachments/25965.pdf.
25. Prevention of Parallel Imports, Federal Council Report of 22 June 2016 in response to Postulate 14.3014 "Simplifying customs clearance and promoting parallel imports by recognising additional documents as proof of origin", https://www.newsd.admin.ch/newsd/message/attachments/44557.pdf, p.42.
26. The full report of Swiss Economics on the introduction of the SIEC test (in German) is available under the following link: https://webcache.googleusercontent.com/search?q=cache:FSa5W04NbrEJ:https://www.seco.admin.ch/dam/seco/de/dokumente/Wirtschaft/Wirtschaftspolitik/Wettbewerb/Kartellgesetz/Studie%2520SIEC%25202017.pdf.download.pdf/Studie%2520SIEC%25202017.pdf+&cd=1&hl=de&ct=clnk&gl=ch.

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Taiwan

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Overview of merger control activity during the last 12 months

The National Regulatory Agency is the Taiwan Fair Trade Commission ("TFTC"). There is no supranational regulatory agency (e.g., the European Commission) that has, or may have exclusive competence. The TFTC is empowered to prohibit transactions it determines would have a net-negative market impact, after weighing the transaction's anti-competitive or other adverse effects on the Taiwan market against any countervailing economic benefits.

Below are the statistics published by the TFTC in relation to merger control notifications and clearances:

Year	Notification	Clearance
2016	71	33
2017	43	11
2018 (1st quarter)	13	5

For global transactions, the most recent case is the merger by Linde AG, Praxair, Inc. and Linde Public Limited Company. On May 9, 2018 the TFTC approved that the merger would not cause a negative market impact on the Taiwan gas market. Other international transactions include the merger by and between Jersey (UK)-based Glencore Plc and Australian companies Anotero Pty Limited, Hunter Valley Operations Joint Venture and HVO Coal Sales Pty Limited. The merger was approved by the TFTC on January 24, 2018. Also after review by the TFTC, it was concluded that the merger between Google LLC and CGC Inc. Mobile Communications Lab would be unlikely to lead to any significant competition restraint. The merger was cleared on January 24, 2018.

The most significant local merger filing is in connection with the combination of three major Taiwanese solar cell manufacturers, i.e., Gintech Energy, Solartech Energy Corp and Neo Solar Power. The merger was approved by the TFTC on April 18, 2018. The TFTC held that the merger is unlikely to reduce domestic market competition nor to increase entry barriers in the solar product market; on the contrary, the new joint venture would have a stronger competitive edge to increase the production of electricity generated from renewable sources, which is beneficial for the overall economic environment.

New developments in jurisdictional assessment or procedure

The regulatory regime applicable to mergers and similar transactions in Taiwan is the Taiwan Fair Trade Act ("TFTA") which became effective in 1991. The TFTA requires

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a pre-merger notification if a regulated transaction meets the turnover threshold or the market share threshold. For global transactions, they would require a merger filing in Taiwan provided that the transaction falls within one or more of the categories of regulated transactions and meets the turnover threshold or the market share threshold. The merger control provisions were amended on February 4, 2015 to provide more clarity on the thresholds for pre-merger notification. For jurisdictional thresholds for the application of merger control, pursuant to the amended merger control provisions, the turnover should be calculated on a "group/consolidated basis", which means that the sales amounts of affiliates of the enterprise participating in the combination shall be included in determining the turnover threshold.

The most recent amendment made in relation to merger control provisions was to deal with hostile takeover situations. Pursuant to the latest amendment to the TFTA on June 14, 2017, in a hostile takeover case, the TFTC shall inform the targeted entity of the per-merger notification made by the initiating party and consult the target entity's comment before rendering its decision. If necessary, the TFTC may invite a third party to provide expert opinion to assist the TFTC in rendering its decision as to whether to approve the contemplated takeover.

Transactions caught by the national rules

First of all, pursuant to the TFTA, the following types of transactions constitute a "merger" and shall be reviewed pursuant to relevant thresholds to determine if the transaction triggers merger filing:

- merges with another enterprise;
- holds or acquires more than one third of the total voting shares or capital contribution of another enterprise (the shares or capital stock of another enterprise held by companies that have directly subordinating relationships with the enterprise shall be combined together when calculating the shares or capital contribution);
- 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.

The size/turnover of transaction threshold

The TFTA requires filing if any one of the following conditions exists with respect to a regulated transaction:

- upon consummation of the proposed transaction, the combined entity would control one-third of the relevant market in Taiwan;
- prior to the consummation of the proposed transaction, one of the participants in the transaction controls one-fourth of the relevant market in Taiwan;
- during the immediately preceding fiscal year: (i) one of the transaction participants had sales revenue in Taiwan exceeding NT$15 billion (approx. US$465.5 million) (in case of a non-financial institution) or NT$30 billion (approx. US$931 million) (in case of a financial institution); and (ii) the other participant had sales revenue in Taiwan exceeding NT$2 billion (approx. US$62.1 million); or
- during the immediately preceding fiscal year, (i) one of the transaction participants

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had global sales revenue exceeding NT$40 billion (approx. US$1.32 billion), and (ii) two participants each had sales revenue in Taiwan exceeding NT$2 billion (approx. US$62.1 million).

Circumstances for exemption from the pre-merger notification obligation

The obligation to file a pre-merger notification with the TFTC shall be exempted if any of the following circumstances exist:

- any of the enterprises participating in a merger, or its 100% held subsidiary, already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger, and merges such other enterprise;
- enterprises, 50% or more of the voting shares or capital contribution of which are held by the same enterprise, merge;
- an enterprise assigns all or a principal part of its business or assets, or all or any part of its business that could be separately operated, solely to another enterprise newly established by the former enterprise;
- the redemption of shares by certain shareholders of an enterprise (pursuant to certain provisions in the Company Law or the Securities and Exchange Law) results in any remaining shareholder(s) holding more than one-third of the outstanding shares of the enterprise;
- a single enterprise reinvests to establish a subsidiary and holds 100% of the shares or capital contribution of such a subsidiary; or
- any other designated type of merger promulgated by the TFTC.

Geographic scope/national market effect of transaction

With respect to foreign-to-foreign combinations (i.e., extraterritorial combinations), the sales figures apply only to sales in Taiwan which would include the sales of the parties' foreign or local group companies. Upon receipt of the notification, the TFTC may, subject to its discretion, decide not to exercise jurisdiction over an extraterritorial combination if the extraterritorial combination is unlikely to cause a direct, substantial and reasonably foreseeable impact on the Taiwan market. Regardless of the geographic dimension of the affected markets, mergers must be notified to the TFTC if any of the above thresholds is exceeded. While it is uncertain whether any local effect would arise, the normal practice is still to notify the TFTC of the intended combination and let the TFTC decide from its preliminary review if the foreign-to-foreign merger can be exempted from the merger control obligation in Taiwan. In any event, the TFTC will focus on the effects of a merger in the Taiwan market, even if the geographic dimension of the markets affected by the said concentration is wider.

Expedited filing procedure for merger control filings

A short-form and accelerated procedure has been adopted by TFTC in its review of certain types of merger control, such as conglomerate merger where there are no significant concerns of substantial overlap of products or concentration of markets. To elaborate, the following types of merger are allowed to apply the expedited filings procedure:

- horizontal mergers – (i) the combined market share of the participants is less than 20%, or (ii) the combined market share of the participants is less than 25% and the market share of one of the participants is less than 5%; provided that such rules do not apply or are modified under certain circumstances related to high levels of market concentration;

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- vertical mergers – the aggregate market share of the participants in each relevant market is less than 25%;
- conglomerate mergers – there is no significant potential competition between the participants; or
- related party mergers/acquisitions – one of the participants directly owns at least ⅓, but less than ½, of the voting rights or equity capital of the other participant.

However, please note that expedited review is not available for transactions involving certain industries such as financial holding companies. The TFTC also has the discretion to adopt the standard review process instead of an expedited review if it determines that the transaction involves significant public interest, the relevant market is difficult to identify, the participants' market shares are difficult to assess, or there are other significant concerns related to possible competition-limiting effects such as high market concentration or market entry barriers.

The expedited procedure mainly reduces the burden of the volume of documents to be prepared and submitted for the TFTC's review. For example, in a standard merger control review, the applicant shall submit financial information for the last three fiscal years; in an expedited review, the financial information required is the last two fiscal years. Regarding the explanation of the overall positive and negative economic impacts of the proposed transaction which is required in a general/standard merger control review, the expedited review submission does not require such evaluation, and a description regarding each participant's three main products or services and its three primary competitors will usually suffice.

Form and content of initial filing

A pre-merger notification shall be submitted with an official notification form together with the related information and documents:

- a report form specifying the following information:
  a) type and substance of the merger;
  b) the name and the place of office of each participating enterprise, or the name and the place of the office or business of each participating company, sole proprietorship, partnership, or association;
  c) the scheduled date of merger; and
  d) the name of the attorney-in-fact, if any, and the supporting document.
- basic data on each participating enterprise:
  a) the name and residence or domicile of the responsible person or administrator, if any, of each enterprise;
  b) the capital and business items of each participating enterprise;
  c) the turnover in the preceding fiscal year of each participating enterprise and any enterprise with which it has a relationship of control or Taiwan subordination;
  d) the number of employees of each participating enterprise; and
  e) certificate of incorporation or establishment of each participating enterprise.
- the financial statement and operating report for the preceding fiscal year of each participating enterprise;
- data such as the production or operating costs, sales prices, and production and sales values (volumes) of the participating enterprises' goods or services related to the combination applied for;

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- an explanation of the benefits of the merger for the overall economy and any disadvantages due to restraints on competition;
- major future operating plans of the participating enterprises;
- overview of the long-term investments by the participating enterprises in other enterprises;
- if a participating enterprise's stock is listed on the stock exchange or traded on over-the-counter markets, the most recent prospectus or annual report;
- information on the market structure relating to horizontal competition and upstream and downstream enterprises of the participating enterprises; and
- other documents as specified by the TFTC.

Automatic waiting period

There is an automatic waiting period of 30 working days after the TFTC's issuing a letter to confirm the filing of complete information. A notified merger is allowed to close unless the TFTC objects to such merger within the 30 working day waiting period, which can be shortened or extended by the TFTC for another 60 working days. The review period commences from the next day of the day when the filing is completed.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

According to the TFTC's past merger decisions, the key industries include at least the electronic, semiconductor, mobile and financial industries.

According to comments made by the TFTC in defending its position in determining the relevant market impact (including merger control review and cartel allegations, wherein market effect is often debated), demand and supply substitution seem to be the primary factors of market constraint that the TFTC evaluates in its analysis of relevant markets. To determine the demand and supply substitution, the TFTC has adopted qualitative and quantitative analysis methodologies, which include reasonable interchangeability of use, the hypothetical monopolist test, and cross-elasticity of demand measurements.

The TFTC evaluates the effect of these competitive constraints to define the relevant market, both in terms of the nature of the product or service being offered and the geographic sales area of such product or service. Among others, the TFTC will consider a variety of factors, including:

- the general nature of the product or service and its use;
- views of customers and competitors regarding substitutability of the product or service generally and specifically within a particular geographic area;
- historical data on past substitution of similar products or services;
- the cross-price elasticity of demand;
- effects of price variation generally, the effect of price changes in different regions and related transportation costs between such regions, and the diversion of orders to other geographic areas in response to price changes; and
- costs to customers associated with switching to different products, including the ease with which customers can obtain products from different regions, and transaction costs for customers purchasing products from different regions.

In practice, if there is an independent third party's market research report or government

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statistics, the TFTC usually accepts the market definitions in such market research report. However, if there is no such market research report or government statistics, the TFTC may rely on the CCC Code (which is the commodity classification coding system used by the Taiwan Customs) and the SIC Code (which is the industry classification coding system used by the Taiwan government) to define the relevant market.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The main approach adopted by the TFTC is to evaluate if the overall economic benefit of the merger would outweigh the disadvantages resulting from competition restrictions.

In a horizontal merger, the following factors shall be considered: (1) unilateral effects; (2) coordinated effects; (3) entry barriers; and (4) countervailing power of customers.

In a vertical merger, the following factors shall be considered: (1) ability for rivals to choose contract parties; (2) impact on entry barriers of non-participating parties to enter relevant markets; (3) likelihood that participating entities may abuse their market power through the intended merger; (4) likelihood that rivals may need to increase their operation costs in order to be competitive; (5) likelihood to form cartels; and (6) likelihood of market foreclosure.

In a conglomerate merger, the following factors shall be considered: (1) likelihood of change of legal landscape and the impact on the participating firms; (2) likelihood of cross-industry operation facilitated by technological innovation; (3) original plan of cross-industry operation without the intended merger.

In the case where there are significant competition concerns, upon request by the TFTC, the parties may provide the following explanations for the TFTC's assessment: (1) economic efficiency; (2) consumer welfare; (3) the fact that one of the participating parties is in a disadvantaged trading position; (4) the fact that one of the participating parties is a failing firm; and (5) other benefits to the overall economy.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to the TFTA, the TFTC has the discretion to impose conditions or undertakings in its merger clearance in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. Usually, the TFTC only imposes remedies on transactions that raise anticompetitive concerns and enter phase 2 review. Also, the TFTC has only imposed behavioural remedies and no divestitures remedies have been imposed. In giving merger control clearance, the most common approach adopted by the TFTC is to request the participating parties to provide continuous and updated market information for a certain period of time post-merger, to ensure that no market concentration is caused. For example, in the merger contemplated by Net Wave Cable Systems Co., Ltd. and Power Full Cable Television Co., Ltd., the FTC approved the merger in September 2017 with conditions that the two companies shall provide the following information for the fiscal year in 2018 and 2019 to the FTC:

1. the price, quality, termination conditions, etc. they offer to consumers for using their internet and cable services; and
2. the efforts they have made to increase the quality of internet cable services provided to consumers.

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Key policy developments

Recently, the TFTC has increasingly used economic analysis (such as UPPI/CPPI analysis) in its merger review. Also, for transactions that raise local concerns and attract a high level of local attention, the TFTC may invite the participating participants, the relevant government agencies and think tanks, and the interested parties to a closed-door meeting to hear their comments.

Reform proposals

Major revisions were made to merger control-related provisions in 2015 and 2017, and there are no indications of imminent further reforms.

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Overview of merger control activity during the last 12 months

The Turkish merger control regime is primarily regulated by the Law on Protection of Competition No. 4054 ("*Law No. 4054*") dated December 13, 1994, and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("*the Merger Communiqué*") published on October 7, 2010. The Merger Communiqué entered into force as of January 1, 2011 and was amended on February 1, 2013. Subsequently, on February 24, 2017 Communiqué No. 2010/4 was amended by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("*Communiqué No. 2017/2*").

According to the annual statistics of the Mergers and Acquisitions Status Report for 2017, the Competition Board reviewed 184 transactions in total, including: 150 mergers and acquisitions that were approved unconditionally; two decisions that were approved conditionally; five privatisations, 30 out of the scope of merger control (i.e. they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to lack of change in control); and one transaction that did not receive clearance.

New developments in jurisdictional assessment or procedure

On February 24, 2017, Communiqué No. 2010/4 was amended by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("*Communiqué No. 2017/2*"). The new amendments effected by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4, are as follows:

1. Prior to the amendment brought by Communiqué No. 2017/2, the Article 8(5) of Communiqué No. 2010/4 had stated that "two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué". Article 2 of Communiqué No. 2017/2 amended Article 8(5) of Communiqué No. 2010/4 as follows: "two or more transactions carried out between the same persons or parties or within the same relevant product market, within a period of three years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué".
2. Article 3 of Communiqué No. 2017/2 introduced a new paragraph to be included to Article 10 of Communiqué No. 2010/4, which reads as follows: "*If the control is acquired from various sellers by way of series of transactions in terms of securities within the stock exchange, the concentration could be notified to the Turkish Competition Board after the realisation of the transaction provided that the following conditions are satisfied: (a) the concentration should be notified to the Turkish Competition Board without delay; and*

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(b) the voting rights attached to the acquired securities are not exercised or exercised solely to maintain the full value of its investments based on a derogation granted by the Turkish Competition Board. For the sake of completeness, the Turkish Competition Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition."

This newly introduced provision by Article 3 of Communiqué No. 2017/2 is similar to Article 7(2) of European Commission Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, even before the promulgation of Communiqué No. 2017/2, the case law of the Turkish Competition Board was shedding light on this matter. In the *Camargo* decision (Camargo Corrêa S.A. decision 12-24/665-187, May 3, 2012), the Board recognised that the parties can close a public bid on a listed company before the Turkish Competition Board's approval, subject to the condition that: (i) the transaction is notified to the Turkish Competition Board without any delay; and (ii) the acquirer does not exercise control over the target pending the Turkish Competition Board's approval decision. That said, since this approach had not been solidified through subsequent decisions on that front and the Camargo decision appears to be rather unique, a legislation-based security on these types of concentrations would be most welcome.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Traditionally, the Competition Authority pays special attention to transactions that take place in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors that are important to the country's economy (such as automotive, telecommunications, energy, etc.) attract the Competition Authority's special scrutiny as well. The Competition Authority's case handlers are always extremely eager to issue information requests (thereby cutting the review period) in transactions relating to these sectors, and even transactions that raise low-level competition law concerns are looked into very carefully. In some sectors, the Competition Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority, pursuant to Section 7/2 of the Law on Electronic Communication No. 5809). In such instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The consolidated statistics regarding merger cases in 2017 show that the transactions in the sector for food, agriculture, forestry, fishery and stockbreeding took the lead with 26 notifications, followed by the energy industry with 22 notifications..

The Competition Board adopted many **significant decisions** in the past year, examples of which are summarised below:

- In May 2017, the Board granted unconditional approval to the transaction concerning the acquisition by Maersk Line A/S ("*Maersk*") of all shares and sole control of Hamburg Südamerikanische Dampfschifffahrts – Gesellschaft KG ("*HSDG*"). Maersk (the buyer) is the largest container shipping company, while HSDG is among the top ten worldwide. Maersk and HSDG offer their services on trade routes through cooperation agreements with other shipping companies based on vessel-sharing agreements, where members decide jointly on capacity setting, scheduling and ports of call, which are all important parameters of competition. In its decision, the Board clearly indicated that in its assessment of the proposed transaction it took into consideration the commitments

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that the parties submitted to the European Commission, specifically with respect to the trade routes from/to Mediterranean Sea. The European Commission had cleared the proposed acquisition (Case M.8330 – Maersk/Hamburg (2017)) conditionally upon the withdrawal of HSDG from five consortia on trade routes. Among these routes, the ones connecting (i) the Mediterranean and West Coast South America and (ii) the Mediterranean and East Coast South America are related to the Turkish markets. The Commission stated in its press release dated April 10, 2017 that this will entirely remove the problematic links between Maersk and HSDG's consortia that would have been created by the transaction. In view of the proposed remedies, the Commission concluded that the proposed transaction, as modified, would no longer raise competition concerns. The Commission's decision is conditional upon full compliance with the commitments.

- In November 2017, the Board granted an unconditional approval to the transaction concerning the reinstatement of certain minority protection rights granted to Anheuser-Busch InBev ('ABI') over Anadolu Efes and formation of a joint venture between those two undertakings (November 23, 2017, 17-38/611-267) by concluding that the relevant transaction will not result in creation of a dominant position or strengthening an existing dominant position, and will not significantly impede competition. The transaction is of importance as it was a cross-border deal between ABI, one of the biggest players in the production of beer worldwide, and Anadolu Efes, the largest beer producer in Turkey and a significant player in Eastern Europe, where ABI acquired joint control over Anadolu Efes due to reinstatement of certain strategic veto rights.
- In November 2017, the Board concluded its Phase II review of the acquisition of Ulusoy Deniz Taşımacılığı A.Ş, Ulusoy Gemi İşletmeleri A.Ş., Ulusoy Ro-Ro İşletmeleri A.Ş., Ulusoy Ro-Ro Yatırımları A.Ş., Ulusoy Gemi Acenteliği A.Ş., Ulusoy Lojistik Taşımacılık ve Konteyner Hizmetleri A.Ş. and Ulusoy Çeşme Liman İşletmesi A.Ş. ('Ulusoy Ro-Ro') by U.N. Ro-Ro İşletmeleri A.Ş. ('U.N. Ro-Ro'). The Board concluded that: the transaction will strengthen U.N. Ro-Ro's dominant position in the market for Ro-Ro transport between Turkey and Europe; U.N. Ro-Ro will be in a dominant position in the market for port management concerning Ro-Ro ships upon the consummation of the transaction; the transaction will significantly impede competition in these markets; and the behavioural remedies submitted by the parties are not sufficient to eliminate the competition law concerns arising from the transaction. In this respect, the Board did not grant approval to the transaction.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Turkish merger control regime currently utilises a 'dominance test' in the evaluation of concentrations. Pursuant to Article 13/II of the Merger Communiqué, mergers and acquisitions which do not create or strengthen a sole or joint dominant position, and do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Competition Board. Article 3 of the Law No. 4054 defines a dominant position as: "the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers". The Guideline on the Assessment of Horizontal Mergers and Acquisitions ("Horizontal Merger Guideline") states that market shares higher than 50% may be used as an indicator of a dominant position, whereas aggregate market shares below 25% may be used as a

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presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40% and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position but also significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of the Law No. 4054.

On the other hand, there were a couple of exceptional cases where the Competition Board discussed the coordinated effects under a 'joint dominance test', and rejected some transactions on those grounds. For instance, transactions for the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected after the Competition 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 Competition 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 creation of joint dominance by certain players in the market whereby competition would be significantly impeded. Nonetheless, the High State Court has overturned the Competition Board's decision and decided that the 'dominance test' does not cover 'joint dominance'. This has been a very controversial topic ever since, because the Competition Board has not prohibited any transaction on the grounds of joint dominance after the decision of the High State Court.

In terms of joint venture transactions, to qualify as a concentration subject to merger control, a joint venture must be of a full-function character, satisfying two criteria: (i) existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis (i.e. having adequate capital, labour and an indefinite duration). If the transaction is a full-function joint venture, the standard dominance test is applied. Additionally, regardless of whether the joint venture is full-function, the joint venture should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself.

On the other hand, economic analysis and econometric modelling has been seen more often in the last years. For instance, in the *AFM/Mars Cinema* case (11-57/1473-539, November 17, 2011), the Competition Board used the OLS and 2SLS estimation models in order to define price increases that are expected from the transaction. It also employed the Breusch/Pagan, Breusch-Pagan/Godfrey/Cook-Weisberg, White/Koenker NR2 tests and the Arellano-Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses which are used more often are the HHI and CRN indices to analyse concentration levels.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to Article 10 of the Law No. 4054, once the formal notification has been made, the Turkish Competition 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 calendar days following a complete filing. Regarding the procedure and steps of a Phase II review, the Law No. 4054 makes reference to the relevant articles which govern the investigation procedures for cartel and abuse of dominance cases.

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The Competition Board may grant conditional clearances to concentrations. In the case of a conditional clearance, the parties comply with certain obligations such as divestments, licensing or behavioural commitments to help overcome potential competition issues. The Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions provide guidance regarding remedies. The parties can close the transaction after the clearance and before the remedies have been complied with; however, the clearance becomes void if the parties do not fully comply with the remedy conditions.

In 2017, four transactions were taken into Phase II review, concerning the sectors for ro-ro transportation services, agriculture, port services and optics. The decision concerning the acquisition by UN Ro-Ro İşletmeleri A.Ş. (i.e. the transaction in the ro-ro transportation services) was not granted clearance (17-36/595-259, November 9, 2017). The remaining three Phase II Reviews are ongoing. On the other hand, the Competition Board granted clearance to two transactions after the parties submitted commitments.

In *Bekaert/Pirelli* (17-06/56-22, February 9, 2017), the Board initiated a Phase II review, considering that the transaction might raise competitive concerns in the affected markets by causing significant concentration levels and increasing market power. During an in-depth Phase II review, the Board evaluated the behavioural commitments submitted by the parties which mainly included long-term supply agreements with local consumers, pricing commitments and provision of prices at a competitive level. As a result of its assessment, by also receiving the relevant local consumers' positive views on the commitments, the Board concluded that the commitments submitted by the parties are sufficient, sustainable and clear in terms of eliminating competitive concerns that might arise as a result of the transaction, and granted a conditional approval based on purely behavioural remedies to a sophisticated transaction which, under normal circumstances, could have been expected to prompt structural remedies.

Furthermore, the Turkish Competition Board has, until the *Bekaert/Pirelli* case, consistently rejected all carve-out or hold-separate arrangements proposed by merging undertakings' arrangements, based on the argument that a closing is sufficient for the Board to impose a suspension violation fine, and a deep analysis of whether change in control actually took effect in Turkey is unwarranted. The Board's approach to carve-out or hold-separate arrangements has been challenged with a genuine arrangement which includes splitting the transaction into two separate transactions in the *Bekaert/Pirelli* case. During the Phase II review, the parties proposed to split the transaction in spite of the Board's negative approach on carve-out or hold-separate arrangements. The Board, similar to its previous decisions, first argued that a closing outside of Turkey is sufficient for the suspension violation fine to be imposed. However, separate SPAs have been prepared and all the necessary measures have been taken in an attempt to prevent these two transactions being considered as one transaction. The Board clearly stated in its decision that it did not see any problem with respect to the parties splitting the transaction into two separate transactions concerning (i) the assets located in Brazil, Italy, Romania and China, and (ii) those located in Turkey and, accordingly, the parties' closing of the transaction in terms of the assets in the relevant four countries outside Turkey – which led the Board to solely assess the Turkish part of the transaction.

The *Maersk/HSDG* and *Ulusoy/UN Roro* cases are also examples from the past year that are subject to remedies, details of which are provided above under 'Significant decisions'.

As evident from the above, the Merger Communiqué enables the parties to provide commitments to remedy substantive competition law issues that may result from a

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concentration. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). If the parties decide to submit the commitment during the preliminary review period (Phase I), the notification is deemed filed only on the date of the submission of the commitment. The commitment can also be submitted 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.

The Competition Authority does not have a clear preference for any particular types of remedies. The assessments are made on a case-by-case basis in view of the specific circumstances surrounding the concentration. Nevertheless, divestitures are the most common commitment procedure in the Turkish merger control regime.

Key policy developments

The amendment of the turnover thresholds in the Merger Communiqué is surely the most important development in Turkish merger control regime in the past few years. In line with the amendment of the Merger Communiqué, the Competition Board also revised its Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned") and took out the relevant section on affected markets, so that the concept of affected markets is now only relevant to the preparation of the notification form and the analysis of the transaction. Furthermore, the Competition Authority has promulgated two guideline documents in relation to the assessment of concentrations: i) the Horizontal Merger Guideline; and ii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). The Guidelines are in line with EU competition law regulations and seek to retain the harmony between EU and Turkish competition law instruments.

The approach of the Competition Board to market shares and concentration levels is similar to the approach taken by the European Commission and spelled out in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). As the first factor discussed under the Horizontal Merger Guideline, market shares above 50% can be used as evidence of dominant position. If the market share of the combined entity remains below 25%, this would not lead to a need for further investigation into the likelihood of harmful effects emanating from the combined entity. Although a brief mention of the Competition Board's approach to market shares and HHI levels is provided, the Horizontal Merger Guideline's emphasis on an effects-based analysis (coordinated/non-coordinated effects), without further discussing the criteria to be used in evaluating the presence of dominant position, indicates that the dominant position analysis remains still subject to Article 7 of the Law No. 4054.

Other than the market share and concentration level discussion, the Horizontal Merger Guideline covers the following main topics: the anticompetitive effects that a merger would have in the relevant markets; buyer power as a countervailing factor to anticompetitive effects resulting from the merger; the role of entry in maintaining effective competition in the relevant markets; efficiencies as a factor counteracting the harmful effects on competition which might otherwise result from the merger; and conditions of the failing company defence. The Horizontal Merger Guideline also discusses coordinated effects in the market that might arise from a merger of competitors via increasing concentration in the market, and may even lead to collective dominance. In its discussion of efficiencies, it

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indicates that the efficiencies should be verifiable and should provide a benefit to customers. Significantly, the Horizontal Merger Guideline provides that the failing firm defence has three conditions: i) the allegedly failing firm will soon exit the market if not acquired by another firm; ii) there is no less restrictive alternative to the transaction under review; and iii) it should be the case that unless the transaction is cleared, the assets of the failing firm will inescapably exit the market.

The Non-Horizontal Merger Guideline confirms that non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2,000 (except where special circumstances are present) are unlikely to raise competition law concerns, similar to the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Competition Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal Merger Guideline include the effects arising from vertical mergers, and the effects of conglomerate mergers. The Non-Horizontal Merger Guideline also outlines certain other topics, such as customer restraints, general restrictive effects on competition in the market, and restriction of access to the downstream market.

Apart from the foregoing, the below communiqués and guidelines are the recent key legislative developments:

- Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position were accepted on January 29, 2014.
- Communiqué on the Increase of the Lower Threshold for Administrative Fines Specified in Paragraph 1, Article 16 of the Act No 4054 on the Protection of Competition, came into force on December 10, 2016.
- Block Exemption Communiqué on Research and Development Agreements (Communiqué No. 2016/5) came into force on March 16, 2016.
- Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board, came into force on February 24, 2017. Block Exemption Communiqué on the Vertical Agreements in the Motor Vehicle Sector in Turkey (Communiqué No: 2017/3), came into force on February 24, 2017.
- Guidelines on the Explanation on the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicle Sector in Turkey, were accepted on March 7, 2017.
- Communiqué No. 2017/4 on the Payments of Joint Stock Companies and Limited Liability Companies as per Law No. 4054, came into force on March 31, 2017.

Reform proposals

The Draft Proposal for the Amendment of the Competition Law (Draft Law) and the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition (Draft Regulation) were officially added to the drafts and proposals list. The Prime Ministry sent the Draft Law and the Draft Regulation to the Presidency of the Turkish Parliament on January 23, 2014 and January 17, 2014, respectively. In 2015, the Draft Law became obsolete again due to the general elections in June and November 2015. It is yet to be seen whether the new Turkish Parliament or the Government will renew the Draft Law. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft

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Law. The 2015 Annual Report of the Competition Authority notes that the Competition Authority may take steps toward the amendment of certain articles if the parliament of Turkey does not pass the Draft Law.

The Draft Law aims to further comply with the EU competition law legislation on which it is closely modelled. It adds several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation. The Draft Law proposes several significant changes in terms of merger control. First, the substantive test for concentrations will be changed. The EU's SIEC Test (significant impediment of effective competition) will replace the current dominance test. Secondly, the Draft Law adopts the term "concentration" as an umbrella term for mergers and acquisitions. Thirdly, the Draft Law eliminates the exemption of acquisition by inheritance. Fourthly, the Draft Law abandons the Phase II procedure, which was similar to the investigation procedure, and instead provides a four-month extension for cases requiring in-depth assessments. During in-depth assessments, the parties can deliver written opinions to the Competition Board, which will be akin to written defences. Finally, the Draft Law extends the review period for concentrations from the current 30-day period to 30 working days, which equates to approximately 40 days in total. As a result, obtaining a Phase I decision is expected to be extended.

The Draft Law proposes to abandon the fixed rates for certain procedural violations, including failure to notify a concentration and hindering on-site inspections, and set upper limits for the monetary fines for these violations. This new arrangement gives the Competition Board discretionary space to set monetary fines by conducting case-by-case assessments. Additionally, the Draft Regulation is set to replace the Regulation on Fines. The content of the Draft Regulation also seems to be heavily inspired by the European Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02). Thus, the introduction of the Draft Regulation clearly demonstrates the motive of the Competition Authority to bring the secondary legislation in line with the EU competition law principles during the harmonisation process.

Another significant anticipated development is the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition, which will replace the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance. The draft regulation is heavily inspired by the European Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003. Thus, the introduction of the draft regulation clearly demonstrates the authority's intention to bring the secondary legislation into line with EU competition law during the harmonisation process. The draft regulation was sent to the Turkish Parliament on January 17, 2014, but as yet no enactment date has been announced.

Additionally, on July 20, 2017, the Authority's Information Note regarding the Proposed Guidelines on Vertical Agreements ('Proposed Guidelines') was exposed to public opinion through the official website of the Authority. The Proposed Guidelines incorporate certain significant amendments as regards the Authority's current Guidelines on Vertical Agreements No. 15-36/537-RM(2) ('Guidelines') as well as several assessments relating to the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ('Communiqué No. 2002/2'). The Proposed Guidelines address the need to regulate and/or update the legislation which relate to (i) agency agreements, (ii) the most favoured nation/customer ('MFN') clauses, and (iii) internet sales, in light of the changing market conditions.

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With regard to agency agreements, the Authority has pursued a more rigid approach in terms of the restrictive nature of agency agreements. The Proposed Guidelines indicate that non-compete restrictions should not be evaluated under the scope of a rule-of-reason approach and set forth that if non-compete obligations lead to foreclosure effects in the market where the products/services subject to the agreement are being sold, such obligations will be considered within the scope of Article 4 of Law No. 4054.

Additionally, the Proposed Guidelines provide detailed explanations on MFN clauses with a view to clarify such a greenfield topic in competition law, and thereby update the legislation in light of the market dynamics. Specifically, the Proposed Guidelines recognise the pro-competitive nature of MFN clauses and prescribe a rule-of-reason analysis, while setting out that the anti-competitive effects of MFN clauses could be determined based on an effect analysis that covers aspects such as the relevant undertakings' positions in the market, the object for incorporating the MFN clause, and the characteristic features of the relevant market.

Lastly, the Proposed Guidelines also project some fresh amendments on internet sales and explicitly define them as a passive sales method for the first time. The Proposed Guidelines emphasise every retailer's and distributor's right to perform sales over the internet, and thereby set out the restrictions which leave vertical agreements outside the scope of the block exemption.

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Overview of merger control activity during the last 12 months

2017/18 marked the fourth full year of merger control enforcement by the Competition and Markets Authority ("CMA") in the UK, following its assumption of responsibility for phase 1 and phase 2 merger control investigations in April 2014.

The CMA publishes statistics regarding merger control enforcement activity each year for a 12-month period up to 31 March:

Table 1: Statistics on Phase 1 outcomes

	2013/2014		2014/2015		2015/2016		2016/2017		2017/2018		Last five financial years	
	No	**%**	**No**	**%**	**No**	**%**	**No**	**%**	**No**	**%**	**No**	**%**
Found not to qualify	12	18	10	12	2	3	1	2	0	0	**25**	**8**
Cleared unconditionally	42	65	56	68	36	58	39	68	37	60	**210**	**64**
De minimis exception applied	3	5	7	9	4	6	3	5	4	6	**21**	**6**
Phase 1 remedies accepted	0	0	3	4	9	15	9	16	12	19	**33**	**10**
Referred to Phase 2	8	12	6	7	11	18	5	9	9	15	**39**	**12**
Total decisions	**65**	**-**	**82**	**-**	**62**	**-**	**57**	**-**	**62**	-	**328**	**-**
Initial undertakings / initial enforcement order imposed	30	46	33	40	21	34	30	53	20	32	**134**	**41**
Case review meeting held	19	29	24	29	24	39	28	49	30	48	**125**	**38**

Table 2: Statistics on Phase 2 outcomes

	2013/2014		2014/2015		2015/2016		2016/2017		2017/2018		Last five financial years	
	No	**%**	**No**	**%**	**No**	**%**	**No**	**%**	**No**	**%**	**No**	**%**
Abandoned	0	0	1	25	3	25	1	13	0	0	**5**	**12**
Cleared unconditionally	6	50	2	50	8	67	1	13	4	67	**21**	**50**
Cleared subject to behavioural conditions	1	8	0	0	1	8	1	13	0	0	**3**	**7**
Cleared subject to divestment conditions	3	25	1	25	0	0	4	50	2	33	**10**	**22**
Prohibited	2	17	0	0	0	0	1	13	0	0	**3**	**7**
Total decisions	**12**	**-**	**4**	**-**	**12**	**-**	**8**	**-**	**6**	**-**	**42**	**-**

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The statistics highlight several trends from the past year:

- The total number of cases reviewed by the CMA is broadly consistent over the past couple of years (62 in 2015/16, 57 in 2016/17, and 62 in 2017/18).
- In parallel, the trend for around half of all cases reviewed by the CMA to raise material competition concerns continues. 48% of cases in 2017/18 gave rise to material competition concerns and therefore required a case review meeting at phase 1 (in line with 49% of cases in 2016/17 and 39% of cases in 2015/16).
- These trends continue to reflect that the CMA is focusing on cases which raise substantive concerns, and that the Mergers Intelligence Committee is effective at filtering out those cases which do not merit a formal investigation.
- Of those cases which raise potential concerns, the trend for CMA intervention continued in 2017/18:
  (a) In total, nine cases (15% of the total) were referred to a full phase 2 investigation. This represents an increase compared to 2016/17 when five cases were referred to phase 2, and is more in line with the five-year average of 12% of cases being referred to phase 2.
  (b) In 12 cases (an increase from nine in 2016/17, and above the five-year average), the parties offered undertakings in lieu of a reference to a phase 2 investigation. A large number of these cases raised competition concerns in local markets, with divestments of local sites being required for clearance – for example, the divestment of 33 out of 1,800 pubs in **Heineken / Punch Taverns**, and an agreement in **David Lloyd / Virgin** for the buyer not to purchase gyms for a period of 10 years in the two local areas which raised competition concerns. One case required remedies to address national security concerns (**Sepura plc / Hytera**).
  (c) A further four cases (**Capita / Vodafone**, **WAP GLO Dutch / Mallinckrodt**, **Integra LifeSciences / Codman**, and **Wilhelmsen Maritime / Drew Marine**) were cleared under the *de minimis* exception rather than being referred to phase 2. This exception allows the CMA to exercise its discretion not to refer a transaction where the total value of the market affected by the merger is sufficiently low for it not to be in the public interest for the CMA to open a phase 2 inquiry. This represents a small rise in the number of cases from 2016/17.
- These statistics suggest that the CMA, under its voluntary notification system, is continuing to focus on cases which raise substantive competition concerns, and seeking to remedy those concerns at phase 1 where possible. No cases were found 'not to qualify' for review based on not meeting the tests for the CMA to have jurisdiction, compared to one case (2%) in 2015/16 and as many as 12 cases (18%) in 2013/14, before the creation of the CMA. This suggests that the CMA is successfully filtering out transactions which 'do not qualify' for review by dealing with jurisdictional issues during the pre-notification period, as well as through the use of its 'briefing paper' process and information requests from the Mergers Intelligence Committee.
- The number of cases where the CMA imposes 'hold separate orders', under which the merging businesses are required to be managed and run separately during the CMA's investigation, was lower in 2017/18 (32%) than in the previous year (53% in 2016/17), and more in line with the five-year average of 41%. Nonetheless, this shows that a large number of parties are still taking the view that they are prepared to complete deals without notifying them, a decision in line with the UK's voluntary merger control

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regime, and take the risk of managing the hold-separate requirements in the event of a subsequent investigation by the CMA (up to four months after completion).

In terms of phase 2 outcomes, of the six cases reviewed in 2017/18, there were four unconditional clearances at phase 2 (**Cardtronics / DirectCash, Just Eat / Hungryhouse, Tesco / Booker, and Manchester Hospitals**), two mergers requiring remedies (**Euro Car Parts / Andrew Page** and **Cygnet Health / Cambian adult services**), and no prohibitions. This marks a substantial change to the trend over the preceding few years: in 2014/15, 50% of phase 2 cases were cleared unconditionally; in 2015/16, 67% were cleared unconditionally; but in 2016/17 this figure had fallen to just 13%. This could, of course, simply be that the cases before the CMA happened to raise more substantive concerns, but could also reflect the fact that in 2017/18, the CMA remedied a number of cases at phase 1 (even those requiring a large number of divestments, such as **Heineken / Punch Taverns)**, avoiding the need for a phase 2 investigation.

Two mergers were abandoned following a reference but before the start of the phase 2 review process, with the CMA investigation subsequently being cancelled. In **Capita / Vodafone WAP**, the transaction involved a potential reduction in the number of competitors from '2 to 1' in the relevant market for wide-area paging services to customers, including emergency services and hospitals**.** Another merger, **Mole Valley Farmers / Countrywide Farmers**, was also abandoned by the parties following a reference to phase 2. In that case, the CMA highlighted to the parties at an early stage of pre-notification discussions that the merger raised substantive concerns in the market for the supply of bulk agricultural products. Unusually, it involved the CMA opening a phase 1 merger investigation even where a complete merger notice had not yet been provided, as the period for the CMA's jurisdiction to review the transaction was ending. The CMA's decision was based on the draft merger notices provided by the parties, pre-notification discussions, responses to information requests, and third party views.

New developments in jurisdictional assessment or procedure

Procedural timelines

In its 2017/18 Annual Plan, the CMA stated that it is continuing to target the improvement of the process and procedure for its merger control investigations, with a focus on embedding an "*efficient, effective and targeted merger control end-to-end process across both phase 1 and phase 2*".[1]

Extended periods for pre-notification discussions continue to be a feature of the UK merger control process. The CMA expects parties to make contact at least a couple of weeks before the intended formal notification date, but this period tends to be far longer (in some cases, six weeks or more), especially for more complex and/or data-heavy transactions. The CMA currently notes that pre-notification discussions generally last an average of around 30-35 working days, with a phase 1 investigation lasting on average, a further 35 working days (five days faster than the 40-working-day statutory maximum).

Although a longer pre-notification period can be a burden on merging parties, by presenting a case in detail upfront, this tends to lessen the risk of a 'stop-the-clock' process during the formal phase 1 statutory period. It can also lead to better preparation for a case review meeting during the phase 1 process, thereby increasing the chances of a clearance decision at phase 1 rather than a referral to phase 2. Once the notification has been formally submitted, the CMA can 'stop the clock' during the phase 1 statutory period only in exceptional circumstances, and the CMA has noted that this has occurred recently only in

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cases referred back from the European Commission, rather than in cases originally notified to the CMA.

<u>Mergers intelligence function</u>

In 2017, the CMA also updated its guidance on the CMA's mergers intelligence function (see further below). This guidance confirms the process followed by the CMA when a non-notified merger comes to its attention. A number of cases reviewed by the CMA in the past year have been identified by the Mergers Intelligence Unit as qualifying for review, including **Stanley Black / Decker**, **JD Sports / Go Outdoors, GLO Dutch / Mallinckrodt** (which was cleared under the *de minimis* exception, see below) and **LN-Gaiety / Isle of Wight Festival Ltd**.

<u>*De minimis*</u>

Use of the *de minimis* exception under UK merger control law remains rare. The CMA changed the thresholds for the application of the *de minimis* exception in 2017, increasing the lower threshold from £3m to £5m (with total aggregated turnover in those markets lower than this figure, being presumed to be a market of insufficient importance to justify a reference to phase 2) and its upper threshold from £10m to £15m, with total aggregated turnover in those markets between this higher threshold and the lower threshold requiring a consideration of whether the expected customer harm resulting from the merger is greater than the cost of a phase 2 investigation.

Given these increased thresholds, and the CMA's continuing policy that parties should raise *de minimis* arguments during pre-notification discussions, it may be surprising that an increased number of cases in 2017/18 went through a full investigation before being cleared on this basis. However, the use of the *de minimis* exception involves an exercise of discretion by the CMA who must first assess, in the case of the first threshold, whether a clear-cut undertaking in lieu of reference is available in principle. In the case of the second threshold, the CMA will base its assessment of expected customer harm on a number of factors including the size of the market concerned, the likelihood that a substantial lessening of competition will occur, the magnitude of any competition that would be lost, and the expected duration of that substantial lessening of competition.

The **Capita / Vodafone WAP** case provided an example of an unsuccessful attempt to apply the *de minimis* exception. While the relevant market in that case fell within the market size threshold for the *de minimis* regime, the CMA did not use its discretion to apply the exception given that the magnitude of competition lost would be large. This involved a '2 to 1' merger, and the CMA found that customers would face potentially significant price rises and quality degradation.

The *de minimis* exception was successfully applied in **GLO Dutch / Mallinckrodt**, however, in a market with an aggregate value of £5m, even though the merger led to a reduction in the number of competitors from 3 to 2 in one market segment (single photon emission computed tomography radiopharmaceuticals) and customers considered that prices could rise as a result of the transaction. The CMA found that the exception should be applied on the basis that the remaining competitor in the market was expected to be more competitive in the future, and that new technology may provide alternative competition. Similarly, in **Wilhelmsen Maritime Services / Drew Marine,** the CMA found that the competitive impact of the transaction was likely to be lessened in the longer term as other competitors were entering the market within this timeframe; it was therefore appropriate for the exception to be applied.

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The exception was also granted in **Integra LifeSciences / Codman**, where competition concerns were identified in relation to certain categories of medical equipment. The aggregate turnover in the market segments affected by the merger were each below £5m, and the CMA found that there was some buyer power in the market, as well as evidence from customers that they considered that the market would remain competitive. As a result, the CMA exercised its discretion to apply the exception in this case.

Fast-track investigations

In **Tesco / Booker**, the parties requested the CMA to make a fast-track reference of the merger to a phase 2 review on the basis that the case raised a realistic prospect of competition concerns in one or more local areas. Such requests remain quite rare under the CMA regime, and are only normally requested in cases, such as this, where competition concerns are clearly likely to arise. This case was ultimately cleared unconditionally at phase 2 (see below).

Key industry sectors reviewed and approach to market definition, barriers to entry, and remedies

The CMA's substantive analysis of mergers continues to focus on its assessment of economic and factual evidence based on theories of harm, which provide the CMA with a framework for assessing the effects of a merger, and in particular whether or not it could lead to a substantial lessening of competition. The CMA will assess the closeness of competition between the parties, possible changes arising from the merger, the nature and extent of competitive constraints, and any impact on rivalry and expected harm to customers, as compared with the situation likely to arise absent the merger (referred to as the counterfactual).

Sectors

The CMA examined cases in a wide range of different sectors and business models in 2017/18, including: telecoms (**BT Group / IP Trade**, **Capita / Vodafone WAP**), deep sea containers (**GWI UK / Pentalver Transport**), food (**Hain Frozen Foods / The Yorkshire Provender**), outdoor clothing (**JD Sports / Go Outdoors**), road construction (**Fayat / Dynapac Compacting Equipment**), gyms (**David Lloyd / Virgin**), education products (**RM plc / Hedgelane**), radiopharmaceuticals (**GLO Dutch / Mallinckrodt**), asset management (**Standard Life / Aberdeen Asset Management**), CRM property software (**ZPG / Expert Agent**), insurance software (**Open International / Transactor Global Solutions**), car dealerships (**Steven Eagell / Lancaster Motor**), motor racing circuits (**MSV / Donnington Park**), oil and gas testing services (**Element / Exova**), ATM services (**Cardtronics / DirectCash**), vehicle repair and maintenance platforms (**Solera / Emperor**), fundraising platforms (**Blackbaud / Giving**), beef and lamb production (**Dawn Meats, Dunbia**), chicken production (**Cargill / Faccenda**) capital and support services to companies spun out of higher education institutions (**IP Group / Touchstone**), outsourced VAT refund services (**Fintrax / GB TaxFree**), sofas (**DFS / Sofology**), grocery retail (**Tesco / Booker**), and care homes (**FC Oval / Bupa Care Homes**).

National security

The CMA has the power to review certain transactions which have an impact on national security in the UK. In **Sepura plc / Hytera** the Secretary of State accepted draft undertakings offered by the merging parties to address the concerns, rather than referring the transaction to a more detailed phase 2 investigation. The undertakings required the merging parties to implement enhanced controls to protect sensitive information and technology from unauthorised access, and to provide rights of access to premises and information so that relevant UK agencies could audit compliance.

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Local markets

In common with previous years, the CMA's caseload continues to have a focus on competition in local markets. These cases require a detailed degree of analysis from the CMA on very specific local areas, and the CMA has developed precedent 'filter' tests for many industries to identify local areas which potentially raise competition concerns.

The CMA's approach is framed in its updated 'Retail Mergers Commentary' which formalises the CMA's shift to a 'case by case' assessment of mergers which raise concerns in particular local areas, rather than using a fixed methodology. Key themes from the guidance include defining local catchment areas based on 80% of sales or customers, using filters to remove unproblematic areas, and using weighting on certain competitors depending on the competitive constraint these offer in a given area.

Certain cases in 2017/18 were considered under this framework. These included **JD Sports / Go Outdoors**, with a filtering exercise identifying certain local areas. The CMA concluded in this case that there was sufficient local competition, and showed a willingness to consider restraints from online retailers within each local area.

Divestment remains a common remedy to address phase 1 merger control concerns in local markets. In addition to the cases discussed above (e.g. **Heineken / Punch Taverns**), in **Vision Express / Tesco Opticians**, competition law concerns arose in three local areas, requiring a divestment of stores in these areas. A different remedy was used in **David Lloyd / Virgin**, where the buyer agreed not to purchase gyms for a period of 10 years in the two local areas which raised competition concerns.

Exiting / Failing firm

The use of the 'failing firm defence' continues to arise from time to time but is rarely successful. It was unsuccessfully argued in **Capita / Vodafone WAP**, with the result that this transaction was abandoned following reference to a phase 2 investigation (on the basis that the merger would have reduced the competitors in the market from 2 to 1). In this case, the CMA placed importance on internal documents which stated that the closure of the Vodafone WAP business was the least viable alternative, that financial results showed the business was profitable and had strategic importance, and that Vodafone considered closing the business only after the approach from Capita. This case once more shows the importance of internal documents to CMA reviews (see further below).

Hospital mergers

NHS hospital mergers are subject to the UK merger control rules where the jurisdictional tests are met. In 2017/18, there were three cases (**Manchester Hospitals, Derby Hospitals** and **Birmingham Hospitals**) where the merger of hospital trusts, despite raising competition concerns, were cleared on the basis of efficiency and consumer benefits. Two of these cases were cleared on this basis in phase 1.

In **Manchester Hospitals**, the CMA emphasised that the role of competition in delivering quality of care had declined. There was an increased role of collaboration in the provision of such services within local health economies. Despite this, the CMA found competition concerns in 18 elective/maternity services and in specialised services. The CMA found that recent policy developments, which make the provision of funding conditional on financial and quality targets, would "significantly constrain" the merged entity. The CMA concluded that the adverse effects were "substantially lower" than the patient benefits, but required a phase 2 process to come to this conclusion.

In **Birmingham Hospitals**, the CMA applied the test from the Manchester Hospitals case

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and found competition concerns in 25 elective specialties, but that the patient benefits of the merger outweighed these concerns. The CMA also focused on the fact that Heart of England had been underperforming and the merger would provide it with long-term access to highly respected and skilled management at University Birmingham Hospital. This was the first case of this type to be cleared on a 'patient benefit' basis at phase 1.

Similarly, in **Derby Hospitals**, the CMA once more found that the merger would lead to a reduction in choice for patients for certain services, which potentially would have the result of reducing the hospital trusts' incentives to maintain or improve quality in the services. As with the Birmingham Hospitals case, the CMA found, however, that these concerns were outweighed by the patient benefits expected, and that it was comfortable to reach this conclusion at phase 1.

These cases are likely to be limited to their market sector. It appears unlikely that private merging parties will receive a similarly sympathetic ear from the CMA regarding efficiencies or consumer benefits, especially during a phase 1 process. The factors and evidence considered by the CMA were highly specific to the UK National Health Service, so these decisions are unlikely to have a wider application.

Media plurality

The CMA has the role of reviewing mergers which have an impact on media plurality in the UK, following a referral by the UK Secretary of State. Fox's proposed purchase of full control of Sky was referred to the CMA in this way in 2017/18. In May 2018, the CMA was also examining the completed purchase by Trinity Mirror of Northern & Shell Media Group Limited on media plurality grounds following a referral by the UK Secretary of State.

The CMA provisionally concluded that the **Fox / Sky** transaction is not in the public interest due to medial plurality concerns. The CMA is concerned that the Murdoch Family Trust would have too much control over news providers in the UK across all media platforms (TV, radio, online and newspapers), such that it would have too much influence over public opinion and the political agenda. The CMA has rarely investigated transactions on the basis of media plurality and this is the first time it has issued a negative decision on these grounds.

The CMA is consulting on possible remedies that could allay these concerns such as: that the deal is blocked; that Sky News is spun off or sold; or that Sky News is insulated from the influence of the Murdoch Family Trust. In April 2018, Fox stated that it would offer to sell Sky News to Disney (with Disney proposing to purchase Fox in a separate transaction), with funding guaranteed for 15 years, as well as proposing that Sky News would have an independent board. A parallel bid for Sky by Comcast could complicate the CMA's assessment of the transaction. The outcome of the case, which was still awaited at the time of writing, will set an important precedent for the CMA's practice in this area.

Key economic appraisal techniques applied

In 2017/18, the CMA continued to develop the economic appraisal techniques it applies to the assessment of mergers. Table 2 summarises the phase 2 investigations conducted in 2017/2018. As in previous years, the key focus of the CMA phase 2 investigations was on unilateral effects in horizontal mergers. In this regard, **Just Eat / Hungry House** provides an insight into the CMA's approach to the assessment of mergers in online markets. The year was also notable for the Phase 2 investigation by the CMA of **Tesco / Booker**, in which a new analytical framework was employed to assess both vertical and horizontal theories of harm at the local level in the grocery sector.

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Table 2: UK phase 2 decisions – 2017/18 Summary

Case	Theory of Harm	Outcome
Cardtronics / DirectCash Payments	Horizontal unilateral effects	Clearance
CMUH / UHSM	Horizontal unilateral effects	Clearance
Cygnet Health Care / Cambian Adult Services	Horizontal unilateral effects	Remedies
Euro Car Parts / Andrew Page	Horizontal unilateral effects	Remedies
Just Eat / Hungry House	Horizontal unilateral effects	Clearance
Tesco / Booker	Vertical and horizontal effects	Clearance

Source: CMA, RBB Economics.

Horizontal effects: local markets

The CMA's approach to the assessment of horizontal unilateral effects in local markets continued to evolve in 2017/18 with notable cases including: **Cardtronics / DirectCash Payments, Euro Car Parts / Andrew Page** and **Tesco / Booker**.

First, when considering whether a local analysis is necessary, the CMA has sought to assess empirically the arguments of the merging parties that their retail offering is set at a national level, and does not respond to local competitive conditions. In **Cardtronics / DirectCash Payments,** the CMA assessed quantitatively whether the merging parties would have the incentive to alter their pricing to customers whose agreements covered multiple local areas across the country. Since the proportion of areas in which local competition would be lost that were covered by these national contracts was very small (<10%), the CMA concluded that there could be no incentive to increase prices across all sites.

Second, when focusing on local effects, the CMA has frequently used a simple rule-based filter to remove areas that are unlikely to raise competition concerns. The CMA continued to develop and adapt its approach to local filtering in 2017/18, taking into account the following factors:

- **Effective competitors**: The CMA has sought to empirically assess to what extent local rivals constrain the merging parties. In **Cardtronics / DirectCash Payments**, the CMA used extensive data from the merging parties and rivals to assess how the number of transactions was affected by the presence of a competitor within a certain distance by using an econometric model that tested the effect of nearby entry. In **Euro Car Parts / Andrew Page**, the CMA based its assessment of effective competitors on the response to a customer survey, as well as evidence of which rivals the merging parties matched their prices against.
- **Competitor weightings**: Within the set of effective local competitors, the CMA has built on its recent practice of applying different weights to the assessment of the constraint posed by certain fascia or outlets. In **Tesco / Booker**, the CMA applied a lower weight to fascia that were located further from the centre of the catchment area of each store; similarly, discount retailers (such as Aldi and Lidl) were assigned a lower weight because of the somewhat more limited overlap between their product offering and the merging parties'.
- **Filtering rule**: Identifying the number of rival fascia within a local area is one of the CMA's traditional approaches to filtering, which was used as a first stage in **Cardtronics / DirectCash Payments** to filter out areas where at least three competing fascia would remain post-merger. However, the CMA also applied a second-stage

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filter by estimating an Indicative Price Rise (IPR) that might arise due to the merger in each local area. In **Tesco / Booker**, the CMA took a similar approach by estimating a Gross Upward Pricing Pressure Index (GUPPI) across all local overlap areas. Both approaches require considerable amounts of detailed local information, including diversion ratios based on local (weighted) market shares and margins. In each case, the CMA filtered out areas where estimated pricing pressure was less than a critical threshold (5-10%). In adopting these filtering rules, the CMA has shown a willingness to move beyond structural indicators such as fascia-count to apply more sophisticated economic appraisal techniques.

Horizontal effects: online markets

The CMA has used a different set of economic appraisal techniques to assess the horizontal effects that may arise from the merger of two online competitors. Indeed, it has shown itself to be more willing to accept arguments based on dynamic considerations such as new entry.

In assessing the merger of two online food ordering platforms in **Just Eat / Hungry House**, the CMA analysed the competition that takes place between platforms to attract restaurants to list on the platform, on the one hand, and to attract consumers to order from those businesses, on the other. The CMA accepted that new entrants would provide a strong constraint, based on an econometric analysis that showed that the merging parties derived less revenue from one side of the market (consumers) as new entrants grew their own platforms on the other side of the market (restaurants). This led the CMA to unconditionally clear the merger, despite the parties' combined 90% share of the narrowest relevant market.

Vertical effects

Vertical mergers involve the combination of non-competing (and indeed complementary) products, and as a result there is a general presumption that vertical mergers are significantly less likely to give rise to competition concerns than horizontal mergers. However, in 2017/18, **Tesco / Booker** gave the CMA the opportunity to consider vertical concerns in detail at Phase 2, and in doing so modified its framework for the assessment of vertical foreclosure concerns.

In **Tesco / Booker**, one of the CMA's principal concerns was that the merging parties would have an incentive to increase upstream prices in order to foreclose downstream retailers that compete with Tesco. To assess this, the CMA adopted an analogous approach that it took to assessing the horizontal concerns, namely to estimate a *vertical* GUPPI. This measure, based on the downstream (weighted) share of supply, and the upstream level of margins, provides an estimate of upstream pricing pressure post-merger, i.e. the risk of partial input foreclosure. The CMA calculated a vGUPPI for all 12,000 local areas in which the parties had a vertical relationship, but did not find a vGUPPI of 10% or greater in any. In view of the efficiencies that can be expected from a vertical merger, it therefore concluded that the merging parties would not have the incentive to foreclose rivals by increasing upstream prices.

Key policy developments

Internal documents during a merger review

In March 2018, the CMA announced that it is consulting on guidance regarding the provision of internal documents in merger reviews, indicating that it is considering taking a stricter approach in the future. The CMA has outlined circumstances in which it is likely to formally request internal documents, including where: parties' responses in the merger notice do not appear to fully capture the merger parties' analysis of the merger or

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their assessments of competitive conditions within the markets at issue; where documents provided in the merger notice refer to other documents that the CMA considers may be material to its investigation; or where there is an evidence gap in relation to an issue or set of issues. The documents likely to be requested include emails, internal analyses and even handwritten notes and messaging chats, dating back up to three years.

This approach follows the CMA's fine of £20,000 imposed on Hungryhouse in November 2017 in **Just Eat / Hungryhouse**. This is the first case where the CMA has issued a procedural fine (in this case, issuing a fine below the statutory maximum of £30,000) as Hungryhouse failed to adequately respond to a formal information request (including the non-disclosure of documents and emails regarding Hungryhouse's internal evaluation of the merger), during the phase 2 review of the acquisition of Hungryhouse by its competitor, Just Eat.

The CMA found that Hungryhouse should have appreciated that its process for identifying documents (including the search terms used) created a substantial risk of missing responsive documents. In addition, the assessment and production of emails involving senior individuals at the company should have been prioritised. Moreover, Hungryhouse did not discuss with the CMA its process, or any issues with responding to the information request, despite being sent a draft of the information request in advance.

This case therefore emphasises the importance of understanding the scope of an information request from the CMA as soon as it is received, putting in place proper procedures to respond to information requests (including understanding that any searches conducted must be sufficiently broad to capture all responsive documents) and ensuring there is adequate staffing within the organisation to manage the request. The final guidance on the CMA's approach to internal documents is awaited (the consultation closed in April 2018).

This approach reflects a trend amongst European competition authorities taking action when they consider that misleading information has been provided, or that information has been withheld from a merger investigation. Most recently, this was seen when the European Commission took subsequent enforcement action against Facebook for providing misleading information to the Commission during its investigation of the acquisition by Facebook of WhatsApp.

Updated CMA guidance documentation

In 2017/18, the CMA concluded consultations on the use of Initial Enforcement Orders and Derogations in Merger Investigations, as well as updating its Merger Notice and updating its guidance in relation to its mergers intelligence function.

The CMA's guidance on Initial Enforcement Orders and derogations provides a template derogation request to give clarity to merging parties on the process of requesting standard derogations from a 'hold separate' order, as well as clarifying that its enforcement powers in this area will only be used rarely, and that certain instances (such as the provision of back office support services by the acquirer to the target, continued access to key staff members where integration is staggered, and the replacement of key staff at the target) are areas where derogations are commonly given.

The guidance regarding the CMA's mergers intelligence function clarifies the use of confidential 'briefing papers': these are often used to seek guidance where a merger is close to the UK thresholds, results in only a minor overlap, or concerns only a very small market. The guidance clarifies that the CMA will consider a briefing paper only once there is a signed merger agreement or a legally binding heads of terms. If the CMA does not wish to

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investigate a merger, it will indicate after receiving the briefing paper that it has no further questions at that stage. However, that response does not preclude the CMA opening an investigation should additional information come to light at a later stage that may change the CMA's views.

The CMA has also updated its Merger Notice in 2017, changing the level of information required. As a result of this, the CMA has clarified that 'bespoke' submissions, not following the format of the Merger Notice, are accepted by the CMA; that there are circumstances where merger parties are not required to provide information to all the questions in the merger notice; clarification on when particular types of data are required (e.g. switching data, capacity data, margin data). The CMA also updated its 'Case Team Allocation Form' and provided updated templates for how information (e.g. contact details) should be provided.

National Security Reviews

The UK government has consulted on a proposed mandatory notification regime for foreign investment in "essential functions" such as the civil nuclear and defence sectors. As an immediate step, the Government proposes to lower the turnover threshold to £1 million and to remove the requirement for any competitive overlap between the merging firms in respect of deals in the military and dual use sector (businesses who manufacture or design items that are on the Strategic Export Control List), and deals relating to multi-purpose computing hardware and quantum technology. This would apply to both foreign and domestic transactions. As shown by the **Septura plc / Hytera** merger review by the CMA, these types of cases can already be subject to CMA intervention, and these proposals would widen the CMA's powers in this area. The proposals are currently subject to parliamentary scrutiny in Spring / Summer 2018.

These proposals are being considered in parallel with a proposal from the European Commission regarding the review of foreign direct investment in the EU, which proposes that Member States be permitted to implement mechanisms to review foreign investments on the basis of public order or national security.

Brexit

The UK government is yet to provide clarity on how the UK competition regime will change as a result of the UK's vote to leave the EU. At the current time, it appears that the UK's aim of seeking a 'transitional agreement' until the end of 2020 will result in the current merger control system not changing until the end of that period (with transactions falling under the jurisdiction of the European Union Merger Regulation (EUMR) continuing to be reviewed by the European Commission). In any event, it does not appear that Brexit will lead to a change to the substantive UK merger control rules.

The CMA received an increase in its budget of £2.8m, and then a further £23.6m for the 2018/19 financial year and for subsequent years, both to enable it to take on more cases and in anticipation of a likely larger workload following Brexit (the CMA has estimated that the change will lead to up to 70 additional merger cases a year, which would be a more than 100% increase on its current workload). Any move to take the UK outside of the scope of the EUMR is likely to lead to increased burdens on business, as some transactions would require separate merger filings in the UK in addition to Brussels under the EU regime. The CMA itself (in its 2017/18 report) has recognised that it 'may need to alter the priorities it sets' as a result of the evolving Brexit environment, and that the exact bearing it has on the CMA's work is dependent on 'the exit negotiations and the terms of the future relationship with the EU'.[2]

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* * *

Endnotes

1. CMA Annual Plan 2017/18, paragraph 4.9.
2. CMA Annual Plan 2017/18, paragraphs 5.13-5.14.

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USA

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Overview of merger control activity during the last 12 months

The Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) (collectively, the Agencies) are responsible for antitrust merger enforcement at the national level. The Agencies review merger-related activity and challenge those transactions that the Agencies believe will substantially lessen competition. In the United States, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act) requires certain transactions be reported to the Agencies under its premerger notification program, and most merger investigations and challenges result from this process. However, the Agencies also have the authority to challenge non-reportable mergers before or after they are consummated, under Section 7 of the Clayton Act (e.g., Parker Hannifin/CLARCOR discussed below).

In fiscal year 2017,[1] which captures the first nine months of the Trump Administration, the number of reportable transactions under the HSR Act rose to 2,052 – a 12% increase from the prior fiscal year. At the same time, the number of FTC and DOJ Second Request and challenges decreased from the prior fiscal year. The decline in these statistics does not necessarily suggest that the Trump Administration will have less of an enforcement appetite, as the Agencies' leadership was in transition during most of fiscal year 2017. While DOJ leadership has spoken to the need to increase the speed and reduce the burden of merger reviews,[2] it has also expressed scepticism of the efficacy of behavioural remedies to mergers that it believes would tend to lessen competition.[3]

U.S. Merger Enforcement Data[4]										
Fiscal Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Transactions Reported	1726	716	1116	1450	1429	1326	1663	1801	1832	2052
Second Requests										
DOJ	20	16	22	31	29	22	21	27	29	18
FTC	21	15	20	24	20	25	30	20	25	33
Total	41	31	42	55	49	47	51	47	54	51
Percentage[5]	2.5%	4.5%	3.7%	3.9%	3.5%	3.7%	3.2%	2.7%	3.0%	2.6%
Challenges										
DOJ	16	12	19	20	19	15	16	20	25	18
FTC	21	19	22	18	25	23	17	22	22	21
Total	37	31	41	38	44	38	33	42	47	39
Percentage[6]	2.2%	4.5%	3.6%	2.7%	3.1%	3.0%	2.0%	2.4%	2.7%	2.0%

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Federal Trade Commission

The FTC challenged 21 transactions during fiscal year 2017, including 14 transactions where the FTC accepted consent orders for public comment and final orders; six transactions where the parties abandoned or restructured as a result of antitrust concerns raised during the investigation; and one transaction where the FTC initiated administrative or federal court litigation.

The FTC agreed to settle the following challenges initiated over the past 12 months (June 1, 2017 to May 31, 2018) in exchange for a remedy:

- *Air Medical Group Holdings, Inc. / AMR Holdco, Inc.* – The FTC required AMR Holdco to sell its air ambulance transport services, alleging that the proposed transaction between Air Medical and AMR would harm competition among air ambulance transport services that transfer patients between medical facilities among the Hawaiian islands.
- *Amneal Pharmaceuticals LLC / Impax Laboratories Inc.* – This transaction involved the combination of two generic drug manufacturers. The FTC required Impax to divest its rights and assets for 10 products to three other companies, as part of a settlement resolving charges that Amneal's acquisition of an equity share in Impax likely would be anticompetitive. According to the DOJ, the transaction as proposed would have likely harmed future and present competition in U.S. markets for several generic drug products.
- *Red Ventures / Bankrate* – The FTC required Red Ventures and Bankrate to divest one of Bankrate's businesses, Caring.com – a website providing third-party paid referral services for senior living facilities. According to the FTC, Caring.com is the second largest provider of customer leads to senior living facilities, while the number one provider of customer leads to senior living facilities is APlaceforMom.com. Two of Red Ventures' minority private equity-backed shareholders (which own approximately 34% of Red Ventures combined) operate APlaceforMom.com. Because these private equity shareholders are entangled with both entities, the FTC believed that if consummated, the proposed transaction would enable Red Ventures to exercise unlawful market power unilaterally, as well as increase the likelihood of unlawful marketplace coordination between Caring.com and APlaceforMom.com.
- *Alimentation Couche-Tard Inc. / Jet-Pep, Inc.* – The FTC required retail fuel station and convenience store operator Alimentation Couche-Tard Inc. to divest certain retail locations in certain markets where the number of independent market participants was three or fewer. According to the FTC, without the divestitures, the acquisition would increase both the likelihood of successful coordination among the remaining retailers and the likelihood that the combined entity could unilaterally exercise market power.
- *Potash Corporation of Saskatchewan Inc. / Agrium Inc.* – As a condition to this transaction, the companies had to divest facilities in two relevant markets. The FTC's position was, without a remedy, the merger would eliminate direct competition between PotashCorp and Agrium in the markets for certain chemicals, which are generally marketed to agricultural wholesalers and retailers who use the chemicals to produce a certain fertiliser sold to farmers. According to the FTC, the transaction would have enhanced the new firm's ability and incentive to raise prices, and increase the likelihood of coordination between remaining competitors in the market.
- *Becton, Dickinson and Company / C. R. Bard, Inc.* – According to the FTC, this acquisition would have likely harmed competition by combining the top two suppliers in the U.S. in the markets for tunnelled home drainage catheter systems and soft tissue

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core needle biopsy devices. As a condition of the transaction, the merging entities were required to divest these two medical device product lines.

- *Mars, Incorporated / VCA Inc.* – This transaction involved the combination of two providers of certain specialty and emergency veterinary services. The FTC required Mars to divest 12 clinics in 10 localities to three divestiture buyers in order to preserve head-to-head competition between Mars specialists in the area and those of VCA.

Over the past year (June 1, 2017 to May 31, 2018), at least three mergers were abandoned after the FTC expressed concerns that the transactions raised serious antitrust issues:

- *DraftKings / FanDuel* – After a thorough FTC investigation, DraftKings and FanDuel decided to abandon their transaction. According to the FTC, competition between DraftKings and FanDuel has spurred innovation and favourable pricing in the daily fantasy sports market, and these competitive benefits would have been lost had the transaction proceeded. In the face of this antitrust resistance, the parties abandoned the transaction.
- *CDK Global, Inc. / Auto/Mate, Inc.* – The FTC filed an administrative complaint charging that this transaction between two specialised software vendors violated federal antitrust laws. According to the FTC's complaint, the transaction would have reduced competition in an already concentrated market for software used by new care dealers to manage nearly every aspect of their business, including accounting, payroll, parts and vehicle inventory, service repair scheduling, and vehicle financing. Shortly thereafter, the parties abandoned their transaction.
- *Conagra Brands, Inc. / J.M. Smucker Co.* – This transaction involved Smucker's purchase of Conagra's Wesson cooking oil brand. The parties abandoned the transaction after the FTC filed an administrative complaint alleging that the transaction would substantially lessen competition in the market for branded canola and vegetable oils sold to grocery stores and other retailers.

<u>Department of Justice Antitrust Division</u>

The DOJ challenged 18 mergers during fiscal year 2017, including nine transactions where the DOJ simultaneously filed a complaint and proposed settlement; six transactions where the parties abandoned or restructured as a result of antitrust concerns raised during the investigation; and two where the DOJ filed a complaint initiating litigation.

Over the past year (June 1, 2017 to May 31, 2018), the DOJ announced the following settlements that required divestitures:

- *Martin Marietta Materials, Inc. / Bluegrass Materials Company, LLC* – This transaction involved producers and sellers of aggregate, a key input in asphalt and ready-mix concrete that is used in road building and other types of construction. The DOJ required the divestiture of certain quarries in Georgia and Maryland where Martin Marietta and Bluegrass were two of only three sources of aggregate qualified by the respective states' Departments of Transportation. As such, divestitures were required to preserve competition in these markets.
- *Vulcan Materials Company / Aggregates USA, LLC* – The DOJ required the divestiture of 17 facilities that produce and sell coarse aggregate, which is a type of crushed stone purchased by construction contractors as well as suppliers of asphalt concrete and ready-mix concrete. The divested facilities were in markets where Vulcan and Aggregates USA were the only two producers of coarse aggregate and where, according to the DOJ, the transaction would have resulted in higher prices and poorer customer service.

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- *TransDigm Group Incorporated / Takata Corporation* – The DOJ required TransDigm to divest two businesses it acquired from Takata to preserve competition in markets for several types of restraint systems used on commercial airplanes. The transaction occurred in early 2017, but was not reportable under the HSR Act due to its structure. However, the DOJ investigated and filed a civil antitrust lawsuit concurrently with a proposed settlement.
- *Entercom Communications Corp. / CBS Radio, Inc.* – The DOJ alleged that this transaction would have eliminated head-to-head competition between Entercom's and CBS's radio stations competing for the business of local and national advertisers on radio stations in several local markets. The DOJ required Entercom to divest 13 radio stations to preserve competition as a condition of the acquisition.
- *CenturyLink, Inc. / Level 3 Communications, Inc*. – The DOJ required CenturyLink to divest Level 3's telecommunications networks in certain markets as a condition of CenturyLink's purchase of Level 3. According to the DOJ, the combined company would have reduced competition for fibre-optic-based telecommunications services in certain geographic markets as well as for the sale of dark fibre along certain intercity routes across the U.S.
- *Showa Denko K.K. (SDK) / SGL Carbon SE's (SGL)* – The DOJ required SDK to divest SGL's U.S. graphite electrodes business in order for SDK to proceed with its proposed transaction. According to the DOJ, SDK and SGL competed in the manufacture and sale of large ultra-high power graphite electrodes, which are used to generate sufficient heat to melt scrap metal in electric arc furnaces. According to the DOJ, SDK and SGL were two of the three leading suppliers of large ultra-high power graphite electrodes to U.S. electric arc furnace steel mills. The transaction would have resulted in the combined firm having approximately 56% of the market share.
- *The Dow Chemical Company (Dow) / E.I. DuPont de Nemours & Co. (DuPont)* – As a condition to Dow and DuPont's $130 billion merger, the DOJ required divestitures of multiple crop protection chemicals and two petrochemicals. According to the department's complaint, Dow and DuPont were two of only a few significant competitors in the markets for certain herbicides and insecticides as well as in the acid copolymers and ionomers market. The DOJ alleged that the transaction would have resulted in higher prices, less favourable contractual terms, and a reduced incentive to innovate.
- *General Electric Co. / Baker Hughes Incorporated* – This transaction involved the market for refinery chemicals and services. The DOJ required the divestiture of GE's Water & Process Technologies business in order to proceed with their merger. According to the DOJ, the merger would have created one of the largest oilfield service companies in the United States, with $32 billion of combined revenue. Specifically, it would have combined two of the four companies that provide certain chemicals and services required to refine crude oil and natural gas.

Over the past year (June 1, 2017 to May 31, 2018), at least one merger was abandoned after the DOJ expressed concerns that the transactions raised serious antitrust issues:

- *Ultra Electronics Holdings plc / Sparton Corporation* – This transaction was abandoned by the parties after the DOJ expressed concerns that the transaction would have permanently combined the only two qualified suppliers of sonobuoys to the U.S. Navy, which are buoys used to support multiple U.S. Navy missions during peacetime and combat operations.

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Over the past year (June 1, 2017 to May 31, 2018), the DOJ also filed suit to block two mergers:

- *AT&T/DirecTV's / Time Warner Inc.* – The DOJ filed suit to block AT&T's proposed acquisition of Time Warner, alleging the combined company would use Time Warner's valuable and highly popular networks to harm competing distributors. This was notable in that it is a vertical transaction, rather than a merger of horizontal competitors. As of May 2018, the litigation itself has concluded but the judge has not announced his decision. That is expected in early June.
- *Parker Hannifin / CLARCOR Inc.* – The DOJ challenged Parker-Hannifin's consummated acquisition of CLARCOR Inc., alleging that it had eliminated head-to-head competition between the only two domestic manufacturers of fuel filtration systems and filter elements used to remove particulate contaminants and water droplets before such fuel is delivered into commercial or military aircraft. The DOJ challenged this transaction after it had allowed the initial waiting period under the Hart-Scott-Rodino Act to expire in mid-January 2017, and ultimately blocked it.

New developments in jurisdictional assessment or procedure

HSR rules and thresholds

Parties to acquisitions of voting securities, non-corporate (LLC/LP) interests, or assets which meet specified thresholds in terms of the value of the transaction and the parties' annual net sales and total assets, must file notification with the Agencies, and observe a waiting period, before closing. An HSR filing is required if the size of transaction and size-of-person tests are met, and no exemption applies. The FTC adjusts the HSR thresholds annually in the first quarter based on changes in the Gross National Product. For 2018, these thresholds are:

Size of Transaction: The total value of the voting securities, non-corporate interests or assets that the acquiring person will hold after closing must be more than $84.4 million.

In addition to the minimum $84.4 million size of transaction threshold, there are additional, higher thresholds that, if exceeded, can require another HSR filing – even if the acquiring person previously made a filing at the $84.4 million transaction threshold. These additional transaction thresholds are:

- $168.8 million;
- $843.9 million;
- 25% of the company's voting securities if the value exceeds $1,687.8m; and
- 50% of the company's voting securities.

Size of Persons: The size of persons test is met if:

- the acquiring person has annual net sales or total assets of $168.8 million or more; and
- the acquired person is engaged in manufacturing and has annual net sales or total assets of $16.9 million or more; or
- the acquired person is not engaged in manufacturing, but has total assets of $16.9 million or more;

OR

- the acquiring person has annual net sales or total assets of $16.9 million or more; and
- the acquired person has annual net sales or total assets of $168.8 million or more.

The size of person test does not apply to transactions that have a value of more than

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$337.6 million. An HSR filing may be required for transactions that are valued at more than $337.6 million, even if the size of persons test is not met.

An acquisition that is subject to notification may not be completed until a 30-day waiting period either expires without action or is terminated early by the agencies (a 15-day waiting period applies to all cash tender offers and acquisitions out of bankruptcy proceedings).

The parties may file notification based either on a signed, non-binding term sheet or letter of intent, or an executed definitive agreement. In either case, the parties may request early termination of the applicable waiting period. The FTC and DOJ must both agree to terminate the waiting period early. If the transaction being notified does not raise any substantive antitrust concerns, the FTC and DOJ may terminate the waiting period within the first two weeks after filing. However, the Agencies are not required to grant requests for early termination even for transactions that do not raise any antitrust issues, or to grant requests for early termination within any specified time period after filing.

The Agencies may extend the applicable HSR waiting period by issuing a request for the parties to submit additional information or documents (a "Second Request"). If the investigating agency issues a Second Request, then the expiration of the waiting period is tolled until 30 days after the parties certify that they have substantially complied with the Second Request (or 10 days after the acquiring person certifies substantial compliance in a cash tender offer or acquisition out of bankruptcy).

The failure to make a required HSR filing can result in maximum civil monetary penalties of up to $41,484 from the date of the violation until the violator makes a remedial HSR filing. The amount of the *per diem* penalty is adjusted annually, along with the reporting thresholds.

The FTC and DOJ have continued to actively pursue violations of the HSR Act. In 2017, the Agencies settled several enforcement actions involving the acquisition of minority interests.

- The FTC obtained a $720,000 fine from entrepreneur Mitchell P. Rales. Rales was a minority shareholder of Colfax Corporation ("Colfax"), a public company listed on the New York Stock Exchange. On October 31, 2011, Rales' wife bought 25,000 shares of Colfax through open market purchases. Under the HSR Act and rules, the holdings of a spouse and minor children must be aggregated with a person's direct holdings to determine whether any of the HSR Act thresholds are satisfied. As a result of his wife's purchase of Colfax shares on the open market, Rales' total holdings of Colfax shares exceeded the the $100 million threshold, as adjusted. Rales also failed to report open market purchases of Danaher Corporation voting stock in January 2008. In imposing the $720,000 civil penalty, FTC noted that Rales had previously paid civil penalties to settle another HSR Act enforcement action in 1991.
- FTC also obtained a civil penalty of $180,000 from hedge fund founder Ahmet H. Okumus. In November 2014, Okumus made a remedial filing to report his acquisition two months earlier of more than 10% of the outstanding voting stock of Web.com Group, Inc. ("Web.com"), worth more than $50 million, as adjusted. As a result of making his notification at the lowest monetary reporting threshold, Okumus was able to acquire additional stock of Web.com without making any further HSR Act notification so long as the total aggregate value of his holdings did not exceed the next-highest, $100 million as adjusted, threshold. In June 2016, Okumus acquired additional voting securities of Web.com that pushed the total value of his holdings over the $100 million, as adjusted, threshold. As a result of his second failure to make a required HSR Act notification within a two-year period, Okumus agreed to pay a civil fine of $180,000.

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The DOJ also pursued enforcement of a "gun-jumping" case against Duke Energy Corporation ("Duke Energy"). Duke Energy agreed to pay $600,000 to settle charges that it acquired beneficial ownership and control of Osprey Energy Center ("Osprey") before filing a required HSR notification. DOJ claimed Duke Energy entered into a tolling agreement to acquire control of Osprey's output and to receive the right to Osprey's profits and losses, and as a result Osprey ceased to be an independent competitor before making its HSR notification and observing the HSR waiting period.

The Agencies have indicated that they intend to continue to pursue aggressive enforcement of the HSR Act requirements.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

The Agencies investigate and pursue enforcement actions against mergers in all areas of the economy. The Agencies have generally divided responsibility over mergers by industry based on prior agency experience, although there are instances where both Agencies will claim responsibility over the same merger. Such procedural "clearance battles" during the initial waiting period can delay the substantive investigation of a transaction.

During the past year, the DOJ has challenged mergers in a variety of industries, including airlines, energy, movie theatres, advertising, yoghurt, agriculture, manufacturing, aviation fuel filtration,[7] video distribution,[8] airplane safety restraint systems,[9] mining,[10] and radio.[11]

Several of the FTC's merger challenges during the past year involved healthcare products and services, including vascular disclosure devices, physician provider organisations, animal vaccines, medical devices, injectable drug components, veterinary services,[12] and third-party paid referral services for senior living facilities.[13] The FTC also challenged mergers involving daily fantasy sports websites, natural gas pipeline transportation, pesticides, energy production components, industrial wood coatings, retail gasoline and diesel sales, and fibre channel switches.[14]

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Agencies remain at the forefront in the use of economic data and sophisticated analytical tools in merger reviews. Each merger investigation at the agencies is assigned staff from the Bureau of Economics (FTC) or the Economic Analysis Group (DOJ). While most of their work and input are behind the scenes, each of the respective economics departments cited their work on recent merger cases, particularly in the healthcare space, such as the FTC's review of the Hershey/Pinnacle and Advocate/Northshore mergers, and the DOJ's review of the Anthem/Cigna and Aetna/Humana mergers.[15] Parties are well-advised to hire economists for any transaction expected to receive scrutiny from the agencies.

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

Arguably, the most material change in the government's approach to remedies is the DOJ's departure from its recent reliance on behavioural remedies. Structural remedies often involve divestitures of operating units or product lines, while behavioural remedies are those that govern the specific conduct of the parties post-merger. While structural remedies have been the primary means of addressing competitive issues in mergers,

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the DOJ under previous administrations had looked more favourably upon behavioural remedies, at least compared to recent history. The DOJ's 2011 Antitrust Division Policy Guide to Merger Remedies had removed language from previous guidelines that was critical of behavioural remedies, particularly with vertical mergers. Indeed, recent DOJ challenges in vertical deals resulted in consent decrees that regulated parties' conduct post-merger (for example, in Comcast/NBC Universal).

In November of 2017, newly confirmed Assistant Attorney General for Antitrust, Makan Delrahim, in a speech to the antitrust bar, made clear his approach at the DOJ: "[A]ntitrust is law enforcement, it's not regulation."[16] Behavioural remedies, according to Delrahim, places the DOJ in the unfavourable position of "supplant[ing] competition with regulation",[17] a particular problem since markets are often dynamic. In addition, enforceability of consent decrees often presents problems for the DOJ. Delrahim has noted that the need for constant oversight places a difficult burden upon the DOJ, and that "[s]uch decrees, over time, effectively become perpetual regulations that the Department of Justice and the courts are often not well-suited to enforce."[18] While recognising that behavioural remedies still have their place, he signalled that parties will have to meet a high standard in order to show that such remedies are appropriate.

The DOJ has already acted upon this policy posture. Notably, the DOJ challenged the AT&T/Time Warner transaction where the parties argued publicly that behavioural remedies would be sufficient to ameliorate any competitive concerns. This was a merger that many antitrust practitioners speculate would have been cleared under the previous administration, and the first challenge of a vertical transaction by either the DOJ or FTC in decades. The parties had argued that behavioural remedies would be sufficient to ameliorate any competitive concerns, but the DOJ rejected such arguments. In addition, the DOJ recently announced an initiative to terminate so-called outdated consents. Delrahim noted that many consent decrees "do little more than clog court dockets, create unnecessary uncertainty for businesses or, in some cases, may actually elicit anticompetitive market conditions."[19] For recent consent decrees, the DOJ has negotiated terms that make the standard of proving a violation of consents one based on the "preponderance of the evidence standard", a lower standard than "clear and convincing evidence", the standard used previously, and has indicated this will be the DOJ's position going forward.[20]

Key policy developments

With the inauguration of President Donald Trump in January 2017, the United States has experienced numerous legal and public policy shifts, and understandably so. Ironically, however, merger enforcement remains one area of the law where consistency between the previous Democratic administration and actions of the newly installed Republican antitrust agency leadership have proven almost entirely consistent. This was somewhat unexpected given that Republicans are stereotypically thought to be less enforcement-minded than their Democratic counterparts. But, upon deeper reflection, in examining the economic populist ideology and messaging which, in part, contributed to President Trump's election, the consistency in merger enforcement is not altogether surprising. As the above data and text explains, both the DOJ and the FTC continue to challenge mergers at an incredible clip. Indeed, leadership in both agencies has made clear that transactions which may lead to a substantial lessening of competition will be thoroughly vetted and when the leadership deems appropriate, challenged.

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At the DOJ, the statements by AAG Delrahim expressly questioning the wisdom of behavioural remedies to resolve mergers, and instead placing an emphasis on remedying potentially anticompetitive transactions via structural remedies only,[21] diverge significantly from previous recent DOJ enforcement actions under Democratic administrations, even going back to his Republican predecessors in the late 1990s and early 2000s. Indeed, as we note above, the AT&T/Time Warner litigation which awaits now only the judge's decision is reminiscent of a transaction cleared via behavioural remedies by the previous Democratic DOJ leadership, Comcast/NBC Universal. AT&T/Time Warner is also an entirely vertical transaction, an area of merger enforcement that has not seen any government-filed litigation since the late 1970s. Delrahim and his colleagues appear focused on careful scrutiny of additional vertical transactions, including one announced transaction that would combine retail drugstore/pharmacy operations with a health insurer. It is certainly the case that horizontal transactions will continue to face close scrutiny, and the litany of recent DOJ enforcement actions described above for those types of mergers speaks for itself.

Meanwhile, only as of May 2, 2018 has the FTC seen a full complement of Commissioners installed. In a first for the independent agency, roughly from Trump's inauguration, the FTC functioned with just two Commissioners, a Republican and a Democrat. This is unusual because the FTC is intended to function with five Senate-confirmed Commissioners, operating on staggered seven-year terms with no more than three from the political party of the President. Even so, during that window, the FTC continued to challenge mergers at a rate similar to those of previous Commissions with five sitting Commissioners. The new members of the Commission each have significant exposure to the application of the antitrust laws, be that from experiences in private practice or government service. The FTC's new Chairman, Joseph Simons, has served previously at the FTC in high-level positions and was well-known to be a supporter of bringing merger challenges when the economics and facts called for it. The expectation is that his colleagues will all share similar views, but only time will tell how each Commissioner interprets the law in light of a given transaction's facts.

Reform proposals

Several times since 2014, the United States Congress has debated the passage of the Standard Merger and Acquisition Reviews Through Equal Rules Act ("SMARTER Act").[22] Previously, the bills had passed in the House of Representatives but not in the Senate. On May 9, 2018, the House again passed the bill. As background, in the United States, the FTC and DOJ have joint jurisdiction over the antitrust review of mergers, but operate under different standards in several key areas. The SMARTER Act attempts to standardise the merger review process between the Agencies, most notably by requiring the FTC to obtain an injunction from a federal court in order to block a proposed merger, which the DOJ is required to do, instead of relying upon its internal administrative proceedings. In addition, the Act would require the FTC to seek injunctions under a "substantial likelihood" standard as enumerated in the Clayton Act, instead of the arguably lower "public interest" standard found in the FTC Act.

While each Agency's subject matter jurisdiction is often well settled, for certain transactions both Agencies will claim jurisdiction, and thus the Agencies must negotiate who will investigate that transaction. Supporters of the SMARTER Act say this "coin toss" places unnecessary uncertainty over the merger review process, that businesses will benefit from greater clarity, and that parties faced more difficulty when their transaction was reviewed by the FTC. Detractors say that in practice, the differing standards had little effect and thus the

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SMARTER Act unnecessarily erodes the valid enforcement powers of the FTC. The Obama Administration had indicated that it would not sign the bill into law, but the current Trump administration has not expressed a position publicly.

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Endnotes

1. The US government fiscal year runs from October 1 to September 30 of the following calendar year.
2. Donald G. Kempf, Jr., *Merger Reviews: Do They Take Too Long?* (Nov. 17, 2017), https://www.justice.gov/opa/speech/file/1012156/download.
3. Makan Delrahim, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.
4. Hart-Scott-Rodino Annual Reports for fiscal years ended 2017, 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, and 2008, available at www.ftc.gov/bc/anncompreports.shtm.
5. Percentages are based on adjusted transactions because they exclude transactions that are not subject to the merger review procedures of the HSR Act.
6. The percentage of challenged transactions may be overstated or understated in certain years because not all challenged mergers required notification to the Antitrust Agencies and some challenges were recorded in a fiscal year subsequent to notification.
7. For each of the foregoing industries, *see* Hart-Scott-Rodino Annual Report Fiscal Year 2017, at 10-15, *available at* file:///C:/Users/BD15/Desktop/p110014_fy_2017_hsr_report_final_april_2018.pdf.
8. https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.
9. https://www.justice.gov/opa/pr/justice-department-requires-transdigm-group-divest-airplane-restraint-businesses-acquired.
10. https://www.justice.gov/opa/pr/justice-department-requires-vulcan-divest-17-aggregate-facilities-order-acquire-aggregates.
11. https://www.justice.gov/opa/pr/justice-department-requires-divestitures-radio-stations-boston-san-francisco-and-sacramento.
12. For each of the foregoing industries, *see* Hart-Scott-Rodino Annual Report Fiscal Year 2017, at 15-20, *available at* file:///C:/Users/BD15/Desktop/p110014_fy_2017_hsr_report_final_april_2018.pdf.
13. https://www.ftc.gov/news-events/press-releases/2017/11/parties-agree-divestiture-senior-living-facilities-referral-service.
14. For each of the foregoing industries, *see* Hart-Scott-Rodino Annual Report Fiscal Year 2017, at 15-20, *available at* file:///C:/Users/BD15/Desktop/p110014_fy_2017_hsr_report_final_april_2018.pdf.
15. https://www.ftc.gov/system/files/documents/reports/economics-ftc-deceptive-claims-market-definition-patent-assertion-entities/1712-be-rio.pdf; https://link.springer.com/article/10.1007/s11151-017-9599-3.

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16. https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.
17. *Id*.
18. https://www.justice.gov/atr/press-statement.
19. https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.
20. https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar.
21. See note 3 above.
22. The current iteration of the bill is the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2018, H.R. 5645, and can be found at https://www.congress.gov/115/bills/hr5645/BILLS-115hr5645eh.pdf.

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