

# Merger Control 2020

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# Merger Control 2020

**Consulting editor****Thomas Janssens**

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Lexology Getting The Deal Through is delighted to publish the twenty-fourth edition of *Merger Control*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his and the firm's continued assistance with this volume.



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# Merger control in flux



**Andrew Ewalt, Tone Oeyen, Hazel Yin and  
Jenn Mellott**  
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The global M&A market remained strong in 2018, with announced transaction volumes exceeding US\$4 trillion. This activity is in spite of regulatory and geopolitical headwinds creating uncertainty, in particular for transformational mergers and 'mega deals' valued in excess of US\$10 billion. The strong M&A market is expected to continue through 2019. At the same time, politicians and businesses worldwide continue to test the role of merger control in the modern economy. Competition regulators face mounting pressure for radical intervention in some concentrated sectors and questions about whether they have the right tools for the job, and even more fundamental questions about what the goal of merger control should be. These questions create uncertainty for businesses looking to engage in mergers and acquisitions by making the time frame and outcome for merger review harder to predict, making transaction planning more important than ever. We set out below just a few of the areas where there has been a meaningful press for change.

## **Political considerations in merger control**

In 2019, competition regulators globally are facing a growing number of questions from politicians, academics, and in some cases the regulators themselves as to whether existing merger control rules are 'fit for purpose' and whether merger review processes should be expanded to look at a wider range of issues than the traditional consumer welfare standard that is used in the overwhelming majority of jurisdictions today. In other jurisdictions, competition regulators have been criticised for taking geopolitical considerations into account. The specific concerns raised vary by jurisdiction and by the source of the complaint, but, when taken together, the calls to dramatically change existing merger control rules create risk and uncertainty for businesses with plans for acquisitions, combinations or disposals.

In some cases, these questions have focused on whether the merger review process should move beyond its traditional focus on competition and consumer welfare to consider other social or economic issues. These may include, for example, the impact of a proposed transaction on employment, national security, the environment, the exportation of jobs and industry abroad, or data privacy. In the United States, these proposals have come from both democrats and republicans, and have in many cases fallen alongside 'hipster antitrust' proposals that the US agencies should revert to the historic concept of 'big is bad' that predated the modern consumer welfare standard. For example, in reaction to concerns voiced in the halls of Congress and among consumer advocacy groups that the US economy has become less competitive in recent decades as a result of lax antitrust enforcement and a string of judicial decisions favoring defendants, the US Federal Trade Commission (FTC) has convened a series of hearings to take stock of US antitrust laws and to assess whether the now more than 100-year-old statutes are working in the context of the modern economy or if instead they are ripe for revision. Detractors point out that the US Department of Justice (DOJ) and FTC lack the expertise and framework to consider

these factors, and that they are better dealt with outside of the merger control process.

Some of the advocacy for change has come from within the merger control authorities themselves. For example, the French competition authority has advocated for legislation that would give it the power to assess transactions that do not meet the French merger control thresholds but may nevertheless have a competitive impact in France. Other regulators in Europe, including in the UK, have suggested that merger control thresholds should be modified to capture 'killer acquisitions' that often involve the purchase of a target with limited turnover or resources for a very high transaction value.

In the European Union (EU), the European Commission has come under intense pressure from politicians in some member states asking whether existing merger control rules have a stifling impact on EU industrial policy. In February 2019, the French and German governments issued a joint manifesto suggesting a number of changes to the existing merger control rules, including the possible introduction of a right of appeal of the Council (which is composed of ministers from each EU member state), which could override a prohibition in certain circumstances where a transaction is desirable for industrial policy reasons. Subsequently, in July, the German, French and Polish governments published a detailed set of proposals on merger reviews suggesting that the merger control guidelines be amended to allow the Commission to take into account the distortive effect on competition of companies that are controlled or heavily subsidised by foreign states, including state-owned enterprises. The proposals follow the Commission's prohibition of the proposed combination of the mobility businesses of Siemens and Alstom, which had significant backing from the French and German governments, who saw the transaction as necessary to create a European mobility company capable of competing with China's state-owned equivalent, CRRC. In response, Commissioner Vestager has been steadfast in arguing that DG Competition should continue to make decisions independently, arguing that Siemens and Alstom already are each global champions even absent the proposed transaction. It will be interesting to see whether any of these proposals will be picked up by the new European Commission, which is expected to take office in November 2019.

Still other jurisdictions are in the process of expanding existing merger control regimes to cover new sectors or new types of transactions, while others are introducing merger control for the first time. For example, the merger control regime in Malaysia, which historically was limited to the aviation sector, has been expanded to cover telecommunications. This move came shortly after the announced combination of the first- and second-largest mobile service providers in Malaysia, Axiata and Telenor, which otherwise would have fallen outside of the existing merger control regimes.

At the other end of the spectrum, in at least one case questions were raised about whether the competition regulator took geopolitical considerations into account in a merger control decision. In July 2018,

Qualcomm abandoned its planned US\$44 billion acquisition of NXP. Qualcomm had obtained eight of nine merger control approvals identified as conditions precedent for the transaction, including agreeing to remedies in the EU and South Korea to address competition concerns. However, the parties were unable to secure merger control clearance in China in advance of the long stop date set out in the transaction agreement. While the State Administration for Market Regulation (SAMR) has taken the position that it was unable to approve the transaction because the remedies offered by the parties were not sufficient, press reports suggested that the US-China trade war played a meaningful role in the process.

Of course, regardless of the outcome of the political negotiations, Brexit will have a significant impact on transactions involving the UK, whether as a result of ongoing uncertainty for parties to transactions being reviewed by the European Commission that would be notifiable to the UK if a hard Brexit occurs, or for transactions that will require a parallel UK and EU review in a post-Brexit world.

### Focus on digitisation

Concerns about whether existing merger control regimes are equipped to handle the modern economy have been most pronounced in the technology sector, where concerns about use of data, e-privacy, digital taxation and platforms are central to a wider debate around the potential need to strengthen oversight by competition and other regulators. Technology is transforming the way businesses work and the products and services they offer. Many companies see M&A as the best – or at least the fastest – way to build their digital capabilities, with digital investment rising to a new high of US\$258 billion in 2017 and the average digital deal value higher today than its non-digital counterpart.

So far, much of the hand wringing in this area has been theoretical, consigned to sector inquiries and market studies. For example, the UK created a Digital Competition Expert Panel to assess whether the Competition and Markets Authority (CMA) and other UK regulators have the tools to assess transactions in the digital economy. The US FTC has created a technology task force to monitor competition in technology markets, investigate any potential anticompetitive conduct in those markets, and take enforcement actions when warranted. To date, no competition authority has prohibited a transaction or required remedies solely on the basis of concerns around 'big data' or platform access. However, merging parties should expect more attention to this area in any transaction involving technology.

The past year has also seen a number of merger reviews where regulators have focused on the issues raised by these various studies and sector inquiries. In February 2018, Apple's proposed acquisition of UK-based music company Shazam was referred to the European Commission following notification in Austria. The Commission opened a Phase II investigation, focused on a number of issues around whether combining Apple's and Shazam's data could result in vertical input foreclosure, allowing the merged company to restrict competitors' access to Shazam's data. Ultimately, the Commission cleared the transaction unconditionally, concluding that Apple would not be able to use Shazam's data to foreclose competitors of Apple Music, largely based on a finding that Shazam's data was not unique. Although the transaction was ultimately cleared without conditions, *Apple/Shazam* is indicative of the way in which merger control authorities may look at deals involving big data in the future.

Transactions involving the digital economy continue to raise questions around whether existing analytical frameworks have led to under-enforcement in rapidly changing industries. Competition regulators across Europe have raised concerns about killer acquisitions, which involve acquisition by a large company of a smaller target that is an important potential competitor, but has yet to fully realise or monetise its business concept. Chief Competition Economist for the European

Commission, Tommaso Valetti, has suggested a radical change in approach that would reverse burden of proof for killer acquisitions, requiring 'super large' acquiring companies to affirmatively justify the efficiencies arising from their transaction. Valetti argued that allowing a company like Google, which already has 'a zillion applications', to acquire yet another application has limited social benefit, particularly where the business offering that smaller application could go on to become a major competitor to Google.

In 2019, the UK CMA is expected to publish ex-post evaluations of a number of completed mergers involving potential competitors. Similarly, the Korea Fair Trade Commission is expected to publish new guidance on its assessment of future competition. While merger control analysis is inherently prospective, an assessment of how fast-moving digital markets would have operated absent the merger is especially difficult – and especially so in these markets, many of which did not even exist 10–15 years ago.

Often, transactions that might be considered killer acquisitions fall below existing merger control thresholds because the target has limited turnover. In light of this, Germany and Austria have introduced additional merger control jurisdictional thresholds based on transaction value – and not turnover – to catch these transactions, consistent with the long-standing approach in the US. The European Commission, CMA, Japan Fair Trade Commission and Australian Competition and Consumer Commission are considering similar changes.

### Innovative theories of harm

Working within the bounds of existing merger control regimes, regulators have brought aggressive enforcement actions and focused on novel theories of harm, creating uncertainty for merging parties.

For example, while competition authorities have long recognised that innovation – in addition to price and product quality – is a relevant component of competition, they have traditionally limited the analysis of the likely impact of a merger on innovation to the overlaps between the merging parties' marketed and (late-stage) pipeline products. That is changing. Following the European Commission's decision in *Dow/Dupont*, competition regulators are also considering whether a transaction might result in an overall reduction in R&D where the parties to a transaction are important competitors in the development of new and innovative products. In other cases, regulators are expanding focus to early-stage pipeline overlaps, as seen in the European Commission's imposed remedy in *J&J/Actelion*. Officials at the US FTC have indicated that, where a remedy is required in a pharmaceutical merger that will result in a loss of competition between a marketed and a pipeline product, the FTC will in most cases require divestiture of the marketed product.

Competition regulators are also increasingly considering the potential impact on competition of common ownership by institutional investors in multiple players in the same industry. Critics have argued that large minority investors benefit if these companies do not compete aggressively with one another, such that these prolific ownership interests can have a stifling effect on competition. Commissioner Vestager has indicated that the EU is studying this issue, and the European Commission has considered common ownership issues as part of the analysis in a number of recent transactions, including *Dow/Dupont*.

Regulators are also resurrecting theories of harm that were previously considered to have fallen out of fashion. A series of recent cases in a diverse range of industries indicates that the Commission is looking at issues around conglomerate effects with renewed interest, despite having not focused on conglomerate effects since the *GE/Honeywell* decision in 2001. For example, the Commission articulated serious concerns and required remedies in the *Microsoft/LinkedIn* and *Broadcom/Brocade* transactions relating to conglomerate effects that could arise from combination of complementary product lines.

In China, SAMR has been consistently paying close attention to conglomerate effects of transactions. In 2018, SAMR was the only competition authority that attached conditions to its approval of *Essilor/Luxottica*, a transaction that was largely conglomerate in nature. *UTC/Rockwell Collins* is another example, where SAMR was concerned about the conglomerate effects of the transaction and imposed conduct remedies on UTC, including commitments not to engage in tying, bundling or lowering the interoperability and compatibility of certain of its products with third party products.

In the US, the DOJ unsuccessfully sought to block AT&T's proposed acquisition of Time Warner, alleging that the transaction would result in vertical foreclosure. That case was litigated reportedly because DOJ leadership demanded – and the parties were unwilling to offer – a 'structural' settlement involving a divestiture of assets, despite the fact that the DOJ historically has been willing to accept behavioural commitments in vertical cases.

### Procedural reforms: streamlining on the horizon?

From a more practical perspective, in the past year a number of competition regulators have acknowledged that review periods are becoming too long and the process unduly burdensome. In many cases, regulators have committed to or are considering tangible steps to streamline the process.

In the US, the DOJ and FTC have introduced a number of reforms to expedite merger reviews, including by reducing data and document requests and providing soft commitments to published time frames. The decision came in response to concerns that 'significant' mergers were taking 65 per cent longer to clear than they were just a few years ago. Expanding review timelines are in large part because of the increase of available documents and data, and the corresponding struggles to produce that information to the agencies. The DOJ and FTC have each released a new Model Timing Agreement and the DOJ has released a Model Voluntary Request Letter, all intended to facilitate more narrowly focused Second Request investigations and to commit the agencies to faster reviews, provided that parties are willing to provide information early and meet intermediate deadlines. The DOJ's Model Timing Agreement limits a review to 20 custodians and 12 depositions per party in most cases, and endorses the use of technology assisted document review.

In China, SAMR has continued MOFCOM's practice of using a simplified procedure that allows for an expedited review for cases where the combined market share of the parties to the transaction is below 15 per cent, among other criteria. Cases filed under the simplified procedure now account for approximately 80 per cent of filings in China, and more than 98 per cent of these filings are cleared within Phase I (i.e. within a month from acceptance).

Notable exceptions to this trend are the European Commission and UK CMA, where review time frames for Phase II and remedies cases continue to extend, with no plans proposed to shorten the process. In the EU, in complex Phase II cases it is now routine for parties to provide a Form CO that is hundreds of pages long and includes thousands of pages of annexes, as well as hundreds of thousands of ordinary course documents. In addition, stop-the-clocks are now a matter of course in Phase II reviews, which regularly extend well beyond the 125 working day maximum review period provided for under the EU merger rules.

### Merger litigation trends

Anticipating heightened litigation risk early is key in any regulatory strategy. Strategic deals are facing not only ever-closer regulatory scrutiny, but also more challenges in court.

For example, in recent years parties have become much more likely to challenge a decision to prohibit a proposed transaction. Following in the footsteps of UPS's successful challenge in Europe of its prohibited

acquisition of TNT, an appeal is pending relating to CK Hutchison's attempted acquisition of O2 UK. Increased willingness to appeal a European Commission prohibition decision will undoubtedly impact the Commission's merger control processes as it focuses on ensuring that any prohibition decision is unassailable.

Merger litigation is also increasing from sources other than the usual regulators. Third-party suppliers, customers and competitors are also taking an increasingly activist role towards transactions that may impact their businesses, including through litigation. For example, KPN has successfully filed suit in Europe alleging that the Commission had failed to justify its decision to clear the *UPC/Ziggo* transaction. In the United States, state attorneys general filed a lawsuit seeking to block the pending combination of Sprint and T-Mobile, even before the DOJ had completed its investigation of the transaction (which is pending as at the time of writing).

### Expansion of foreign investment review

The impetus for change has not been limited to competition merger control regimes. While foreign investment screening is nothing new, the last year has seen rapid growth and expansion of public interest and foreign investment review processes. By the end of 2018, all of the G7 and 60 per cent of the G20 members had recently introduced, strengthened, or considered introducing or strengthening their national security regimes. In the US, the Committee on Foreign Investment in the United States (CFIUS) introduced new mandatory notification requirements for certain transactions.

While transactions linked to the defence sectors have traditionally been closely monitored and have always been likely to be subject to government review or intervention on national security grounds, the concept of national security risk is increasingly being interpreted more broadly and the types of investments that are considered to be high risk have markedly expanded in scope. Many of these changes have expanded the scope of products considered to be important to national security and focused in particular on advanced technologies. In Germany, recent foreign investment reforms identified several areas – critical infrastructure, cloud computing software and the media, to name only a few – as being especially sensitive, and in France the foreign investment regime has been expanded to cover artificial intelligence, cybersecurity, robotics, semiconductors and hosting of data. These, along with reforms in the UK (which seek to capture deals involving computing hardware or quantum technology) and Italy (which seek to cover data-related industries) will apply alongside the new EU Regulation, which provides for cooperation between member states and the Commission in screening investments involving critical infrastructure and critical technologies.

Consistent with this, the number of cases subject to foreign investment review is increasing. Whereas just under 100 deals were reviewed under the US national security regime in 2013, this number exceeded 250 cases in 2018. A similar picture emerges in Europe, where the number of reviewed filings has been increasing in Germany, France and Italy. While the vast majority of foreign investment deals are still completing, more deals are being reviewed and this is having an impact on deal timelines.

With an expansion of enforcement powers comes an expansion in enforcement activity. In August 2018, the German government was prepared to take its first ever decision to block a transaction on foreign investment grounds, prohibiting Chinese investor Yantai Taihai's proposed purchase of a German mechanical engineering firm. The transaction was ultimately aborted just moments before the prohibition would have been issued. In the US, CFIUS blocked Broadcom's proposed acquisition of Qualcomm in March 2018, reportedly based on concerns that the transaction would disadvantage the US in the race to create 5G technology. These actions underscore how outcomes are becoming less predictable than they were in the past.

**Conclusion**

A number of policy makers and authorities are looking hard at their regimes and practices to consider whether they remain fit for purpose in the modern economy, creating uncertainty for businesses in the merger review process. At the same time, competition authorities are scrutinising deals with increased intensity and sophistication, using their extensive investigative powers to gather vast amounts of documentary and other evidence.

Factoring these developments into early deal planning (in addition to or as part of the broader regulatory strategy planning) is essential to identifying antitrust risks and assessing and minimising their impact on timing, potential remedies, deal certainty, costs and the potential for negative publicity. This need is amplified in cross-border transactions, where multiple competition authorities may assess the transaction, many of which will seek to be equally thorough in their investigations. Parties must ensure that they are well advised, and allocated sufficient resources and personnel to allow the process to run as smoothly as possible.



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# How and when economic submissions help decision makers in merger control proceedings

Peter Davis and Kostis Hatzitaskos<sup>1</sup>

Cornerstone Research

## Introduction

Economic analysis is central to assessing whether a merger will result in a significant lessening of competition (SLC) in the US and UK or a significant impediment to effective competition (SIEC) in the EU. While the jurisdictions' legal tests may use different terminology, the substantive assessment of a proposed merger is similar across jurisdictions.

In contrast, the decision-making framework for merger control differs markedly across jurisdictions. In the EU and UK, the merger control system is regulatory, with competition agencies making legally binding decisions about whether a merger would result in an SIEC or SLC, respectively. Although merger appeals are rare, particularly in the EU, the agencies' decisions are subject to judicial oversight (by the General Court (and ultimately the European Court of Justice) in the EU, and by the Competition Appeal Tribunal in the UK, and ultimately the UK's Court of Appeal and UK Supreme Court). In the US, the Federal Trade Commission (FTC) and Department of Justice (DOJ) must go to court to persuade a judge to enjoin a merger.

The key challenge in all jurisdictions is to develop economic evidence that will be persuasive to the relevant decision makers. No matter the jurisdiction, the key test of economic evidence is whether it helps them fulfil their obligations as decision makers. Both agencies and courts find economic evidence useful when it:

- is understandable to decision makers;
- answers or informs the answers to relevant questions; and
- is found to be worthy of evidential weight after detailed examination.

In this article, we briefly discuss each of these criteria, highlighting the strengths and weaknesses of various types of evidence that can be submitted in merger cases. In addition, we explain that economics plays a significant role in merger cases by helping to define which questions a decision maker does (and does not) need to answer during an investigation, as well as the appropriate weight to place on each piece of the available evidence base, including that arising from internal documents and witness testimony.

## Economic evidence must be understandable

In every jurisdiction, whether in court or in front of an agency, the decision makers will need to understand the economic evidence presented to them. Decision makers generally require economic advisers and experts to explain their evidence clearly and convincingly before they are willing to grant it evidential weight. Successful economists therefore place a heavy emphasis on clear communication.

Clear communication is particularly important because in many merger evaluation contexts an economic expert will not usually be explaining their analysis to other economists:

- First, the majority of merging-party executives do not have PhDs in economics, and may not have had any prior contact with the competition system.
- Second, while competition law professionals typically have at least some training in economics, most will understandably not wish to engage in a discussion of the merits of the economic analysis using technical language. Counsel want to understand whether the economic evidence is robust and helpful for their client.
- Third, whether the central lessons drawn from the economic evidence resonate with decision makers frequently hinges on whether and how these lessons fit with other evidence in the case, documentary evidence in particular.<sup>2</sup>
- Fourth, the fact that most decision makers themselves are rarely economists<sup>3</sup> means that the explanation of economic ideas in plain, accessible language is crucial. In an annex to an economist's expert report, it can be helpful to engage in a highly technical debate between economists; however, this will ordinarily be more effective for engaging in the debate with agency staff economists, rather than the decision makers.

In general, overly technical presentations of economic theory and empirical analyses can be hard for non-specialists to access effectively. The use of economic jargon and technical detail can materially hinder non-economist decision makers' understanding of economic evidence.

However, there are some situations in which technical details can enhance understanding and improve communication. One common example is when economic experts discuss a case under consideration by a competition agency. When an experienced PhD economist serving as an economic adviser is talking to an experienced PhD economist from an agency, the use of technical economic language is both common and necessary. For example, economists may discuss the statistical properties of regression estimators in a particular case by reference to the econometric literature considering merger policy.

Properly conducted and explained, economic evidence can help define which questions decision makers must ask and evaluate how much weight decision makers should place on specific pieces of evidence to answer a relevant question. We discuss each of these topics in turn.

### **Economic evidence must answer or inform the answer to a relevant question**

Typically, competition agencies define a list of potential theories of harm relatively early in a merger investigation. The term 'Theories of harm' is a misnomer: the difference between a theory and a hypothesis in standard scientific terminology strongly suggests it would be more aptly termed 'hypotheses of harm'. Each jurisdiction's merger guidelines describe common hypotheses of harm associated with proposed mergers. These hypotheses include:

- Unilateral effects. Unilateral effects can arise in a horizontal merger when one firm merges with a competitor, allowing the merged firm to profitably raise prices (or worsen the value proposition to customers on non-price dimensions) on its own and without needing to coordinate with its rivals.<sup>4</sup>
- Coordinated effects. A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.<sup>5</sup>
- Non-horizontal (non-coordinated) effects. These may principally arise when non-horizontal mergers give rise to foreclosure. The term 'foreclosure' is used to describe any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability or incentive to compete.<sup>6</sup>

For a given hypothesis of harm, economic evidence can help clarify the circumstances under which the proposed merger would be problematic. Generally, to find a hypothesis of harm credible, the decision maker must believe that each element underlying a hypothesis of harm is satisfied to the requisite legal standard, particularly in light of where the burden of proof lies.<sup>7</sup> For example, for a merger to have unilateral effects relative to a relevant counterfactual, it generally must be that:

- the merging parties are currently a significant competitive constraint on one another in one or more relevant markets;
- the remaining rivalry from non-merging parties active in the relevant markets is sufficiently limited that the loss of competitive rivalry because of a merger is significant;
- efficiencies are not sufficient to offset the loss of the competitive constraint; and
- new entrants are unlikely to replace the rivalry lost because of the merger in a timely and sufficient fashion.

If the authorities find that a hypothesis of harm holds true and so identify a problem with the merger, decision makers can then use economic evidence to help assess proposed remedies. Remedies must be effective and proportionate to the problem identified. Thus, in addition to helping identify potential problems with a merger, economic evidence can also shed light on the efficacy of potential solutions. However, when using economic evidence to evaluate remedies, some staff tasked with assessing remedies in some agencies will have accounting or general business backgrounds rather than an academic economics training. A highly technical piece of economic theory, therefore, may prove hard for some remedies staff to engage fully with and so may receive little evidential weight. Economic advisers need to adjust their approach and terminology accordingly.

### **Economic evidence can help define which questions a decision maker does (and does not) need to answer**

To understand how economic evidence can help define which questions decision makers do and do not need to answer, or to prioritise questions in the face of limited resources, we consider two leading

examples that distinguish the practical application of economics from economic theory.

#### ***No need to distinguish every plausible candidate market definition***

As part of a merger assessment, competition authorities and merging parties regularly seek to define markets to calculate market shares and other measures of concentration. While market definition can proceed relatively formally following the processes described in the relevant merger guidelines, often it is more useful to calculate market shares under a variety of potentially plausible candidate market definitions. This can help decision makers to focus their efforts on the issues that will matter to the case. For example, if two candidate market definitions both predict a very small market share for each merging party, then it is likely unnecessary to distinguish between those two candidate market definitions. Economic analysis thereby allows for some resource prioritisation for both agencies and parties.

#### ***Understanding the dimensions of competition over which merging parties may have incentives to worsen their value proposition***

Economic analysis in merger control is necessarily prospective; the task is to predict the future effects of a merger. A starting point in these analyses is to clarify the overlap between the merging parties. For example, two manufacturers may supply parts with broadly the same function, but a closer inspection of their products may demonstrate that there is little functional overlap and hence limited competition between the merging parties. This may deprioritise a more careful analysis of these products for the merging parties and the agencies.

For each area of overlap, the analysis frequently turns to a qualitative assessment of whether and how the merging parties compete. Often the focus is on prices, but it can also be over different dimensions of competition, such as innovation, terms of service, or quality. Economics can provide a framework with which to understand incentives to compete before the merger and, in particular, how incentives will change following the merger. This framework can help identify questions for document discovery and areas of potentially informative data analysis to prioritise. It is also likely to help the agencies shape their conversations with industry participants and correspondingly can help the merging parties and their advisers anticipate such conversations and prepare for follow-up discussions.

### **Economic evidence is often relevant to evidential weight**

Importantly, the framework provided by economics in merger cases can also help decision makers weigh the evidence provided. It may be that factors relevant to weighing evidence will be laid out in a guidance document issued by competition authorities.

In this sub-section we present two examples where economic theory and insight can help decision makers define the appropriate evidential weight to apply to a particular type of evidence (whether empirical or documentary) in merger cases.

#### **Evidential weight from market shares versus the likely effect of the merger on incentives**

A prime example of how economic understanding can shape the way decision makers weigh evidence is the evolution of the role of market definition in merger control. A central lesson from economics is that market shares, considered alone, can be misleading when assessing the incentive effects of a merger. While analyses based on market shares continue to play a central role in merger evaluation, the role of market definition in merger practice has evolved over time. This evolution was reflected in the UK and US competition agencies' respective Horizontal Merger Guidelines of 2010,<sup>8</sup> which sought to reduce agencies' reliance on market definition, and the consequent market shares. Specifically, the guidelines place a greater focus on agencies' effort in merger evaluation

on economic evidence relevant to assessing the actual competitive effects of the merger. This in turn requires that agencies give appropriate evidential weight to the actual incentive effects of a merger rather than relying on market shares alone. Put differently, no matter how markets are defined by agency officials, the actual competitive effects of a merger will remain the same, while the measured market shares may change with different market definitions.

In the UK, for instance, the formal or semi-formal use of the Hypothetical Monopolist Test to define markets has significantly reduced in favour of a more flexible approach to defining markets. This practice is referred to in the CMA guidelines as market definition providing only a 'frame of reference' for the actual analysis of the likely competitive effects of a merger. This evolution in approach has had the practical advantage of focusing agencies' attention on the relevant question of whether a merger will actually reduce the merged firm's value proposition to customers, for instance by raising prices or lowering quality.

Economics can help inform decision makers on whether and how market shares should be given evidential weight when used in conjunction with other pieces of evidence. And, of course, economics can also be crucially important for the competition agency's assessment of the incentive effects of a merger.

### **The counterfactual and the assessment of evidence on pre-merger market shares**

Consider the potentially important role of the counterfactual in merger analysis. According to the EU, UK and US guidelines, the counterfactual ordinarily used in merger control is the pre-existing conditions of competition. However, this need not always be the case for a variety of reasons.

One particular case in which pre-existing conditions form a poor counterfactual is when one of the merging parties is a failing firm, or when the target is a failing division. If plan B, absent the merger, is for the target firm to completely or partially close the assets being acquired, then pre-existing conditions of competition, and in particular, current market shares, may markedly overstate the likely future extent of competition should the merger not proceed.

A second case in which pre-existing conditions form a poor counterfactual is when a target firm has well-developed and advanced plans to enter a market where the acquirer is active.

And a third case is where technological innovation changes the market landscape, such as where third parties develop new products that provide a constraint on the merging parties that was not there historically.

In each case, decision makers must be careful to assess the correct evidential weight to give to the pre-merger market share evidence, if any. Economic theory and intuition can be useful in identifying which counterfactuals are most suitable in the situation at hand, allowing decision makers to better weigh evidence on market shares.

### **Economic evidence must be worthy of evidential weight**

Another crucial feature of useful economic evidence is that it must be found worthy of evidential weight. Agency staff and expert economists will seek to inform decision makers' views by submitting economic analyses and related evidence testing the assumptions, reliability and robustness of any significant piece of economic evidence submitted during merger control proceedings.

### **Testing reliability and robustness of economic evidence**

To assess evidential weight, agencies and courts will evaluate the reliability of the economic evidence submitted to them. In the EU and UK, competition agencies have published guidance on 'best practices for the submission of economic evidence'.<sup>9</sup> In US courts, the reliability of expert evidence at trial has been codified in the form of the Daubert test.

One important aspect of reliability is that the results of a piece of economic analysis must be replicable (see, for example, the UK guidelines for submission of economic evidence).<sup>10</sup> The economic evidence can then be tested using statistical techniques to assess whether it is reliable and robust. For example, regression models can be tested both by checking the calculation and definition of explanatory variables included in the specification and also by testing whether the specification should include new or alternative variables. A regression analysis considering whether there is evidence of a causal relationship between price and higher concentration, for example, must control for movements in cost, suitably defined. To see why, suppose an economic expert obtained data from a set of local markets in a merger inquiry and found that high prices are associated with high concentration. If the analysis did not properly control for cost variation across markets, then this may just be revealing that high cost markets are associated with both high prices and few market participants (ie, high concentration) so that, once cost variation across markets is properly controlled for, no evidence of a causal relation between price and concentration may remain.

A second significant aspect of reliability is that the assumptions underlying a piece of economic evidence must be understood and tested. Assumptions may be implicit in pieces of economic analysis, but once drawn out explicitly can be tested against the available documentary evidence and witness testimony (see the further discussion of this point below).

Next, we provide an illustration of the way in which implicit assumptions in a piece of economic analysis can be made explicit and thereby affect the assessment of the proper weight to assign to a piece of evidence.

### **'Identification' and the need to distinguish between competing hypotheses**

When economists are engaged by parties to submit evidence to a competition authority or court, the aim is to help decision makers distinguish between competing hypotheses. In its simplest form, decision makers seeking to improve consumer welfare must distinguish between the competing hypotheses that a merger is 'good for consumers' or 'bad for consumers'.

To do so, economists must look for data that distinguish the two scenarios using the framework of the hypotheses of harm. Empirical analysis that cannot distinguish between two hypotheses at issue is unlikely to be worthy of evidential weight.

For example, under a coordinated effects hypothesis of harm, suppose competition economists submit evidence that prices of firms in the industry move in parallel with one another. This type of evidence is well known to be potentially consistent with either one of two conflicting interpretations: costs moving together and competitive prices moving in parallel as a result; or firms tacitly coordinating movement in their prices. The fact that prices move together is consistent with either competitive or coordinated behaviour. In short, absent cost data, it is not possible to use the available pricing data to distinguish a problematic merger from a non-problematic one. As a result, the empirical evidence (in itself) will not be sufficient to distinguish (or in economists' terms, 'identify') whether or not a merger is problematic.

### **Challenges and opportunities**

There are some areas where courts and other decision makers sometimes find it difficult to assess whether and how much weight to place on pieces of evidence. To close our discussion, we illustrate with a number of examples.

### **Evidence from documents**

Documentary evidence often plays a very important role in cases and in many instances that is entirely justified. For example, a strategy

document created in the ordinary course of business presented to the board after months of underlying work defining a company's competitor set and strengths and weaknesses relative to its competitors is likely to receive significant evidential weight. On the other hand, some documents can actively mislead, and it is certainly the case that not all internal documentary evidence will be worthy of substantial evidential weight. For example, competition agencies are ordinarily professionally sceptical of strategy documents created in anticipation of the specific merger under investigation, reasoning that the parties may take legal advice that shapes those documents to appear favourable. Other documents may say very unhelpful things for merging parties but, on investigation of the context in which they were produced, turn out to have been written by mid-ranking staff, contain and rely on little convincing evidence or argumentation, and contain proposals that were subsequently dropped or otherwise rejected by more senior individuals in the business. Thus, it can be important to understand the context and motivations of the author of a document to decide upon its import.

### Evidence from economic theory

Economic modelling provides, at its best, a series of 'if-then' propositions. If the 'if' is wrong, that is, if the model's assumptions do not correspond with relevant facts in the case at hand, then the 'then' will also be wrong. Of course, in actual cases, economists often deal with approximations, so that the relevant question is usually whether the 'if' is a sufficiently good approximation to the facts of the case that the economic theory in question provides reliable insight into the effects of the merger. Professional economists may sometimes reasonably disagree with each other regarding the applicability of a certain model or assumption, and decision makers may also reasonably take an independent view. In general, decision makers struggle with abstract economics and economists are ordinarily more comfortable making assumptions than the decision makers. Clearly, the best practice is to ground economic assumptions in evidence wherever it is feasible to do so, and to highlight where it has not been feasible.

### Evidence from industry participants

As a part of a merger investigation, competition agencies often launch an effort to collect information from industry participants; in the EU, this is known as the market investigation. This involves reaching out to a subset of firms in the industry, suppliers and customers to collect information on each of their perspectives about the merits of the merger. Merging parties sometimes do the same, collecting statements from particular industry participants in support of the merger.

Competition agencies and merging parties sometimes consider or present the results of their market investigations (informal surveys) as definitive, even though such evidence may not have been collected in a way that reflects best practices in survey design. While such information can be helpful, there are reasons to believe it should be treated carefully: a merger that would lead to a significant increase in prices may be welcomed by competitors. Conversely, a merger may be viewed adversely by competitors if they expected it to generate significant efficiencies and strengthen competition. Similarly, the incentives and actions of customers may require careful thought. For example, customers may seek to leverage the fact that their evidence may be either helpful or unhelpful in a merger inquiry into obtaining more favourable terms in ordinary commercial negotiations. Respondent incentives can be particularly complex to understand in vertically integrated industries, where respondents may be both customers and competitors of the merging parties in different levels of the industry.

### Survey evidence

Formal surveys require careful design work in accordance with best survey design practice. While survey evidence plays an important

role in a large number of cases (and has done so for decades in some jurisdictions, particularly the UK), developing genuinely unbiased questions and asking them to a suitable representative sample is often very challenging to do in practice. Furthermore, there can of course be a difference between how customers state their preferences in surveys and how customers would actually act, that is, reveal their preferences, in the real world.

### Evidence from past mergers

Another example of evidence that can be challenging for decision makers to weigh is the economic evidence that arises from evaluating past mergers. Absent direct information about the effects of a merger under investigation, one indirect source of evidence about a merger's potential effects is to examine the impact of past mergers on either prices or efficiencies.

Evidence about the similarity and relevance of past mergers to the circumstances at issue in a current case may be challenging to develop. Because no prior merger is likely to offer a perfect parallel to the present merger, it can be important to tie any learning from prior mergers into economic modelling of the present merger, as well as documentary evidence and customer testimony.

### Conclusions

Economic evidence plays a crucial role in competition cases. To be persuasive to decision makers, economic evidence must be understandable, relevant and worthy of evidential weight. If economic evidence fails to achieve any one dimension of these criteria, it will likely receive very little evidential weight from decision makers, whether in competition agencies, tribunals or in court. In addition, economics plays a significant role in helping to define which questions a decision maker does (and does not) need to answer during an investigation, and the appropriate weight to place on each piece of the available evidence base, including that arising from internal documents and witness testimony.

### Endnotes

- 1 The views expressed herein are solely those of the authors and do not necessarily represent the views of Cornerstone Research.
- 2 For a case study on tying complex economic evidence to documents and testimony, see Aviv Nevo et al, 'The Aetna-Humana Proposed Merger', in *Antitrust Revolution, 7th ed*, eds John Kwoka and Lawrence White (Oxford University Press, 2018).
- 3 There can be exceptions. For example, some panel members deciding the UK Competition and Markets Authority (CMA)'s Phase II merger investigations are economists, as are some Tribunal members serving on cases before the UK Competition Appeals Tribunal.
- 4 Competition Commission and the Office of Fair Trading, Merger Assessment Guidelines, CC2 (Revised) OFT1254, September 2010, paragraph 5.4.1.
- 5 US Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, 19 August 2010, p24, <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.
- 6 See 'Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings', *Official Journal of the European Union* 265 (18 October 2008), paragraph 18, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018(03)&from=EN).
- 7 The burden of proof can shift depending on the question in a merger inquiry. For example, in the EU Merger Regulation the burden of proof for establishing efficiencies is placed on those proposing the merger: '[I]t is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned'. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation),

paragraph 29, emphasis added. In the US, the burden of proof begins with the government but shifts to the merging parties if the government can demonstrate a 'structural presumption' of harm based on the level and increase of concentration in one or more appropriately defined relevant antitrust markets. See, for example, discussion in Herbert J. Hovenkamp and Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, University of Pennsylvania Law School Legal Scholarship Repository, 2018.

- 8 In the US, the Horizontal Merger Guidelines were issued on 19 August 2010 by the US Department of Justice and the Federal Trade Commission. In the UK, the Merger Assessment Guidelines were issued in September 2010. In the EU, the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03) were issued in 2004 and have not been updated since. Nonetheless, much of the economic toolkit, including the discussion of upward pricing pressure tests, endorsed by the UK and US when issuing their Horizontal Merger Guidelines in 2010 has also played an important role in casework in the EU in recent years.
- 9 DG Competition, Best Practices of the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases (working paper, European Commission), [http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_submission\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf).
- 10 Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission. See Competition Commission, Suggested Best Practice for Submissions of Technical Economic Analysis from Parties to the Competition Commission, CC2com3, 1 February 2009, <https://www.gov.uk/government/publications/economic-analysis-submissions-best-practice>. As the name suggests, this guidance was originally published by the UK Competition Commission. When that organisation was merged with the UK Office of Fair Trading to form the UK Competition and Markets Authority, the guidance was formally adopted by the CMA Board at the point of transition and remains in force today.

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# Timelines

Michael Bo Jaspers and Joanna Goyder

Freshfields Bruckhaus Deringer

The timelines provide a high-level overview of the duration of the merger control process and the procedural steps in the 68 jurisdictions covered by this book. Given the complexity of some merger control regimes, it has not always been possible to cover all possible variations and exemptions. For more detailed information, the reader should turn to the relevant country chapters. The following aspects should be borne in mind when working with the timelines:

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



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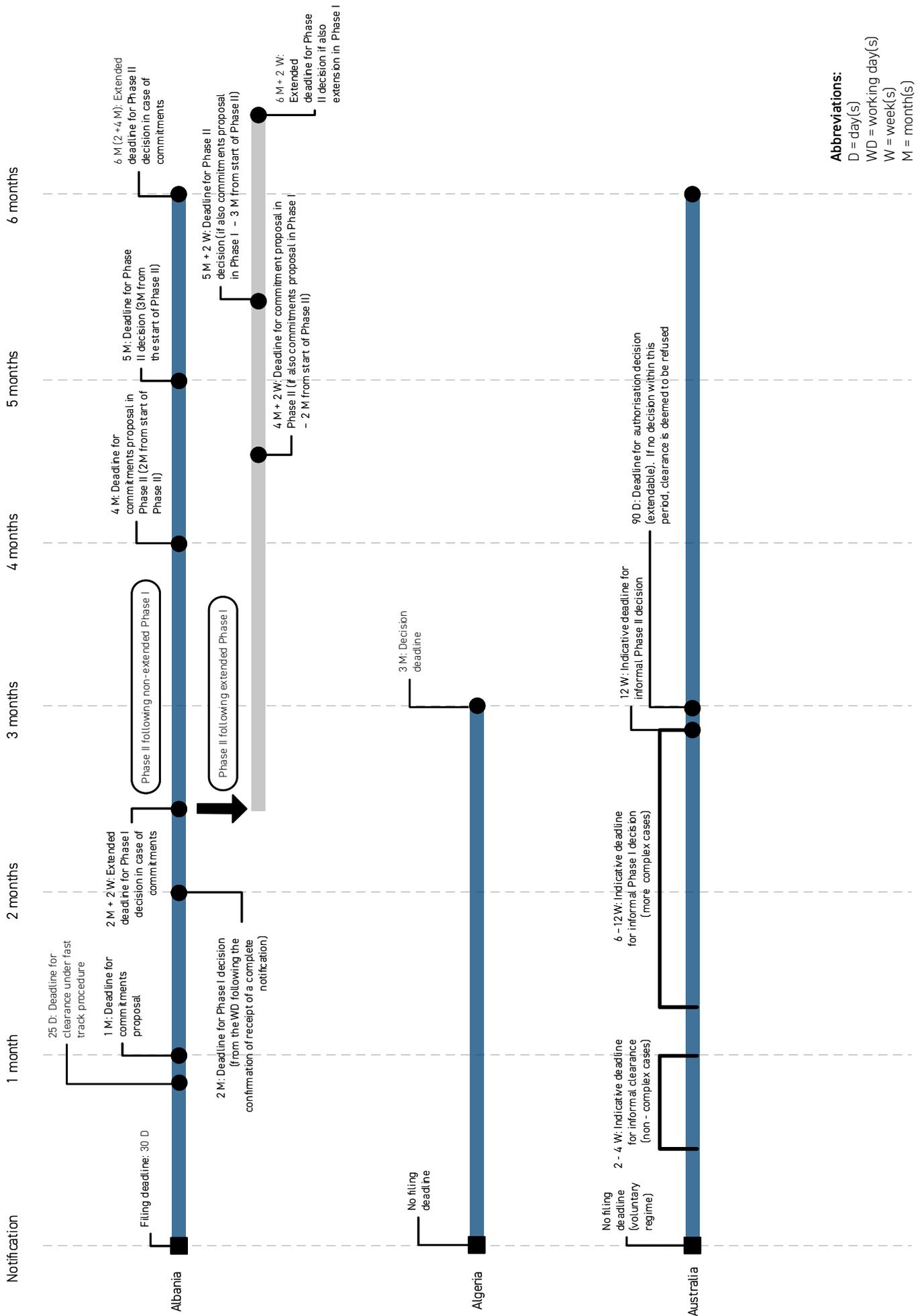
## **Our antitrust, competition and trade practice – working around the world**

With more than 50 partners and over 250 specialists based in Asia, Europe, the US and the Middle East, we advise our clients on their most critical matters wherever in the world they arise. We frequently act as lead global counsel in complex and groundbreaking international transactions, combining our own forces with trusted local advice from our network of relationship firms in jurisdictions where we do not practise the local law – and so delivering the best outcome in every country.

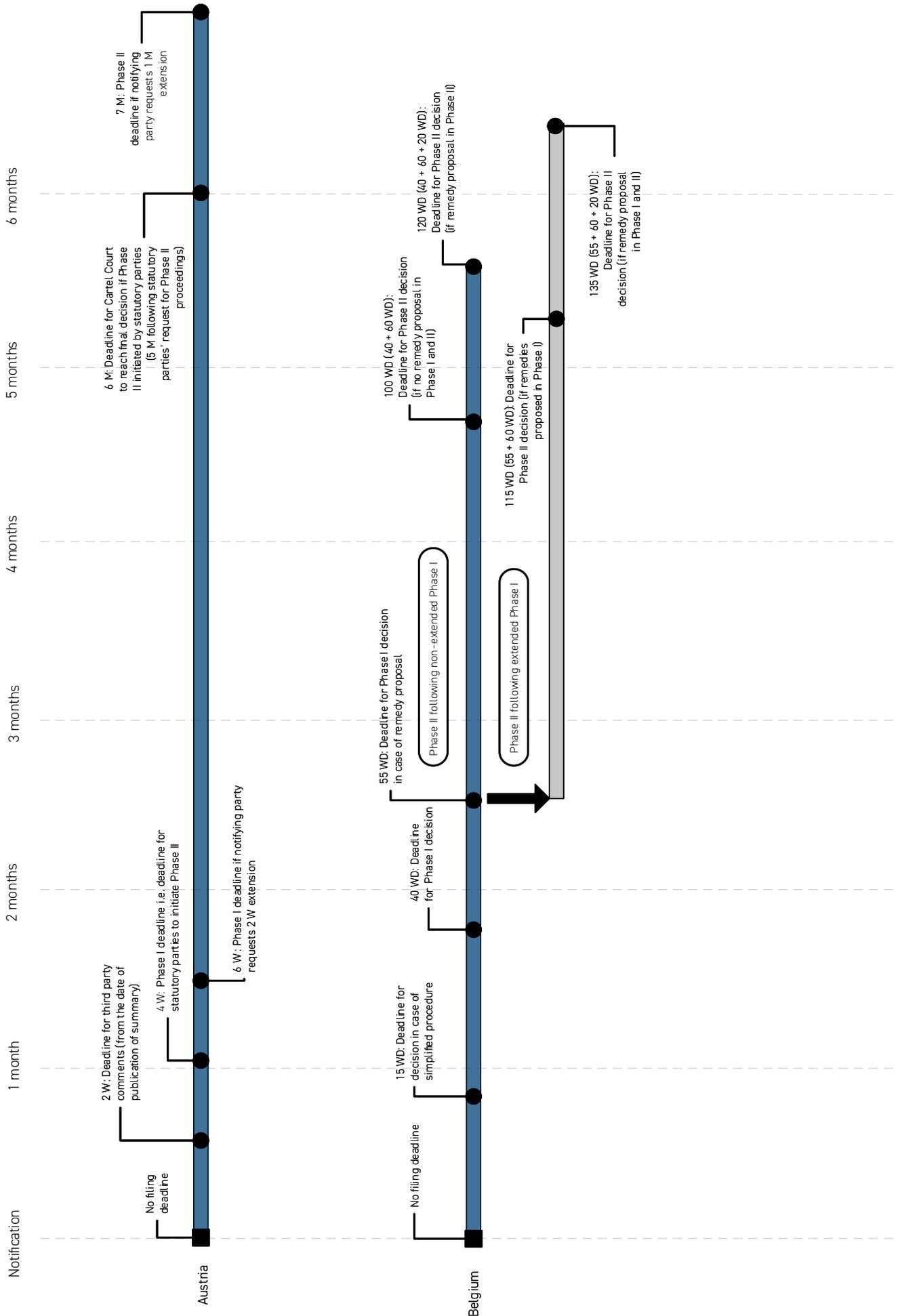
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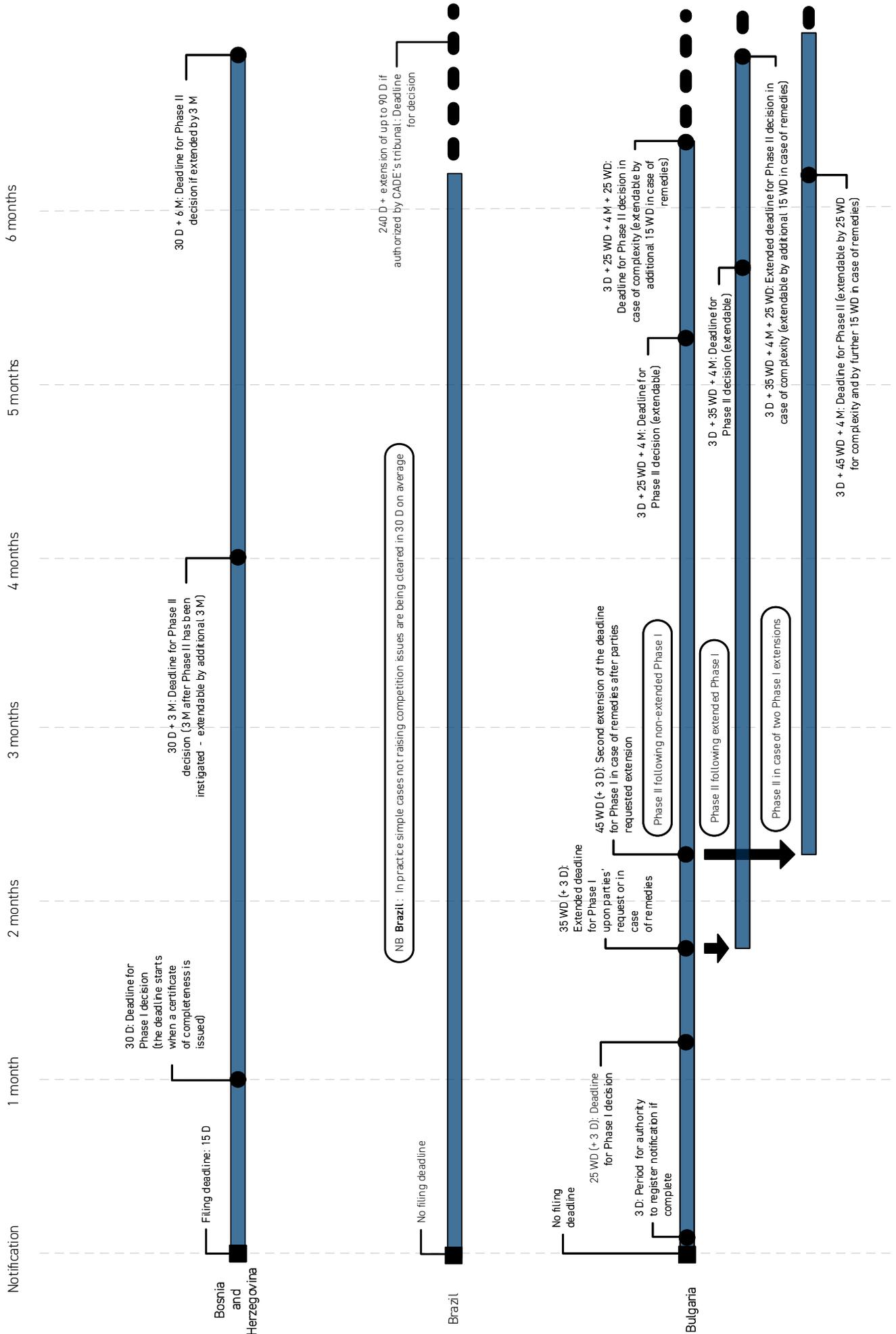
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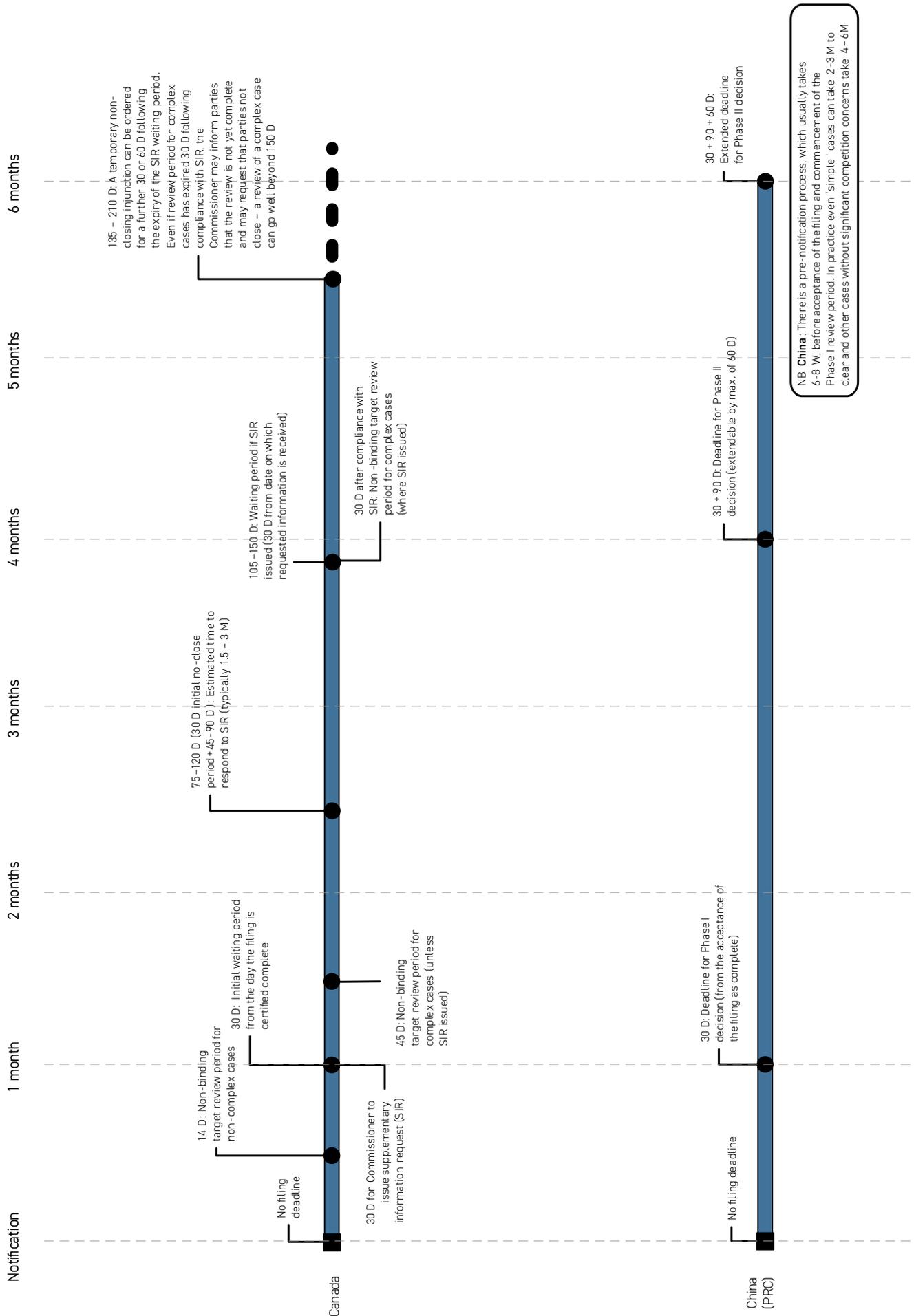
- The timelines do not take into account ministerial authorisations after a prohibition decision, which are possible in some jurisdictions.
- Some jurisdictions have a pre-merger as well as a post-merger notification requirement. In these cases, the different deadlines are dealt with in one timeline.
- Where relevant, additional information about, for example, proposed changes to the procedure or the status of the merger control rules are explained in separate boxes next to the relevant jurisdiction's timeline.

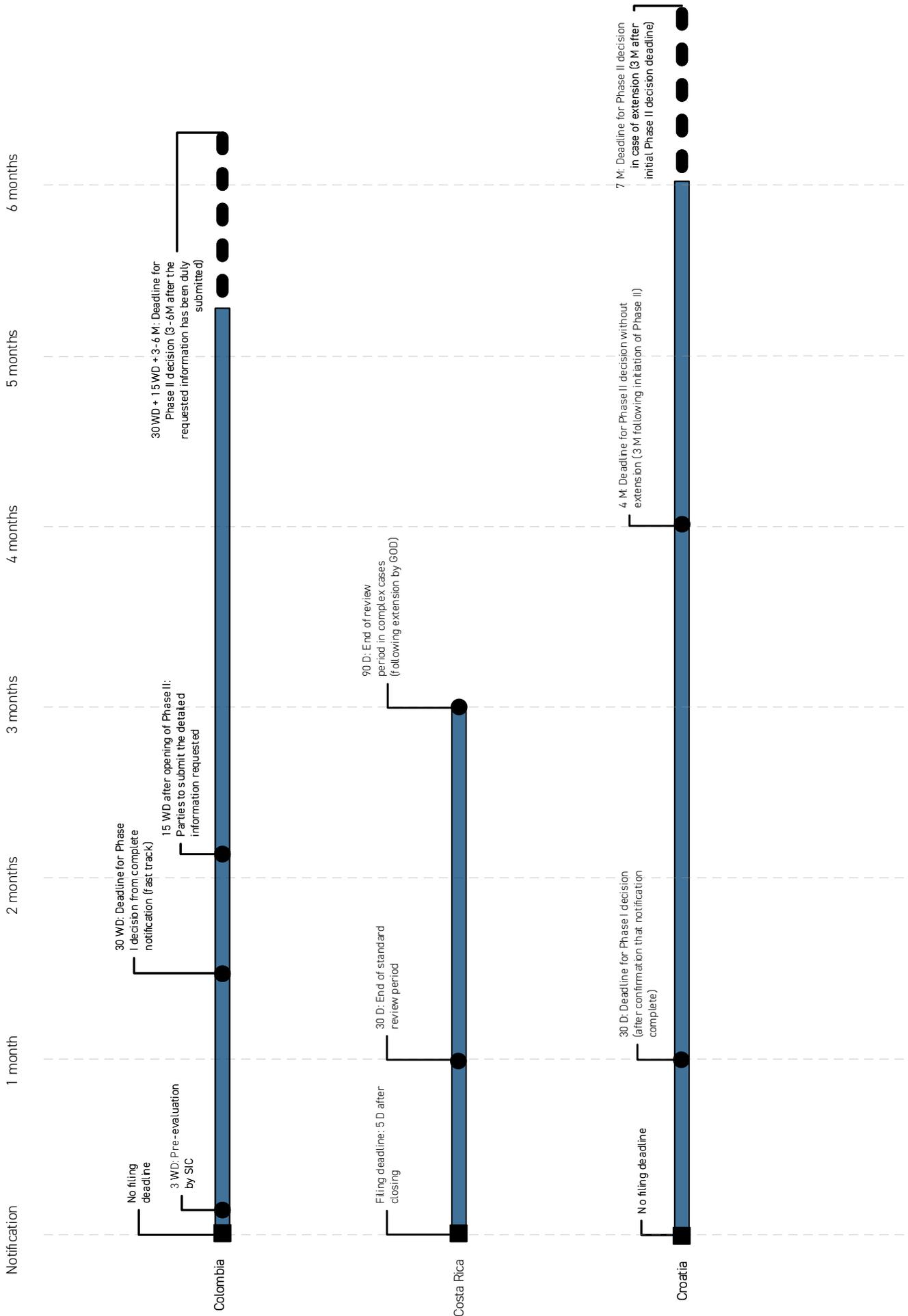


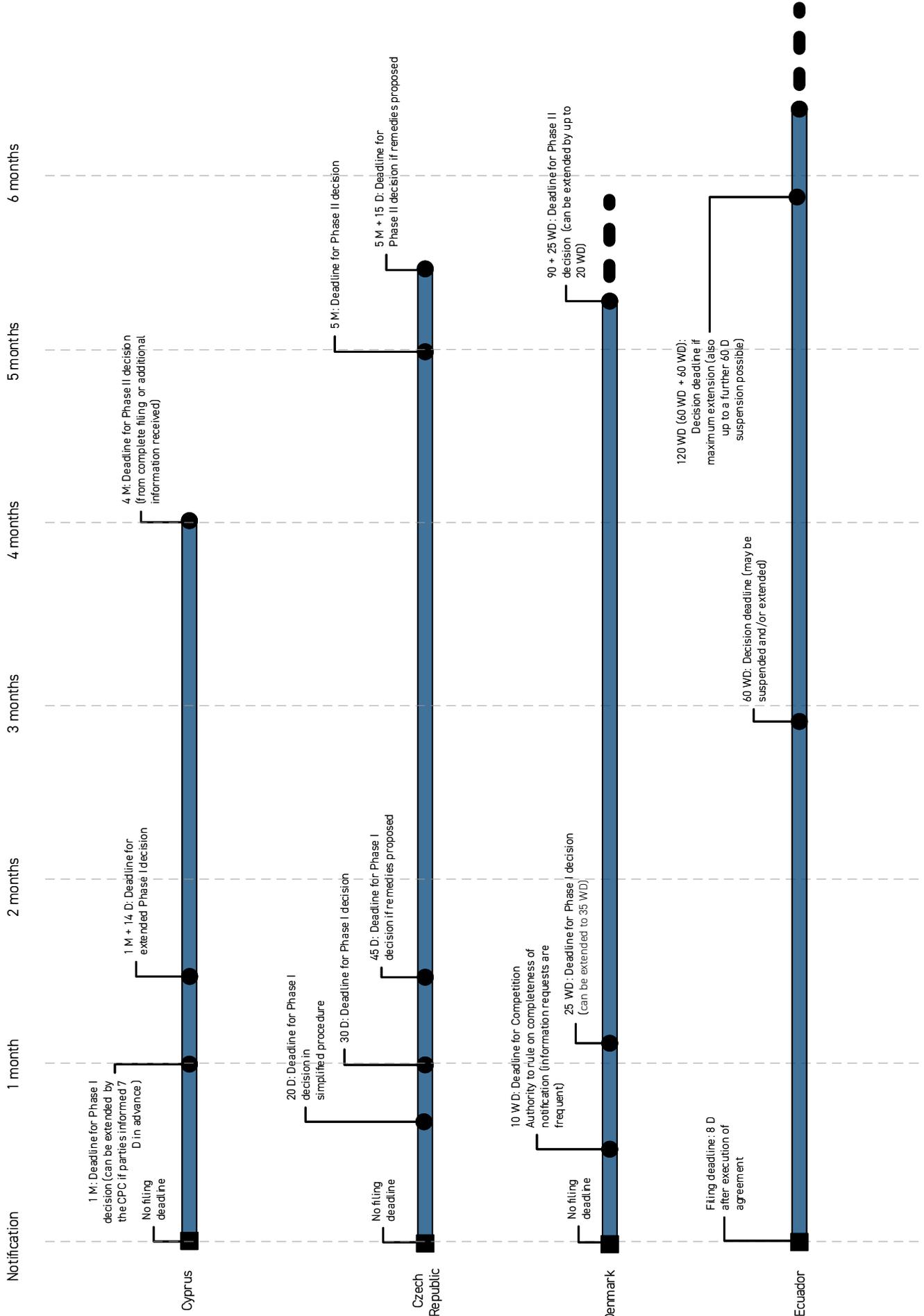
**Abbreviations:**  
 D = day(s)  
 WD = working day(s)  
 W = week(s)  
 M = month(s)

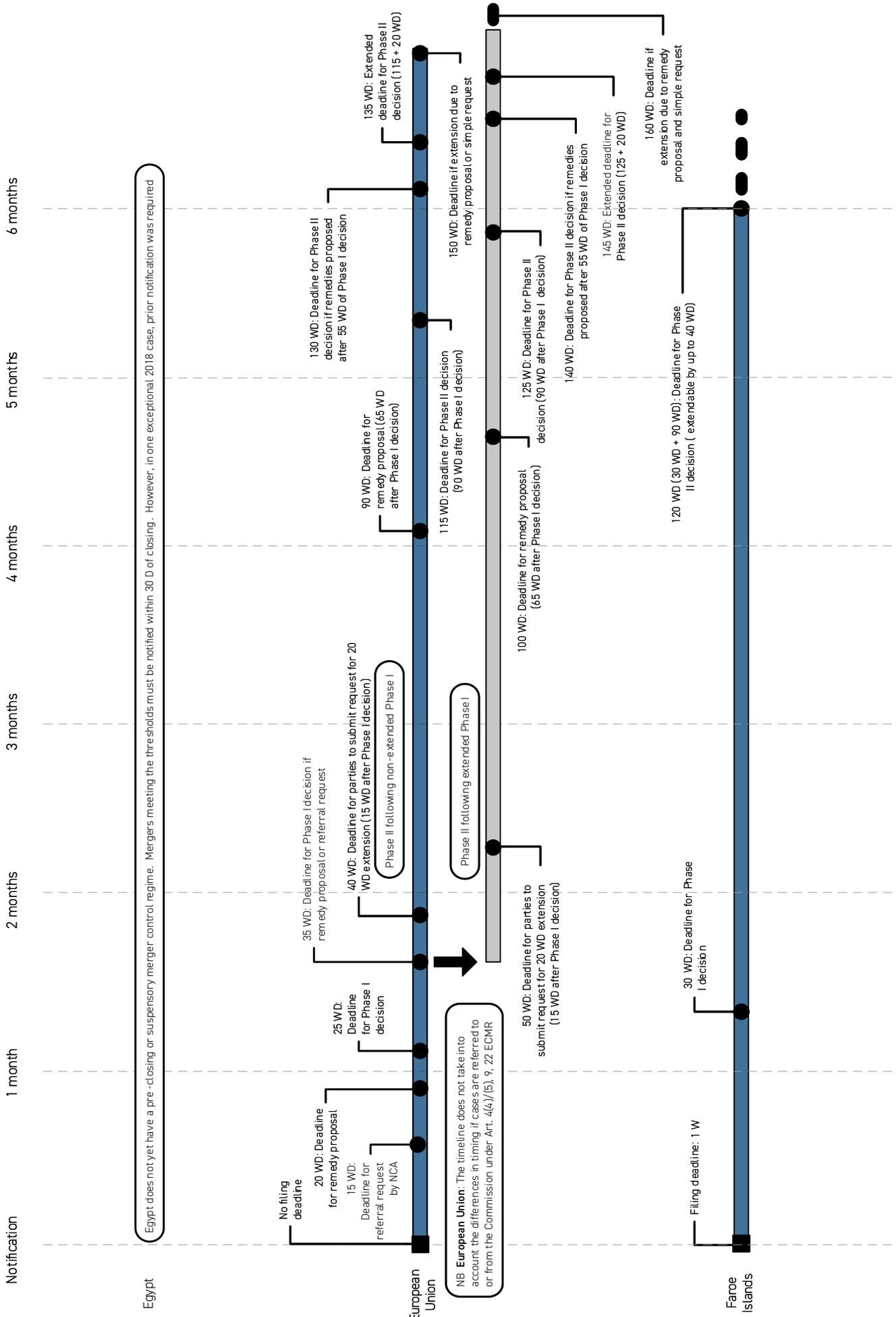


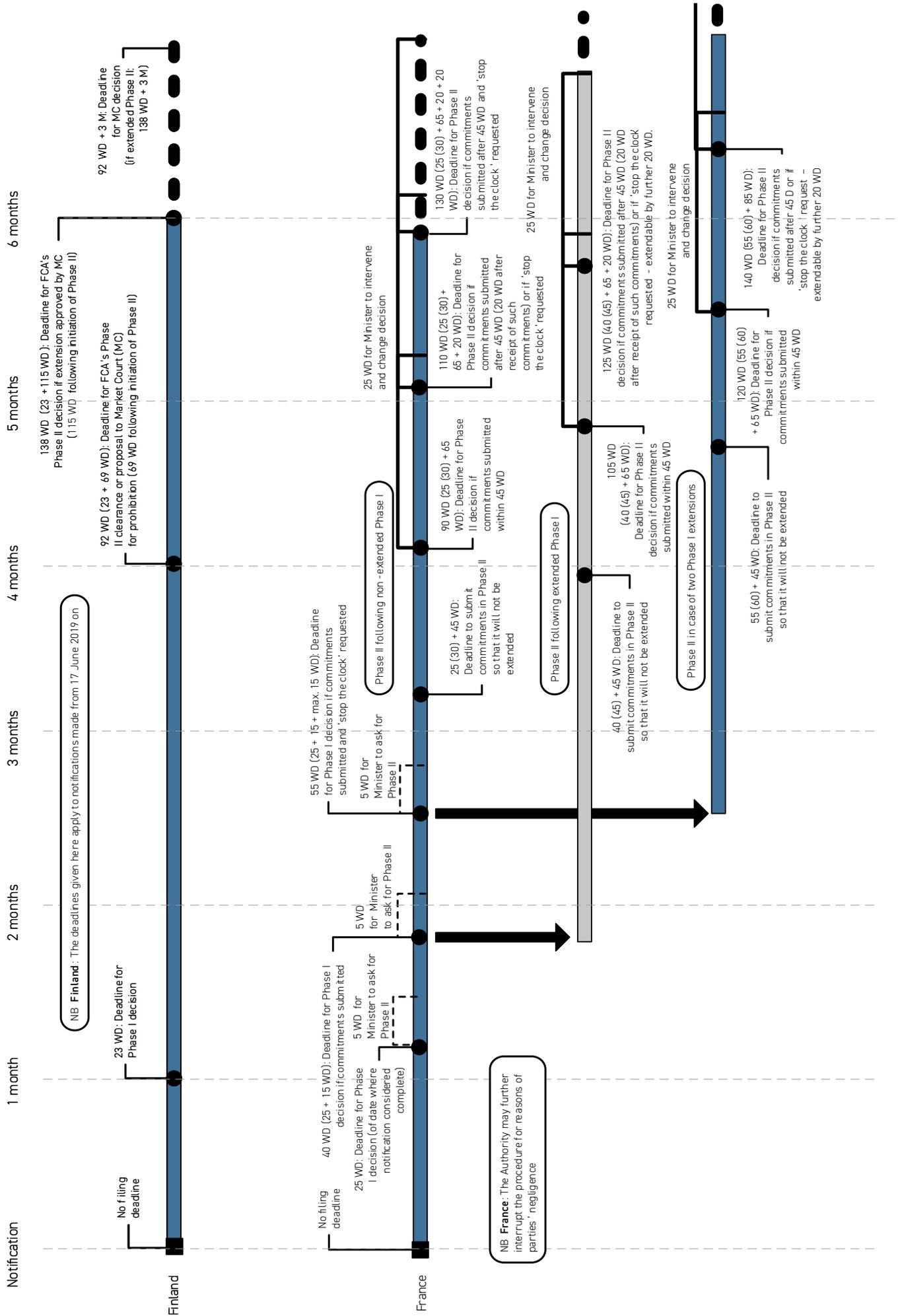


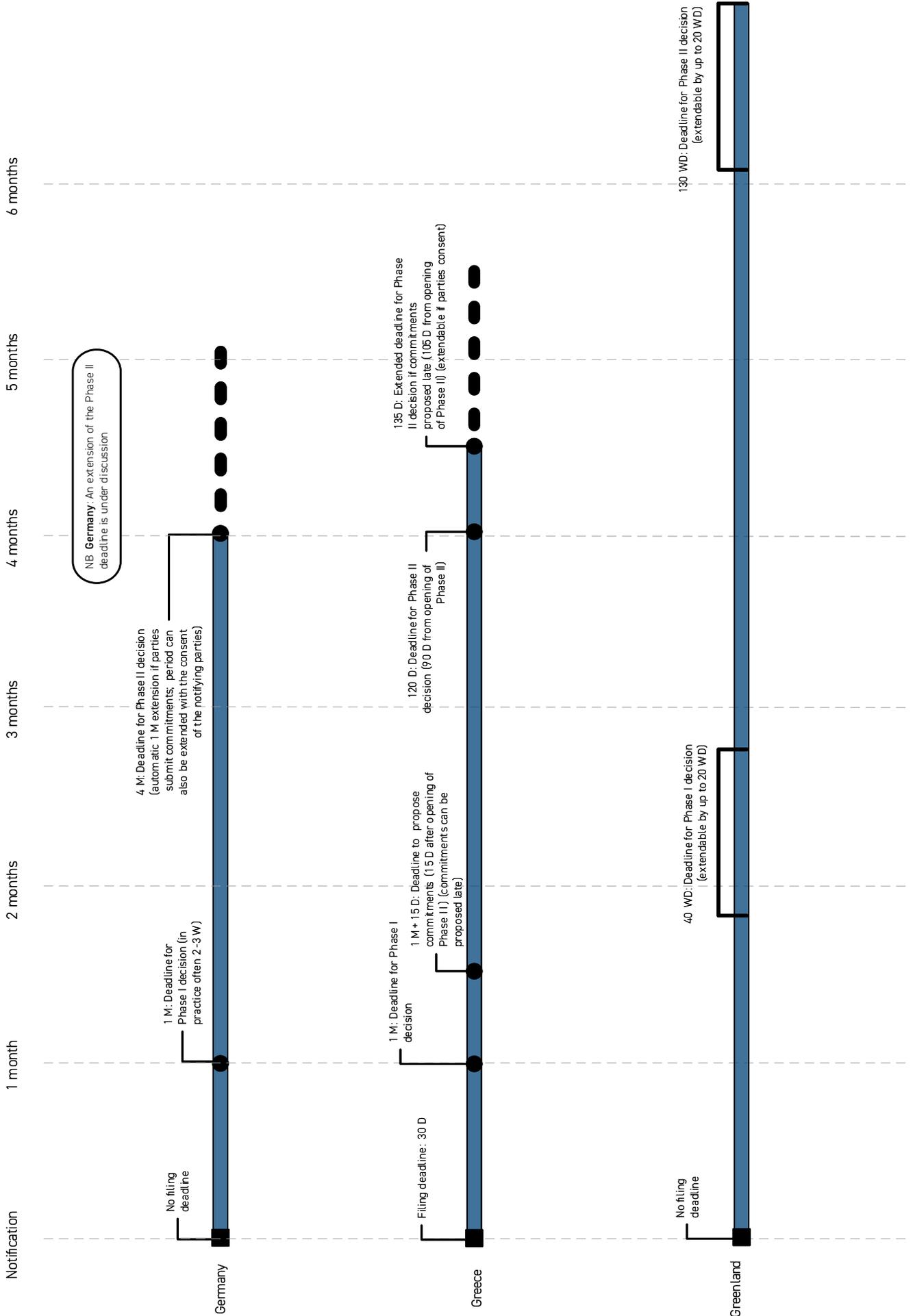


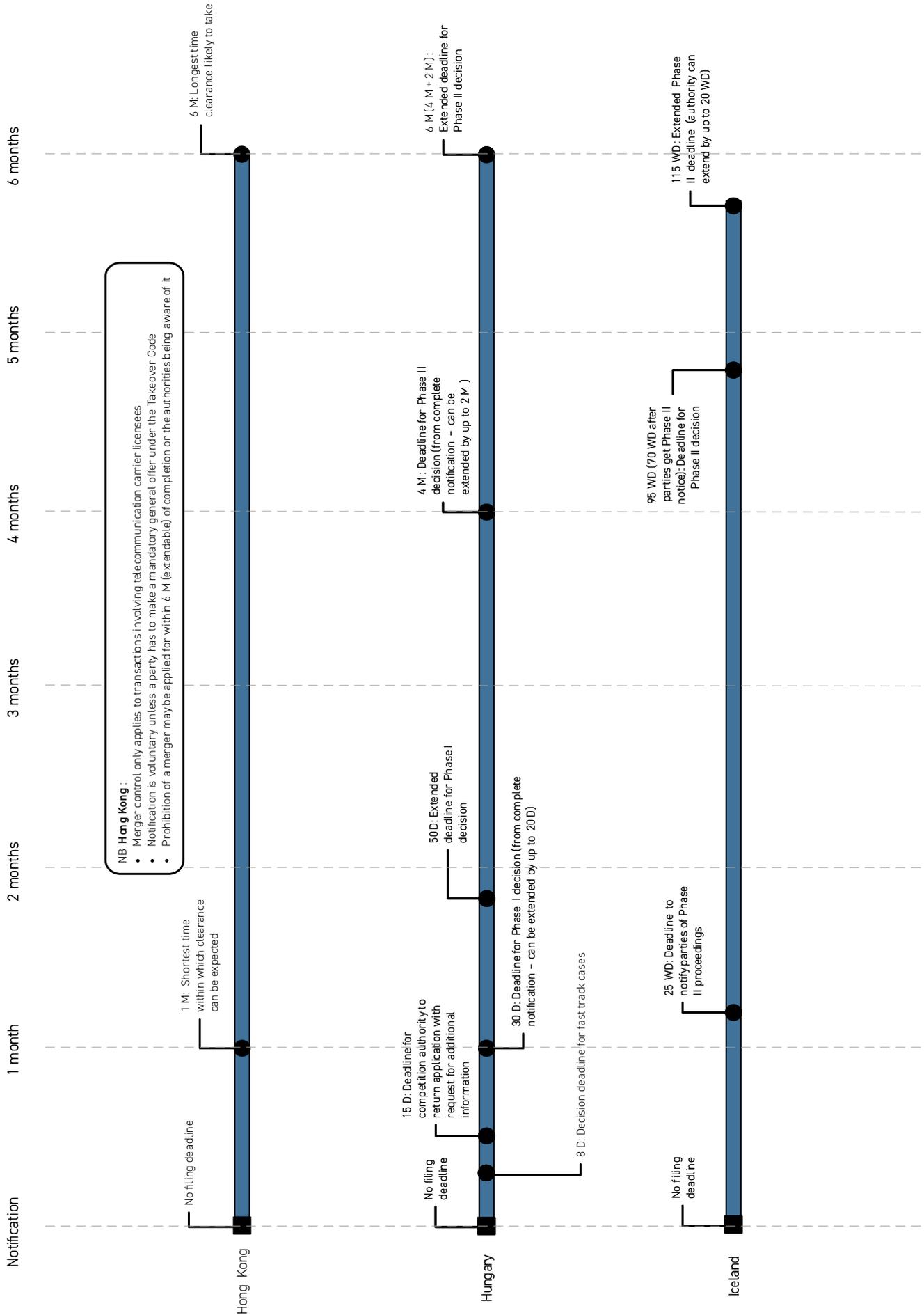


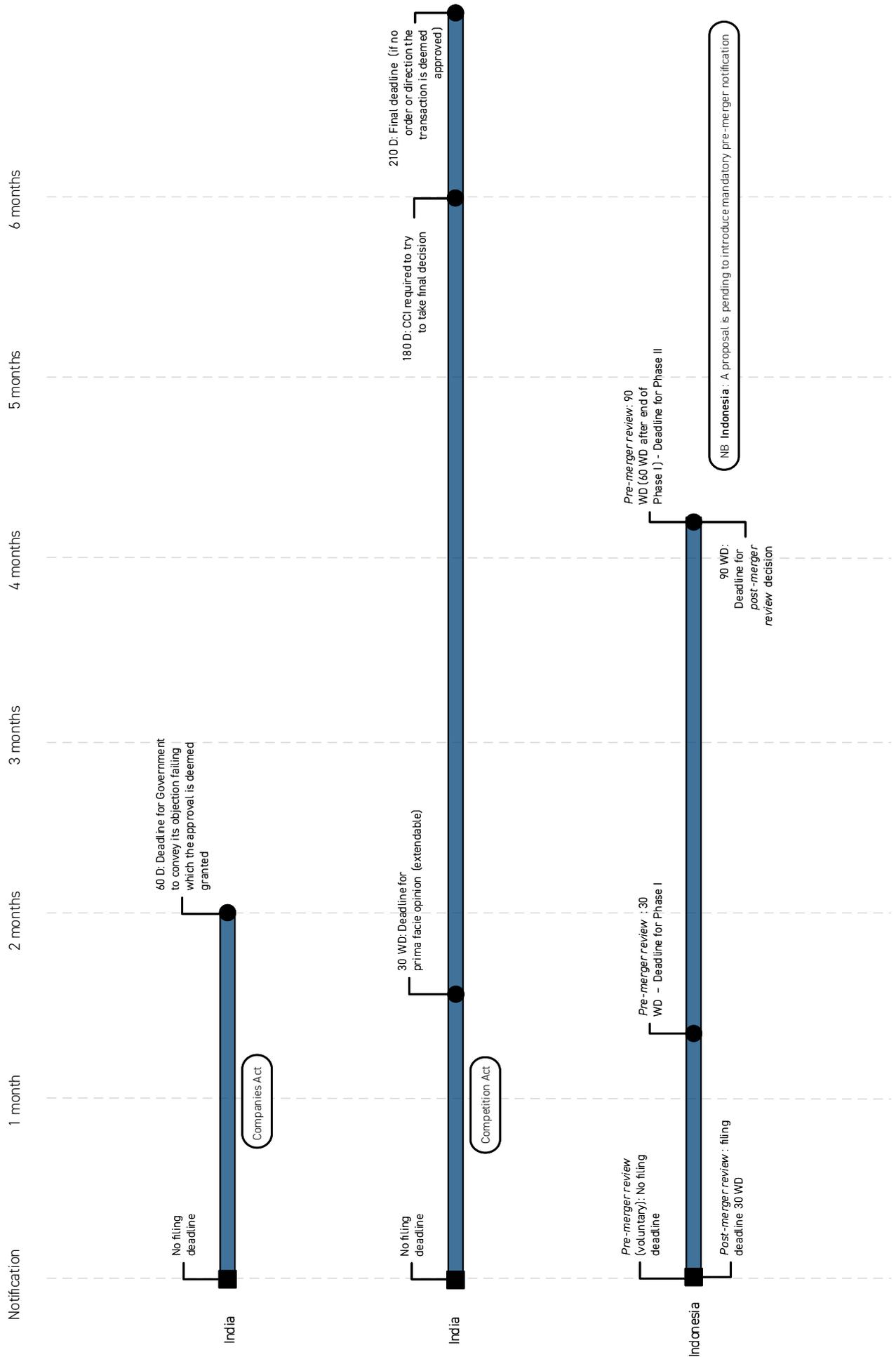


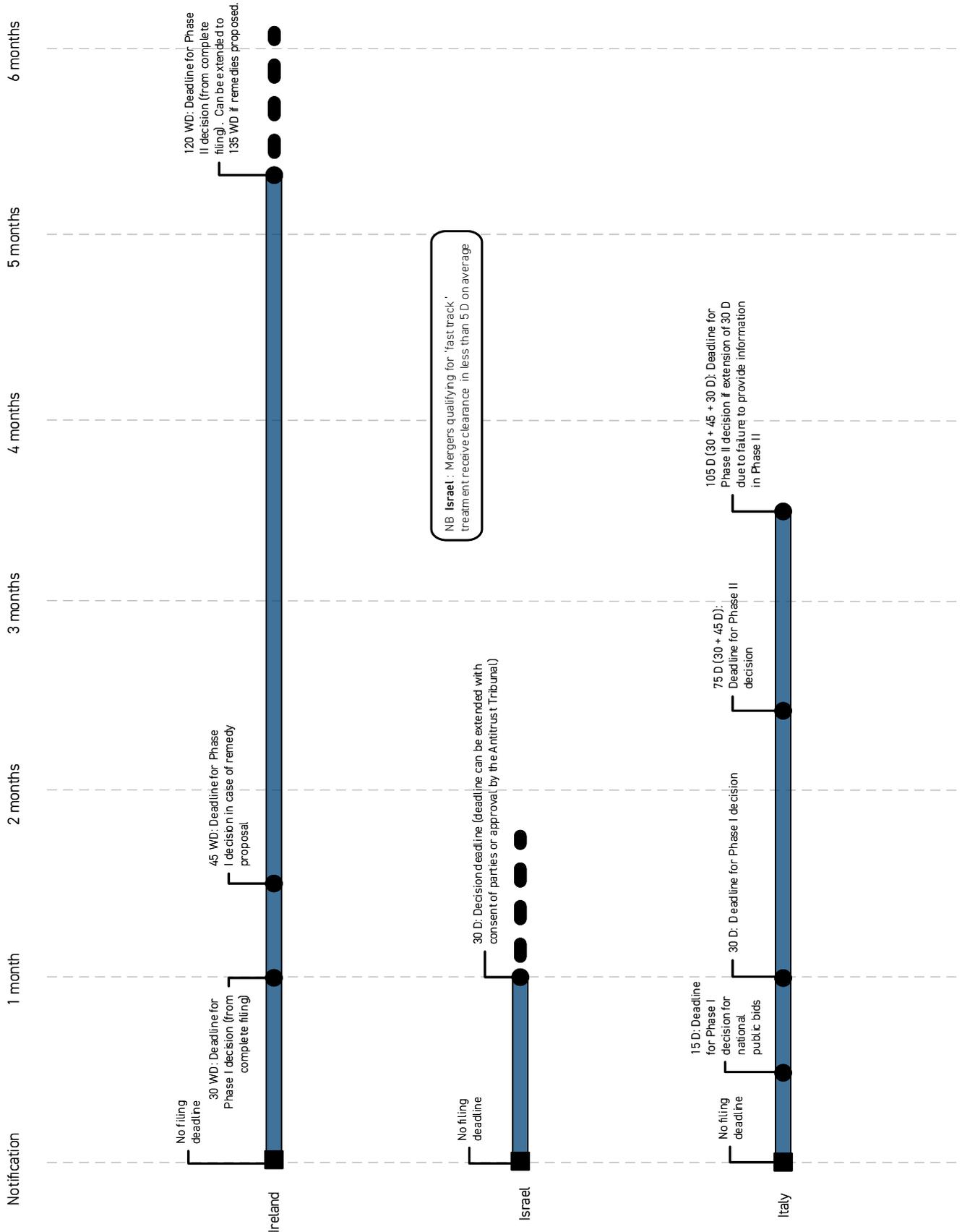


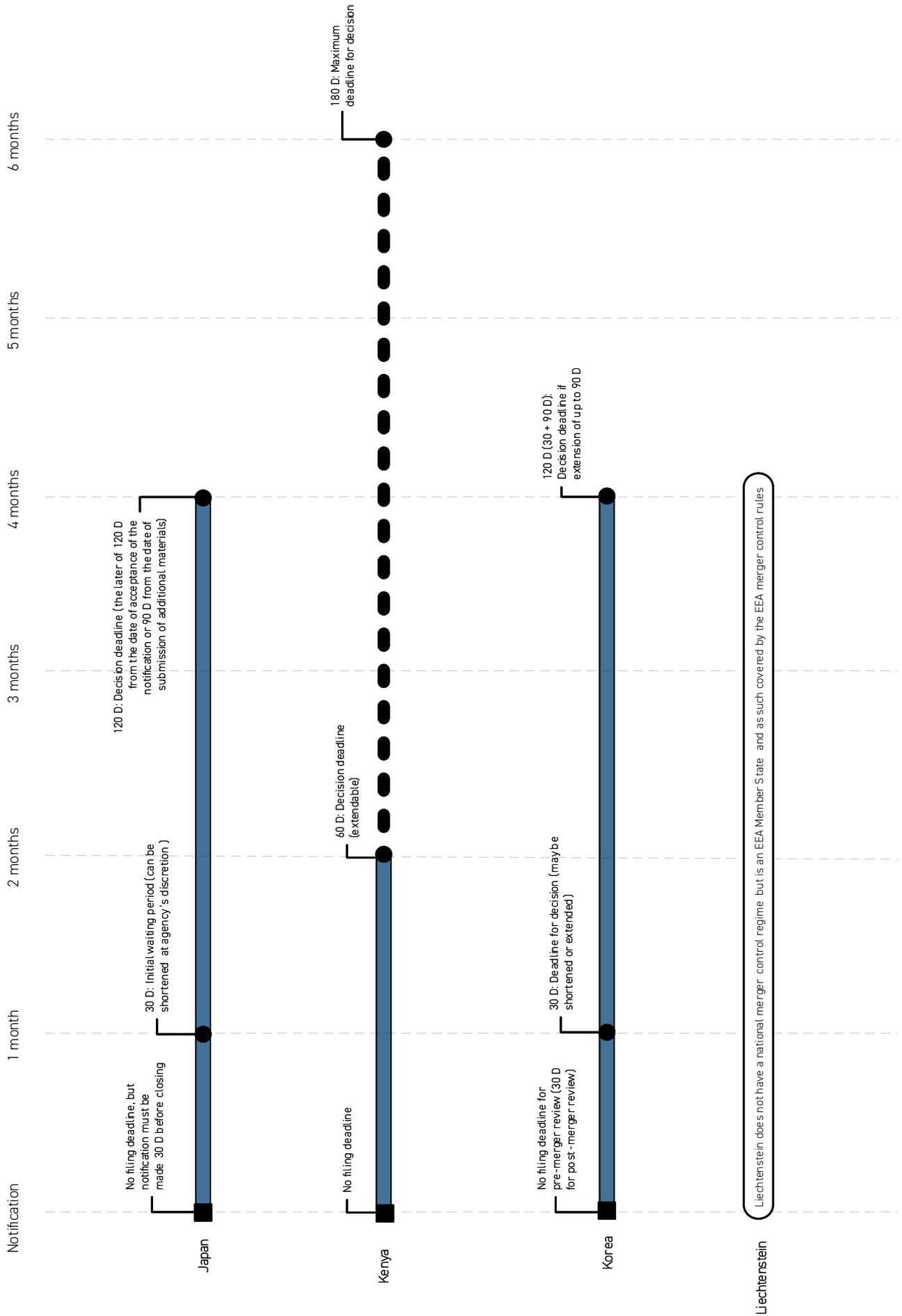


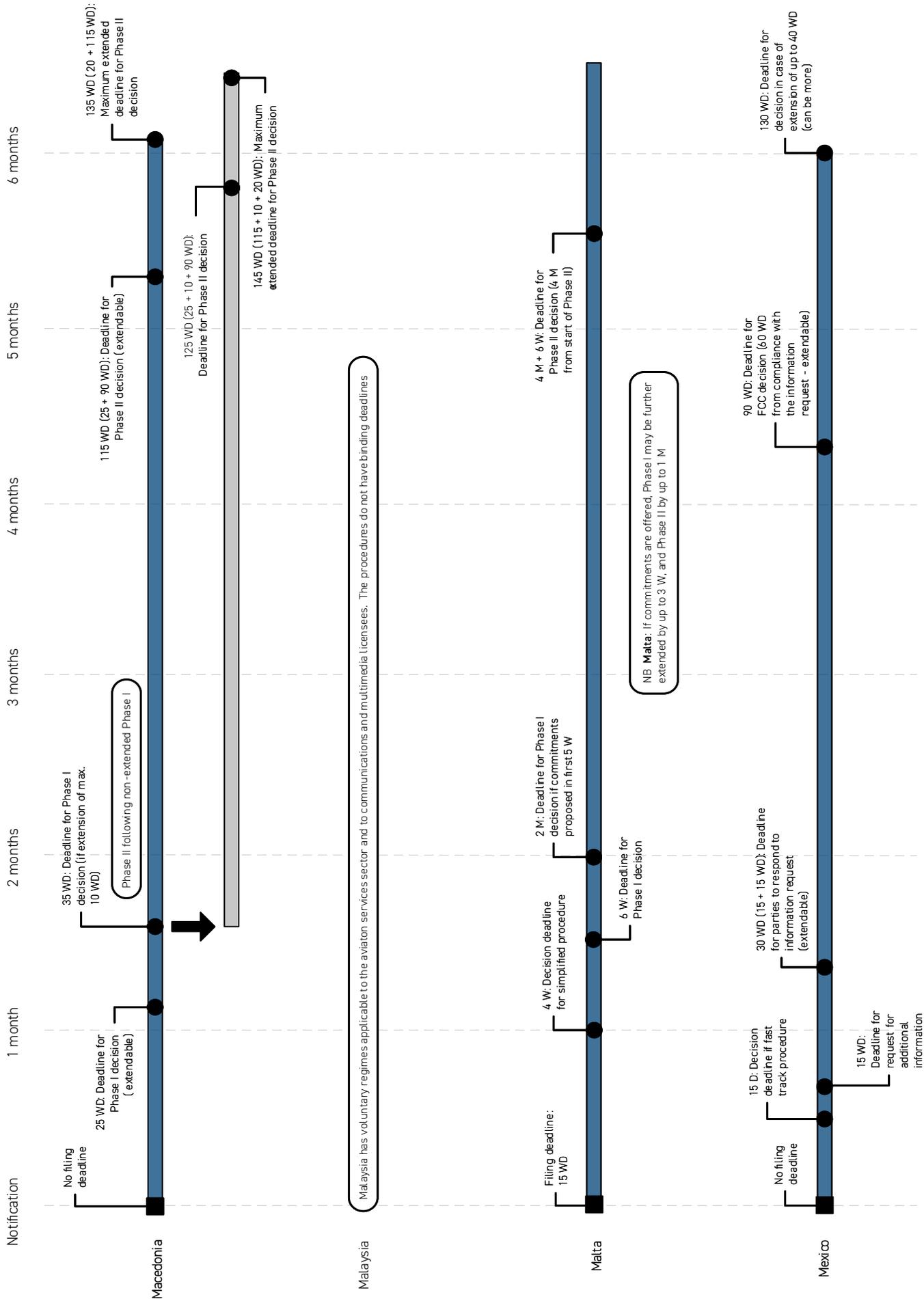


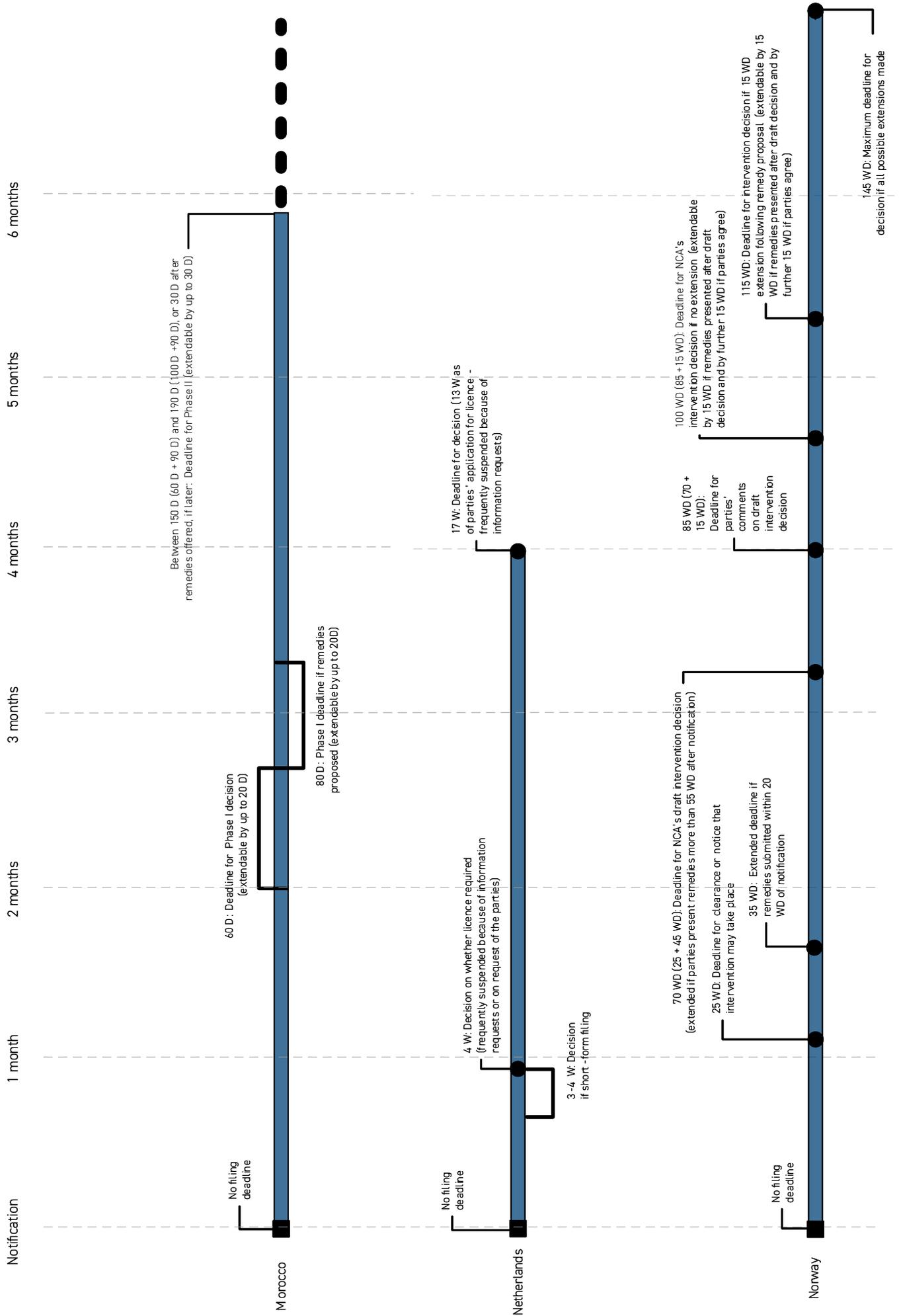


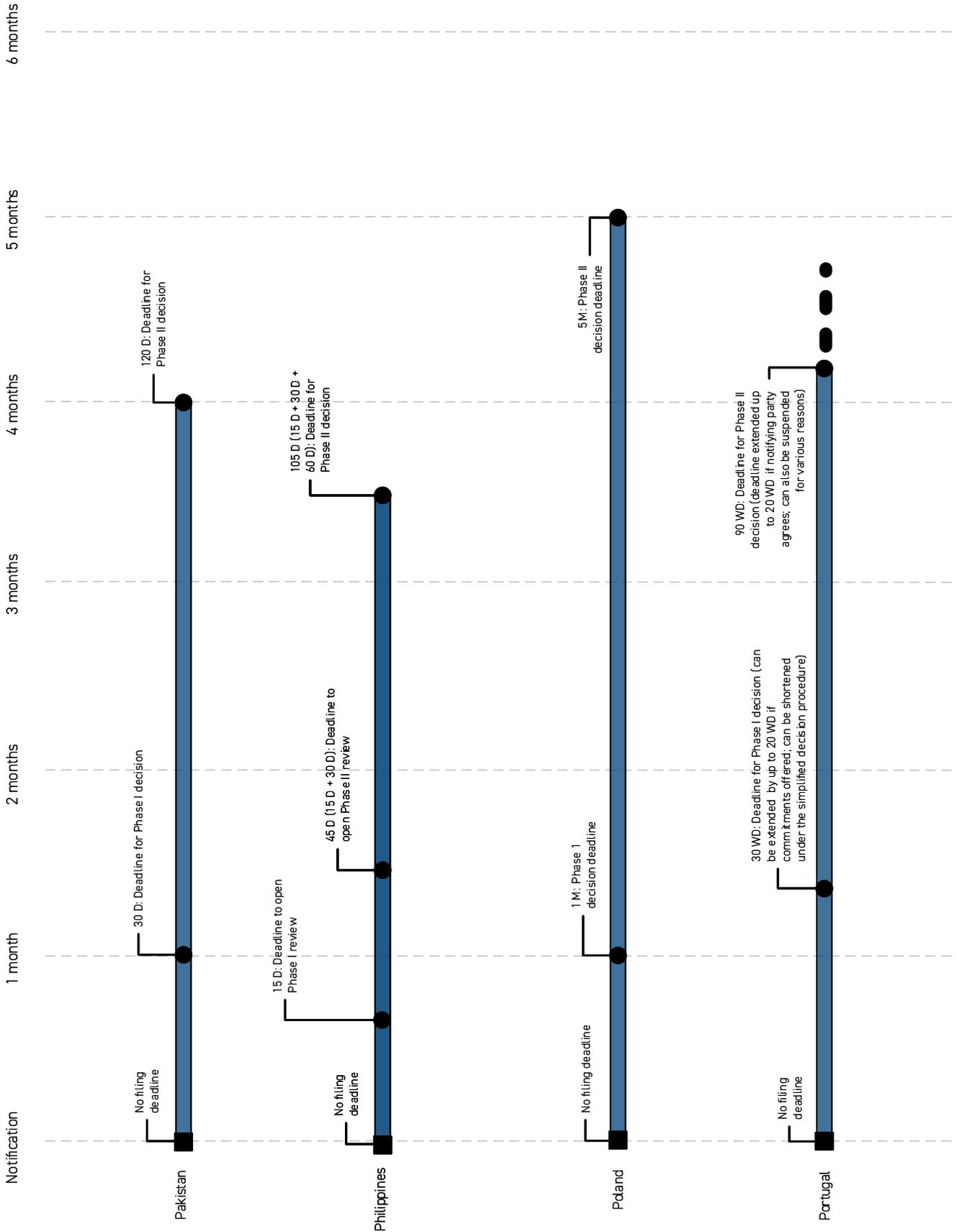


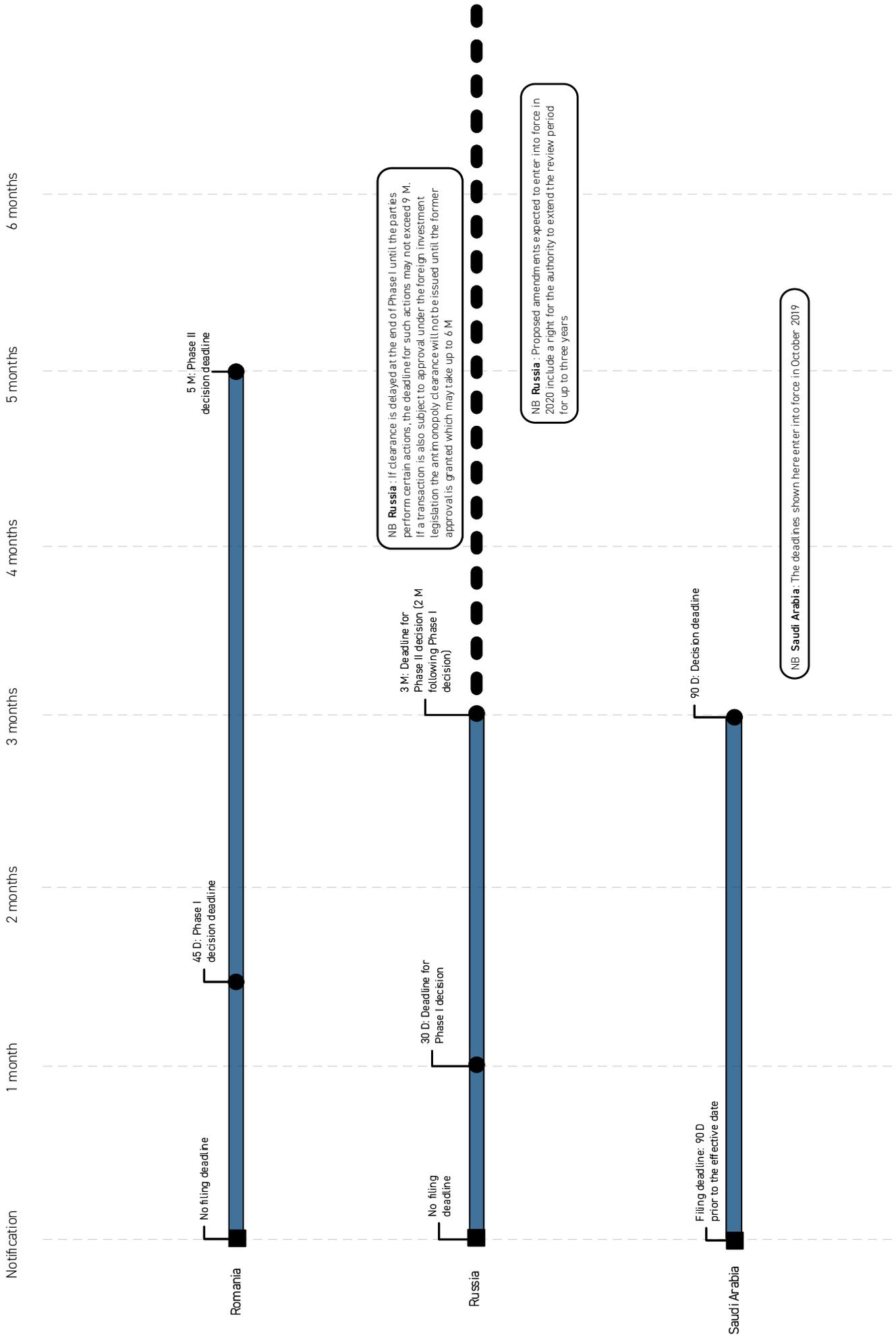


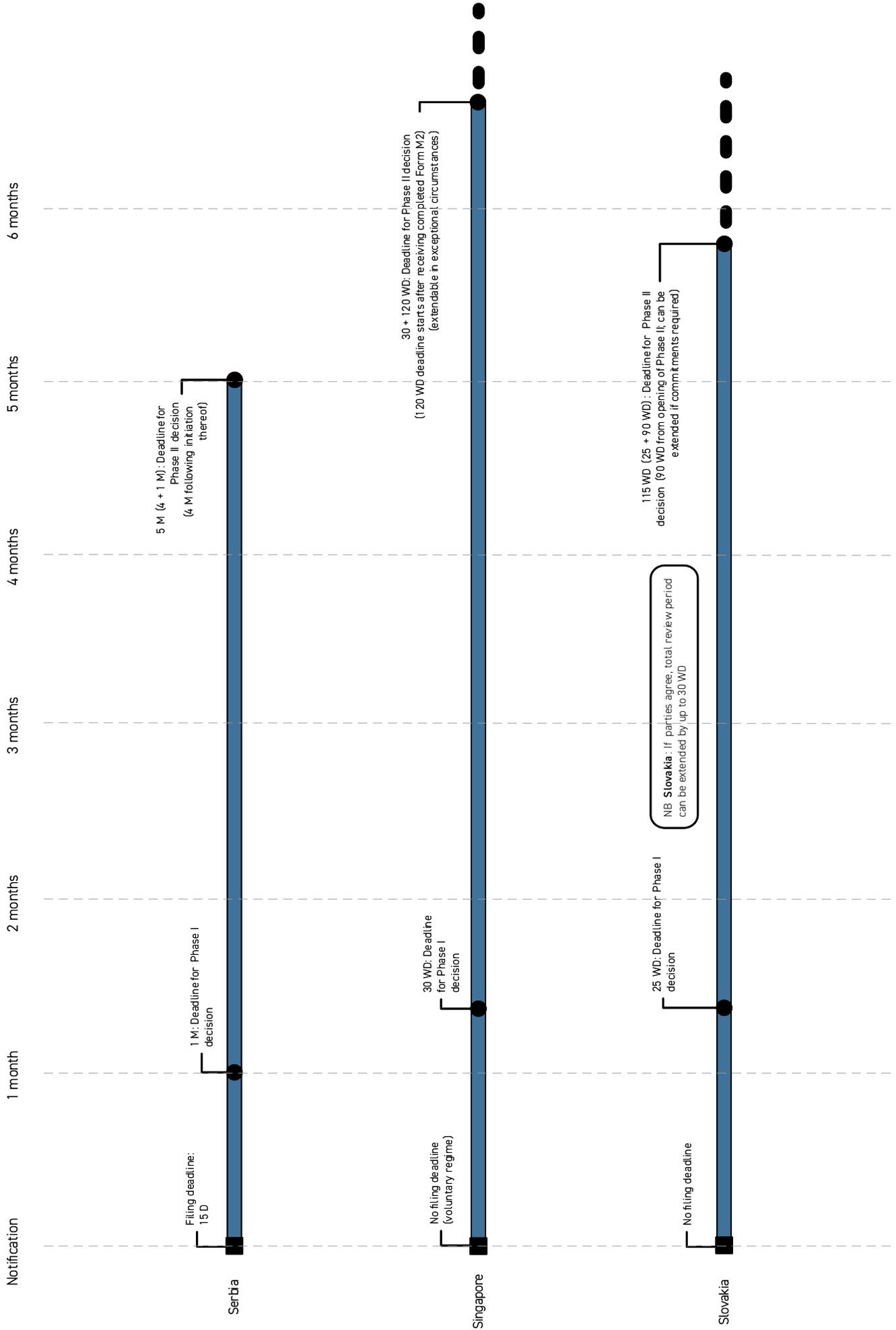


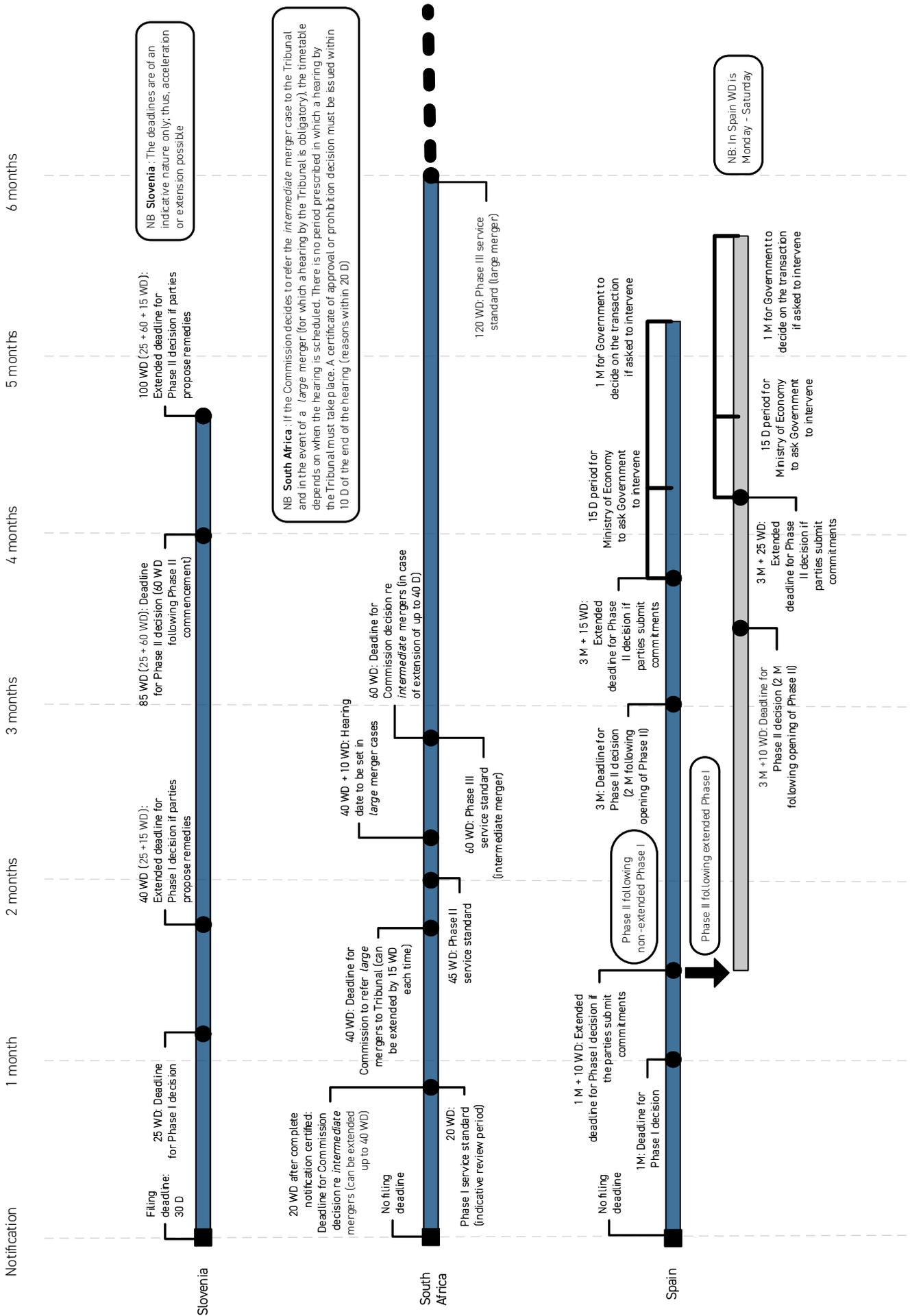


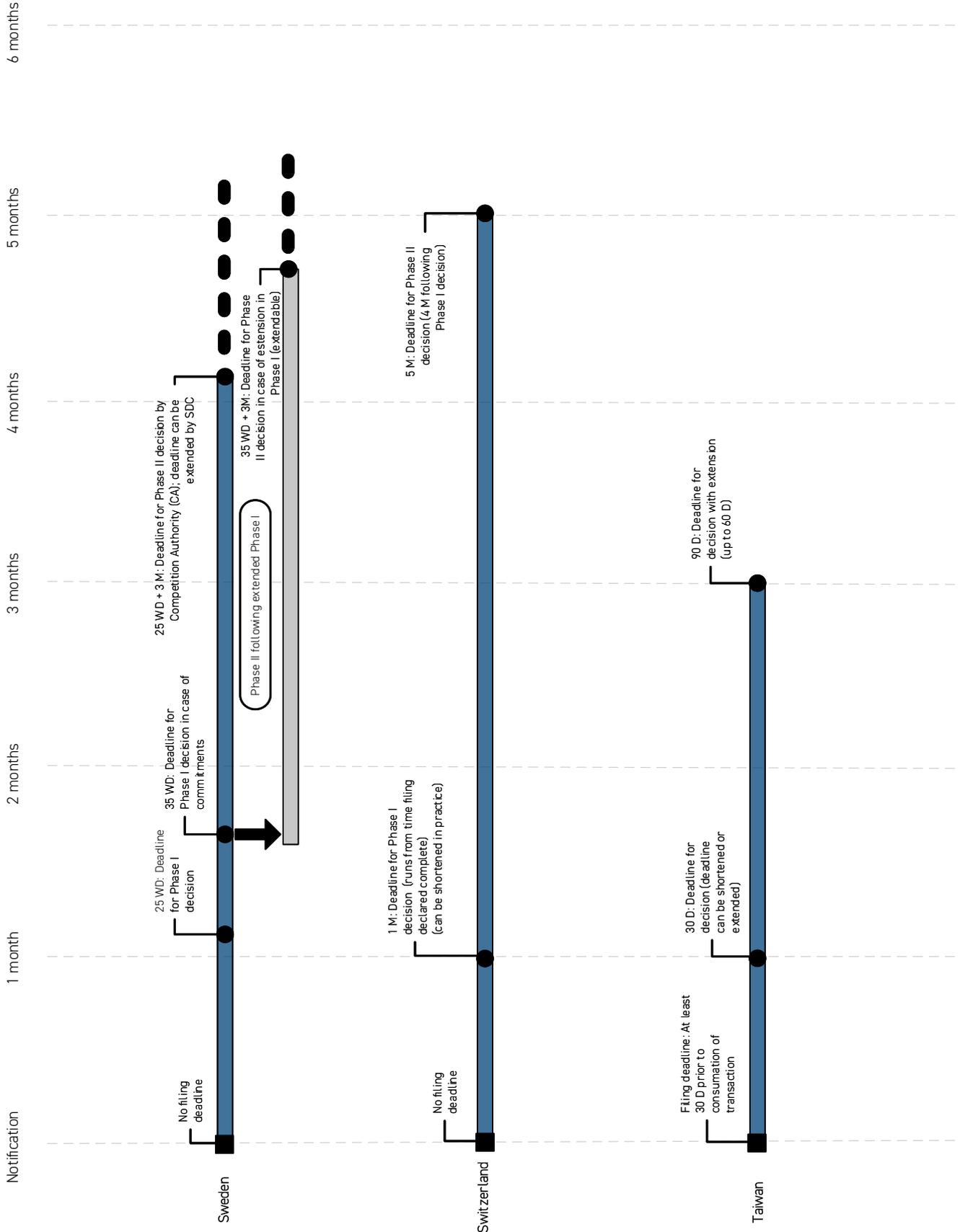


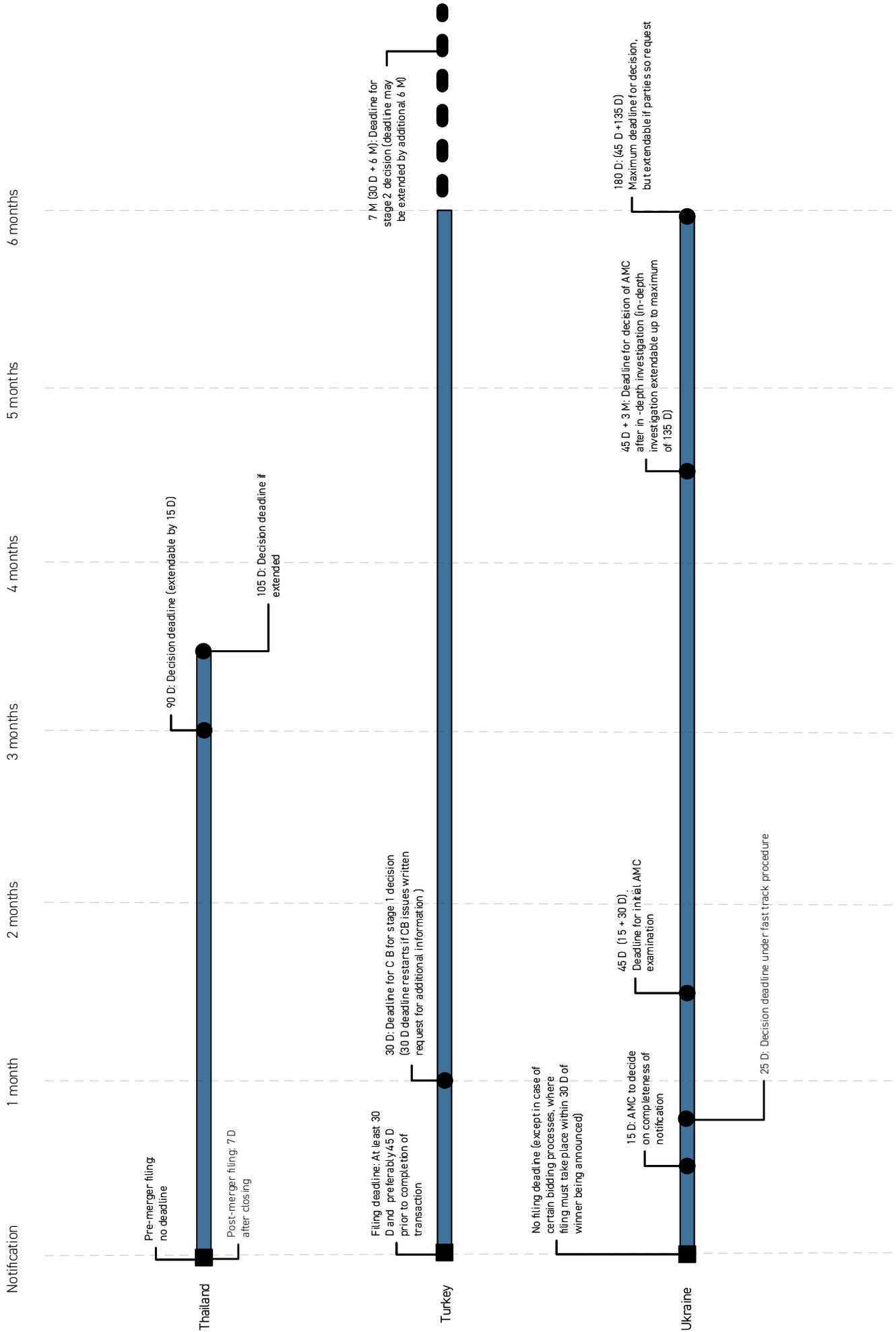


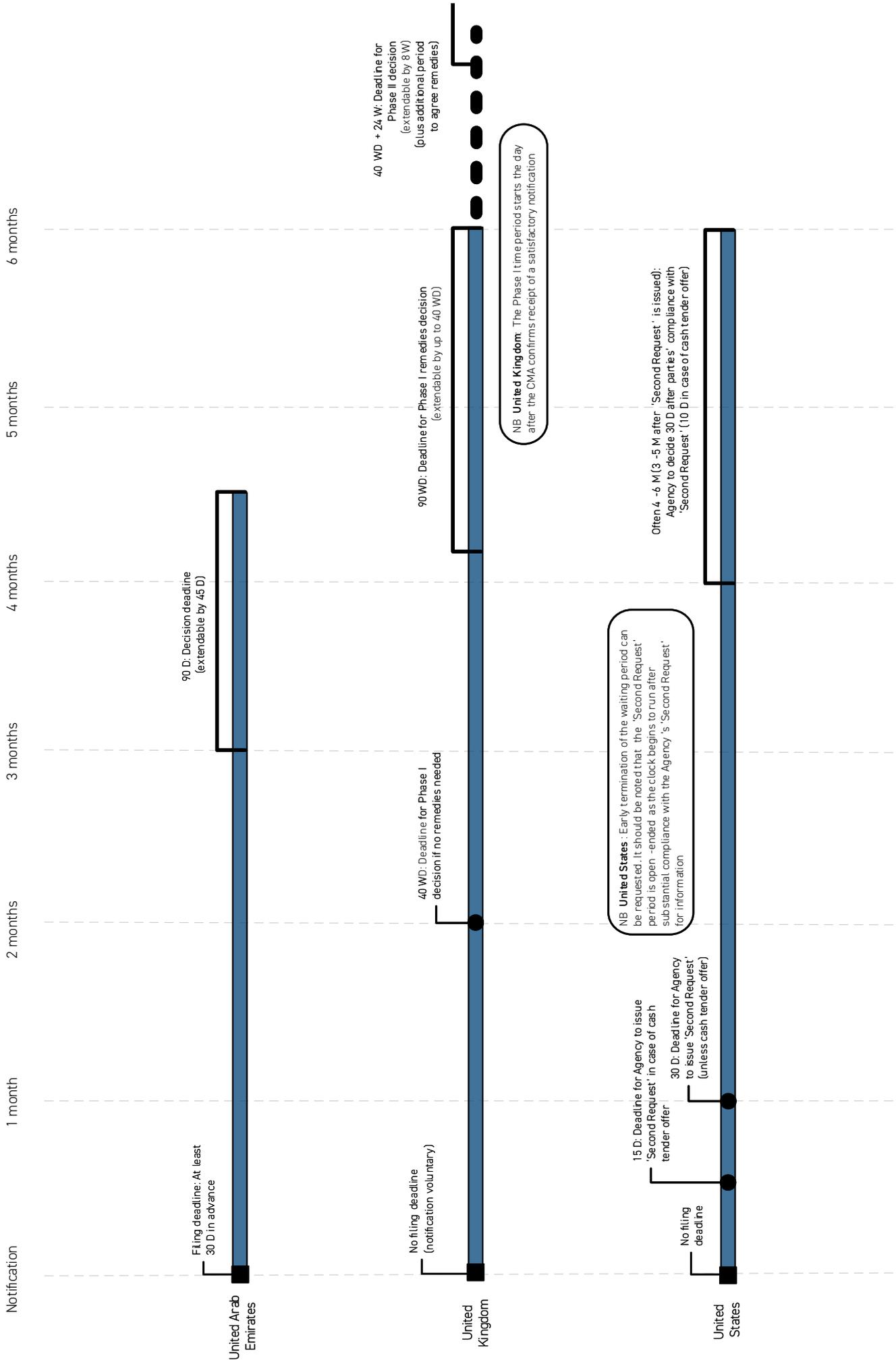


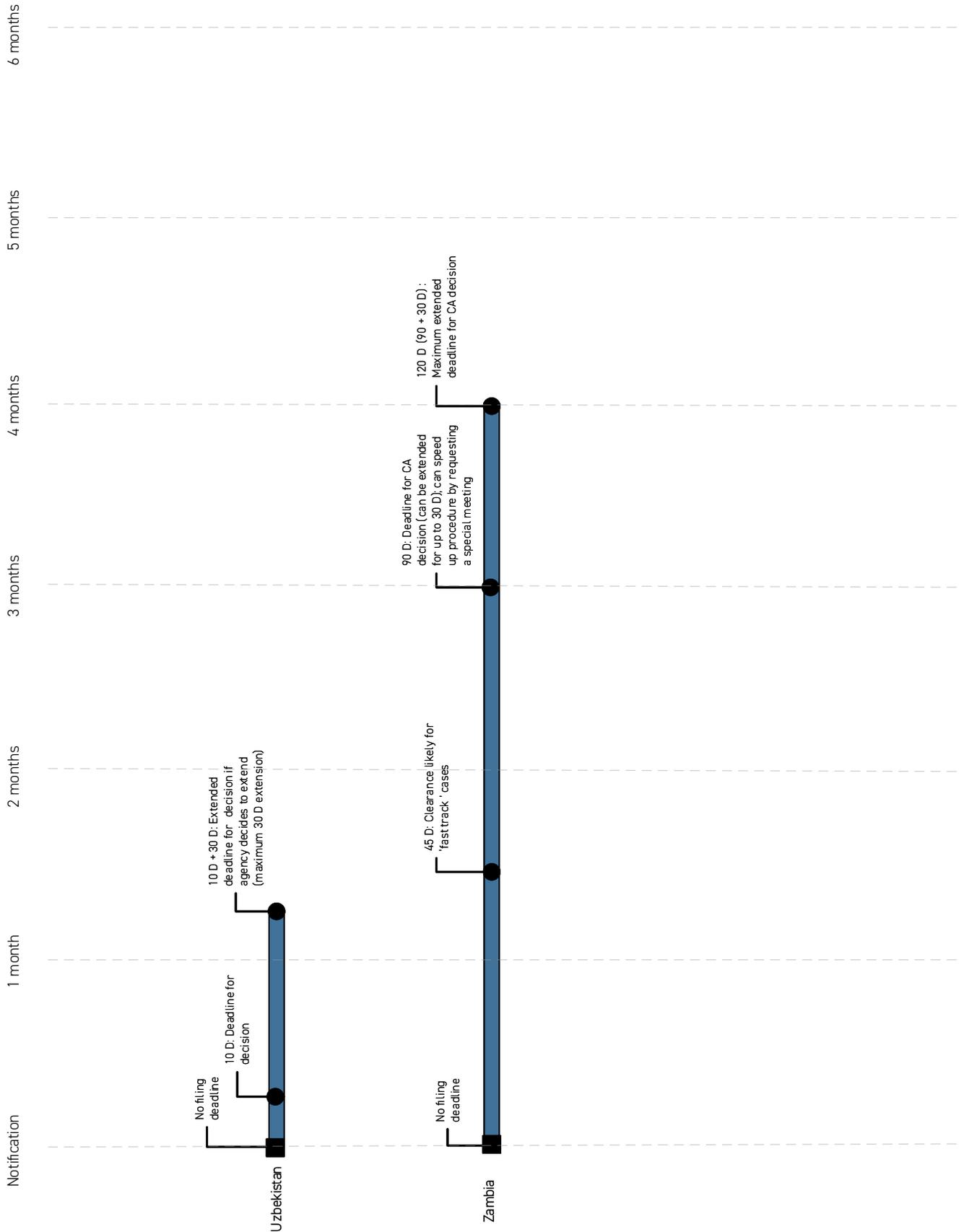












# Acknowledgements for verifying contents

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Albania	Albanian Competition Authority	Ms Ola Daka, Integration and Communication Director
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Belgium	BCA	Jacques Steenberghe, President of the BCA
Brazil	Conselho Administrativo de Defesa Econômica – CADE	Mário Sérgio Rocha Gordilho Júnior and Noemy Melo Colin
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Colombia	Superintendency of Industry and Commerce	Carolina Liévano Liévano, Head of Mergers Unit, Superintendency of Industry and Commerce
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Zambia	Competition and Consumer Protection Commission	Mr Chilufya Sampa, Executive Director

# Albania

Günter Bauer and Denis Selimi

Wolf Theiss

## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

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

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

### Scope of legislation

#### 2 | What kinds of mergers are caught?

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

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

#### 3 | What types of joint ventures are caught?

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

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

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

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

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

### Thresholds, triggers and approvals

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

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

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

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

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

The notification of a merger to the Authority is mandatory if the turnover threshold criteria specified in question 5 are met.

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

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

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

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

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

There are no specific rules on foreign investments.

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

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

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

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

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

With regard to the sanctions for closing before clearance, see question 12.

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

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

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

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

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

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

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

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

Phase I proceedings apply to mergers that will probably not lead to a substantial lessening of competition in the relevant market or part of it. In preliminary proceedings, the Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. In June 2016, the Authority introduced fast-track proceedings for certain types of concentrations that do not raise competition concerns (for details, see question 18). These accelerated proceedings enable the Authority to clear straightforward concentrations within 25 days of the working day following the confirmation of receipt of a complete notification.

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

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

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

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

### Pre-clearance closing

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

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

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

restriction of competition to qualify as a serious infringement. It remains to be seen how the Authority will interpret this requirement in practice.

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

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

In 2009, the Authority imposed a fine of 2.6 million leks on a company that had violated the merger filing obligation. Other possible remedies, such as structural sanctions (see question 24), were not imposed. In 2014, the Authority imposed a fine on a company for failure to notify amounting to 100,000 leks. That is in line with two cases in 2012 where the Authority imposed fines on two companies for failure to notify, amounting to 100,000 leks each.

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

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

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

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

**Public takeovers**

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

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

**Documentation**

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

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

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

The notification must, inter alia, provide the following:

- information on the identity of the undertakings concerned and their authorised representatives (such as names and addresses);
- turnover of the undertakings concerned in the domestic market and worldwide;

- market shares of the undertakings concerned, including information on the methods for their calculation or estimation;
- information on the form of the concentration (merger, acquisition of control, etc);
- information on the controlling interests in the undertakings concerned; and
- information on the relevant product and geographical market and, where applicable, the market affected by the concentration.

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

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

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

**Investigation phases and timetable**

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

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

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

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

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

In preliminary proceedings, the Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. That period can be extended by another two weeks if the parties offer certain measures to the Authority to mitigate the possible negative effects of the merger on the market. In practice, it is our experience that the Authority strives to decide on the transaction within one month of the receipt of a complete notification. In June 2016, the Authority introduced a fast-track merger control procedure for the following types of concentrations that usually do not give rise to competition concerns:

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

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

As already mentioned in question 11, under the fast-track procedure, the Authority clears concentrations by way of a short-form decision within 25 days of the working day following the confirmation of receipt of a complete notification.

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

The Competition Act provides that temporary clearance can be granted under certain circumstances (see question 14).

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

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

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

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

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

## Theories of harm

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

In general, the Authority will assess whether a merger leads to a substantial lessening of competition in the relevant market or part of it (see question 19). The Authority's assessment is based on a series of factors including the market share of the companies participating in the merger and of their competitors; barriers to market entry; potential competition; the economic and financial power of the undertakings concerned; the economic dependency of suppliers and customers; the development of the distribution networks; economic relationships with other undertakings; demand substitutability, etc. Neither the Competition Act nor the Guideline (or other guidelines in Albania) specify theories of harm that the Authority investigates specifically (besides the substantial lessening of competition); however, in practice, the Authority's assessment often refers to precedents established by the European Commission. Therefore, it is not unlikely that the Authority would look at theories of harm such as coordinated effects, foreclosure, harm to innovation, etc.

## Non-competition issues

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

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

## Economic efficiencies

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

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

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

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

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

## Remedies and conditions

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

The Authority may require certain remedies for clearance of the concentration, such as the divestiture of certain parts of the undertaking, the

sale of shareholdings in other undertakings, the termination of contractual relations, the granting of licences, and behavioural remedies.

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

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

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

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

**Ancillary restrictions**

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

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

**INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES**

**Third-party involvement and rights**

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

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

**Publicity and confidentiality**

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

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

**Cross-border regulatory cooperation**

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

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

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

**JUDICIAL REVIEW**

**Available avenues**

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

Decisions by the Authority may be challenged before the Tirana Court.

Fines imposed by the Authority have to be challenged within 30 days.

The Authority may revoke its decision if:

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

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

**Time frame**

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

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

**ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS**

**Enforcement record**

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

The Authority has in recent years shown its general willingness to impose fines on undertakings that violate the filing obligation or the prohibition to complete concentrations prior to receipt of Albanian merger clearance (for the respective fining practice in previous years, see question 12); six fines in 2018, no fines regarding those merger filing infringements were imposed. Beside the area of merger control, the Authority has shown specific interest and launched preliminary investigations regarding alleged abuses of dominant positions, in particular in the following sectors: technical control of vehicles, maritime port services and airport services.

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

**Reform proposals**

**35 | Are there current proposals to change the legislation?**

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

**UPDATE AND TRENDS****Key developments of the past year**

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

In 2018, the Authority reviewed and cleared 30 concentrations that were related to the following industry sectors: energy, audio-visual, fuels, call centres, tourism, banks, etc.

Apart from these, the Authority has shown specific interest and launched preliminary investigations for alleged abuses of dominant positions in the air travel sector, technical control of vehicles, food retailers, maritime port services, etc.

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

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# Algeria

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

Algerian merger control rules are set forth in Chapter III of Ordinance No. 03-03 dated 19 July 2003 relating to competition, as amended by Law No. 08-12 dated 25 June 2008 and Law No. 10-05 dated 15 August 2010 (Ordinance 03-03). The Executive Decree No. 05-219, dated 22 June 2005 (Decree 05-219) specifies the conditions of merger control notifications.

The competent authority is the Algerian National Competition Council (the Competition Council).

The Competition Council was reactivated on 29 January 2013 following a freeze of its activities for almost 10 years.

The Competition Council, as an administrative authority assigned to the Trade Minister, is entrusted with the following tasks:

- to sanction anticompetitive practices, such as concerted practices, cartels and abuses of a dominant position;
- to control concentrations, in particular to prevent the strengthening of dominant positions and the abuses that may derive from it; and
- to advise companies and associations at the request of public authorities or on its own initiative.

After a period of time to process the files left by the former Competition Council and train its members in the context of a twinning programme with the European Commission, the Competition Council now focuses notably on increasing the economic operators' awareness on the merger control framework.

The government and the Ministry of Trade retain residual powers regarding merger control. For example, the Competition Council shall seek the opinion of the Minister of Trade and the Minister in charge of the sector concerned by the concentration, before authorising or rejecting, by motivated decision, the concentration.

The government is entitled to authorise a concentration rejected by the Competition Council on the basis of public interest reasons.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Pursuant to article 15 of Ordinance 03-03, there is a concentration when:

- two or more previously independent undertakings merge;
- one or more natural persons already controlling at least one undertaking, or one or several undertakings, acquire directly or indirectly, whether by acquisition of an equity stake or by purchase of assets, by contract or by any other means, the control of the whole or of parts of one or several undertakings; or
- a joint-venture performing on a lasting basis all the functions of an autonomous economic entity is created.

#### 3 | What types of joint ventures are caught?

Joint ventures performing on a lasting basis all the functions of an autonomous economic entity are caught by the Algerian merger control regime.

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

The control, used to appraise the existence of concentrations, results from contractual rights or any other means that either separately or jointly, and having regard to the considerations of fact or law involved, give the possibility to exercise a decisive and lasting influence over the activity of an undertaking. In particular such control results from:

- ownership rights or rights to use all or part of the assets of an undertaking; and
- rights or contracts that confer decisive influence over the composition, deliberations or decisions of the corporate bodies of an undertaking.

### Thresholds, triggers and approvals

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

Concentrations that may impact competition by reinforcing, for example, the dominant position of an undertaking on a given market shall be notified to the Competition Council.

Such notification is automatically required when the concentration aims at achieving a threshold in excess of 40 per cent of the sales or purchases made on a given market.

Even in the hypothesis that the market share threshold of 40 per cent is not met, the referral to the Competition Council might be required when the concentration has an impact on the competition.

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

The filing is mandatory and not voluntary. No exceptions exist.

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

Foreign-to-foreign mergers must be notified to the Competition Council whenever the conditions set forth by Ordinance 03-03 are met, that is, the relevant transaction is characterised as a concentration and the concentration impedes competition on a relevant market (which is the case when the 40 per cent threshold is reached).

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

Algeria has adopted a new Investment Law in 2016, which repeals most of the provisions of Ordinance No. 01-03 on the development of investment and provides for significant changes to the legal framework governing investments. Six executive decrees dated March 2017 complete this new set of legal rules.

Foreign investments are merely subject to a prior registration with the National Agency for Investment Development. The approval of the National Council for Investment is no longer required, except with regard to the exceptional advantages granted by the Investment Law.

Among the rules applicable to foreign investments, it is worth noting that the exercise in Algeria by foreign investors of activities in the sectors of production of goods, services and importation can only be conducted through a company in which 51 per cent of the share capital is held by one or several Algerian national residents. As a consequence, the level of foreign ownership in the capital of an Algerian company operating in these sectors cannot exceed 49 per cent of the share capital.

Certain sectors are regulated and require specific approvals. Such sectors include:

- the oil and gas sector supervised by the Ministry of Energy, the Hydrocarbons Regulatory Authority and the Hydrocarbons Resources Valuation National Agency;
- the medical and pharmaceutical sector supervised by the Ministry of Health;
- the banking sector supervised by the Banking Commission (within the Central Bank);
- the insurance sector supervised by the Insurance Supervisory Commission;
- the automotive sector supervised by the Ministry of Industry and Mines; and
- the telecommunication sector supervised by the Post and Telecommunications Regulatory Authority.

In terms of the merger control regime, the Competition Council seeks the opinion of the Minister in charge of the sector concerned with the concentration, before authorising or rejecting the concentration, by motivated decision.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

No specific deadlines are provided for filing. The only obligation is to obtain a clearance from the Competition Council prior to closing the transaction. Given the level of details requested by the Competition Council as part of the filing, the transaction should be referred to the Competition Council as soon as it has become sufficiently advanced and certain.

In this sense, it is worth noting that the upcoming reform of Ordinance 03-03 provides that the notification shall be made when the project is sufficiently advanced to enable the file to be examined, in particular when the parties have reached an in-principle agreement or signed a letter of intent.

The absence of filing is sanctioned by Ordinance 03-03 when a referable transaction is closed without the clearance of the Competition Council (see question 12).

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

When the concentration takes the form of a merger or the creation of a full-function joint venture, it shall be jointly notified by the parties to the concentration.

When the concentration takes the form of a takeover, the acquirer is responsible for the notification.

No filing fees apply.

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

The Competition Council shall render its decision within three months of the filing.

During the timeline required for the decision of the Competition Council, the authors of the concentration operation shall not take any measure rendering the concentration irreversible. In other words, the filing has a suspensory effect.

### Pre-clearance closing

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

The sanction incurred in case of a concentration closed without prior clearance consists of a maximum fine of 7 per cent of the turnover realised during the last fiscal year in Algeria by the parties to the concentration or by the undertaking resulting from the concentration (article 61 of Ordinance 03-03).

Ordinance 03-03 and Decree 05-219 do not expressly provide for the dismantling of the concentration in Algeria (and cancellation of the effects of the concentration) in case the latter is closed without the prior clearance by the Competition Council.

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

The sanctions described in question 12 apply where a referable transaction is closed before clearance by the Competition Council, regardless of whether the transaction is foreign-to-foreign.

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

Ordinance 03-03 and Decree 05-219 do not provide for specific solutions to permit closing of foreign-to-foreign mergers before clearance.

### Public takeovers

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

The Algerian competition legislation does not provide for any special merger control regime applicable to public takeover bids. General rules should therefore be applied.

The upcoming reform of Ordinance 03-03 provides for a special provision whereby notification of a merger in the context of a takeover bid shall take place at the time of the announcement of the offer.

## Documentation

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

Decree 05-219 specifies the content of the file to be submitted to the Competition Council regarding the application for the authorisation of a concentration, which is fairly detailed.

The main documents and information to be provided consist of:

- the application form (according to Annex 1 of Decree 05-219) dated and signed by the 'concerned undertakings' (or their representatives duly authorised) indicating:
  - identity of the applicants;
  - identity of the other participants to the filing;
  - subject matter of the application; and
  - statement from the applicants whereby they declare that the information and documents provided to the Competition Council are sincere and conform to the facts, and that the estimates, figures and assessments are indicated in a manner as close as possible to the reality; and
- the information form (according to Annex 2 of Decree 05-219) providing for:
  - activity concerned by the notification;
  - turnover generated by the concerned activity;
  - share capital structure of each undertaking;
  - nature of the concentration;
  - economic and financial structure of the concentration;
  - market data (alternative markets of the products or services; geographical zone where the concerned undertakings offer their products or services); and
  - impact of the concentration on the concerned market of products or services (markets impacted by the concentration, structure of the concerned market of products or services, existence of barriers to entry into such market, extent of the impact of the concentration on the competition, measures to mitigate the effects of the concentration on the competition).

The Competition Council may ask for any other documents or information it deems necessary (it can even order the seizure of any documents it deems necessary).

The Decree 05-219 does not provide any sanctions for supplying wrong or missing information. The general rule of article 59 of the Ordinance 03-03 should therefore be applied.

## Investigation phases and timetable

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

Since its reactivation, the Competition Council is sparsely seized of concentration cases. Except for the indications provided by Algerian law (as described herein), it is difficult at this stage to rely on an outstanding practice from the Competition Council to describe the typical steps in an investigation.

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

Ordinance 03-03 provides that the overall process from the filing until the decision by the Competition Council shall not exceed three months. No detailed procedure or timetable per phase is provided by Algerian law.

The Algerian competition legislation does not provide for any accelerated procedure.

## SUBSTANTIVE ASSESSMENT

### Substantive test

- 19 | What is the substantive test for clearance?

The substantive test for clearance is whether the transaction impacts competition on a relevant market, by strengthening notably a dominant position. A referral to the Competition Council is automatic when the concentration aims at achieving a threshold in excess of 40 per cent of the sales or purchases made on a given market.

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

Algerian law does not provide for a special substantive test for joint ventures.

### Theories of harm

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

As a preliminary step, the Competition Council shall define precisely the relevant product markets and their geographical scope.

When assessing the impact of the concentration on competition, the Competition Council will analyse the various effects that the transaction might have, such as:

- horizontal effects (horizontal overlap resulting in the creation or strengthening of a dominant position);
- vertical effects (input foreclosure or customer foreclosure);
- coordinated effects (coordination of behaviour post-merger); and
- conglomerate effects (portfolio effects).

### Non-competition issues

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

The concerned parties shall submit to the Competition Council, as part of the filing, the purpose of the concentration as well as the economic sectors concerned by the merger.

Once the review process has been completed and the Competition Council has made its decision, the government may authorise for general interest reasons, upon a report of the Minister of Trade and the Minister responsible for the sector concerned by the concentration, a concentration rejected by the Competition Council.

Moreover, the Algerian mergers control authorises mergers when they are resulting from the application of legislative or regulatory text.

### Economic efficiencies

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

Concentrations that improve the competitiveness, help to develop employment or enable small and medium-sized enterprises to consolidate their competitive position in the market are not subject to the 40 per cent threshold. Such efficiencies are assessed by the Competition Council as part of the review process.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

The Competition Council is entitled, after consultation with the Minister of Trade and the Minister responsible for the sector concerned by the concentration, to reject the merger by reasoned decision.

Article 21 of Ordinance 03-03 entitles the Algerian government to authorise, on the basis of a report of the Trade Minister and the Minister in charge of the sector concerned by the concentration (at its own initiative or upon the request of the parties), a concentration rejected by the Competition Council, provided that public interest reasons justify such authorisation.

### Remedies and conditions

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

The Competition Council can authorise the concentration with prescriptions aimed at mitigating the effects of the concentration on the competition. The parties to the concentration could also by themselves undertake certain commitments aimed at mitigating the effects of the concentration on the competition.

In the case of non-compliance with the prescriptions or commitments, the Competition Council may impose a fine of up to 5 per cent of the turnover excluding taxes realised in Algeria during the last financial year by each undertaking that is a party to the concentration, or by the undertaking resulting from the concentration.

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

The parties are entitled to suggest, by themselves, commitments along with the notification file. Indeed, the parties shall indicate in the notification of the concentration the nature of measures to be taken to mitigate the effects of the concentration on competition (if applicable).

Nothing prevents the parties from proposing commitments during the review process of the filing by the Competition Council.

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

To our best knowledge, the Competition Council has not yet required remedies in foreign-to-foreign merges since its reactivation in 2013.

### Ancillary restrictions

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

Ordinance 03-03 remains silent on the issue of ancillary restrictions. The decisional practice of the Competition Council would likely clarify this issue in the future.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

Customers and competitors might be involved in the review process of the concentration, as the Competition Council is authorised to seek

the advice of any expert or hear any person who may inform it. The Competition Council may collect any information it deems necessary for its investigation from the companies or any other person.

### Publicity and confidentiality

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

Decisions rendered by the Competition Council are published in the official competition bulletin as well as on the website of the Competition Council.

Past decisions and brief summaries of pending notifications are publicly available on the Competition Council's website.

The Competition Council members are bound by professional secrecy.

When filing a concentration to the Competition Council, the concerned undertakings can ask that certain information or documents be covered by the trade secrecy. In such case, the concerned information and documents are made available separately and shall indicate on each page 'trade secret'.

It is worth noting that nothing prevents the Competition Council from organising a market test with respect to the concentration resulting from any transaction, and contacting the parties' competitors and suppliers to define, for example, the relevant product markets and their geographical scope.

### Cross-border regulatory cooperation

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

Since its reactivation, the Competition Council has cooperated with the French Competition Authority, the Italian and German competition councils to elaborate its doctrine, in the frame of a cooperation programme financed by the European Commission, entitled 'programme de jumelage entre l'Algérie et l'Union Européenne (P3A)'.

This programme involves the members of the Competition Council and the French Authority (as leader and principal partner) and the Italian and German competition councils. One of the purposes of this programme is to provide training to the Competition Council from European experts, and to assist the Competition Council in building its own doctrine.

For example, on 27 April 2017, the Competition Council with the French Competition Authority's vice president led a workshop in Algiers, which many companies, organisations and administrations attended, to raise their awareness of competition compliance programmes.

## JUDICIAL REVIEW

### Available avenues

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

A decision of the Competition Council rejecting a concentration can be appealed before the Conseil d'Etat (administrative Supreme Court).

The upcoming reform clarifies the fact that decisions authorising a concentration can also be appealed before the Conseil d'Etat.

### Time frame

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

Ordinance 03-03 does not provide for any appeal period.

**ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS****Enforcement record****34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

The Competition Council is sparsely seized of concentration cases, with around four applications since its reactivation, including one case in 2014 on the acquisition by the National Investment Fund of 51 per cent of Orascom Telecom Algérie (Djezzy) share capital, one of the leading mobile operators in Algeria. More recently, on 15 October 2017, the Competition Council has received a merger notification in the industrial gases sector between LINDE AG, a German company, and PRAXAIR INC, a US company. By a decision dated 16 January 2018, the Competition Council authorised the operation without subjecting the parties to commitments. Within the framework of the substantive assessment, the Competition Council submitted the operation to the opinion of several ministries concerned by the concentration as provided for in article 19 of Ordinance 03-03, including: the Ministry of Energy; the Ministry of Industry and Mines; and the Ministry of Trade. In an effort to address this trend, the Competition Council recently conducted an awareness campaign intended for the economic operators on the merger control framework, recalling the sanctions incurred when a notifiable concentration is realised without the Competition Council authorisation (fine up to 7 per cent of the turnover realised during the last fiscal year in Algeria by the parties to the concentration or by the undertaking resulting from the concentration). On 9 January 2018, the Competition Council published a communiqué to the economic operators concerning the authorisations of the merger operations in which it develops the conditions and the procedure of merger control notification.

**Reform proposals****35 | Are there current proposals to change the legislation?**

The Competition Council has announced that a draft reform of Ordinance 03-03 on competition is under preparation.

This draft reform results from an audit of the Algerian competition legal and regulatory framework led by international experts under the auspices of UNCTAD, and from the experience gained by the Competition Council over the past four years.

The reasons for this draft reform were exposed by the Competition Council in its last annual report, which include the several grey areas of the current framework.

In its notice No. 04/2016, the Competition Council details the main proposed amendments to the provisions of Ordinance 03-03.

Concerning the merger control regime, the main proposals can be summarised as follows:

- clarification of the deadline for filing (ie, when the parties concerned are in a position to submit a project sufficiently advanced to enable the file to be examined, in particular where they have reached an in-principle agreement, signed a letter of intent or announcement of a takeover bid or public offering sale);
- replace the 40 per cent market share threshold by turnover thresholds;
- total worldwide turnover excluding taxes of all the undertakings or groups of natural or legal persons involved in the concentration exceeds the amount fixed by regulation; and
- total turnover excluding taxes in Algeria by at least two of the undertakings or groups of natural or legal persons concerned exceeds the amount fixed by regulation.

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# Australia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

The Competition and Consumer Act 2010 (CCA) regulates mergers affecting Australia from a competition law perspective. The CCA is a federal law aimed at restricting anticompetitive business conduct and protecting consumers.

The merger provisions of the CCA are enforced by the Australian Competition and Consumer Commission (ACCC). Section 50 is the main merger provision in the CCA. Only the ACCC has standing to seek a Federal Court injunction under section 50 to prevent a merger from proceeding. Other persons, including competitors, can take action against anticompetitive mergers following completion, and may seek damages, declarations or divestiture. The ACCC may also seek these remedies following an acquisition and, in addition, may seek pecuniary penalties and an order declaring the transaction void.

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

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

### Scope of legislation

#### 2 | What kinds of mergers are caught?

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

effect on competition in terms of the section of the global or regional market that exists within Australia.

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

#### 3 | What types of joint ventures are caught?

Joint ventures will be caught under the merger provisions of the CCA if they involve the acquisition of shares or assets. Other provisions of the CCA may also need to be considered in relation to joint ventures, including the provisions dealing with anticompetitive arrangements and the civil and criminal cartel offences. There are exceptions to the civil and criminal cartel offences for joint ventures for the production, supply or acquisition of goods or services; however, strict criteria must be satisfied for the defences to apply.

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

There is no definition of 'control' in relation to section 50. Section 50 applies to all acquisitions of shares or assets, regardless of whether they deliver 'control' of the target firm, if the acquisition leads to a substantial lessening of competition.

It will generally be assumed that a corporation controls its subsidiaries. The CCA defines an entity as a 'subsidiary' if the parent:

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

Where an acquisition does not result in the target becoming a subsidiary, the acquisition of a minority shareholding may nonetheless be found to give rise to effective control. Factors that will be taken into account by the ACCC when considering whether the acquisition of a minority shareholding is sufficient to deliver control of a company or raise competition issues include:

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

Further, the ACCC may raise issues under section 50 even where no control is achieved, if it regards the transaction as leading to a

substantial lessening of competition by reducing competitive tension between parties in the market or increasing the potential for coordinated conduct.

In relation to transactions that occur wholly outside Australia and are captured by section 50A, there is a requirement that a controlling interest is obtained in order for the transaction to be reviewable under section 50A. A controlling interest will be obtained if a company becomes a subsidiary (as defined above) of the acquirer.

### Thresholds, triggers and approvals

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

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

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

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

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

The notification of mergers and acquisitions in Australia is voluntary and there is no minimum turnover or other monetary threshold for notifying mergers to the ACCC. However, the ACCC's Merger Guidelines indicate that the ACCC expects to be notified of mergers in advance where the products of the merger parties are either substitutes or complements, and the merged firm will have a post-merger market share greater than 20 per cent in the relevant market.

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

- An informal clearance system under which parties approach the ACCC on an informal (and sometimes confidential) basis for clearance on the grounds that the transaction is unlikely to result in a substantial lessening of competition. There is no statutory basis for this clearance, and it does not prevent third parties from subsequently challenging the transaction. The process followed by the ACCC in an informal review is set out in the ACCC's Informal Merger Review Process Guidelines. It is the main method of obtaining clearance in Australia.
- A merger authorisation process that came into effect (in its current form) on 6 November 2017. The ACCC can grant merger authorisation if it is satisfied that either the proposed acquisition would be unlikely to substantially lessen competition or the likely public benefit from the proposed acquisition outweighs the likely public detriment. Where authorisation is granted and any conditions

attached to the authorisation are complied with, an action cannot be brought by the ACCC or third parties on the basis that the acquisition contravenes section 50 of the CCA. The ACCC's Merger Authorisation Guidelines outline the legislative requirements and procedural steps for parties wishing to apply to the ACCC for authorisation of proposed mergers and acquisitions.

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

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

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

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

Also see comments below in relation to rules on foreign investment.

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

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

Among other things, the Australian government may consider both domestic and global competition issues when assessing an application for foreign investment approval.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

As there is no mandatory requirement under the CCA for the parties to a proposed transaction to notify the ACCC, there are no sanctions for not filing. However, if a transaction proceeds without notification and the ACCC successfully establishes that it has the likely effect of substantially

lessening competition in any market, then penalties and remedies for a contravention of the merger provisions will apply (see question 24).

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

- informal clearance: there is no set deadline for filing; however, parties will normally approach the ACCC on a confidential basis prior to the public announcement of a transaction; or
- authorisation: there is no set deadline other than the parties must lodge a filing prior to completion of the transaction. As an undertaking that the transaction will not complete until after the ACCC's decision is required to be provided, any filing should occur well in advance of completion to allow for the statutory time periods (see question 11).

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

The acquirer is usually responsible for notifying a transaction to the ACCC under the informal process, and is the party required to file under the merger authorisation process. There are no fees for informal clearances by the ACCC. There is a filing fee of A\$25,000 for authorisation applications lodged with the ACCC. Fees are generally payable in respect of filings required to be made to FIRB under the FATA.

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

In relation to an informal clearance decision, there is no set time frame for an ACCC decision. Seeking informal clearance does not require the transaction to be suspended prior to clearance, but in some cases where the ACCC identifies competition concerns, the ACCC will request the acquirer provide it with a written undertaking not to complete the acquisition during the informal merger review process, or alternatively to provide a minimum period of notice before completing the transaction. If an undertaking is not provided, the ACCC may seek a court injunction to stop the transaction completing until it has completed its review.

In general, an initial assessment of a merger will be conducted to determine whether a public review will be required. Where the ACCC is satisfied, based on that initial assessment of the information provided that there is a low risk of a merger substantially lessening competition, the ACCC may decide that it is not necessary to conduct a public review – these mergers are described as being 'pre-assessed'. An initial assessment can be conducted for both confidential and non-confidential mergers. A significant proportion of the mergers notified to the ACCC are able to be pre-assessed expeditiously, often within two to four weeks, some of which involve targeted market inquiries conducted by the ACCC, subject to whether the transaction is confidential. If the ACCC decides that a public review is necessary to assess a merger in the public domain, the review will typically take a further six to 12 weeks. Complex mergers that result in the publication of a statement of issues are likely to take an additional six to 12 weeks after the statement of issues is published, but this can vary depending on factors such as the responsiveness of the merger parties to information requests and whether remedies are proposed.

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

## Pre-clearance closing

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

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

Where informal clearance is sought from the ACCC, it is usual to wait until the ACCC has concluded its review before completing the merger. There are no sanctions for closing a transaction before informal clearance is obtained; however, the ACCC is able to seek an injunction to prevent this from occurring. Alternatively, the ACCC might let the transaction proceed and instead seek remedies including pecuniary penalties (see question 24), divestiture of the shares or assets acquired, or an order that the transaction is void and that monies should be refunded to the vendor. The ACCC has rarely sought these remedies in relation to mergers. More commonly, if the ACCC is concerned that the transaction raises serious competition issues, it will seek an undertaking from the parties not to complete the transaction until completion of the ACCC's review. Often this undertaking will be provided if the transaction is one in which there are complex competition issues, given the potential for the ACCC to obtain an injunction if the undertaking is refused.

If a filing has been made to FIRB under the FATA, it is a criminal offence to close without FIRB approval.

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

As there is no mandatory requirement under the CCA for the parties to a proposed transaction to notify the ACCC, there are no sanctions for closing prior to clearance. However, if the ACCC subsequently establishes that the transaction has the likely effect of substantially lessening competition in any market, then the court can impose penalties and other remedies for a contravention of the merger provisions (see question 24).

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

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

In limited circumstances, the ACCC may accept the following:

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

## Public takeovers

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

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

## Documentation

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

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

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

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

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

There are serious consequences for providing false or misleading information to the ACCC when applying for informal clearance or authorisation.

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

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

## Investigation phases and timetable

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

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

Where a party seeks informal clearance:

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

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

The application must be accompanied by a lodgement fee of A\$25,000, an undertaking that the parties will not complete the merger before a decision is reached, a declaration that the application is true, correct and complete, and an electronic copy of any relevant information or other documents (eg, transaction documents). The ACCC will then follow the timeline set out in question 18.

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

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

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

### Informal clearance

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

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

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

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

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

While the ACCC will attempt to meet shorter deadlines, particularly where genuine commercial considerations can be demonstrated, it will not do so if this compromises its ability to make appropriate market enquiries. The ACCC publishes an indicative and non-binding timeline for each public informal clearance review at the beginning of the public review process, which outlines the dates it expects each of the above

stages to be completed. The timeline may be suspended or revised if the ACCC requests additional information from the merger parties or other parties, or if remedies are proposed that require additional public consultation.

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

### Authorisation

In the case of applications for merger authorisation, the ACCC must make a decision in respect of an application within 90 days of the application being validly lodged (this may be extended as set out in question 11). If the ACCC has not made a decision within 90 days (or any extended period), the application is taken to have been refused.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

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

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

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

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

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

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

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

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

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

There is no special substantive test for joint ventures. As discussed in question 3, joint ventures are only covered by the merger regime if they involve the acquisition of shares or assets. However, other provisions of the CCA need to be considered in relation to joint ventures, including the civil and criminal cartel offences and the provisions dealing with anticompetitive arrangements.

### Theories of harm

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

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

### Non-competition issues

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

Where a party seeks merger authorisation, non-competition issues may be relevant, as they are taken into account when determining whether the public benefit of the merger outweighs the public detriment (see question 19). They are also relevant if the merger occurs wholly outside Australia and falls for review under section 50A.

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

### Economic efficiencies

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

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

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

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

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

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

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

### Remedies and conditions

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

In relation to informal clearances, the ACCC may grant clearance subject to remedies in the form of undertakings. Where the ACCC raises concerns about a transaction, the parties may modify the proposal by providing a court-enforceable undertaking pursuant to section 87B of the CCA, which may include divestment or behavioural undertakings. The ACCC's Merger Guidelines indicate that the ACCC has a strong

preference for structural (divestment) undertakings and that behavioural undertakings will only occasionally be appropriate, as an adjunct to a structural remedy. It is rare for the ACCC to accept behavioural undertakings that apply on a permanent basis. In addition, the Merger Guidelines state that the ACCC will generally prefer divestiture to occur on or before the completion date of a merger.

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

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

Where divestment is negotiated as part of a remedy provided to the ACCC, the divestiture remedy will specify the period within which divestment must occur. As stated in question 25, the ACCC's preference is for divestments to occur on or before the completion of the acquisition. If this is not possible, the ACCC's general practice has been to require an independent administrator or manager to be appointed during a hold-separate period between completion of a merger and subsequent divestment of any business or assets required to obtain competition clearance. Although the period in which divestment must take place will depend on the circumstances, the ACCC's preference is a divestment period of one to three months where divestment post-completion is required.

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

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

- in March 2019, the ACCC accepted an undertaking from Gebr. Knauf KG (Knauf) and a number of related Australian entities in relation to Knauf's proposed acquisition of USG Corporation (USG). USG's only interest in Australia was its 50 per cent share in a joint venture with Boral International Pty Ltd and Boral Building Materials Pty Ltd. The undertaking provided that if Knauf did not divest USG's joint venture interest to an ACCC-approved purchaser within a certain period, Knauf would divest certain other assets;
- in March 2016, the ACCC accepted an undertaking from Iron Mountain Incorporated in relation to its proposed acquisition of Recall Holdings. The undertaking provided that Iron Mountain would divest its Australian business, other than its local records management customers in the Northern Territory and its data protection business;
- in January 2015, the ACCC accepted an undertaking from GlaxoSmithKline Plc (GSK) and Novartis AG (Novartis) in relation to GSK's proposed acquisition of Novartis' global human vaccine businesses. The undertaking provided that the merged entity would comply with European Commission commitments relating to the divestiture of GSK's global MenACWY Vaccines Business;
- in December 2014, the ACCC accepted an undertaking from GSK and Novartis Consumer Health Australasia Pty Ltd in relation to Novartis AG and GSK's proposal to merge their healthcare businesses. The undertaking provided that the merged entity would

divest Novartis' business relating to Nicotinell products in Australia; and

- in July 2014, following the Hertz Global Holdings Inc (Hertz) acquisition of Dollar Thrifty Automotive Group Inc (Thrifty), the ACCC accepted an undertaking from the parties. The terms of this undertaking provided that the Hertz and Thrifty businesses in Australia must continue to compete. This was ensured by ring-fencing the management of the businesses, limiting the information shared by the businesses, preventing the sharing of confidential information between the businesses and Hertz relinquishing certain licensing rights in respect of the Thrifty business in Australia.

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

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

### Ancillary restrictions

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

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

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

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

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

### Publicity and confidentiality

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

The informal clearance process may be undertaken by the ACCC on a confidential or non-confidential basis. If a merger is pre-assessed or an acquirer seeks a confidential assessment, no public review will be conducted and the details of the proposed merger and the ACCC's views on it will not be included in the mergers register on the ACCC website. If the ACCC decides that a public review is required, the ACCC will disclose its consideration of the public proposal, but information that is provided to the ACCC either by the parties to the transaction or by third parties on a confidential basis will not be disclosed unless required by law. The ACCC actively seeks to protect the confidentiality of information provided to it on a confidential basis, so that potential acquirers as well as other interested parties feel comfortable providing commercially confidential information to the ACCC to assist in its assessment of the transaction. Note, however, that the ACCC may provide such information to other regulators, both in Australia and overseas, pursuant to section 155AAA of the CCA.

In terms of publicity, once a transaction undergoes a public review, the ACCC will list the review on its website. It may issue a general invitation for submissions from third parties, or conduct a targeted consultation process where submissions are sought directly from customers, suppliers, competitors and other potentially affected parties. If the ACCC releases a statement of issues in relation to the transaction,

it will also usually issue a media release. At the conclusion of a merger, the ACCC will routinely issue a media release, and subsequently will either post a summary of the reasons for the decision on the website or issue a public competition assessment with more detailed reasons for the ACCC's decision.

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

### Cross-border regulatory cooperation

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

The ACCC liaises with, and seeks assistance from, overseas regulators in relation to merger matters. This includes the New Zealand Commerce Commission (NZCC), with which the ACCC has a protocol for cooperative trans-Tasman mergers review and cross-commission appointments between the ACCC and NZCC, the Department of Justice (antitrust division) and the Federal Trade Commission in the United States, the Competition Bureau in Canada, the European Commission, and the Competition and Markets Authority in the United Kingdom. Where the ACCC seeks to engage in such exchange through sharing of confidential information and documents obtained from the merger parties, its common practice is to obtain consent for such disclosure from the parties through its standard form waiver. Exchange of information between these regulators is subject to the confidentiality restrictions under which the regulator operates. The ACCC is also actively involved in the International Competition Network through which it is able to liaise with individual competition agencies.

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

## JUDICIAL REVIEW

### Available avenues

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

There is no statutory right under the CCA to appeal an ACCC informal clearance decision. If the ACCC indicates that it will reject an application for informal clearance and oppose the merger, the acquirer may seek a declaration in the Federal Court that the proposed acquisition does not have the effect or likely effect of substantially lessening competition. If

the parties decide to proceed with the transaction, the ACCC may seek an injunction. If the ACCC rejects an application for informal merger clearance, the applicant also has the option of instead applying to the ACCC for authorisation. Unlike the informal clearance process, authorisation allows for net public benefits to be considered as part of the ACCC's assessment and also offers additional appeal rights (as set out below) if the application is rejected by the ACCC.

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

## Time frame

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

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

In relation to merger authorisations, if a determination made by the ACCC is appealed to the Tribunal, the Tribunal must make a decision within 90 days of receiving the application for review. An extended period of 120 days applies for the review if the Tribunal allows new information, documents or evidence. The Tribunal may extend this period by a further 90 days if the Tribunal considers it necessary because of its complexity or other special circumstances. In relation to appeals on decisions of the Tribunal, there is no set time frame by which an appeal on a question of law would be heard by the Full Federal Court, although, as noted, the court will attempt to deal with merger matters expeditiously.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

As at 7 June 2019, 24 of the 310 mergers assessed by the ACCC under the informal clearance regime have undergone a public review in FY2018–2019. Out of those mergers, 16 were cleared unconditionally, five were cleared subject to remedies to address competition concerns, one was discontinued before the ACCC made a final decision and two were opposed.

To date, there has been only one application made to the ACCC for merger authorisation under the new regime discussed above under question 6, in relation to the proposed acquisition by AP Eagers Limited of Automotive Holdings Group Limited. That application is still under consideration.

There are a number of enforcement trends that have recently emerged. One of those trends is that the ACCC is increasingly beginning to scrutinise the broader commercial arrangements between merger parties. For example, in July 2018 the ACCC instituted proceedings against Cryosite, Limited (Cryosite), a supplier of cord blood tissue and banking services in Australia, in relation to the proposed sale of its assets to Cell Care Australia Pty Ltd (Cell Care). The ACCC alleged that Cryosite and Cell Care engaged in cartel conduct, which amounted to 'gun jumping' by making an agreement as to how they would market their services and how customers would be allocated between them in

the pre-completion period. The parties had not sought informal merger clearance from the ACCC. Cryosite ultimately admitted that it had engaged in cartel conduct and agreed to pay a penalty of A\$1.05 million in civil penalties.

In July 2018 the ACCC also commenced proceedings against rail companies Pacific National Pty Limited (Pacific National), Aurizon Holdings Limited (Aurizon) and related entities in relation to Pacific National's proposed acquisition of Aurizon's Queensland intermodal business and the Acacia Ridge Terminal. After conducting a public merger review and opposing the transaction, the ACCC instituted proceedings for alleged breaches of section 45 (the anticompetitive agreements provision) and section 50 of the CCA. In May 2019, the Federal Court delivered its decision in favour of Pacific National and Aurizon, in light of Pacific National's willingness to enter into an undertaking guaranteeing other operators access to the terminal and fair prices.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

There are no current proposals to change the legislation. However, significant changes to Australian competition law were introduced on 6 November 2017 through the commencement of the Competition and Consumer Amendment (Competition Policy Review) Act 2017. The Act introduced the following changes to the merger review process:

- the ACCC, instead of the Tribunal, is now the first instance decision-maker for all merger authorisation reviews;
- parties are no longer able to apply directly to the Tribunal for authorisation;
- the ACCC has jurisdiction to authorise a merger if the ACCC is satisfied that the merger would not result, or would not be likely to result, in a substantial lessening of competition, or that the merger would result, or be likely to result, in a benefit to the public and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct. Previously, the ACCC had no power to authorise a merger or consider public benefits. Instead, parties had to apply to the Tribunal directly for authorisation involving consideration of the net public benefit;
- the ACCC has the power to compel the production of certain information, documents and evidence when considering the application for authorisation;
- the ACCC's review is subject to a statutory deadline of 90 days after which the ACCC is deemed to have refused to grant authorisation unless the parties agree to an extension; and
- decisions made by the ACCC are subject to review by the Tribunal, subject to a statutory deadline of 90 or 120 days, as applicable (which can be extended in certain circumstances).

The changes are a significant departure from the previous process whereby parties could choose to notify the ACCC of a proposed acquisition (using either the informal or formal merger review processes) or to seek authorisation directly from the Tribunal without first needing to apply to the ACCC. The ACCC is now the decision maker of first instance for all merger reviews and authorisation applications.

## UPDATE AND TRENDS

### Key developments of the past year

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

The ACCC is becoming increasingly focused on the impact of mergers undertaken by digital platforms (particularly with respect to the control of data), as evidenced by the recommendations in its Digital Platforms

Inquiry Preliminary Report released in December 2018. The ACCC has recommended in its report that:

- the factors to be taken into account under section 50(3) of the CCA in assessing the likely competitive effects of a merger should be amended to clarify that the following are relevant factors: the likelihood that an acquisition would result in the removal of a potential competitor; and the amount and nature of data to which the acquirer would likely have access as a result of the acquisition; and
- the ACCC is intending to ask large digital platforms (such as Facebook and Google) to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition.

The ACCC has also focused on issues concerning the control of data in other transactions. For example:

- In the proposed acquisition of three WestConnex toll road concessions by the Sydney Transport Partners consortium (which includes Transurban Group among others), the ACCC was concerned that the Transurban Group had a competitive advantage that would be enhanced by the proposed acquisition because of its access to traffic data. Transurban Group ultimately provided an undertaking to the ACCC to the effect that it would publish certain traffic data on a quarterly basis and update it if the New South Wales government announces a toll road concession sale process six or more weeks before that traffic data is due to be published under the quarterly process.
- In the proposed acquisition by Tabcorp Holdings Limited of Intecq Limited (November 2016), the ACCC explored venues' concerns that following the transaction, Tabcorp Holdings Limited may misuse customer gaming data and customer data obtained from venues that are customers of Intecq Limited, to favour venues that use Tabcorp Holdings Limited's full service products in a way that would distort competitive dynamics. However, the ACCC recognised that Tabcorp Holdings Limited and Intecq Limited operated in a heavily regulated environment, and misuse of the relevant data in the manner contemplated would result in severe consequences for Tabcorp Holdings Limited. Given the regulations and the consequences for failing to comply with them, the ACCC considered that Tabcorp Holdings Limited was unlikely to misuse Intecq Limited's data to distort competition following the acquisition.
- In the proposed merger between Essilor International SA and Luxottica Group SpA (October 2017), the ACCC considered whether the proposed merger would provide the merged firm with downstream rivals' commercially sensitive information through Essilor International SA's practical management system, Sunix. The ACCC found that most retailers' data was stored on their own private servers. While it was likely that some retailers' data would be stored on a third party 'cloud' server in the future, this data would be protected from use by the merged entity, either on an individual store or aggregate basis, through existing contractual arrangements.

In 2018 and 2019, the ACCC has continued to work closely with international agencies in the review of global deals. An example was the acquisition of Monsanto Corporation by Bayer AG (March 2018), where the ACCC worked with the European Commission, US Department of Justice and the Canadian Competition Bureau in assessing the transaction. The European Commission ultimately gave conditional approval for the transaction subject to the divestiture of major parts of Bayer's. In light of the parties' divestiture commitments to the European Commission, the ACCC concluded that the transaction would not substantially lessen competition in a relevant market in Australia.

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In its Merger Guidelines, the ACCC acknowledges the importance of company documents and public statements in its assessment of certain mergers. In 2017, the ACCC foreshadowed that there will be increased scrutiny of contentious mergers. In addition, the ACCC noted that it would be adopting a more intensive information gathering approach when reviewing contentious mergers. This change was adopted in response to concerns that the ACCC's approach to merger review has not resulted in probative or persuasive evidence for the Tribunal or Federal Court of the likely anticompetitive effects of proposed acquisitions. To that end, the ACCC has indicated there has recently been a significant increase in the number of section 155 notices issued in the context of merger reviews (from 44 notices in FY2016-17 to 89 notices in FY2017-18). Those notices have involved both requests for information and documents, as well as directions to attend oral examinations under oath. While the issue of such notices continues to be concentrated on a handful of contentious mergers, it shows that the ACCC is serious about carrying out its intention to scrutinise transactions with potential competition concerns more rigorously.

# Austria

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

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

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

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

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

### Scope of legislation

#### 2 | What kinds of mergers are caught?

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

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

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

### Bank exemption

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

#### 3 | What types of joint ventures are caught?

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

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

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

The ACA does not contain a definition of the term 'control'. As mentioned above, any connection of undertakings conferring on one undertaking a direct or indirect controlling influence over another undertaking is deemed to be a merger. In practice, the notion of control is applied according to the concept of the EUMR (in particular, the European Commission's Consolidated Jurisdictional Notice).

Because of the formal approach of Austrian merger control provisions, even the acquisition of a percentage of shares that does not confer control is subject to merger control: as mentioned above, an acquisition

whereby a participation of 25 per cent is reached or exceeded constitutes a merger within the meaning of the ACA.

### Thresholds, triggers and approvals

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

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

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

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

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

This new threshold is intended to catch transactions involving early stage technology targets with a high purchase price despite low turnovers, but applies to all sectors. In 2017, two transactions were notified under the new threshold and 17 were notified in 2018, while in 26 cases pre-notification discussions were held with the authorities regarding a potential notification requirement.

In light of the practical uncertainties regarding the new threshold, the FCA developed a joint guidance paper with the German Federal Cartel Office on the transaction-value-based threshold (which was introduced in a very similar fashion in Germany). The final guidance paper was published in July 2018. Practice so far has shown that it can be difficult to assess whether the target is 'active in Austria to a significant extent'. The guidance discusses criteria that relate to the assessment of domestic activity, local nexus of domestic activity, market relevance and significance. Domestic activity is generally not measured on the basis of domestic turnover but rather various indicators such as production facilities, branches, local sales forces, research and development activities, or (regarding the digital economy) numbers of monthly active users. Furthermore, for the new threshold to be met, the activity in Austria has to be significant. Based on its guidance paper, the FCA will generally find that there is no domestic activity if the turnover of domestic target companies is below €500,000, provided that this turnover adequately reflects the market position and the competitive potential of the target company. The FCA has encouraged companies and their advisers to reach out to the authorities and discuss the application of the new threshold in case of doubt. Moreover, the statutory parties have on several occasions pointed out that, while not mandatory, pre-notification contacts can be very helpful to obtain clearance in the context of Phase 1 review even in more challenging cases.

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

by the available guidance paper or decision practice yet, the phrasing and the systematics of the law seem to exclude this.

The calculation of turnover is governed by section 22 of the ACA: the relevant turnover of an undertaking concerned also includes the turnover of all undertakings that are connected to it by one or more of the links that constitute a concentration within the meaning of section 7 of the ACA (in particular, by way of a shareholding of at least 25 per cent upstream or downstream).

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

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

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

If a transaction constitutes a concentration within the meaning of the ACA and exceeds the notification thresholds mentioned under question 5, filing is mandatory.

However, even if the thresholds are technically exceeded, no notification is required if a merger cannot have any effects whatsoever on the Austrian market (see question 7).

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

Foreign-to-foreign mergers are subject to Austrian merger control if the turnover of the undertakings concerned exceeds the turnover thresholds and the transaction does not qualify for the de minimis exception (see questions 5 and 6). Notwithstanding the de minimis exception, the ACA still subjects a large number of foreign-to-foreign mergers to Austrian merger control, as it does not provide for a minimum Austrian turnover to be achieved by at least two parties.

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

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

Second, the FCA has publicly expressed its disappointment with the Supreme Court's judgment. This implies that the authority will continue to take a very wide view of the scope of Austrian merger control. Therefore, it may still be advisable to submit a merger notification even in cases where potential effects on Austrian markets are clearly limited. Furthermore, in a recent decision the Cartel Court confirmed that to obtain formal confirmation that a transaction is not notifiable, a precautionary notification would be required, followed by a Phase II request that the court would subsequently reject (as the FCA itself does not have the power to refuse jurisdiction).

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

Following an amendment of the Foreign Trade Act (FTA) in December 2011, according to section 25a of the FTA, certain transactions (leading to control or an investment acquisition of at least 25 per cent) relating to public security and public order, including, inter alia, services of general interest (eg, military equipment, energy supply, telecommunications services), have to be notified to the Federal Ministry of Economy, Family and Youth for approval even prior to signing. This notification requirement generally applies to acquisitions of undertakings with their registered seats in Austria being subject to the domestic rules of accounting by foreign buyers that are located outside the EU/EEA or Switzerland. The Minister has to issue a formal decision within one month after submission of the application, either clearing the proposed transaction or initiating an in-depth investigation and thereby extending the review period by a further two months.

Within this period, the Minister has either to authorise the transaction, authorise it subject to stipulations if they are necessary to avoid any serious and imminent threat to the interests of public order and public security, or refuse the authorisation if even stipulations are not sufficient to avoid such a threat. Should the Minister fail to take a formal decision within the relevant one or two-month period, the transaction may be implemented in any event.

Further, in the case of a suspicion of circumvention and of a serious and imminent threat to the interests mentioned above, the Minister has to formally impose an approval requirement with regard to certain other transactions, including also (shareholding) acquisitions of Austria-based undertakings with activities relating to public safety and order by buyers located in the EU/EEA or Switzerland. However, any such approval requirement under this section may only be imposed if it is compatible with Austria's obligations under EU and international law. Implementation prior to approval may cause criminal penalties and, further, may render the transaction in question void.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

There are no legal deadlines for prior notification of mergers but, as mergers subject to merger control must not be completed before clearance, notifications must be submitted well before the envisaged date for the closing of the transaction. It is possible to file a pre-merger notification even prior to the signing of the relevant agreement, provided the parties have, in principle, agreed on the structure and timing of the transaction and intend in good faith to enter into this agreement in the foreseeable future. Following a legal dispute about option rights between two potential buyers, the statutory parties have recently initiated Phase II proceedings in relation to a notified takeover in the gambling sector, to obtain a court ruling on the question of notifiability

of the proposed transaction. There are no specific sanctions for not filing a notifiable merger (within a certain deadline). For sanctions for implementing a transaction prior to clearance, see question 13.

In complex cases (especially where the need for remedies may already be anticipated by the notifying parties) it can also be helpful for the parties to engage in pre-notification discussions with the statutory parties prior to formal filing. While there is no formal pre-notification procedure, the FCA's head has recently voiced concerns with regard to a case – which had gone to Phase II – where the notifying party had failed to engage in a pre-notification contact prior to notification. For instance, in the telecoms sector it is advisable to engage in pre-notification discussions and provide the FCA/FCP with regulatory data at an early stage in Phase I. In the proceeding regarding the acquisition of Tele2 Austria, a provider of fixed line telecommunications services, by Hutchison Drei Austria, one of the major Austrian mobile telecoms operators, the parties reached out to the authorities at an early stage of the transaction process, engaging in pre-notification contacts to discuss the scope of information and data required. The case has shown that clearance within the four-week Phase I window can be obtained even in complex cases if the parties actively engage with the FCA/FCP.

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

Each of the undertakings concerned is entitled to file a pre-merger notification. However, usually the acquirer files the notification. Joint notifications are permissible but rare in practice. In Phase I proceedings, there is a fixed filing fee of €3,500. In Phase II proceedings, the Cartel Court sets a lump-sum fee of up to €34,000. However, in the case of a (full) in-depth review of a merger in Phase II there will usually be additional costs for the preparation of an expert's opinion, which the notifying parties will have to pay (in the past, fees ranged between €150,000 and €300,000).

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

Generally, the waiting periods are four weeks in the case of a Phase I clearance and up to six months if proceedings for a Phase II review by the Cartel Court are initiated. However, since the 2013 amendment to the ACA the notifying party has had the right to apply for an extension of the Phase I deadline by two weeks to avoid the initiation of an in-depth investigation without reasonable concerns on the substance. This request makes sense if the FCA and the FCP can be convinced with a little more time that the transaction does not raise competition concerns or if a remedy package in Phase I is a feasible option for both the authorities and the parties. In previous years, such an extension of Phase I was sought in only few cases (usually significantly below 5 per cent of all cases).

Further, the review period for Phase II proceedings will be extended by one month upon request by the notifying party. Implementation must be suspended until clearance.

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

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

See also question 18 on timing.

## Pre-clearance closing

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

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

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

To date, the highest fine imposed by the Cartel Court for violation of the standstill obligation is €1.5 million. Fines in other cases have been significantly lower, typically ranging between €15,000 and €150,000. The Cartel Court imposed a fine of €20,000 in a case relating to the notifiable establishment of interlocking directorates at the managing board level. An unlawful completion of the concentration had been effected by formal registration of the amended representation competences at the companies' register. When determining the fine, the court acknowledged the factual complexity of the case, the fact that joint (not sole) control had been established as well as the fact that the infringement had been voluntarily terminated by subsequent submission of a merger notification.

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

Yes; sanctions for violation of the standstill obligation by early implementation of a notifiable transaction are also applied in foreign-to-foreign merger cases. In 2010, for instance, the FCA requested the Cartel Court to impose a fine against a foreign logistics company that had failed to notify its initial acquisition of a minority shareholding in a Hungarian company. After imposition of a fine of €4,500 by the Cartel Court, the FCA appealed and requested the fine to be increased to almost €5 million, largely on general turnover grounds. In its final decision issued in 2013, the Supreme Court imposed a fine of €100,000.

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

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

## Public takeovers

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

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

## Documentation

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

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

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

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

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

## Investigation phases and timetable

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

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

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

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

Following the initiation of a Phase II review of the merger, the Cartel Court has five months to adopt a prohibition or clearance decision (upon request by the notifying party, the review period will be extended by one month). A decision by the Cartel Court by which a concentration is cleared subject to conditions or obligations, or both, will be published

on the FCA's website once it is final and binding. Non-confidential (full text) versions of decisions of the Cartel Court are also published in an electronic database (Ediktsdatei) run by the Federal Ministry of Justice.

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

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

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

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

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

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

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A concentration will be cleared if it does not give rise to the creation or the strengthening of a dominant position. An undertaking will be considered to be dominant under the ACA if it faces no or only insignificant competition, or if it is in a superior market position as regards its competitors, customers or suppliers. The ACA provides for a number of rebuttable presumptions of dominance. The concept of collective dominance was formally introduced into the ACA with the 2013 amendment. In the assessment practice of the FCA, the 'significant impediment of effective competition' (SIEC) test (which has not yet been formally introduced into the ACA) has also played a role.

Single dominance will be presumed where:

- an undertaking's market share is greater than 30 per cent;

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

Collective dominance will be presumed where:

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

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

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

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

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

No.

### Theories of harm

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

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

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

## Non-competition issues

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

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

## Economic efficiencies

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

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

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

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

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

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

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

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

## Remedies and conditions

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

According to the ACA, the parties may offer remedies (conditions or obligations, or both) even in Phase I to convince the statutory parties not to request a Phase II review of the merger by the Cartel Court. Parties may also offer remedies later to convince the statutory parties that they should withdraw such a request or to receive a formal clearance decision from the Cartel Court should the statutory parties decide not to do so. Such remedies are binding upon the parties in that the implementation of a concentration in violation of these remedies is equivalent to a violation of the standstill obligation, which is subject to fines in the amount of up to 10 per cent of the worldwide turnover achieved by the relevant party in the last business year (see questions 9 and 12).

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

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

In a case in April 2017, the parties committed themselves to granting non-discriminatory access to outdoor advertising space (along with minimum capacity and quality guarantees) to competitors at market prices for a period of five years. These commitments were designed to remedy concerns as to potential input foreclosure, while according to the Cartel Court the increased market concentration as such did not give rise to competitive concerns on the basis of negative horizontal effects, such as price increases or a decrease in quality.

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

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

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

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

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

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

There is no specific time frame in which remedies may be offered and discussed. In practice, the parties may therefore approach the authorities at any time until the end of the investigation. It is advisable, however, for a party wishing to offer remedies to approach the statutory parties as soon as the nature of their competition concerns becomes clear. In several cases, parties have been able to avoid a full Cartel Court investigation by offering remedies at a relatively early stage of the proceedings (in some cases, the statutory parties were also prepared to withdraw their applications for an in-depth review on the basis of remedy offers resulting in an early termination of the ongoing Phase II proceedings; see question 18).

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

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

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

### Ancillary restrictions

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

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

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

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

As regards the rights of third parties to intervene in merger proceedings, third parties whose legal or economic interests are affected by the concentration (ie, in particular, competitors and customers) may

submit written comments to the FCA and the FCP. The deadline for the submission of written comments is two weeks after the date of publication of a short summary of the notification on the FCA's website. Such interveners, however, do not have a right to any specific treatment of their submission.

In the course of Phase II proceedings before the Cartel Court, third parties may at any time submit written comments to the court. The ACA, however, explicitly provides that third-party interveners do not acquire party status in the proceedings by virtue of their submission.

### Publicity and confidentiality

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

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

Also, decisions by the Cartel Court clearing a concentration subject to conditions and obligations have to be published on the FCA's website. In cases involving remedies agreed between the notifying party and the FCA (so as to avoid a request for a Phase II investigation or to have such request withdrawn, see question 25), the FCA also publishes the text of the commitments on its website.

Finally, with the 2013 amendment to the ACA, an enhanced duty of the Cartel Court to publish full text decisions was introduced. Decisions of the Cartel Court (including the court's reasoning) are published in the Ediktsdatei, a publicly available online collection of court decisions (however, the parties have the right to request that confidential information be redacted prior to publication, and this is done at the discretion of the court).

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

### Cross-border regulatory cooperation

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

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

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

## JUDICIAL REVIEW

### Available avenues

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

Decisions by the Cartel Court are subject to judicial review by the Supreme Court. Only the parties to the transaction and the statutory parties are entitled to appeal decisions of the Cartel Court; third parties may not appeal such decisions, irrespective of their interest in the case and of any intervention in the proceedings before the Cartel Court.

### Time frame

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

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

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

In 2018, 481 transactions were notified in Austria, which is – again – a slight increase compared to the previous year, which saw 439 merger filings. As in previous years, the statutory parties have been busy with merger review and significant enforcement action.

In 2018, one case went into Phase II (compared to two cases in 2017). It concerned the acquisition of joint control of D.Med Consulting by Fresenius Medical Care and KR2. D.Med Consulting is active in the field of development and marketing as well as consulting for medical products with a focus on dialysis technologies and related medical fields. The merger was cleared in early 2019 subject to conditions intended both to protect current projects conducted by the target for a competitor of the acquirer and to prevent the acquirer gaining a competitive advantage by obtaining sensitive information. One of the Phase II cases of 2017, which concerned the leasing of railcars, was cleared in 2018 with conditions after an in-depth review by the Cartel Court (*VTG Rail Assets/CIT Rail Holdings (Europe)*; Nacco-Group), with concerns relating to the possible creation of a dominant position in particular in the area of the rental of dry goods wagons and regarding the accuracy of the proposed market definition. The notifying parties undertook to sell approximately 30 per cent of the Nacco business to an upfront buyer (the same conditions were also agreed on with the German Federal Cartel Office).

In 2017, the FCA started its sector investigation into the Austrian healthcare sector, which had previously seen two noteworthy mergers (both cleared subject to remedies). The investigation targets numerous segments of the healthcare industry, including pharmaceutical production and distribution, pharmacies, medical devices, e-health and also health institutions and health insurance. First results relating to the pharmacy area were published in May 2018. In this report, the FCA addresses possible competition restraints regarding market entry, ownership as well as operating rules applicable to pharmacies. According to the FCA, anticompetitive regulations exist in various areas such as needs assessment, prohibition of chains and third-party ownership, restriction of opening hours, restrictions on online sales of OTC medicines and of pharmacy delivery services and exclusive rights of pharmacies to sell OTC medicines. Far-reaching liberalisation measures are therefore recommended, with the aim of achieving better prices

and more transparency for consumers as well as enhanced quality through more competition. On this basis, it can be expected that transactions in the healthcare sector will generally be of interest to the FCA. Furthermore, in October 2018 the FCA published a 'Fairness catalogue for companies' which is intended as (non-binding) guidance to market participants and to prevent breaches of good conduct, with a particular view to the retail sector.

Furthermore, there was an interesting merger in the media and entertainment sector, relating to the takeover of Sky, Europe's largest media company and pay-TV broadcaster, by the US telecommunications conglomerate Comcast. In parallel to the EU filing, this case was reviewed as a media merger in Austria (and certain other countries). The case was cleared unconditionally in Phase I, following an extension of the review period by two weeks, which allowed the statutory parties to rule out any concerns as to media plurality in Austria.

One case concerning the operation of ski-resorts (*Bergbahnen Aktiengesellschaft Wagrain; Fremdenverkehrs GmbH/Bergbahnen Flachau Gesellschaft mbH*) was cleared without remedies in the formal sense, but the companies had agreed to certain commitments that were already included in the initial merger application for the Phase I review. The commitments included discounted new ski passes and new bus tariffs. One case (*Apple Inc/Shazam Entertainment Ltd*) was referred to the European Commission by a number of national authorities, including the Austrian FCA. Another case, relating to Knauf's acquisition of AWI's modular suspended ceilings business, was referred to the Commission in early 2018.

As explained in question 7, a large number of transactions with only very limited effects on the Austrian market come within the ambit of Austrian merger control, because of the low turnover thresholds. In light of the FCA's criticism of the Supreme Court's case law on the domestic effects requirement, it will presumably continue to closely monitor compliance with the notification obligation. In this context, the head of the FCA has repeatedly emphasised his ambition not only to take up cases of early implementation but also to focus on the completeness of notifications submitted to the FCA.

Moreover, in recent years, the FCA has been active in the gas and electricity markets. Mergers in this sector could therefore attract particularly close competition scrutiny. The same applies to media mergers, which tend to be closely scrutinised by both the FCA and the FCP (including in particular aspects of media plurality). Other sectors of a broader public interest, for example, telecoms and financial services, have also been subject to an in-depth review recently. The telecom sector was also subject to a sector investigation by the FCA, which was concluded in March 2016. With regard to the food retail sector, which has been under close scrutiny for anticompetitive conduct, takeovers of the majority of stores from an insolvent retailer by several of the major retail chains in Austria were cleared in Phase I in early 2016 (out of 98 stores, 28 could only be taken over subject to conditions, while takeovers of eight stores were abandoned because of competitive concerns; considerations relating to the securing of jobs played a certain role in the authorities' assessment).

Apart from that, there have been developments in the kinds of evidence that the FCA reviews in assessing mergers. For complex cases, it is advisable to provide economic evidence, at least in Phase II and potentially earlier to avoid a Phase II referral. Also, the FCA and FCP appear to be increasingly interested in parties' internal documents in complex cases. For instance, we have seen in the telecoms sector that it is advisable to engage in pre-notification discussions and provide the statutory parties with regulatory data early Phase I. The acquisition of Tele2 Austria, a provider of fixed-line telecoms services, by Hutchison Drei Austria, one of the major Austrian mobile telecoms operators, is a prime example of good procedural cooperation with the authorities. This case has shown that a detailed economic analysis of a transaction

within the four-week Phase I window is possible if the parties reach out to the authorities at an early stage of the transaction process, engage with pre-notification contacts to discuss the scope of information and data required, and keep up the dialogue with the authorities throughout Phase I to swiftly provide any additional evidence required for the analysis. The same applied for the *Comcast/Sky* case, which, because of the close cooperation regarding the authorities' media merger review, could be cleared unconditionally in Phase 1, using the two-week procedural extension tool. This matter required a solid understanding of the media market not only in Austria but more widely, combined with an ongoing dialogue with the authorities. In Phase II proceedings, the Cartel Court usually appoints an independent economic expert to review this evidence or conduct their own market investigations on which they will then report to the Cartel Court. It is also quite common that the FCA sends out questionnaires to market participants (eg, in the case *BGO Holding/hali/svoboda büromöbel*, the FCA conducted a market test with 300 customer surveys and 172 requests for information from competitors in Austria and abroad). Besides that, however, third parties still have a rather limited role in Austrian merger control, especially compared to the EUMR process. They have no procedural rights and cannot challenge a clearance decision. Another interesting development is that the FCA has made use of the instrument of referral of a transaction to the European Commission in recent years (along with other national authorities). This was done in *Apple Inc/Shazam Entertainment Ltd* and *Knauf's* acquisition of AWI's modular suspended ceilings business.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

As mentioned above, the latest amendment to the ACA was adopted in May 2017. This introduces several unclear legal terms that can be difficult to handle in practice. In the light of practical uncertainties regarding the new threshold, the FCA recently published a joint guidance paper with the German Federal Cartel Office on the new transaction-value-based threshold (which was similarly introduced in Germany).

In terms of the interpretation of the new threshold, according to the wording of the law, the 'value of consideration' has to exceed €200 million. The FCA has already made it clear that this should not only include the purchase price itself, but other non-cash benefits granted to the seller such as payments that are conditional on future turnover or profits. Moreover, it can be difficult to assess whether the target is 'active in Austria to a significant extent'.

The FCA has clarified in a number of public talks that current activities of the target are relevant for the purpose of the analysis. There is some uncertainty in particular around the question of what constitutes an activity.

The FCA has worked with a number of indicators such as production facilities, branches, local sales forces, R&D activities – or with regard to the digital economy – a high amount of 'monthly active users'. Furthermore, for the new threshold to be met, the activity in Austria has to be significant. This should be judged on a sector-specific scale, but there is currently no case law or decision practice available on this issue. The FCA has encouraged companies and their advisers to reach out to the authorities and discuss the application of the new threshold in cases of doubt.

Concerning procedure, the present institutional structure of competition enforcers in Austria (with two authorities – the FCA and FCP – being entitled to request the initiation of proceedings before the Cartel Court, and the Cartel Court acting as the sole adjudicator in competition law matters) has been up for debate for some time. However, whereas the FCA has repeatedly pointed out that it should be the competent body for both negotiating and decision-making with regard to remedies, current reform discussions do not question this aspect any more.

Similarly, the legislator has not yet decided to increase the (domestic) turnover thresholds to limit the number of transactions that are notifiable to the FCA but have no impact on the Austrian market.

The latest reform discussions have also included a potential change of the substantive test (with a view to introducing a SIEC test as in the EUMR); however, it is still unclear whether and when such change might be introduced.

## UPDATE AND TRENDS

### Key developments of the past year

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

The recent amendment of the Austrian Cartel Act has introduced a new notification threshold, considering the value of the consideration of a transaction. Under the new threshold, mergers have to be notified if the combined worldwide turnover of the undertakings concerned exceeds €300 million, the combined Austrian turnover of the undertakings concerned exceeds €15 million, the value of consideration exceeds €200 million and the target is active in Austria to a significant extent. This threshold has been introduced in Germany in an almost identical manner (with different values) and, accordingly, raises the same questions in law in both jurisdictions. Being still very new to both legal systems, it gives rise to interpretation and application issues that can be difficult to handle in practice. In light of those practical uncertainties, the FCA has developed a draft joint guidance paper together with the German Federal Cartel Office (FCO) which is currently subject to public consultation.

The following summarises key considerations concerning the criterion of a 'significant domestic activity', as addressed in the guidance provided by the authorities. It is not always straightforward to assess whether the target is 'active in Austria to a significant extent'. Importantly, the FCA/FCO have clarified in a number of public talks and in their draft joint guidance paper that current (as opposed to potential future) activities of the target are relevant for the purpose of the analysis.

There is some uncertainty around the question of what constitutes a 'significant domestic activity'. As clarified in the draft joint guidance paper, the criterion of an activity – according to the laws of both jurisdictions – is measured in terms of any activity of the target with a market nexus (for example, this is generally assumed where the target's services are offered for cash on an existing market). Furthermore, the assessment of domestic activity requires sector-specific indicators, such as local production facilities, branches, sales forces, R&D activities, or, with regard to the digital economy, a high amount of 'monthly active users' or access frequency of a website. A sufficient local nexus can also be based on the location of the customer base (eg, if users of an app are located in Austria). In Austria, a mere location of the target company can also constitute a sufficient domestic activity (which does not necessarily require a registered company in the formal sense).

Furthermore, for the new threshold to be met, the domestic activity has to be significant. This should be judged on a sector-specific basis. The situation is different if domestic turnover is not an adequate indicator; for instance, because the company is active in a market that is not characterised by turnover or because its product has only recently come onto the market so that the low turnover generated so far does not reflect the competitive potential. In this case, significance must be determined on the basis of other criteria.

Considering the above uncertainties, the FCA has encouraged companies and their advisers to reach out to the authorities and discuss the application of the new threshold in cases of doubt. Important examples are, in particular, pharma cases, where it may not be clear whether the R&D activities (eg, pipeline products) amount to a significant activity;

in this context, further indicators could be a local specific budget assigned to this activity or proximity to market launching.

Regarding the second crucial element relating to the 'value of consideration', the joint guidance paper defines the value of consideration as encompassing 'all assets and other monetary benefits that the seller receives from the buyer in connection with the merger in question'. The term 'asset' is to be interpreted in a broad sense and covers all cash payments and the transfer of voting rights, securities, tangible assets and intangible assets. But it also includes 'considerations that are contingent on certain conditions, such as those specified in earn-out clauses, or agreed additional payments to the seller that are conditional on the achievement of certain turnover or profit targets at a specific point in future (eg, licence fees)'. Last but not least, also included are payments for non-competition by the seller.



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# Belgium

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

The relevant legislation is included in Book IV of the Code of Economic Law and the Royal Decree of 30 August 2013 on the notification of concentrations. On 25 April 2019, Parliament adopted a new law by which it replaced Book IV of the Code of Economic Law in full (see question 35) resulting in a new numbering of its articles. The decisions mentioned in this chapter shall be read as referring to the corresponding provisions of the new text.

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

### Scope of legislation

#### 2 | What kinds of mergers are caught?

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

- two previously independent undertakings merge;
- an undertaking or a person already controlling an undertaking acquires control over the whole or part of another undertaking; or
- two or more undertakings form a 'full-function' joint venture (see question 3).

#### 3 | What types of joint ventures are caught?

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

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

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

### Thresholds, triggers and approvals

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

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

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

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

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

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

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

Foreign-to-foreign mergers must be notified in Belgium where the turnover thresholds are met (see question 5), regardless of the location or nationality of the parties. Many foreign-to-foreign mergers may therefore trigger an obligation to file where the parties have sales in Belgium, even if they have no Belgian-based assets.

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

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

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

On 5 December 2018, the Flemish Government adopted a new decree establishing a type of 'emergency brake' procedure for strategic investments into government-owned entities. These new rules allow the Flemish Government to annul or declare void any foreign acquisition that would threaten the strategic interests or the independence of the Flemish Region or Flemish Community or both.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

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

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

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

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

No filing fees are required.

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

As is the case under the EUMR, concentrations may not be implemented before clearance.

This suspension obligation does not prevent the implementation of a public bid or of a series of transactions in securities, provided that the concentration is notified without delay and the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments, and on the basis of a derogation granted by the President.

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

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

### Pre-clearance closing

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

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

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

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

The sanctions for gun jumping, outlined in questions 9 and 12, equally apply in the case of a foreign-to-foreign transaction.

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

Foreign-to-foreign mergers cannot be closed outside Belgium without breaching the suspension obligation, unless the President grants a derogation (see question 11 in relation to public takeover bids).

#### Public takeovers

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

No, except that in this case the duty to notify rests with the bidder only and the suspension obligation is somewhat different (see question 11).

#### Documentation

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

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

Filing in the form and assembling the supporting documents can take up to a month, depending on the complexity of the issues involved and the availability of the information required. Certain mergers that are unproblematic from a competition law perspective can be notified under the simplified procedure (see question 18). Under this procedure, the information provision burden is slightly reduced, although significant amounts of information must still be provided.

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

#### Investigation phases and timetable

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

A distinction can be made between simplified and non-simplified cases. Simplified cases are reviewed and cleared on an expedited timetable (see question 18). Non-simplified cases can be dealt with in first phase or, if they raise serious doubts, may go into an in-depth second phase investigation.

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

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

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

Where the conditions for the simplified procedure are met and the concentration does not raise any competition concerns, a member of the Investigation and Prosecution Service will confirm this in a written decision to the notifying parties within 15 working days. This decision has the legal value of a Competition College clearance decision. In 2017, the majority of simplified decisions were issued before the end of the statutory 15 working day review period.

In non-simplified cases, the Competition College must take a decision no later than 40 working days after notification (first-phase decision), failing which the transaction is deemed to be cleared. The Competition College may decide to initiate second-phase proceedings if the concentration raises serious doubts as to its effect on competition. A further 60 working days' investigation is then carried out, at the end of which the Competition College must reach its final decision (second-phase decision). There is no possibility of speeding up this process, but the time limits may be prolonged at the request of the parties. If the parties offer commitments, the first phase will be increased by 15 working days and the second phase by 20 working days. A proposal to modify Book IV of the Code of Economic Law was adopted by Parliament on 25 April 2018 (see question 35). The modifications will leave the time periods unchanged. However, the Prosecutor will have an extended deadline to submit its comments to the Competition College when the parties offer remedies. The new rules also introduce the possibility for the Prosecutor to stop the clock at all stages of the proceedings.

### SUBSTANTIVE ASSESSMENT

#### Substantive test

#### 19 | What is the substantive test for clearance?

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

In its assessment, the Competition College must take into account factors such as the effectiveness of actual or potential competition

(whether at a national or international level) as well as barriers to entry, the bargaining power of customers and suppliers, the maturity of the market, the economic and technical level of the market and alternative sources of supply.

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

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

Book IV of the Code of Economic Law does not provide for a special substantive test for the joint ventures it governs (ie, full-function joint ventures). However, to the extent that full-function joint ventures between undertakings that remain independent could lead to coordination of the behaviour of the parent companies, such coordination will be assessed under the criteria set out in article IV.1 of the Code of Economic Law, which is the Belgian equivalent to article 101 TFEU (see question 3).

### Theories of harm

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

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

### Non-competition issues

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

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

### Economic efficiencies

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

See question 19.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

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

### Remedies and conditions

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

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

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

In multiple cases, the Authority has proven to be receptive to behavioural commitments rather than relying solely on structural remedies to address concerns. In 2017, the Authority approved the acquisition by telecommunications provider Telenet of cable operator Coditel subject to Telenet granting a third party (Orange) access to the Coditel network based on defined technical terms and price setting mechanism and not to offer any new quad-play services in the Coditel area during a certain period. In 2016, the Authority made the acquisition of AMP and LS Distribution Benelux by postal incumbent bpost, active in press and small parcel distribution, press subscription management services and operation of retail press outlets, subject to behavioural remedies aimed at preserving competition between different distribution systems and guaranteeing the equal treatment and non-discrimination of all the points-of-sale. In 2014, the Competition College conditionally cleared the acquisition by telecoms company Tecteo of EDA and Avenir Advertising, active in the daily press market through the newspapers *L'Avenir* and *Proximag*. To remedy the Authority's concerns, TECTEO committed to a number of behavioural remedies to prevent it from gaining access to competitors' commercially sensitive information. In 2015, the Authority conditionally approved the acquisition by media company De Persgroep Publishing NV of several Belgian magazines (*Huma*, *Teve-blad*, *Story* and *Vitaya*). De Persgroep Publishing NV inter alia committed to maintain *Huma*, *Story* and *Teve-blad* on the market for a period of three years to safeguard the plurality of media. Behavioural remedies aimed at maintaining editorial diversity were imposed by the Competition College on 25 October 2013 on Belgian media groups Corelio NV and Concentra NV when clearing the creation of Mediahuis. Both parties agreed to maintain the distribution of their respective newspapers.

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

In the first-phase investigation, the notifying parties have five working days from the day they are informed of the Prosecutor's objections (which needs to occur at the latest on working day 20) to formally offer remedies. In the second phase, they have 20 working days from the opening of the second phase investigation to do so.

In recent cases, the remedies documents attached to the Authority's conditional clearance decisions have taken a similar form as the model text of commitments under the EUMR, including a detailed description of the conditions and obligations attached to the clearance, the assets to

be divested (in the case of a divestiture remedy), reporting obligations to the Authority, the conditions that need to be met by the purchaser of the remedy assets, etc. It is now standard practice to include the possibility for the notifying parties to request a waiver or modification of (part of) the commitments.

In 2018, the Authority lifted one of the conditions (the mandatory notification to the Authority of any organic growth) imposed on leading movie theatre company Kinepolis in 1997 when the authority conditionally approved the merger of cinema groups Bert and Claeys, resulting in the creation of Kinepolis. In late 2018, the Market Court annulled that decision on procedural grounds. The Authority subsequently adopted a new decision in 2019, lifting the same condition subject to some limitations.

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

In 2016, the Authority showed that it takes the compliance with behavioural commitments seriously by fining a company for failure to abide by remedies. It found that Nethys (previously Tecteo) had not respected commitments offered in the context of its acquisition of Editions de l'Avenir-L'Avenir Advertising (EdA) in 2014. These commitments consisted of a number of behavioural remedies to prevent Nethys from gaining access to competitors' commercially sensitive information through EdA's advertising activities.

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

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

### Ancillary restrictions

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

Even though the Competition Act does not provide any explicit reference to ancillary restrictions, its approach to ancillary restraints should be the same as under the EUMR. Therefore, competition restrictions (such as non-compete clauses) agreed in connection with a concentration will be covered by the clearance decision provided they are directly related and necessary to the implementation of the concentration. However, they are not expressly covered in the decision, so the risk of incorrectly categorising them as ancillary lies with the parties. Where they are not covered by the decision, they remain subject to the usual competition rules on restrictive agreements. The Authority recently confirmed this

approach in its 2017 decision approving the acquisition by Brussels Airlines of Thomas Cook.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

Any individual or legal entity showing 'sufficient interest' can intervene during the investigation. The Competition Act allows the Authority to consult any person it deems appropriate for the purpose of its investigation, and contacts with third parties, including competitors and customers, are routinely made. It has become standard practice in cases that give rise to competition concerns for the authority to hear interested third parties (see most recently *Telenet/Coditel*; *Shanks NV/Van Gansewinkel Groep BV*; *Cebeo NV/Cheyns NV*; *bpost NV/AMP NV*; *Delhaize NV/Koninklijke Ahold NV*; *Kinepolis Group NV/Utopia NV*; *De Persgroep Publishing NV/Humo NV*; *Teve-blad, Story, Vitaya*). Recently, the Authority has been using online investigation tools to collect feedback from customers and competitors (eg, in *Volvo Belgium/Kant Group*). Finally, the Supreme Court, when deciding on a reference for preliminary ruling in 2008, confirmed that interested third parties can be authorised by the Competition Council (and, by analogy, now by the Competition College) to inspect and make copies of certain non-confidential documents in the investigation file, provided that these documents are strictly necessary to enable the interested third parties to effectively intervene and raise any competition concerns. The Competition College has since granted interested third parties access to non-confidential extracts from the draft decision.

### Publicity and confidentiality

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

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

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

### Cross-border regulatory cooperation

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

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

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

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

## JUDICIAL REVIEW

### Available avenues

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

All decisions taken by the Competition College in the field of merger control, including decisions of the members of the Investigation and Prosecution Service under the simplified procedure, can be appealed to a specialised chamber of the Brussels Court of Appeal (the 'Market Court', which was created in January 2017). Interested third parties can appeal decisions if they previously requested to intervene during the proceedings before the Competition College regarding these decisions.

The Competition Act provides that the Market Court does not have full jurisdiction when reviewing merger decisions and can only annul or uphold the decisions.

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

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

### Time frame

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

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

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

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

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

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

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

On 25 April 2019, Parliament adopted a legislative proposal to amend Book IV of the Code of Economic Law. The new rules aim at streamlining merger control and other proceedings before the Authority. While the duration of the simplified Phase I and Phase II review periods will remain unchanged, the Prosecutors leading a merger control investigation will now have more leeway to stop the clock at all stages of proceedings, as opposed to only in Phase I as is currently the case. The Prosecutor will also have five more working days to pass its recommendations to the Competition College if the notifying parties submit a remedy proposal.



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## UPDATE AND TRENDS

### Key developments of the past year

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

In 2018, the Authority adopted 36 decisions, compared to 28 decisions in 2017. All notified concentrations were cleared, with the vast majority of the clearance decisions (27) being adopted after a simplified review procedure.

In 2018, the Authority imposed remedies in one case, *Volvo Belgium/Kant Group*. It also reviewed the commitments it had imposed on Kinopolis in 1997 when it conditionally cleared the acquisition by Kinopolis of the cinemas Bert and Claeys.

#### Volvo Belgium/Kant Group

In late January 2018, the Authority approved the acquisition by Volvo Belgium of various companies belonging to the Kant group, an official Volvo distributor and service provider, subject to conditions after a Phase I investigation. The transaction concerned the market for repair and maintenance of commercial Volvo vehicles. Although the Prosecutor had requested a Phase II investigation, the Competition College decided that the remedies proposed by the parties combined with the existing competitive constraints would be sufficient to alleviate any competition concerns. The parties offered a package of structural and behavioural remedies, including:

- the appointment of an additional Volvo service centre in the area where the parties had a combined market share of 70 to 80 per cent;
- the closure of a Volvo garage in Sint-Niklaas (where the parties had a combined market share of 50 to 60 per cent);
- a commitment not to initiate new repair and maintenance activities in the Sint-Niklaas area; and
- a commitment not to oppose companies commencing competing activities on the premises of the closed Volvo garage.

#### Kinopolis

In May 2018, the Authority revised one of the conditions it had imposed on Kinopolis in 1997, by lifting the condition requiring the cinema group to obtain prior authorisation for opening new cinema complexes

or acquiring existing facilities (organic growth). However, following an appeal lodged by one of Kinopolis' competitors, the Market Court annulled the Authority's decision on procedural grounds.

On 25 March 2019, the Authority again partially lifted the obligation to request prior authorisation for organic growth, subject to certain conditions in relation to the size (no authorisation required if a new cinema has a maximum of seven theatres and a maximum of 1,125 seats) and the location (10-km radius around existing Kinopolis cinema complex) of any new cinema complex.

In the first four months of 2019, the Authority adopted a decision under the non-simplified procedure: *Ineos Oxide/RWE Generation* that was cleared unconditionally. The Authority is set to issue a decision on Telenet's proposed takeover of the De Vijver Media later in 2019, following the European Commission's referral of the deal to the Authority in November 2018.

# Bosnia and Herzegovina

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

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

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

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

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

More information about the Council and its activities can be found at [www.bihkonk.gov.ba](http://www.bihkonk.gov.ba).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Act defines a concentration as:

- a merger by absorption or a merger by the formation of a new entity;
- the acquisition of control or a controlling interest by one or more undertakings over another undertaking or a part thereof, or a group of undertakings or a part thereof through the acquisition of a majority shareholding, or the acquisition of a majority of voting

rights, or in any other way under the company laws of Bosnia and Herzegovina; or

- the creation of a full-function joint venture.

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

#### 3 | What types of joint ventures are caught?

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

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

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

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

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

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

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

### Thresholds, triggers and approvals

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

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

- (i) the combined worldwide turnover of the undertakings concerned exceeds 100 million Bosnia and Herzegovina convertible marks; and

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

The Council adopted a Regulation on the Notification of Concentrations and the Criteria for the Assessment of Concentrations (Regulation), effective as of 4 May 2010. It stipulates, inter alia, that if the undertakings concerned have registered corporate seats in Bosnia and Herzegovina, the concentration shall be notified to the Council if the local threshold (ii)(a) or (b) is satisfied, regardless of whether the worldwide threshold (i) is also met. The Council intended to clarify the wording of the Act with this provision. However, its interpretation has led to confusion. In particular, it was unclear whether the Council is at all competent to interpret the Act in such way in a legally binding manner and whether or not this provision may also have an impact on foreign-to-foreign mergers. Therefore, we filed a request for clarification to the Council. In its rather general reply, the Council stated that if some of the undertakings concerned have their registered corporate seat outside Bosnia and Herzegovina or some undertakings concerned have their registered corporate seat abroad, but have subsidiaries in Bosnia and Herzegovina, both the local threshold (ii)(a) or (b) and the worldwide threshold (i) have to be met to trigger a filing obligation. Therefore, one may conclude that the 'clarification' provided by the Council in the Regulation (ie, notification required if only the local threshold (ii)(a) or (b) is satisfied) applies only to cases where all undertakings concerned are purely domestic undertakings (ie, undertakings that have local shareholders and are not subsidiaries of foreign legal entities).

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

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

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

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

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

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

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

administrator or liquidation administrator in the course of bankruptcy or liquidation proceedings does not require that the Council be notified.

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

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

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

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

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

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

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

Failure to notify the Council of the concentration within due time may result in a fine of up to 1 per cent of the total turnover of the undertakings concerned, realised in the business year preceding the concentration. In addition, a fine of between 5,000 and 15,000 Bosnia and Herzegovina convertible marks may be imposed on the responsible persons within the undertakings concerned. Such fines may be imposed regardless of whether the concentration was implemented or not at the moment when the Council learned of the concentration. Therefore, fines for a failure to notify the Council of a concentration in due time may be substantial (depending on the undertaking's turnover). In this respect, the Council imposed fines for late filling in several cases (2013) ranging between 19,000 and 310,000 Bosnia and Herzegovina convertible marks. The Council may also impose fines for the implementation of a concentration prior to or without clearance (for details and in particular concerning the fines imposed in a case in 2013 combining fines for late filing and closing before clearance, see question 12).

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

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

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

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

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

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

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

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

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

## Pre-clearance closing

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

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

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

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

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

In 2015, 2017 and 2018, the Council did not impose any sanctions for closing before clearance or for failure to notify a concentration, while in 2016 fines were imposed in two cases for failure to notify the concentrations and for implementation of the concentrations without decision of the Council. In one case two undertakings with fines of 30,000 and 7,500 Bosnia and Herzegovina convertible marks, respectively, for failure to notify the concentration, and with fines of 60,000 and 15,000 Bosnia and Herzegovina convertible marks, respectively, for implementation of the concentration without decision of the Council. In the second case a fine in an amount of 10,000 Bosnia and Herzegovina convertible marks was imposed to the undertaking concerned for a failure to notify the concentration within the statutory deadline.

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

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

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

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

#### Public takeovers

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

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

#### Documentation

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

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

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

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

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

- financial statements of the undertakings concerned for the business year preceding the concentration; and
- organisational charts of the undertakings concerned.

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

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

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

#### Investigation phases and timetable

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

See question 11.

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

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

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

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

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

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

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

The Act provides the following general criteria for assessment as to whether the concentration prevents, restricts or distorts the competition:

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

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

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

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

### Theories of harm

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

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

### Non-competition issues

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

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

### Economic efficiencies

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

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

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

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

### Remedies and conditions

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

The Act does recognise structural or behavioural remedies as a way to remedy competition concerns.

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

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

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

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

### Ancillary restrictions

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

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

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

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

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

### Publicity and confidentiality

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

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

Also, the Council publishes information regarding submitted notifications (ie, general information such as the names of the parties, the form of concentration and the business sector in which the concentration is taking place) with an invitation to all interested parties to

submit their comments (see question 29) on its website and in daily newspapers.

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

### Cross-border regulatory cooperation

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

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

## JUDICIAL REVIEW

### Available avenues

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

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

### Time frame

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

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

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

In 2018 the Council issued a total of 28 decisions related to merger control. In all of the final decisions adopted in 2018, mergers have been cleared, either by the Council's assessment that the concentration does not raise competition concerns or by dismissal of the case where certain notified behaviour was not deemed to qualify as a notifiable concentration under the relevant regulations.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

There were no amendments to the Act or pertaining by-laws in 2018 (except for the administrative fee amounts). According to the Activities Report for 2018, in September 2018 the Council prepared and filed a draft amendment to the Act to the Bosnia and Herzegovina Ministry of Foreign Trade and Economic Relations (the body that would officially propose the amendment to the Bosnia and Herzegovina Parliamentary Assembly). However, the content of the draft is related to the immunity of Council members from any action that may be brought against them

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for activities undertaken in their professional capacity. There is no indication that the Act may be amended in any other regard (merger control in particular).

## UPDATE AND TRENDS

### Key developments of the past year

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

In 2018, all mergers that were notified to the Council obtained unconditional merger clearances. Except for one concentration, all cases were cleared in Phase I. Most of these mergers concerned the insurance sector (acquisitions by Croatia Osiguranje related to the markets for technical examination of vehicles in Bosnia and Herzegovina on the one hand and non-life insurance in Bosnia and Herzegovina on the other, the acquisition by Grazer Wechselseitige Versicherung AG regarding the market for the provision of services in relation to life and non-life insurance in Bosnia and Herzegovina, and the acquisition of Vienna Insurance Group AG in the markets for the provision of services for the insurance of property and for life insurance in Bosnia and Herzegovina). Other than that, important mergers took place in the telecommunication sector (acquisitions by M:tel in the markets for landline and mobile networks, the provision of internet services and the provision of radio and TV programme services in Bosnia and Herzegovina) and the pharmaceutical sector (acquisitions by TEVA in the market for over-the-counter medicines, and the acquisition by Amgen Inc in the market for the sale of prepared dosed pharmaceutical products of Anatomical Therapeutic Chemical (ATC) 3 class). In almost all proceedings the Council relied upon the market data submitted by the notifying parties in their merger notifications. Phase 2 proceedings were initiated in only one case (acquisition of MB Impeks by Coca Cola HBC-Srbija). The Council assessed domestic-to-domestic, foreign-to-foreign and foreign-to-domestic mergers.

According to the publicly available information, the Court of Bosnia and Herzegovina has not dealt with a dispute nor issued a decision related to the area of merger control in 2018.

# Brazil

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

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

- CADE's Internal Rules of Proceeding (Resolution No. 01 of 2012, as amended by Resolution No. 22 of 2019);
- Resolution No. 02 of 2012, as amended, provides for the definition of 'group of companies', the cases eligible for the fast-track proceeding, required information under both the fast-track and ordinary proceedings, and stake acquisition rules;
- Resolution No. 12 of 2015 establishes the rules for consultation on CADE's position on the application of merger control rules in specific cases;
- Resolution No. 13 of 2015 establishes the procedural aspects for gun jumping investigations and the notification of transactions the submission of which is not mandatory;
- Resolution No. 16 of 2016 establishes the 30-day deadline for fast-track merger reviews;
- Resolution No. 17 of 2016 establishes the criteria for filing of associative (collaborative) agreements;
- Resolution No. 24 of 2019 establishes the procedural aspects for gun jumping investigations and the notification of transactions the submission of which is not mandatory; and
- Resolution No. 25 of 2019 provides the formal aspects and establishes the standards for the Commissioners of CADE's Tribunal to write and present their votes on cases before they are read during CADE's hearing sessions.

CADE includes three distinct bodies: an Administrative Tribunal, the General Superintendence in charge of merger analysis and antitrust investigations, and a Department of Economic Studies. With respect to merger review enforcement, the General Superintendence is responsible for reviewing and clearing transactions that do not raise antitrust concerns, including those reviewed under the fast-track proceeding, and challenging complex cases before the Tribunal, while CADE's Tribunal is responsible for deciding on the cases challenged by the General Superintendence, by the Tribunal itself or by interested third parties and regulatory agencies.

CADE has issued a series of Guidelines establishing directives on issues related to competition policy or institutional procedures and to provide explanations of the existing legislation, in terms of merger control, including the Guidelines on Gun Jumping and the Guidelines on

the Assessment of Horizontal Mergers. In July 2017, CADE published an Internal Manual for the Analysis of Ordinary Merger Cases, describing the best practices for the review of such cases by CADE's officials based on the experience of the agency since the entry into force of the Law No. 12,529 of 2011, including pre-filing, granting of waivers and infraction notices in the course of the proceeding. In October 2018, CADE issued the Guidelines on Remedies, which gathers the best practices and procedures adopted by CADE in the design, implementation and monitoring of remedies established by the agency. In April 2019, CADE issued the Guidelines for the Submission of Information to the Department of Economic Studies, aiming at improving, standardising and expediting the economic analysis of the cases.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

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

Control and equity acquisitions requirements are detailed in question 4 below.

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

- the parties or groups meet the double Brazilian turnover criterion (further detailed in question 5); or
- the agreement is for a period of at least two years and its object is the creation of a 'joint enterprise' to develop a certain economic activity, provided that:
  - it establishes the sharing of risk and results between the parties regarding the object of the agreement; and
  - the parties or groups are competitors in the relevant market that is the object of the agreement.

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

### 3 | What types of joint ventures are caught?

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

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

Brazilian competition legislation does not provide any definition of 'control'. CADE states broadly that control involves the ability to interfere with the activities of a company or undertaking, either by the majority of the equity interest or by contractual arrangements, for example. The control can be unitary or shared. The acquisition of minority and other interests is also caught by merger control rules under certain circumstances described in Resolution Cade No. 02, article 10:

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

### Thresholds, triggers and approvals

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

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

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

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

CADE may require the submission of any transaction within a period of one year as of its closing date, even if it did not satisfy the notification thresholds mentioned herein.

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

Filing is mandatory whenever the transaction produces any effects in Brazil and satisfies the double Brazilian turnover jurisdictional threshold. The only exception contained in the Brazilian Competition Law concerns joint ventures, consortia or associative or collaborative agreements with the specific purpose of participating in public bids and the agreements derived from these public bids. Resolution No. 02 of 2012, as amended, provides for other exceptions in case of equity acquisition (further detailed in question 4). CADE can request the filing of transactions that do not fulfil the jurisdictional thresholds up to one year after the closing.

Lastly, the mandatory notification of associative or collaborative agreements must fulfil the requirements established in the Resolution No. 17 of 2016 (further detailed in question 2).

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

Yes, foreign-to-foreign mergers must be notified whenever they produce or can potentially produce effects in Brazil and the double Brazilian turnover jurisdictional threshold is met. As previously mentioned, effects, for the purposes of Brazilian merger notification, are defined very broadly to include the presence of assets or legal entities in Brazil or revenues originating in Brazil related to the business involved in the transaction, even if through exports only. There is no 'minimum or sufficient effects' test in place, and even minimal sales or revenues generated in Brazil can trigger a notification.

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

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

Law No. 12,529 of 2011 applies to all economic sectors, which means that no special clearance should be fulfilled by sector regulators or agencies, except for the banking sector. In February 2018, CADE and the Central Bank entered into an agreement (memorandum of understanding) regarding each agency's jurisdiction in merger control cases involving the banking sector, ending a long dispute over their jurisdiction for such cases. Mergers in the banking sector now must be submitted to both agencies, but transactions that may pose 'high and imminent' risks to the stability of the Brazilian financial system – at the Central Bank's discretion – may be unilaterally approved by the Central Bank, and CADE will have to approve the deal without restrictions as well, based on the aspects of a prudential nature applied by the Central Bank.

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

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

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

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

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

Regarding gun jumping, article 147, second paragraph, of CADE's Internal Rules states that:

*parties should maintain their physical structures and competitive conditions unaltered until CADE's final approval, being prohibited any transfer of shares or any influence of one party over another's business, as well as the exchange of competitively sensitive information outside of what is strictly necessary for the execution of the relevant binding agreement by the parties.*

CADE has enforced its gun-jumping regulations increasingly strictly. For instance, CADE negotiated a fine of 30 million reais in the merger review No. 08700.009018/2015-86 (*Cisco/Technicolor*) after the parties recognised that they closed the transaction during CADE's analysis and made a carveout of the Brazilian portion of the target (the highest gun-jumping penalty ever imposed by CADE). In merger review No. 08700.002655/2016-11 (*Blue Cycle/Shimano Inc*), CADE imposed a fine of 1.5 million reais and determined the nullity of the distribution agreement between Blue Cycle and Shimano – this was the first time that the nullity sanction was imposed. In 2017, in the merger review No. 08700.007553/2016-83 (*Mataboi Alimentos/JBJ Agropecuária*), after negotiating a pecuniary fine of 664,983.32 reais, CADE blocked the transaction based on its effects and determined that the transaction be undone entirely. In 2018 and up to mid-May 2019, CADE negotiated another six settlements in gun-jumping cases, which is an increase over previous years.

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

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

Efforts are still undergoing to improve CADE's gun jumping detection efforts. Internal agency guidelines were issued in 2018 to streamline the assessment of third-party gun-jumping complaints. In July 2019, CADE's Tribunal approved Resolution No. 24 of 2019 that replaces Resolution No. 13 and establishes procedural aspects for gun-jumping investigations and the notification of transactions the submission of which is not mandatory. It also sets forth the criteria for the calculation

of gun-jumping fines based on CADE's practices, including aggravating factors (eg, timing, severity of conduct and intent).

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

The law makes no distinction between different parties to a deal, so that all parties (including the seller) are responsible for filing (one filing per deal only), and any party can be punished for non-compliance. In practical terms, the authorities normally select a party to apply monetary sanctions based on their belief that enforcement against such party will be more effective and readily available. The flat filing fee is in the amount of 85,000 reais. The payment receipt of CADE's fee must be submitted along with the filing form on the filing date.

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

Under article 88 of Law No. 12,529 of 2011 merger control cases must be reviewed within 240 days. This deadline can be extended by 60 days, at the request of the parties, and no more than 90 days, based on a reasonable decision of CADE's Administrative Tribunal. As per CADE's Resolution No. 16/2016, the General Superintendence's decision on fast-track cases should be issued within 30 days of filing or amendment. In 2018, the authority actually cleared simple transactions incapable of raising competition issues in an average period of 13.3 days (plus 15 waiting days after the decision is published by the General Superintendence of CADE in the Official Gazette, during which the clearance can be challenged at CADE, in both fast-track and non-fast-track cases). For ordinary cases, parties should also take into account the time necessary for submitting drafts of the filing form with CADE before it deems the filing valid. The time frame for ordinary cases may substantially vary depending on the complexity of the case, yet the 2018 average review period was of 96.3 days. Transactions can neither be closed nor implemented before clearance by CADE.

Transactions carried out in the over-the-counter or in the stock exchange markets do not require CADE's prior clearance to be implemented. However, political rights related to the acquired shares shall not be exercised by the buyer before CADE's approval (see question 15).

### Pre-clearance closing

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

As mentioned in question 9, the gun jumping penalties are:

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

As mentioned in question 9, there have been several cases in which CADE imposed pecuniary gun jumping penalties on the parties, and a couple of cases in which CADE made the deal null and void.

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

There are no examples of sanctions applied in cases involving closing before clearance in pure foreign-to-foreign mergers under the new Brazilian Competition Law. Nevertheless, CADE has clearly stated in the decision of the *Cisco/Technicolor* merger review (merger review No. 08700.009018/2015-86) that CADE will not accept carveouts of the

Brazilian assets, implying that there will be no distinction for the application of the gun jumping sanctions on foreign-to-foreign mergers.

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

CADE may – upon request of the parties – agree with the parties to authorise them to implement some preliminary acts envisaged in the agreement, so that some measures can be anticipated by the parties before a final clearance is issued. This involves a lengthy and uncertain negotiation with the authorities, and remains as an exceptional measure. According to Law No. 12,529 of 2011 and CADE's Internal Rules, upon request, CADE may authorise parties to close a notified transaction before clearance if there would be no irreparable harm to competition, the measures for which the authorisation was requested are fully reversible and the target company would face serious financial losses if it could not proceed more quickly. For the first time since the enactment of Law No. 12,529 of 2011, in December 2017, CADE's Tribunal granted an injunction and preliminary authorisation for the anticipated closing of Merger Review No. 08700.007756/2017-51, involving Excelente BV and Rio de Janeiro Airports. It is important to remark that, in this exceptional case, the General Superintendence already had unconditionally approved the deal, but the parties would have to wait the statutory 15 days (after the publication of the approval decision in the Official Gazette), during which the clearance could be challenged by CADE's Tribunal. This exceptional case was a national case, related to a public agreement and with a certain background of public and political interest (which is the due activity of the international airport of Rio de Janeiro). According to CADE, should the transaction not be closed immediately, one of the parties would not receive the necessary capitalisation and payments, which could interrupt the activities of Rio de Janeiro's international airport. CADE's Internal Rules provide that an injunction and preliminary authorisation may be granted exceptionally when there is no danger of irreparable damage to the conditions of competition in the market, the measures for which authorisation is sought are fully reversible, and the demonstration of imminent substantial and irreversible financial losses to the acquired company.

#### Public takeovers

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

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

#### Documentation

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

Filing requires the preparation of a notification form (either a simpler form for transactions that are eligible for the 'fast-track proceeding', or a complete form for ordinary and complex transactions). Both forms require corporate information on the parties and the economic groups to which they belong, and on the transaction itself. The complete form requires additional information on the parties, similar to a second request of other jurisdictions. In contrast to some other jurisdictions, Brazil requires the parties to present a relevant market definition up front. Estimates of market shares for the parties and their main competitors, clients and suppliers are also required, as well as some elaboration on barriers to entry and other market conditions. The

information is requested in a substantially more detailed way in the complete filing form, which usually demands a considerable time for the parties to prepare.

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

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

Other documents may be required for more complex cases or non-subject to the fast-track proceeding, to the extent that they are available, such as copies of reviews, reports, studies, inquiries, presentations and other similar documents prepared with the purpose of evaluating or analysing the proposed transaction, and market studies, researches, reports, forecasts and any other document, either prepared by third parties or not, which are relative to the affected market dynamics. As already mentioned in question 10, the payment receipt of CADE's fee must be submitted along with the filing form on the filing date.

There are legal sanctions on supplying wrong or missing (labelled 'false or misleading') information in merger reviews to CADE. Based on article 43 of Law No. 12,529 of 2011, as a general rule, false or misleading information, documents or statements provided by any agent to CADE shall be punishable by a pecuniary fine that may vary from 5,000 to 5,000,000 reais. Moreover, if CADE delivers its clearance decision based on false or misleading information, based on article 91 of Law No. 12,529 of 2011, the applicable fine shall vary from 60,000 to 6 million reais without prejudice to the revision of CADE's previous decision and the adoption of other applicable measures.

In 2016, in merger review No. 08700.010688/2013-83 (*JBS/Rodopa*), CADE closed a deal with complex remedies and later learned that the parties had withheld the information that environmental licences did not allow production levels agreed in the remedies to take effect. CADE fined the parties 3.5 million reais and stated it would not declare the transaction null and void solely because of the delicate financial situation of the target. In merger review No. 08700.005560/2016-41, CADE fined Azul Brazilian Airlines 250,000 reais for omitting information, during the 2013 acquisition of competitor Trip Airlines, that could have led CADE to identify a vertical integration that was ultimately not part of the assessment. Still in 2016, in merger review No. 08700.002084/2016-14 (*Marcopola/San Marino*), CADE fined the parties 250,000 reais for misidentifying a company that pertained to the parties' economic group as a competitor.

Providing accurate information to CADE should be a priority even during pre-notification contacts, since the same regulations also apply. The inaccurate information presented in *Marcopola/San Marino* was part of pre-notification contacts.

CADE often contacts third parties during market investigations in complex merger reviews (especially those not eligible for the fast-track proceeding). Not responding to CADE's requests for information is an administrative violation and can subject offenders to fines between 5,000 and 100,000 reais for each day past the original response deadline.

#### Investigation phases and timetable

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

The review starts at CADE's General Superintendence, which is in charge of the merger investigation. Within the General Superintendence,

all cases are first analysed by a specific unit (Triage Unit) in charge of a preliminary analysis to distinguish fast-track from non-fast-track or complex mergers. The latter ones are to be sent to one of CADE's specialised units (according to the market area involved) for further analysis. The final decision on either path comes from the General Superintendent, who can approve the merger outright as he or she normally does for fast-track proceeding cases or ordinary cases that are not considered as harmful to competition. Complex cases will certainly take longer, and are usually analysed by CADE's Administrative Tribunal. If the merger review is to be analysed by the Administrative Tribunal, a commissioner will be assigned to the case by draw. He or she will prepare a report and the decision vote, which is then submitted to the full commission during a public session. The final decision at the tribunal is taken by a majority vote.

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

Simple transactions incapable of causing any anticompetitive impact may be subject to a 'fast-track proceeding'. This fast-track treatment is granted at the authorities' discretion whenever the transaction involves a horizontal overlap inferior to 20 per cent or a vertical relationship in which none of the parties has more than 30 per cent in any of the vertically related markets, if the transaction concerns the creation of classic or cooperative joint-ventures, if it is the entry of a new player, if the horizontal concentration is below 50 per cent and does not surpass the  $\Delta$ HHI inferior to 200. As per CADE's Resolution No. 16/2016, the General Superintendence's decision on fast-track cases should be issued within 30 days of filing or amendment. In addition, these cases are likely to be reviewed in an average period of 15 days (plus 15 waiting days after the publication of the approval of the General Superintendence of CADE in which the clearance can be challenged at CADE's Tribunal). Ordinary cases will take longer, up to the 330-day legal limit (yet the average review period has been of 95 days). With regard to cases where remedies have to be negotiated, our experience shows they take an average time of approximately 180 days, especially because usually the commitments do not provide a clear-cut solution, and also because they heavily rely on the timing of the proposal, in addition to the complexity of the transaction, and eventually CADE's need for market tests related to the proposed remedies.

Besides trying to provide the relevant information as completely and clearly as possible and arranging pre-notification meetings with the authorities to try to anticipate discussions with the case handlers, there is not much the parties can do to speed up clearance.

## SUBSTANTIVE ASSESSMENT

### Substantive test

## 19 | What is the substantive test for clearance?

The Brazilian Competition Law contains both a dominant position test and a lessening or restriction of competition test. Although not much elaboration has been done regarding either one, in practice most decisions tend (usually implicitly) to focus more on the dominant position test, meaning that a deal will normally be cleared if not deemed to create or strengthen a dominant position, even without a deeper analysis of the possible lessening of competition effects.

In July 2016, CADE published the Guideline for the Analysis of Horizontal Concentration Merger Reviews, setting forth the main arguments that would be taken into consideration for the analysis of merger reviews with horizontal concentration.

CADE's recent case law and the Guidelines on the Assessment of Horizontal Mergers show a special concern with the loss of a firm

through a transaction that may facilitate coordination among the remaining firms in the industry, leading to reduced output, increased prices or diminished innovation. Further, the authority recognises the principle that a reduction in the number of firms in a market increases the potential for coordinated conduct, including both overt and tacit collusion. In July 2017, CADE also published an Internal Manual for the Analysis of Ordinary Merger Cases, describing best practices for the review of such cases by CADE's officials based on the experience of the agency since the entry into force of Law No. 12,529 of 2011, including pre-filing, granting of waivers and infraction notices in the course of the proceeding.

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

No, it is the same test applicable to mergers, with the already mentioned exemption of joint ventures aiming at taking part in public bids, which are not subject to merger review by CADE.

### Theories of harm

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

As mentioned above, in accordance with the Brazilian Competition Law, the authority will investigate transactions that lead either to market dominance or to a lessening of competition. For these purposes, the authority will analyse both unilateral effects and coordinated effects, though the latter are much more frequently used in practice. Vertical issues are becoming more important in the review and several remedies have already been imposed based on foreclosure or essential facility-like theories. One new feature in the filing form for complex cases is that the Brazilian authority tends to pay attention to conglomerate effects of the transaction.

### Non-competition issues

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

Traditionally, non-competition issues such as industrial policy or public interest are not factored into the review process by the competition authorities. Other governmental bodies cannot intervene in merger control analysis but merely participate on whatever grounds they deem appropriate. As already mentioned in question 8, in February 2018, CADE and the Central Bank entered into an agreement regarding each agency's jurisdiction in merger control cases involving the banking sector, ending a long dispute over their jurisdiction for such cases. Mergers in the banking sector must now be submitted to both agencies, but transactions whose delay in closing may pose 'high and imminent' risks to the stability of the Brazilian financial system – at the Central Bank's discretion – may be unilaterally approved by the Central Bank and CADE will have to approve the deal without restrictions, as well, based on the aspects of a prudential nature applied by the Central Bank.

### Economic efficiencies

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

The economic efficiency defence is expressly accepted by the Brazilian Competition Law within certain conditions, which include evidence that the gains will also benefit consumers. Although they are regularly analysed and taken into account in substantially complex transactions, it is fairly uncommon for CADE to authorise a deal based on efficiencies. In the authority's opinion, efficiencies presented by the parties in merger transactions are rarely accepted because they are normally

either unproven, not related to the transaction, or insufficient to justify the approval.

CADE has been adopting high standards of proof in the analysis of efficiency claims and, as a rule, efficiencies normally are not decisive for the clearance of a given transaction, especially if it involves significant concentration in the markets involved. Even so, there are some cases in which the efficiency claims were accepted by CADE and therefore played a more relevant role to approve a transaction without restrictions, such as:

- merger review No. 08700.009559/2015-12 (*TNT/Fedex*), after the appeal opposed by a third party, CADE's Tribunal maintained the unconditional clearance decision posed by the General Superintendence and, among other arguments, understood that there were duly quantified efficiencies that demonstrated that the net effect of the transaction is at least non-negative;
- merger review No. 08700.003252/2016-81 (*Casino/Dia*), efficiency claims of countervailing power;
- merger review No. 08700.012062/2015-73 (*Universal Studios/Sony Pictures*), efficiency claims of costs reduction owing to the sharing of the distribution agreement; and
- merger review No. 08700.010033/2015-77 (*TIM/Vivo/Claro/Oi*), efficiency claims of costs reduction owing to the sharing of infrastructure.

Moreover, CADE's practice is to assess efficiencies only at the latest stage of the merger review (ie, after being unable to ascertain that the exercise of market power is unlikely through the traditional analyses of merger control, especially in vertical mergers), as an opportunity to the parties to demonstrate that the effects of the transaction are non-negative. This careful assessment of the efficiencies was reinforced in merger review No. 08700.004446/2017-84 (*Essilor/Luxottica*), in which, after facing third-party allegations that efficiencies were unproven, CADE noted that the probability of exercise of market power had been settled earlier on, following the market test, and that the deal did not need to have proven efficiencies to go through. If it is the case, CADE will likely decide for additional investigation that gives the parties the opportunity to present efficiencies in complex deals, and these may be used as a base to negotiate remedies further.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

CADE has very broad enforcement powers, with the law expressly allowing it to take whatever measures are deemed necessary to remedy damages caused by a transaction, including up to dissolution or break-up of a company. As an administrative authority, CADE can request judicial backing to forcibly carry out decisions such as the collection of fines or the performance of a specific obligation. Since the pre-merger control regime in Brazil entered into force by means of Law No. 12,529/11 in 2012, CADE has reported to have increased the use of remedies in complex deals or transactions reviewed under a non-fast-track proceeding. Since the enactment of Law No. 12,529/11 in 2012, remedies have been rather negotiated between CADE and the parties, and unilateral imposition of restrictions by CADE on the deals are rare.

In addition, CADE has the power to require, within one year of the date of consummation, the submission of any merger to analysis, even when the specific merger is not included under the thresholds provided by Law No. 12,529/2011.

### Remedies and conditions

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

Yes. CADE has a tradition of attempting, whenever possible, to remedy specific competition problems rather than barring a whole deal. Divestment and behavioural commitments have been adopted, tailored to the characteristics of the markets affected, targeting, for instance, brands, production facilities and distribution networks. If, in the post-merger notification regime, such undertakings were unilaterally imposed by CADE, in the pre-merger notification regime it is expected that discussing and negotiating the commitments with CADE will be routine for more complex cases and within the new (and shorter) time frames envisaged in the Brazilian Competition Law. In the past few years, especially from 2016 onwards, we have noticed a predominance of the use of behavioural remedies by CADE. Such behavioural remedies may include objective pricing criteria, transparent commercial policies, as well as prohibitions to impose exclusivity, discriminatory conditions, tying and bundling strategies.

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

The remedies have to be specific, they should address the competition problems raised by the deal, and they have to be adequate to the market. CADE is usually concerned with the effects of the remedies on consumers rather than on competitors. Although, in theory, CADE tends to favour structural remedies owing to its liquidity, the practice shows that, since 2016, most of the remedies negotiated by CADE have been behavioural ones. Timing will depend on the specific remedy being adopted by the authorities; however, offering remedies earlier on in the process in complex cases may increase the chances of successfully negotiating remedies with CADE. Based on article 165 of CADE's Internal Rules, CADE may receive proposals of remedies from the parties from the filing up to 30 days after the challenge by the General Superintendence to CADE's Tribunal.

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

There has never been a foreign-to-foreign case involving foreign companies without any assets in Brazil (parties exclusively active in Brazil through export sales) in which remedies were required by the authorities. Foreign-to-foreign mergers involving assets in Brazil have been subject to the same remedies mentioned above.

### Ancillary restrictions

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

Clearance decisions routinely include non-compete provisions. In 2009, CADE released two internal rulings (*Súmulas 4* and *5*) based on its case law and consolidating the understanding about such ancillary agreements. In *Súmula 4*, CADE consolidated the understanding that it will accept non-compete agreements in joint ventures, provided that they have a close relationship with their corporate purposes and their relevant markets. In *Súmula 5*, CADE consolidated its prevailing understanding that a reasonable period for such non-compete agreements is five years as of the acquisition of the company or business, provided that it is related only to the affected business sold. CADE has frequently ordered the parties, even in foreign-to-foreign mergers, to change the original agreement if a non-compete clause provides for a longer period or comprises a broader territory. Ancillary exclusivity agreements can

also be covered by the decision, and CADE has in the past ordered the elimination of exclusivity clauses it did not deem reasonably justified.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

Clients, suppliers and competitors are often involved in high-profile cases, voluntarily or upon a calling by the authorities. Third parties can present submissions, request meetings with officials or even challenge the clearance made by the General Superintendence. Often, the authorities also bring clients and competitors into the process by sending them official requests for opinions and additional information. Their input is traditionally taken into consideration by the authorities. Third parties that act in bad faith may receive penalties that vary from 5,000 to 5 million reais.

### Publicity and confidentiality

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

The process is given full publicity. After notification, CADE publishes in the Official Gazette a summary of the notification, including the names of the parties and inviting comments from anyone. The parties can require confidential treatment of certain information, but third parties can request access to the remainder of the files. If relevant business information such as business secrets is requested during the review, the parties may request restricted access to that information or confidential treatment. The decision is also published in the Official Gazette and the merger review reaches CADE's Administrative Tribunal, the decision will be taken in an open public session, which is streamed in real time through CADE's website. The entire contents of merger review cases, except for confidential appendixes, is made publicly available after the final clearance.

### Cross-border regulatory cooperation

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

CADE has cooperation agreements or memoranda of understanding with several jurisdictions, including Canada, Chile, the European Union, Mercosur (Argentina, Paraguay, Uruguay and Venezuela), the BRICS (Russia, India, China and South Africa), Portugal, the United States, France, Peru, Ecuador, Colombia, Japan and South Korea. CADE has also signed similar agreements with the Inter-American Development Bank and the World Bank Group. Contacts and discussion between Brazilian authorities and those of other jurisdictions are steadily increasing, especially with respect to the investigation of international cartels, and stimulated by repeated contacts in international organisations such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network.

It is said that the new framework also incentivised greater interaction and coordination between CADE and international antitrust authorities during ordinary merger reviews, including the coordination of remedies. At the same time, such interaction and experience has substantially improved the design and implementation of remedies by CADE in comparison to past precedents. In 2019, the OECD accepted Brazil's application for membership as associate member of the entity's Competition Committee.

CADE can and will, in high-profile international cases, cooperate with antitrust authorities in other jurisdictions and may share information with them if the parties grant a waiver.

## JUDICIAL REVIEW

### Available avenues

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

Administrative appeals against CADE's decisions are submitted to the same panel of commissioners, as it is a one-tier agency within the Brazilian public administration. This means that decisions are rarely changed in the administrative sphere, unless there is evidence of a new fact or document that could result in a more favourable decision. However, the parties always have the right to go to court to challenge a CADE decision. The Brazilian Constitution provides for the judicial review of administrative acts. If the capacity of the courts to go over procedural aspects is unlimited, the extent to which they can review the merits of CADE decisions remains unclear and will only be decided by the judiciary itself as more appeals reach the higher courts in the next few years. In any case, the trend seems to be that most CADE decisions that are substantively adverse to the parties will be challenged in the courts.

### Time frame

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

As judicial review in Brazil begins with a court of first instance and may ascend on successive appeals up to the Supreme Court, a final judicial decision on an administrative act may take several years. However, an injunction suspending the effects of CADE's decision may be obtained in a few weeks. This will tend to be the crucial judicial battle, in that if the appealing parties do not get an injunction suspending a CADE order immediately, they will have to comply with it first and then wait for years until a final judicial decision is issued. The number of court challenges to CADE decisions is still quite small, but at least in some high-profile cases, parties were able to secure an injunction suspending a divestment order until the end of the judicial review.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

Enforcement of the notification rules was quite rigorous under the former law, and led to a large number of penalties imposed for non-compliance including foreign-to-foreign mergers. Unfiled deals, which were subsequently discovered, were almost always fined. As mentioned above, CADE has already imposed some penalties for gun jumping events. Moreover, CADE has been imposing several remedies (be it structural or behavioural) in several transactions that are considered as harmful to competition.

In the merger control area, as mentioned above, apart from the already published gun jumping guidelines, CADE published a Guideline for the Analysis of Horizontal Concentration Merger Reviews, setting forth the main arguments that are taken into consideration for the analysis of merger reviews with horizontal concentration.

In July 2017, CADE also published an Internal Manual for the Analysis of Ordinary Merger Cases, describing best practices for the review of such cases by CADE's officials based on the experience of the agency since the entry into force of Law No. 12,529 of 2011, including pre-filing, granting of waivers and infraction notices in the course of the

proceeding. In October 2018, CADE issued the Guidelines on Remedies, which gathers the best practices and procedures adopted by CADE in the design, implementation and monitoring of remedies established by the agency. In April 2019, CADE issued the Guidelines for the submission of standardised information, as requested by the agency, to the Department of Economic Studies, to improve and expedite the analysis of the cases.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

CADE informed that the agency is developing new Guidelines about the methodology for imposition of fines in case of gun jumping (it is expected that a preliminary version of the new Guidelines will be made available for public consultation and discussion in the second half of 2019).

## UPDATE AND TRENDS

### Key developments of the past year

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

Merger control activity in Brazil fluctuated somewhat in the period of the economic crisis in Brazil. From a high of 442 cases decided by CADE in 2014, CADE reviewed 406 cases in 2015, 390 cases in 2016, 378 cases in 2017 and 404 cases in 2018. However, CADE's merger control enforcement has increased its notoriety, with a number of high-profile cases between 2018 and the beginning of 2019 (both national and international), some of them involving complex remedies, such as: *Disney/Fox* (merger review No. 08700.004494/2018-53); *Amtcor/Bemis* (merger review No. 08700.005911/2018-85); *Bayer/Monsanto* (merger review No. 08700.001097/2017-49); *ArcelorMittal/Votorantim* (merger review No. 08700.002165/2017-97); *Linde/White Martins* (merger review No. 08700.007777/2017-76); *Essilor/Luxottica* (merger review No. 08700.004446/2017-84); *Itaú Unibanco/XP Investimentos* (merger review No. 08700.004431/2017-32) and a number of blocked cases, as seen below. A recent trend observed in the cases above is that CADE's remedies practice has evolved to accept the inclusion of third-party trustees for monitoring the compliance with the negotiated remedies, and to employ arbitration clauses to solve disputes – in an effort to reduce monitoring costs to the authority.

In the period between 2018 and the beginning of 2019, CADE blocked one merger between *Liquigás/Ultraz* (merger review No. 08700.002155/2017-51) and another three deals were abandoned as a result of antitrust concerns: *Nadir Figueiredo/Owens-Illinois do Brasil* (merger review No. 08700.005137/2017-21); *Siemens/Alstom* (merger review No. 08700.004077/2018-19); and *Saint-Gobain/Rockfibras* (merger review No. 08700.004162/2018-79). In the *Liquigás/Ultraz* case, CADE blocked the deal after concluding that the transaction could give rise to anticompetitive concerns in the liquefied petroleum gas (LPG) market, as the new entity would account for more than 40 per cent of the market in several states of the Brazil. In the *Nadir Figueiredo/Owens-Illinois* and *Saint-Gobain/Rockfibras* cases, after that the General Superintendence challenged the case to CADE's Tribunal, the parties dropped each case considering that they could not settle with the agency the proper remedies to mitigate the anticompetitive concerns pointed out by CADE. Lastly, in the *Siemens/Alstom* case, the parties abandoned the case in Brazil after the European Commission blocked the deal in Europe.

CADE's competition advocacy practice has also seen a recent boost. Following the late-2018 to early-2019 beginning of bankruptcy proceedings for Avianca Brazil Airlines (Brazil's fourth-largest airline), CADE proactively issued a study on concentration in the air travel market, and

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even suggested that an acquisition by some of the incumbents could result in greater competition concerns. It also issued a recommendation to the Brazilian Civil Aviation Authority that, in case the airline goes bankrupt, its slots should be distributed preferably to a new entrant or companies with low market share.

In July 2019, CADE's Tribunal approved Resolution No. 24 of 2019 that replaces Resolution No. 13 and establishes procedural aspects for gun-jumping investigations and the notification of transactions the submission of which is not mandatory. It also sets forth the criteria for the calculation of gun-jumping fines based on CADE's practices, including aggravating factors (eg, timing, severity of conduct and intent). On the same date, CADE approved Resolution No. 25 of 2019 that provides for the formal aspects and standards for the Commissioners of CADE's Tribunal to write and present their votes on cases before they are read during CADE's hearing sessions.

Lastly, in terms of internal organisation, it is worth noting that CADE's Tribunal has seven seats: one for the agency's President and the other six for appointed Commissioners. Up to May 2019, the Tribunal has six seats filled (followed by the departure of one Commissioner in January 2019) and three other Commissioners will have their terms ended in July 2019. New commissioners are appointed by the Federal President and go through a confirmation process in the Brazilian Senate, and it is expected that at least two seats will be filled before CADE's scheduled mid-year break, with the rest until the end of 2019.

# Bulgaria

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

The principal piece of legislation regulating merger control in Bulgaria is the Protection of Competition Act (PCA). The Bulgarian national competition authority, the Commission on Protection of Competition (the Commission), has been entrusted with enforcing merger control rules under national law. It has issued a standard notification form and guidance on its completion, which are available on the Commission's website ([www.cpc.bg](http://www.cpc.bg)).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The PCA defines a merger (concentration) among undertakings as a lasting change of control, which results from the legal merger or amalgamation of two or more previously independent undertakings, or the case where one or more persons, already controlling at least one undertaking, acquire control, directly or indirectly, in respect of other undertakings or parts of them, by way of acquisition of shares or property, by contract or by any other means.

Changes of control on a temporary basis are generally not caught by local merger control. Examples of situations where control is acquired on a temporary basis include the acquisition by an intermediate buyer in preparation for the transfer of the business to a final controlling shareholder during a short period of time, as well as situations such as a short-term lease of a business. Conditional transactions (such as those related to put and call options) are also generally not considered to occasion concentrations upon their entry, but rather upon the fulfilment of the relevant conditions.

While a concentration can arise both where control of an entire undertaking is being transferred and where control is transferred in respect of only part of that undertaking, transactions where control is transferred in respect of certain assets, solely for the purpose of a particular service being provided back to the transferor or its group by an outside supplier (outsourcing), are generally not considered to result in a concentration, unless the transferred part of the business will have access to the market outside the outsourcing relationship.

Changes between sole and joint control and vice versa, as well as changes in the jointly controlling parents, are usually considered to represent a concentration. The conversion between positive and negative sole control is normally not considered to constitute a merger for the purposes of merger control.

Acquisitions of control by individuals or entities, which do not themselves constitute an undertaking and do not control previously one or more undertakings, have also been considered not to represent a

concentration. However, the Commission has used a very broad interpretation in respect of the concept of undertaking in this context.

Similarly to other jurisdictions, transactions where credit and other financial institutions or insurance undertakings, which deal in securities on own account or on account of others, hold temporarily securities of an undertaking for the purpose of resale, are not considered to represent a concentration, provided they do not exercise the voting rights attached to these securities for the purpose of influencing the competitive conduct of the undertaking, or exercise such voting rights only to the extent necessary to prepare the transfer of the securities that should be fulfilled within one year of their acquisition.

The acquisition of control by a person entrusted with functions in the context of liquidation or insolvency of the undertaking is also not considered a concentration for the purposes of Bulgarian merger control. The acquisition by financial holding companies of control, where such control is exercised solely to maintain the value of the investment, but not to determine the competitive behaviour of the undertakings in which the holding participates, either directly or indirectly, is also not caught by local merger control rules.

Finally, intra-group reorganisations, where ultimately control remains the same, are also not considered to represent a concentration.

#### 3 | What types of joint ventures are caught?

The creation of a joint venture performing on a lasting basis all the functions of an economically autonomous entity is considered a concentration. As above, short-term alliances (eg, consortia established solely for the purpose of bidding for and performing a particular public contract) generally do not constitute a concentration. However, the continuation of their activity on a lasting basis upon change of the original intent may be caught by merger control rules.

The acquisition of joint control of a pre-existing undertaking can also trigger the application of these rules.

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

The PCA defines control as the acquisition of rights, the entry into agreements or other means that as a matter of law or fact, together or individually, would allow the exercise of decisive influence on an undertaking by acquiring ownership or use of all or part of its assets or acquiring rights, including on the basis of an agreement, which afford the ability to exercise decisive influence on the composition, voting or decisions of the bodies of the undertaking.

Acquisitions of minority shareholdings do not trigger Bulgarian merger control rules, unless they result in the acquisition of control within the sense explained above.

In this context, the Commission has taken into account the ability of a minority shareholding to exercise de facto control, considering factors

such as the fact that the remaining shareholdings are widely dispersed, and therefore a sufficiently large minority interest is capable of achieving a decision-making majority in the bodies of the undertaking, in particular considering the history of majorities in such bodies. A minority shareholding can also afford negative sole control where a single shareholder alone is capable of blocking strategic decisions, despite the fact that neither it, nor any other shareholder is capable of adopting them by itself, and provided joint control is not present otherwise.

Joint control results from the ability of several independent parents, jointly to exercise decisive influence on the undertaking, as a result of factors such as their agreement to vote together on particular strategic issues, or their ability to adopt or veto strategic decisions, considering the applicable majorities, the existing shareholdings and other arrangements.

### Thresholds, triggers and approvals

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

A transaction that represents a concentration would need to be notified to and cleared by the Commission, where the jurisdictional threshold detailed below is met, provided, however, such concentration is not subject to notification and clearance by the European Commission under the EU Merger Regulation.

The threshold is as follows:

- the combined aggregate annual turnover of all the undertakings participating in the concentration in the territory of Bulgaria during the preceding financial year exceeding 25 million levs; and
- either the annual turnover of each of at least two of the participating undertakings in the concentration in the territory of Bulgaria during the preceding financial year exceeding 3 million levs; or
- the annual turnover in the territory of Bulgaria during the preceding financial year of the undertakings, subject to acquisition, exceeding 3 million levs.

As a consequence of the second alternative component in the jurisdictional threshold (turnover of the target), situations may arise where the threshold is passed and the notification obligation is triggered, by reason of the target's turnover alone, even though the acquirer may have had no or very little turnover in Bulgaria during the preceding financial year.

Transactions that are below the thresholds cannot be investigated on their merits under Bulgarian merger control. The parties are, however, free, if in doubt, to notify such transactions on a voluntary basis. In such cases the Commission, without reviewing the case on the merits, has to issue a decision that the transaction does not fall within the scope of the prior notification obligation.

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

Where the local notification thresholds are exceeded, the filing is mandatory, unless the transaction also triggers the thresholds for notification to and clearance by the European Commission under the EU Merger Regulation, in which case the European Commission would have jurisdiction. Nevertheless, where the European Commission, despite having jurisdiction, has referred the case to the Bulgarian competition authority under the conditions laid down in the EU Merger Regulation, the Commission would have jurisdiction to review the case, provided the Bulgarian notification threshold (see above) has been exceeded.

No exceptions to the mandatory filing obligation are currently available.

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

Foreign-to-foreign mergers have to be notified where the conditions explained in questions 5 and 6 are met. In this respect there is no distinction between foreign-to-foreign and purely local mergers. The fact that the Bulgarian jurisdictional thresholds are met has been considered sufficient by the Commission to assert jurisdiction irrespective of any local effects or nexus considerations. Such considerations, the Commission has held, are relevant to the assessment of the concentration as part of the merger control proceedings, but not to the obligation to notify.

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

There are generally no rules specific to foreign investments (ie, general prudential supervision of shareholding rules as regards certain regulated entities apply equally to local and foreign investors). Exceptions to this are certain restrictions on foreign investments in the real estate sector and investments and activities by offshore companies and their affiliates. However, these do not factor in the Bulgarian merger control process.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

There is no specific filing deadline; however, given that notification and clearance should precede the acquisition of control and should be submitted prior to undertaking of factual and legal actions to implement the transaction, the parties would be well advised to submit their filing sufficient time in advance to allow that the decision of the Commission be issued in time.

As there is no filing deadline, there are no sanctions related to late filing. As regards closing the transaction without having submitted a notification or prior to clearance, see below.

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

The persons acquiring control (directly or indirectly) are the parties responsible for filing. These, depending on the circumstances of the case, may be the direct parties to the transactions, their parents or the specific entities established to take control or otherwise participate in the concentration.

In the case of a legal merger, the merging parties would be under an obligation to file.

A filing fee of 2,000 levs applies. In addition, a clearance fee of 0.1 per cent of the combined aggregate Bulgarian turnover of the participating undertakings for the latest preceding financial year would apply where a clearance decision is issued. This fee is capped at 60,000 levs.

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

Where notification is mandatory, implementation of the transaction has to be suspended prior to clearance. The suspension does not apply in the case of a tender offer or a series of transactions in securities admitted to trade in regulated markets of financial instruments, by which control is acquired from different sellers, provided the Commission is notified without delay, and also provided the acquirer does not exercise

the rights attached to the securities, except to the extent necessary to protect the value of the investment made.

After submission of the notification, the Commission has three working days to review the filing as to whether it is complete. If the Commission considers the filing complete, the chairperson will initiate proceedings. If the filing is incomplete, the Commission will inform the parties and initiate proceedings only after the deficiencies in the information or documents have been rectified.

As of the day following the day of initiation of proceedings, the Commission, in an accelerated (Phase I) proceedings, has to review the notification within a period of 25 working days. The review period is instructive and its expiry without a decision does not lead to a presumptive clearance. Requests for additional information during the proceedings stop the clock, and the review timeline is correspondingly extended.

The Phase I review period can be extended by up to 10 working days at the parties' request, to allow them to prepare proposals for changes to the concentration. If proposals for changes to the concentration are submitted, the review period is automatically extended by a further 10 working days to allow the Commission to review and analyse the proposed proposals for changes to the concentration.

Where, during the Phase I proceedings, the Commission has come to the conclusion that the concentration raises serious doubts that it may lead to the creation or strengthening of dominance as a result of which effective competition would be significantly impeded, it may initiate an in-depth (Phase II) investigation into the case.

The Phase II investigation must be completed within four months of the publication in the Commission's online electronic register of the decision to open the Phase II investigation. In complex cases, this period can be extended by up to an additional 25 working days. In case of a remedies offer, the timeline for review is automatically extended by 15 working days. The review periods in Phase II are also instructive and no implied clearance is available should they not be met.

### Pre-clearance closing

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

Closing or integrating the activities of the merging businesses in violation of the suspension obligation or without having submitted a notification and obtained clearance where this is mandatory can result in the imposition of sanctions in an amount of up to 10 per cent of the infringing parties' annual turnover.

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

Sanctions are applied in such cases.

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

The Commission has not objected to carveout closing, where the transaction may be implemented in other jurisdictions, but is not implemented in Bulgaria pending clearance from the Commission. The way in which this is achieved would depend in each particular case, considering the parties' activities in Bulgaria, but in general would involve the undertaking of legal obligations that the concentration will not be accomplished as regards Bulgaria until the Commission has issued its decision.

The Commission does not have the authority to waive the standstill obligation neither of its own initiative, nor at the request of the parties.

### Public takeovers

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

As mentioned in question 11, in the case of public takeover bids in respect of publicly listed companies whose shares are traded in regulated markets of financial instruments, the suspension obligation does not apply, subject to notification without delay and provided the acquirer of control does not exercise the voting rights attached to the securities, except where necessary to protect the value of the investment. In this context, notification without delay would normally mean that the notification should be submitted as soon as possible and in any case before the actual acquisition of control has taken place.

Planned concentrations should normally be notified after the publication of the bid, but may occasionally be notified before that, if the parties can demonstrate a good faith intention to make such a bid. It must be underlined, however, that no exception to the notice publication requirement (see question 30) has been provided for such cases.

### Documentation

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

The notification must contain information on the undertakings concerned, as well as their groups, the nature of the concentration as well as the mechanism and time frame in which control will be acquired, the economic rationale of the transaction, description of the relevant markets in which the parties operate, including their market shares, annual turnovers and any barriers to market entry that affect competition in these markets, their main competitors, suppliers and customers, as well as the parties' view as to why the transaction will not lead to the creation or strengthening of a dominant position in any relevant market as a result of which effective competition would be significantly impeded.

Usually, documents evidencing the corporate existence of the parties are attached to the notification, the transaction documents giving rise to the change of control on a lasting basis, the annual reports of the undertakings concerned, a power of attorney, organisational charts of the parties' groups, a draft public notice on the transaction and various other documents that reflect the parties' positions in the relevant markets before the concentration.

In practice, the required level of detail in the notification would vary depending on the nature and complexity of the transaction (eg, whether it is an acquisition of a direct competitor, or a supplier or customer, or an unrelated business), as well as depending on whether the transaction can potentially raise competition concerns.

### Investigation phases and timetable

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

After submission of the filing, the Commission's administration will review the notification and attachments and where they are complete, the chairperson of the Commission will initiate proceedings on the case (a case number is assigned).

Once proceedings are initiated, a brief notice concerning the case is published on the website of the Commission (draft of which is provided by the parties to the merger control proceedings).

During the proceedings, the Commission often sends questionnaires to the parties and to their major competitors, suppliers and customers, who in addition to providing information, are invited to express their views concerning the merger.

At this stage or with the notification, the parties can offer remedies to address specific competition concerns that arise out of the transaction.

After the Phase I review, the Commission will issue a decision by which it:

- (i) declares that the transaction does not constitute a concentration or does not fall within the scope of article 24;
- (ii) clears the transaction unconditionally;
- (iii) clears the transaction subject to conditions and obligations; or
- (iv) initiates in-depth (Phase II) proceedings on the case.

The decision under (iv) above cannot be appealed. The decision at the end of Phase I is issued without a hearing of the parties. Access to the file can be provided only after the Phase I decision is issued.

The actions following the initiation of Phase II investigation follow a similar pattern to those under a Phase I proceeding. Interested third parties are allowed to submit observations within 30 days of publication of the decision opening the Phase II investigation on the Commission's website.

At the end of the review, the Commission will either issue an unconditional clearance, or adopt a statement of objections, addressed to the notifying party or parties.

The parties will have 14 days or more to respond to the statement of objections and access the file. After they submit their response, they also have the right to be heard in an open sitting of the authority, which can take place no sooner than two weeks after the expiry of the deadline for the submission of the response.

At the end of the Phase II investigation, the Commission will issue a decision by which it:

- approves the transaction unconditionally;
- approves the transaction subject to conditions and obligations; or
- prohibits the transaction.

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

In practice, most mergers are reviewed within the 25-working-day review period prescribed by the law for a Phase I (accelerated) proceeding. The Commission rarely shortens its review below this period and also rarely extends it beyond it by any significant amount of time. However, it takes additional time, after the adoption of the Commission's decision, for the parties to be notified.

The preliminary review for completeness of the notification sometimes exceeds the legally allowed three working days following the submission of the notification. In almost all cases the Commission makes use of its ability to request additional information during the preliminary review process (after submission of notification), which extends the period for initiation of the case itself and the deadlines for the decision, respectively.

In Phase II proceedings, in most cases the Commission has issued its decision sooner than the expiry of the four-month period prescribed by the PCA.

As mentioned, the review periods vary depending on the nature and complexity of the case. In principle, the Commission follows the statutory periods for examination and its internal guidelines within the assessment of the specific transaction.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A transaction will be cleared where it does not lead to the creation or strengthening of a single or collective dominant position as a result of which effective competition would be significantly impeded.

The Commission may clear a concentration that would lead to the creation or strengthening of dominance where it aims to modernise the relevant economic activity, improvement of the structures of the market, better meeting interests of consumers and overall the positive effects would outweigh any negative effects on competition in the relevant markets.

The authority's analysis in merger cases is focused on the dominance test and the potential for impediment to competition, particularly having regard to existing entry barriers, including barriers to expansion of existing competitors. Positive effects have rarely, if at all, been the decisive factor in determining the outcome of the review process. Traditionally, the Commission's analysis has often focused on horizontal and vertical non-coordinated effects.

The Commission's case law has occasionally ventured outside the boundaries of the dominance test, by accepting remedies that in essence resolve issues falling outside the creation or strengthening of a dominant position.

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

No, the dominance test applies also to joint ventures.

### Theories of harm

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

The Commission's analysis is essentially focused on dominance, and by extension any horizontal or vertical non-coordinated effects that will arise as a result of the transaction, to the extent that these are a direct result of the creation or strengthening of a dominant position. Conglomerate issues and coordinated effects have rarely, if at all, featured in the reasoning of the Commission's decisions. The Commission also has expressed on several occasions the view that potential abusive conduct by the resulting group falls outside the merger control analysis, which should focus on the change in the process of competition that will result directly from the merger.

### Non-competition issues

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

Non-competition issues would not normally be considered in the Commission's analysis as regards mergers, except where such non-competition issues constitute positive effects of the transaction, which have to be considered in the balance with any factors impeding competition as a result of the transaction.

### Economic efficiencies

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

As discussed above, economic efficiencies are considered to only a limited extent. Normally the analysis is focused on the possible harm to competition as a result of the transaction and ways to address this. Only once they have been addressed or mitigated to a significant extent

can any efficiencies come into play to finalise the Commission's overall assessment. Where serious competition issues arise, efficiencies alone have never been sufficient to tip the balance between prohibiting and clearing the transaction.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

The Commission has the power to prohibit a concentration. It also has the power to clear the transaction subject to conditions and obligations. In a Phase I proceeding, the conditions and obligations should correspond to the proposals for changes to the concentration offered by the parties. At the end of a Phase II proceeding, the Commission itself may choose the remedies it can attach to its clearance decision as conditions and obligations.

Where a notifiable concentration was completed in contravention of a prohibition decision or without clearance, where it finds that the transaction should have been prohibited or cleared subject to conditions and obligations, in addition to imposing any sanctions, the Commission can impose any measures it deems necessary to restore effective competition in the relevant markets, including separation of capital, shares or assets, and termination of joint control.

As noted, the Commission may withdraw its clearance decision where it is based on incomplete, incorrect, untrue or misleading information, or where the parties have failed to comply with the conditions and obligations attached to the clearance decision aimed at preserving effective competition and limiting its negative impact on the market concerned. The decision of the Commission may also be revoked by the court, as specified in question 32.

### Remedies and conditions

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

The parties are free to offer any remedies, behavioural or structural, that they consider capable of addressing any competition issues that may arise as a result of the merger. During the Phase I proceedings, the Commission can accept or reject them. During the Phase II proceedings, the Commission may also impose remedies of its own initiative, or modify the remedies offered by the parties in its final decision.

In general, the preference so far in the Commission's case law has been towards behavioural remedies.

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

The parties can offer remedies at any time during the proceedings before the Commission, including with the notification itself. Guidance on the preparation and submission of such an offer is provided in rules for imposing measures to safeguard competition in case of concentrations between undertakings, which were adopted by Commission Decision No. 1776 of 20 December 2011.

Where accepted, the remedies become binding on the notifying party as conditions and obligations attached to the clearance decision. The obligations usually have a specific deadline by which they need to be fulfilled, but there are also cases where open-ended obligations have been adopted.

The Commission has the power to control the fulfilment of the conditions and obligations, with a corresponding obligation of the parties to inform the Commission about the performance of its decision.

Where the parties have failed to comply, the Commission may impose sanctions upon them and in addition may reopen the case and withdraw the clearance decision.

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

The Commission has adopted remedies as conditions and obligations attached to its clearance decision on several occasions in foreign-to-foreign mergers. In some cases, these have been remedies offered on a global basis across a number of jurisdictions, which were then also transposed in the Bulgarian merger control proceedings, and in others these have been remedies specific to Bulgaria.

### Ancillary restrictions

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

The Commission generally follows closely the European Commission's practice as regards ancillary restraints. On a number of occasions, the Commission has held that such restrictions should be considered cleared with the decision clearing the concentration, provided they are deemed directly related and necessary to the implementation of the concentration. Where the Commission is seized with the matter of such ancillary agreements, it would normally discuss them in the reasoning of its decision.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

Main customers and main competitors are routinely involved in the review process by being invited to provide their position on the transaction, along with any specific information and documents the case handlers deem necessary.

Unless they are constituted as parties or interested third parties in the proceedings, they would not normally have access to the file.

However, where they have a legal interest, they can appeal the Commission's final decision in the framework of judicial review (see questions 32 and 33).

### Publicity and confidentiality

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

Shortly following the opening of the proceedings on the case, a brief notice of the notified transaction is published on the Commission's website. This notice is drafted by the parties and attached to the notification, but may be amended by the Commission before it is published. Therefore, the parties must expect that the transaction will become public shortly after they have submitted the merger notification to the Commission.

Documents containing commercial and other secrets must be accordingly noted (by placing a stamp or written note that the document is confidential on each page) at the time of their submission to the authority. At that time or shortly thereafter, the parties must also provide a non-confidential version of the confidential documents, along with a list of all confidential and non-confidential documents and reasoning for the requests for confidentiality. The confidential document is then excluded from the access to the file and its content will not be replicated in the public version of the Commission's decision.

The Commission may, on a request of a party or of its own initiative, waive the confidentiality of particular information or documents, where it considers they are not confidential, or where this is necessary to prove an infringement or for effective exercise of the rights of defence of the parties. The party (including a non-participating third party) whose information is disclosed has the right to appeal against the disclosure in the framework of judicial review.

### Cross-border regulatory cooperation

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

The Bulgarian competition authority is a member of the European Competition Network – the information sharing network of all competition authorities in the European Union. In this network it actively cooperates with other authorities, particularly in the case of multi-jurisdictional merger filings. Cooperation may be limited to exchanging information, or may extend to sharing views on the scope of relevant markets, the effect that the particular concentration may have upon them and how any competition issues may be remedied. A waiver of confidentiality is often requested from the notifying party for the purposes of such information exchange within the European Competition Network.

The Commission has also entered into bilateral memorandums on cooperation with competition authorities of Azerbaijan, Albania, Bosnia and Herzegovina, Croatia, Cyprus, Kosovo, Moldova, Macedonia, Montenegro, Russia, Serbia, Turkey, Ukraine and others.

In addition, the Commission actively participates in cooperation on competition issues within the International Competition Network, the Organisation for Economic Co-operation and Development, the competition forum of UNCTAD, and certain other international initiatives.

## JUDICIAL REVIEW

### Available avenues

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

All decisions of the Commission ending the proceedings (with the exception of a decision opening a Phase II investigation) are subject to judicial review. The parties to the proceedings, as well as all interested third parties, can bring an appeal against the decision in the framework of judicial review.

### Time frame

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

The deadline for submitting an appeal is 14 days, which for the parties to the proceedings start as of the moment they are notified of the decision, and for third parties – from the moment the decision is published on the website of the Commission.

The judicial review process can go through two instances – a first instance consisting of review by one judge at the Administrative Court of Sofia District, and a cassation instance, consisting of review by a panel of three judges at the Supreme Administrative Court. While the review periods vary depending on the complexity of the case and the workload of the court at the relevant time, normally the proceedings on the case should be complete within a period of one to two years.

An appeal does not suspend the effect of a clearance decision, in respect of which immediate execution derives from the law or the Commission's ruling, unless the court explicitly orders the suspension of its implementation.

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## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

The Commission routinely reviews and decides on foreign-to-foreign, foreign-to-local and local-to-local mergers, without distinction. It also imposes sanctions for failing to notify a merger, where notification was necessary, including in the cases of foreign-to-foreign mergers.

Recently, the Commission's focus has been on strengthening the pre-notification process. Thus, ideally, the Commission would like to have a full set of documents and information it considers it needs from the notifying party before starting the clock. This, occasionally, may extend the process and the parties should adjust their expectations to this approach.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

There are no current proposals to amend the applicable legislation that has been published. The PCA has been recently amended effective as of 1 January 2019, by which the court jurisdiction for judicial review as per question 33 above was changed.

# Canada

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

In Canada, the federal Competition Act (the Act) establishes jurisdiction for the review of mergers affecting any market in Canada. The Act is enforced by the Commissioner of Competition (the Commissioner), who is appointed by the Federal Cabinet for a five-year renewable term. The Commissioner is supported by the Competition Bureau (the Bureau), an independent law enforcement agency within the federal Department of Innovation, Science and Economic Development. The Commissioner and, by extension, the Bureau have broad powers to investigate and evaluate a merger. Should the parties to a merger not be prepared to cure competitive concerns identified by the Bureau, the Commissioner can apply to the Competition Tribunal (the Tribunal) for a remedial order.

The Tribunal, created by the Competition Tribunal Act (the Tribunal Act), is a specialised adjudicative body composed of judicial members and business and economic experts. The Tribunal is the forum of first instance for any merger challenged by the Commissioner. While the Tribunal Act requires that the Tribunal conduct its hearings 'as informally and expeditiously as the circumstances and considerations of fairness permit', the Tribunal operates with many of the procedural trappings of an ordinary court and, consequently, hearings routinely take many months to complete.

For mergers subject to foreign investment or other specific regulatory approvals, see question 8.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

All mergers that have a sufficient Canadian nexus (ie, a real and substantial connection to Canada), regardless of size, are subject to the substantive jurisdiction of the Act, and therefore to potential investigation and evaluation by the Commissioner and possible referral to the Tribunal. The definition of 'merger' is broad and includes the acquisition of control or a significant interest in the business of another person. However, the Act's pre-merger notification regime is of more limited scope. Part IX of the Act creates five broad categories of transactions that are subject to pre-merger notification if they meet certain party and acquiree size thresholds (discussed in question 5). These are: asset acquisitions; share acquisitions; acquisitions of an interest in an unincorporated combination; amalgamations; and the formation of unincorporated combinations.

#### 3 | What types of joint ventures are caught?

Generally, joint ventures with a sufficient Canadian nexus are caught by the Act's broad definition of 'merger' and are subject to the Act's

substantive jurisdiction. Depending on how it is structured, a joint venture could be caught under the mandatory pre-merger notification regime as an unincorporated combination (usually a partnership), a share or asset acquisition, or a corporate amalgamation. However, there are exemptions for joint ventures that meet certain conditions. (There are also similar provisions in the Act dealing with competitor agreements that may apply to joint ventures – see question 20.)

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

The Act contains a bright-line definition of 'control': the holding or acquisition of more than 50 per cent of the voting securities of the corporation or, in the case of a partnership, sole proprietorship, trust or other unincorporated entity, the holding or acquisition of an interest in the non-incorporated entity that entitles the holder or acquirer to more than 50 per cent of the profits of the entity or of its assets on dissolution. However, the Act's pre-merger notification regime does not require that control be acquired to trigger a filing obligation. The acquisition of 'any of the assets in Canada of an operating business' (other than in the ordinary course) or of shares yielding cumulative ownership of more than 20 per cent of the voting shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the voting shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will be sufficient to trigger a notification obligation (provided that other financial criteria discussed in question 5 are met). There are similar thresholds for acquisitions of interests in combinations.

Additionally, minority interests less than outright control may be caught by the substantive (as opposed to notification) provisions of the Act, because the Act defines a merger to include any transaction by which a party acquires a 'significant interest' in the business of another person. What constitutes a 'significant interest' is not defined by the Act. However, the Commissioner's Merger Enforcement Guidelines (MEGs) contemplate that the acquisition of a 'significant interest' could occur at as low as a 10 per cent ownership interest – or in some cases without an equity interest if contractual or other circumstances allow material influence to be exercised over the economic behaviour of another person (including decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights). The MEGs note that, among other factors, board composition, voting and veto rights, the terms of any shareholder or voting agreements and put, call or other liquidity rights are relevant to determining if there has been or will be an acquisition of a 'significant interest'.

## Thresholds, triggers and approvals

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

The Act's substantive jurisdiction extends to all mergers that have a real and substantial Canadian nexus, regardless of size. However, the Act's pre-merger notification requirements are triggered by bright-line thresholds designed to give certainty to merging parties regarding filing obligations. The transaction must involve an 'operating business' in Canada (in the sense that employees regularly report for work within Canada as opposed to merely a passive investment – but, in the Commissioner's view, such employees may be those of an agent or contractor). The obligation to notify is also contingent upon satisfaction of both a party-size threshold and an acquiree-size threshold.

#### Party-size threshold

The parties to the transaction, together with their worldwide 'affiliates' (defined generally as those entities in a relationship of control to one another or under common control), collectively have assets (book value) in Canada or gross revenues from sales in, from or into Canada (that is, domestic sales plus exports and imports) in excess of C\$400 million in the most recently completed fiscal year. For share acquisitions, the acquiring corporation and the acquired corporation (rather than the vendors of the shares) are deemed to be the parties to the transaction. In the case of the acquisition of an interest in a combination, the parties are the person or persons who propose to acquire the interest and the combination whose interest is to be acquired. A vendor that owns more than 50 per cent of the shares or the interests in a combination would be included in the party-size threshold calculation as an affiliate of the entity being acquired.

#### Acquiree-size threshold

The acquiree-size threshold (sometimes referred to as the transaction-size threshold) is based on the book value of assets in Canada that are held by the entity that is the subject (target) of the transaction or that are themselves the subject of the transaction, or the gross revenues generated from those assets (domestic plus export sales). For 2019, the general threshold (for assets or revenues) is C\$96 million. (Note: the threshold is subject to an annual inflation adjustment, which is typically announced in January or early February of the year. Consequently, the threshold is likely to be slightly higher than C\$96 million in 2020.)

As noted in question 4, if the underlying party-size and acquiree-size thresholds are met, the acquisition of more than 20 per cent of the voting shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the voting shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will trigger a notification obligation. Similarly, a proposed acquisition of an interest in a combination of two or more persons to carry on business other than through a corporation (eg, a partnership) is also notifiable if the party-size and acquiree-size thresholds are met and if it will result in the acquiring party and its affiliates being entitled to more than 35 per cent (or more than 50 per cent if the entitlement was already 35 per cent) of the profits of the combination or of its assets on dissolution. Similar, but more complex, thresholds apply to amalgamations.

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

Notification is mandatory for transactions that exceed the thresholds set out in question 5. A narrow exemption exists for asset securitisations

meeting certain criteria. There are also other exceptions of very limited scope (such as, transactions involving affiliated entities).

Parties occasionally notify voluntarily (eg, by applying for an advance ruling certificate), where a transaction falls below the notification thresholds, if there is significant concern about the competitive impact of a transaction. Doing so allows the parties to seek confirmation from the Commissioner that he or she will not challenge the merger. However, the significant filing fees (see question 10) make such voluntary notifications relatively rare.

If a non-notifiable merger comes to the Bureau's attention from other sources (eg, marketplace complaints or the Bureau's Merger Intelligence and Notification Unit), a notification is not required but the Bureau may request or compel production of relevant information to carry out an assessment under the substantive merger provisions of the Act. As noted in question 36, the new Commissioner has signalled that the Bureau will have an increased focus on gathering intelligence to identify and review below-threshold potentially anticompetitive transactions.

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

Canada asserts an 'effects' test for jurisdiction. Thus, foreign-to-foreign mergers may be subject to substantive review under the Act even though they occur outside Canada, if competitive effects from the transaction would occur within Canada and the target has an operating business in Canada. The competitive effects of primary interest are the impacts on customers located in Canada.

Foreign-to-foreign transactions are subject to pre-merger notification if the financial thresholds set out in question 5 are exceeded. The asset value branches of the thresholds focus only on assets in Canada. However, the revenue branches of the thresholds include exports in addition to domestic sales, and in the case of the party-size threshold imports as well. For example, the acquisition of more than 20 per cent of the shares of a foreign public corporation that has a subsidiary that carries on an operating business in Canada would trigger a notification obligation if the financial thresholds are met (see question 5).

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

The Investment Canada Act applies whenever a non-Canadian, directly or indirectly, acquires control of a Canadian business regardless of whether it was owned by Canadians or other non-Canadians. A non-Canadian acquirer must either file an application for review or a post-closing notification of the investment unless a specific exemption applies.

To determine whether an investment is reviewable under the Investment Canada Act, it is necessary to consider whether the investor or the vendor is a 'Trade Agreement Investor' (ie, an entity controlled by citizens of states that are party to the Comprehensive Economic and Trade Agreement between Canada and the European Union, an entity controlled by citizens of states that are party to (and have ratified) the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, as well as citizens of the United States, Chile, Colombia, Honduras, Mexico, Panama, Peru and South Korea), whether the investor or the vendor is a 'WTO investor' (ie, an entity controlled by citizens of member states of the World Trade Organization) and whether the investor is a state-owned enterprise (SOE). Depending on the nationality of the ultimate controller of the investor or the vendor, there are different size thresholds that apply with respect to the need to obtain approval of a transaction. There are also separate and very low thresholds that apply where the Canadian business being acquired engages in

cultural activities (such as those involving books, magazines, film, television, audio or video recordings, or radio or television broadcasting).

The threshold test changed for non-SOE WTO investors from an asset value test to an enterprise value test on 24 April 2015. As of January 2019, if the Canadian business is being acquired directly, by or from a WTO Investor and is not engaged in cultural activities, an investment is reviewable only if the Canadian operating business being acquired has an enterprise value of C\$1.045 billion. Also, as of January 2019, if the Canadian business is being acquired directly by or from a Trade Agreement Investor and is not engaged in cultural activities, the investment is reviewable only if the Canadian operating business being acquired has an enterprise value of C\$1.568 billion. Both the WTO investors threshold and the Trade Agreement Investors threshold undergo annual inflation adjustments each January. Where the investment involves the acquisition of publicly traded shares, enterprise value is calculated as the sum of the market capitalisation of the target and its liabilities minus its cash and cash equivalents. Where the investment involves the acquisition of privately held shares, enterprise value is calculated as the sum of the acquisition value and the target's liabilities (based on its most recent quarterly financial statements) minus its cash and cash equivalents (based on its most recent quarterly financial statements). Where the investment involves the acquisition of assets, enterprise value is calculated as the sum of the acquisition value and assumed liabilities minus cash and cash equivalents.

Where an SOE WTO investor is involved, and if the Canadian business is being acquired directly and is not engaged in cultural activities, an investment will be reviewable only if the Canadian operating business being acquired has assets with a book value in excess of C\$416 million. That threshold is expected to rise by an inflation-adjusted amount in early 2020.

If the acquisition by or from a WTO investor is indirect (ie, the acquisition of shares of a foreign corporation that controls a Canadian business) and does not involve a cultural business, the transaction is not reviewable.

Where the Canadian business engages in any of the activities of a cultural business, or if both the investor and the vendor are not WTO investors, the applicable thresholds for direct and indirect investments are assets with a book value of C\$5 million or C\$50 million, respectively.

An application for review is made to the Investment Review Division of the federal Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage, where the merger involves any cultural businesses). There is an initial review period of 45 calendar days, which may be extended by 30 calendar days at the discretion of the agency, and further upon consent of the investor.

On an application for review, the substantive test applied is whether the proposed transaction is likely to be of net benefit to Canada. Any economic impact on Canada may be considered, including employment, investment, productivity, R&D, exports, Canadian management participation in the business and other factors. If the acquirer is an SOE, the review will also examine whether it is likely to operate the acquired Canadian business in an ordinary commercial manner. The Investment Canada Act approval is parallel to but separate from Competition Act reviews, and the Bureau provides input into this process with respect to a transaction's effects on competition in addition to completing its own review. Very few transactions are rejected under the Investment Canada Act net benefit to Canada test, but it is common for investors to provide undertakings to the government to confirm that the net benefit test will be fulfilled.

An acquisition of control of a Canadian business by a non-Canadian that falls below the thresholds for review under the Investment Canada Act does not require an application for review. However, even where the transaction falls below the thresholds, it must still be notified by way of a filing form to the Investment Review Division of the Department of

Innovation, Science and Economic Development (or the Department of Canadian Heritage for cultural cases). Notifications may be submitted by the acquirer any time before or up to 30 days after consummation of the transaction. If the transaction is in the cultural sector, a review may then be ordered (regardless of the asset value) by the Federal Cabinet within 21 days of receipt of the notification.

The Investment Canada Act also establishes a national security review regime, under which transactions can be reviewed regardless of the size of the business or transaction, the nationality of the acquirer, whether the transaction involves an acquisition of control or of a minority interest and whether or not the transaction has closed. To date, limited guidance has been provided as to the types of transactions that may be injurious to national security. A recent annual report on the administration of the Investment Canada Act noted that national security factors that have given rise to reviews include: the potential for injury to Canada's defence capabilities; the potential for transfer of sensitive dual-use technology or know-how outside Canada; the potential impact of the investment on the supply of critical goods and services to Canadians; the potential to enable foreign surveillance or espionage; the potential for injury to Canada's international interests; and the potential of the investment to involve or facilitate organised crime. A number of transactions have been rejected or have been abandoned based on concerns about the investor in question acquiring telecommunications assets that were regarded as critical infrastructure. There has also been a 'proximity' case in which the establishment of a new Canadian business was required to find a new location that was not nearby a facility of the Canadian Space Agency. One transaction has been blocked because the geomapping assets in issue were sensitive on a national security basis. In addition, a Chinese firm was ordered to divest a recently acquired interest in a Canadian fibre components and modules company, but this decision was challenged and on a re-review the government cleared the transaction. In early 2018, the proposed takeover of a Canadian construction services firm by a Chinese state-owned enterprise was blocked. While the precise reasons for this decision were not made public, the Canadian firm's work with nuclear power facilities, telecommunications infrastructure, and military housing and training facilities may have raised concerns related to critical infrastructure.

In addition to the general reviews under the Competition Act and, if applicable, the Investment Canada Act, there are sector-specific ownership limits and review regimes in areas such as financial services, transportation, broadcasting and telecommunications.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

The Act does not set out deadlines for filing. When to submit a notification is a decision of the parties. However, a transaction that is notifiable may not be consummated until the applicable statutory waiting period has expired (see question 11).

Failure to comply with the pre-merger notification requirements in the Act constitutes a criminal offence with possible fines of up to C\$50,000 as well as the possibility of civil penalties of up to C\$10,000 per day. The Bureau monitors financial press accounts of transactions and may also be made aware of transactions through competitor, customer or supplier complaints. While to date there have been no convictions or penalties imposed for failure to notify (other than agreements to implement compliance programmes), parties should expect this provision of the Act to be enforced vigorously unless the failure to notify was inadvertent, in which case a decision not to prosecute or other resolution

might be negotiable with the Commissioner and the Director of Public Prosecutions.

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

Generally, both parties to the transaction have the obligation to file. For share acquisitions and acquisitions of an interest in a combination, as noted in question 5, the Act deems the target entity, not the vendor, to be a party to the transactions. In hostile or unsolicited takeover bids, the bidder makes an initial filing (which commences the waiting period) and the Commissioner then requisitions the counterpart filing from the target (which must be filed within 10 days).

As of 1 April 2019, the filing fee for a notification was raised to C\$73,584. This fee amount will be in effect until April 2020, when it once again will be adjusted for inflation. (Prior to 2018, a C\$50,000 filing fee had been in place since 2003, which was raised to C\$72,000 in 2018.) The same filing fee applies to a voluntary notification by way of an application for an advance ruling certificate. The filing fee is often paid by the acquirer, but this is a matter of negotiation between the parties. Where filings have been submitted by both parties, the Bureau considers both notifying parties to be jointly and severally liable for the filing fee. If only a request for an advance ruling certificate is submitted for a proposed transaction, the requesting party is solely responsible for the fee.

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

There is a 30-day no-close waiting period from the day the filing is certified complete (usually the same day as the filing by the last of the parties occurs).

The Commissioner may, within the initial 30-day waiting period, issue a supplementary information request (SIR) (similar to a US 'second request') requiring the parties to submit additional information that is relevant to the Commissioner's assessment of the proposed transaction. If the Commissioner issues a SIR, a second no-close waiting period continues until 30 days after the day that the required information has been received by the Commissioner and certified complete by the parties. While the issuance of a SIR is a formal process established by the Act, requests by the Commissioner during the initial waiting period for the voluntary disclosure of additional information are common and do not affect the statutory waiting period.

The Act provides for early termination of the waiting periods by the Commissioner. This can be expected to occur if the review has been completed but not when the review is ongoing.

Consummation of the transaction is not permitted during the waiting periods. If the parties proceed by way of an application for an advance ruling certificate instead of filings, the no-close period effectively runs until the Commissioner has either issued such a certificate or provided a letter confirming that the Commissioner does not, at that time, intend to make an application under section 92 of the Act in respect of the proposed transaction together with a waiver of the filing requirements.

In complex cases, reviews may extend beyond the waiting periods. In such cases, the Commissioner sometimes simply requests that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate such a request, but merging parties often do so. Formal timing agreements between the parties and the Bureau may also be used to confirm that a transaction will not be closed for a period of time after the expiry of the statutory waiting period. Alternatively, the Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

If the Commissioner decides to challenge a transaction, another provision of the Act allows the Commissioner to seek an interlocutory injunction to prevent the transaction from closing in whole or in part, pending the resolution of the Commissioner's challenge on the merits. To obtain an interlocutory injunction, the Commissioner must prove that there will be 'irreparable harm' if the injunction is refused and that the 'balance of convenience' favours delaying the closing of the transaction. The 2016 *Parkland* case clarified that 'irreparable harm' includes harm to consumers and harm to the broader economy resulting from the transaction, where such harms cannot be undone by an order of the Tribunal under the merger provisions of the Act. The Commissioner must provide 'sufficiently clear and non-speculative' evidence of market definition and concentration and likely harm to competition to meet this test.

## Pre-clearance closing

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

Closing prior to expiry of the applicable waiting period is a criminal offence that can be subject to a fine of C\$50,000 and also a civil penalty of up to C\$10,000 for each day of non-compliance. While there have been no reported cases of prosecutions, and while some leniency has been shown in cases of inadvertence, the Commissioner is likely to enforce this provision vigorously if it appears that the non-compliance was intentional.

Regardless of whether the waiting period has expired, closing before clearance carries the risk that the Commissioner will challenge the merger after completion of the review if he or she concludes that it is likely to lessen or prevent competition substantially. He or she may seek a divestiture or dissolution order up to one year after the date of closing. There is also the possibility that coordination undertaken prior to closing that amounts to 'gun jumping' could be subject to a prosecution for conspiracy or bid rigging (given that the parties would not (yet) benefit from the affiliates exception from these criminal offences).

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

Subject to crafting a local hold-separate resolution as noted in the answer to question 14 (which is extremely rare), if the transaction is notifiable in Canada, the penalties for early closing discussed in questions 9 and 12 would apply to foreign-to-foreign transactions.

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

As noted in the response to question 11, the parties may proceed with closing if the no-close waiting periods have expired but the review process is ongoing, and the Commissioner has not obtained an injunction or entered into a timing agreement with the parties.

The Commissioner will focus primarily on Canadian issues in all cases. In a foreign-to-foreign merger, the Bureau (and the Tribunal) will typically be receptive to local divestiture or possibly behavioural remedies as long as they are sufficient to address the domestic anticompetitive effects. Local hold-separate arrangements pending resolution of a Bureau review or Tribunal proceeding have occasionally been employed in the past. However, the Bureau's Remedies Bulletin indicates that the circumstances in which the Bureau will consider agreeing to the use of such hold-separate agreements are narrow.

## Public takeovers

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

As noted in question 10, rules exist to ensure that targets of hostile or unsolicited takeover bids supply their initial notification in a timely manner. In such a case, the waiting period commences upon the submission of the acquirer's filing.

## Documentation

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

The information required for a pre-merger notification filing is set out in the Act and in regulations promulgated pursuant to the Act. The main requirements of the pre-merger notification filing are:

- an overview of the transaction structure;
- an executed copy of the legal documents to be used to implement the proposed transaction (or the latest draft thereof, if not yet finalised);
- a description of the business objectives of the transaction;
- a list of the foreign antitrust authorities that have been notified of the proposed transaction;
- a summary description of the principal businesses carried on by each party and of the principal categories of products (or services) within such businesses, including contact information for the top 20 customers and suppliers for each such product category;
- basic financial information for each party;
- business, product, customer, supplier, financial and geographic scope of sales information of each of the party's principal businesses;
- all studies, surveys, analyses and reports prepared or received by an officer or director for the purpose of evaluating or analysing the proposed transaction that contain market-related or competition-related information (similar to the '4(c)' documents under the US Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the HSR Act)); and
- similar information related to each affiliate of the notifying party with significant Canadian assets or sales.

If the Bureau concludes during the initial 30-day review period that a more detailed review is warranted, it may issue a SIR requiring the production of additional documents and data. The Bureau's (non-binding) guidelines on the merger review process state that, in all but exceptional cases, the Bureau will limit the number of custodians to be searched in preparing a response to a SIR to a maximum of 30 individuals. The default search period for hard copy and electronic records in the possession, custody or control of a party will generally be the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years. The Bureau will also generally limit the relevant time period for data requests to the year-to-date period immediately preceding the date of issuance of the SIR and the previous three full calendar years. Where parties operate on a North American basis, and where the transaction does not raise Canada-specific concerns, the Bureau may, in appropriate cases, work with the parties to try to limit the list of custodians (to the extent possible) to a list of custodians that the US authorities have agreed to in connection with a second request under the HSR Act.

An officer or other person who has been duly authorised by the board of directors of the notifying party is required to certify on oath or solemn affirmation that, to the best of that person's knowledge and belief, all information provided in the pre-merger notification filing and in a response to a SIR (if applicable) is correct and complete in

all material respects. Knowingly providing incorrect information could result in criminal prosecution for perjury in connection with swearing a false certificate.

The Competition Act also contains an obstruction offence that applies where any person impedes or prevents or attempts to impede or prevent any inquiry or examination under the Act. Knowingly withholding or providing misleading information could be seen as impeding or attempting to impede an examination by the Commissioner.

There has also been one reported case where the Bureau advised merging parties (identities not disclosed) that it would rescind the previously issued clearance because the information received in connection with the merger notification was materially misleading.

## Investigation phases and timetable

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

After notifications have been filed, the Bureau will typically have follow-up questions as it conducts its investigation. Bureau staff will usually contact some or all of the customers set out in the parties' filings to solicit information from them regarding the proposed transaction. Suppliers, competitors and additional customers may also be contacted. In addition, the Bureau may request that the parties to the merger provide additional information, documents or data such as estimates of market shares.

If the Commissioner plans to issue a SIR, the scope of this request will be discussed with the merging parties very shortly before the expiry of the initial 30-day waiting period and these discussions may continue after the request is issued. The SIR will typically involve compulsory production of large volumes of documents and data. Subpoenas may also be issued to third parties to produce relevant documents or data. The provision of compulsory testimony through depositions before a hearing officer is possible but rarely used in practice.

Most complex mergers will involve face-to-face meetings with Bureau staff and federal Department of Justice lawyers. Regardless of complexity, regular communication between the Bureau staff and the parties' counsel is the norm.

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

As discussed in question 11, there is a 30-day no-close statutory waiting period from the day the filing is certified complete.

The Commissioner may, within the initial 30-day waiting period, issue a SIR requiring the parties to submit additional information that is relevant to the Commissioner's assessment of the proposed transaction. If the Commissioner issues a SIR, a second no-close statutory waiting period continues until 30 days after the day that the required information has been received by the Commissioner and certified complete by each of the parties.

In most straightforward cases, the Commissioner's review is typically concluded in less than two weeks. However, in more complex cases the Bureau's review process may be substantially longer.

Although it is non-binding, the Bureau's Fee and Service Standards Handbook sets out the following 'service-standard' periods to which the Bureau will attempt to adhere in its review process:

- 14 days for non-complex mergers;
- 45 days for complex mergers, except where a SIR is issued; and
- 30 days after compliance with a SIR, for complex mergers where a SIR is issued (this last service-standard period is co-extensive with the statutory no-close waiting period following compliance with a SIR).

The Bureau informs notifying parties of the commencement of its service standards within five business days of receiving sufficient information to assign a complexity rating, as outlined in its Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters. However, service standards are intended to be maximums and the Bureau may complete cases in less than the full service-standard period.

It is possible to speed up the timetable for clearance if the Bureau's substantive inquiries can be satisfied before the statutory waiting or the 'service-standard' periods (or both) expire. The Commissioner can terminate the waiting periods early – within the initial 30-day period or within the no-close period following the issuance of a SIR – if he or she is satisfied that there is not a competitive concern. Parties and their counsel will usually provide additional information as requested by the Bureau on a voluntary basis and often submit detailed 'competitive impact' analyses to the Bureau to expedite completion of the review process.

As discussed in question 11 above, if the parties proceed by way of an application for an advance ruling certificate, the no-close period effectively runs until the Commissioner has either issued a certificate or provided a letter confirming that the Commissioner does not, at that time, intend to make an application under section 92 of the Act in respect of the proposed transaction together with a waiver of the filing requirements.

Also, as noted in question 11, in cases in which a formal filing has been made, the 30-day period has expired, but the Commissioner needs more time for his or her review, the Commissioner sometimes simply requests that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate such a request, but merging parties often do so. However, there have been a number of recent cases where merging parties have chosen to close their transactions once the waiting periods have expired but prior to the Bureau finishing its review. This includes the *Tervita/Newalta* deal that closed in July 2018 with the Commissioner's review remaining ongoing as of the time of this writing and the *Pembina/Veresen* deal that closed in October 2017 with the Commissioner's decision not to challenge the transaction not being made until September 2018. Formal timing agreements between the parties and the Bureau may also be used to confirm that a transaction will not be closed for a period of time after the expiry of the statutory waiting period. Alternatively, the Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

Given the foregoing, for simple transactions the review period is typically about two weeks. However, for very complex transactions, the review period can extend to 150 days, or even longer. See further discussion as to timing at question 34 below.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for the Commissioner to challenge and the Tribunal to issue a remedial order is whether the merger or proposed merger is 'likely to prevent or lessen competition substantially' in any relevant market. The Act sets out a number of evaluative factors that the Tribunal (and, by implication, the Commissioner during his or her investigation) is to consider in applying this substantive test:

- the availability of acceptable substitute products;
- the effectiveness of remaining competition;
- foreign competition;
- whether the merger will remove a vigorous competitor from the market;
- whether the target entity has failed or is about to fail;
- barriers to entry;
- the nature and extent of change and innovation in the market; and

- any other relevant factors (which will often include the possible existence of countervailing buyer power).

The Act also requires that the Tribunal not make a determination on the basis of market shares or concentration ratios alone.

Uniquely among mature competition regimes, the Act provides a statutory efficiency defence that allows an otherwise anticompetitive merger to be 'saved' if there are offsetting efficiencies (see question 23 with respect to economic efficiencies). A 2015 decision of the Supreme Court of Canada indicated that quantitative efficiencies and quantitative anticompetitive effects will typically be balanced against one another, after which non-quantitative evidence will also be balanced.

The MEGs elaborate on the Bureau's views of each of the evaluative factors set out in the Act. They also establish 'safe harbours' within which the Commissioner generally will not challenge a merger with respect to 'unilateral effects' and 'coordinated effects' theories of competitive harm (see further discussion in the response to question 21). In respect of unilateral effects, the Commissioner generally will not challenge a merger if the combined post-merger market share of the merged entity is less than 35 per cent. For coordinated effects theories of harm, the Commissioner generally will not challenge a merger where the post-merger four-firm concentration ratio (combined market shares of the largest four firms) is below 65 per cent or the merged entity's market share would be less than 10 per cent. Transactions that involve higher market shares or industry concentration are not automatically challenged, but will generally receive careful scrutiny.

While a 'failing firm' technically is not a defence, 'whether the business, or part of the business, of a party to the merger or proposed merger has failed or is likely to fail' is listed as a factor to be considered by the Tribunal in analysing a merger. The MEGs elaborate that, if 'imminent failure' of a firm is probable and that, in the absence of the merger, the assets of the failing firm would be likely to exit the relevant market, then the loss of the actual or future competitive influence of the failing firm will not be attributed to the merger in the Bureau's review. In addition, the Bureau will want to be satisfied that there are no competitively preferable alternatives to the proposed transaction such as a competitively preferable purchaser, retrenchment by or even liquidation of the failing firm.

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

Joint ventures often fall within the definition of mergers (see question 3) and in such situations are subject to the same substantive test (see question 19). However, the Act specifically exempts from merger review certain unincorporated 'combinations' in connection with one-off projects or programmes, provided a number of specified criteria are met. These relate to control of the joint venture parties, the business rationale for the formation of the joint venture, the scope and duration of the joint venture's activities, and the extent of the adverse effect of the joint venture on competition. Part IX of the Act contains an imperfectly analogous notification exemption for 'combinations' that meet specified criteria.

In March 2010, two new provisions of the Act came into force dealing with agreements between competitors. Such agreements may be subject either to criminal prosecution under the conspiracy offence or to challenge as a reviewable practice by way of an application to the Tribunal for a prohibition order. The substantive framework for the competitor agreements reviewable practice is almost identical to the merger provisions. Once the Bureau has decided which track to pursue (merger, civil agreement among competitors or criminal conspiracy), there are double jeopardy protections that preclude it from using the other tracks.

The Bureau has indicated in its Competitor Collaboration Guidelines that the conspiracy offence will be used for 'naked restraints' (cartel-like

conduct) and that those bona fide joint ventures that do not constitute mergers will normally be reviewed under the competitor agreements' reviewable practice provision.

### Theories of harm

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

In general, the Bureau will consider whether a proposed horizontal transaction (ie, a merger involving current or potential competitors) is likely to lead to a substantial lessening or prevention of competition on either a unilateral effects basis or a coordinated effects basis. Under the unilateral theory of harm, the Bureau will consider whether the merged entity will likely be able to raise prices profitably (or lessen competition in other, non-price dimensions) as a result of the merger without relying on an accommodating response from its competitors (see question 19). Under the coordinated theory of harm, the Bureau considers whether the proposed merger is likely to reduce the level of competition in a market by, for example, removing a particularly aggressive competitor, or enabling the merged entity to coordinate its behaviour with that of its competitors, so that higher post-merger prices are profitable and sustainable because other competitors in the market have accommodating responses.

Vertical mergers may raise concerns when they increase barriers to entry, raise rivals' costs or facilitate coordinated behaviour.

Mergers may also give rise to concerns about the prevention (as opposed to lessening) of competition in a market when, in the absence of the proposed merger, one of the merging parties is likely to have entered the market *de novo* and eroded the existing market power of the other party.

In addition to price, the Bureau may also assess the effects of a merger on other dimensions of competition, including quality, product choice, service, innovation and advertising.

### Non-competition issues

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

The MEGs, Tribunal jurisprudence and media statements by senior Bureau staff indicate that merger review is informed by the Act's purpose clause, including its concern with ensuring that 'small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy'. However, as a practical matter, non-competition issues such as industrial policy considerations are generally not relevant to the Commissioner's review. These factors can be relevant to an assessment under the Investment Canada Act, as explored in question 8.

Bureau reviews of proposed mergers in the federal financial services and transportation sectors on competition grounds may operate in parallel with ministerial approval processes that are based on broader public interest considerations. In both systems, the Commissioner's views on the competitive ramifications of proposed mergers inform but would not bind the relevant minister in making a decision on public interest grounds. Thus, the Act specifically provides that the Tribunal shall not make an order in respect of a merger involving financial institutions or transportation undertakings in respect of which the Federal Minister of Finance or Minister of Transport, as the case may be, has certified to the Commissioner that the merger would be in the public interest. In February 2019, the Bureau provided a report to the Minister of Transport regarding a proposed merger of the two main airlines operating in northern Canada, Canadian North and First Air. The Bureau's report concluded that the proposed merger would give rise to significant competition concerns. The Minister of Transport's decision on the merger had not been released as of the time of this writing.

### Economic efficiencies

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

As noted in the response to question 19, the Act provides an efficiency defence that allows an otherwise anticompetitive merger to be 'saved' by efficiencies that are likely to be greater than and offset any prevention or lessening of competition. The scope of the efficiencies defence was examined in the *Superior Propane* and the *CCS/Tervita* cases. *Superior Propane* was the first decision in which a party succeeded in having an otherwise anticompetitive merger saved by efficiencies. The main issue in that case was whether a 'total surplus' or a 'consumer welfare' standard should be used to evaluate the trade-off between efficiencies and anticompetitive effects. The Tribunal adopted the 'total surplus' standard, but the Federal Court of Appeal rejected this approach and remanded the case back to the Tribunal for reconsideration of the proper standard to apply. At the rehearing, the Tribunal again rejected the consumer welfare standard but adopted a 'balancing weights' approach, which gives some consideration to the redistributive effects of a merger (eg, negative impacts on low-income consumers) in addition to the overall magnitude of efficiency gains. This decision was upheld by the Federal Court of Appeal.

In *CCS/Tervita*, the Supreme Court of Canada overturned decisions of the Tribunal and Federal Court of Appeal and accepted the parties' efficiency defence. While the majority decision of the Supreme Court recognised that the transaction's cognisable efficiencies were minimal, the Commissioner had not met the required burden to quantify the quantifiable anticompetitive effects of the merger. As a result, the transaction's minimal efficiencies were sufficient to outweigh the uncalculated anticompetitive effects, which were given a weight of zero. Qualitative anticompetitive effects and qualitative efficiencies generated by a merger will only be considered and weighed against each other in the analysis in respect of effects and efficiencies that cannot be quantified. As a result, the Bureau now seeks to determine whether the parties plan to raise an efficiencies defence early in the review process. SIRs typically have efficiency-related questions that parties must address if they intend to make an efficiency claim. The Bureau may require production of considerable data so that it can properly quantify the transaction's anticompetitive effects and efficiencies.

In the 2017 *Superior Plus/Canwest Propane* transaction, the Bureau concluded that while the merger would give rise to a substantial lessening of competition in 10 local markets, it would not seek to require divestments in these markets because the efficiency gains resulting from the transaction were likely to outweigh the anticompetitive effects in these local markets significantly. Divestments were required in 12 other local markets where efficiency gains were not seen to outweigh the anticompetitive effects. The Bureau also concluded that the efficiency defence was applicable in its 2016 review of Superior Plus's proposed acquisition of Canexus, although this deal was abandoned because of a challenge by the Federal Trade Commission in the United States. In addition, in the 2017 *First Air/Calm Air* merger, the Bureau noted that its financial expert found that the merger's efficiencies gains were likely to outweigh its anticompetitive effects significantly, leading to the Bureau's conclusion that it did not have a sufficient basis to challenge the merger. The Bureau's review of *Chemtrade/Canexus* in 2017 was also approved on the basis that the efficiencies that would likely be lost from blocking the merger or imposing remedies would significantly outweigh the likely anticompetitive effects of the merger.

In March 2018, the Bureau published for public comment a draft of a new guide for assessing efficiencies in merger reviews. The final version of the guide had not been published at the time of writing. However, in May 2019, the new Commissioner gave a speech in which he noted that he is highly unlikely to exercise his enforcement discretion

to not challenge a potentially anticompetitive merger without 'reliable, credible and probative evidence that supports and validates the efficiencies defence being advanced'. The Commissioner indicated that the Bureau will expect to receive detailed evidence supporting the efficiencies claimed, to have the opportunity to test the evidence underlying the efficiency claims and to be provided with adequate time, pursuant to timing agreements, to meaningfully assess the efficiencies. The Commissioner signalled that the Bureau will be providing additional guidance on the evidence and information that parties will need to produce to the Bureau regarding efficiencies in addition to a model form of timing agreement for consultation.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

The Tribunal, on application by the Commissioner, may order the parties to a proposed merger to refrain from implementing their merger or doing anything the prohibition of which the Tribunal determines is necessary to ensure the merger (or a part of it) does not prevent or lessen competition substantially. If a merger has already been completed, the Tribunal may order the dissolution of the merger or the divestiture of assets or shares. In addition, with the consent of the Commissioner and the merging parties, the Tribunal may order any other action to be taken to remedy the anticompetitive effects of a proposed or completed merger.

### Remedies and conditions

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

Divestitures are the primary remedy used in merger cases. In the *CCS/Tervita* case, the Bureau sought dissolution as the preferred remedy, but the Tribunal concluded that a divestiture order would be appropriate. While it is possible (and frequently of interest to merging parties) to resolve issues through the use of behavioural remedies such as firewalls or agreements to supply, these tend to be viewed by the Bureau as less desirable than structural remedies such as divestiture and are more often seen in vertical rather than horizontal cases. Parties should expect that, in most cases, the Commissioner will seek to have any negotiated remedies recorded in a consent agreement that is filed with the Tribunal, whereupon it has the force of a Tribunal order.

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

Any divestiture or other remedy ordered by the Tribunal must restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. The Tribunal has broad jurisdiction to attach detailed terms and conditions to divestiture orders, including deadlines for completion and provisions appointing and empowering trustees to effect divestitures if the merging parties fail to do so in a timely manner. The Bureau also has broad discretion to negotiate the terms of divestiture or dissolution orders or behavioural remedies to be embodied in a consent agreement.

The Bureau's 2006 Remedies Bulletin indicates that it prefers 'fix-it-first' remedies whereby an approved up-front buyer is identified and, ideally, consummates its acquisition of the standalone business to be divested at the same time as the merger parties consummate their own transaction. When it is not possible to fix it first – which, in practice, is frequently – the Bureau will normally require that divestitures be effected by the merging parties within three to six months. If they fail to

do so, a trustee will be appointed to complete the sale in a similar time frame without any guaranteed minimum price to the seller.

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

As noted in question 7, foreign-to-foreign mergers with competitive effects within Canada are subject to the Act, including its remedial provisions. Consequently, divestitures of Canadian assets have been required in many foreign-to-foreign mergers. However, in some cases, the Bureau may rely on remedies required by foreign competition authorities and not take separate remedial steps in Canada if the foreign remedies are sufficient to address anticompetitive concerns in Canada. Examples include *United Technologies/Rockwell Collins*, *BASF/Ciba*, *Dow/Rohm & Haas*, *GE/Instrumentarium*, *Procter & Gamble/Gillette*, *UTC/Goodrich*, *Thomson/Reuters* and *Novartis/GSK*, where the remedies required by the US or European authorities were seen as sufficient to address Canadian concerns. See question 34 for additional discussion of cases in which remedies have been required for foreign-to-foreign mergers in Canada.

### Ancillary restrictions

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

The Bureau will consider ancillary restrictions as part of its consideration of the transaction as a whole. Thus, the Bureau's clearance of a transaction will normally also cover any ancillary restrictions that are known at the time of the review.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

The Bureau routinely contacts customers, and often also suppliers and competitors, for factual information and their views about a merger. However, the Act authorises the Commissioner alone to bring an application to the Tribunal. Consequently, a complainant has no direct ability to challenge a merger.

The Bureau is attentive to complaints from all types of private parties. The Act also provides that any six residents of Canada can compel the Commissioner to conduct an inquiry into a merger, but the Commissioner remains the sole 'gatekeeper' who can commence a challenge before the Tribunal.

The Competition Tribunal Rules provide that, if the Commissioner brings an application to the Tribunal, any party affected by the merger may seek leave to intervene. Thus, complainants may obtain a formal voice in the proceedings at this stage.

### Publicity and confidentiality

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

All documents (including pre-merger notifications) and information provided to the Bureau are treated confidentially. However, the Act does permit the Commissioner to share information and documents received with a Canadian law enforcement agency (which would be rare in merger cases). In addition, the Commissioner may disclose information for the purposes of the administration or enforcement of the Act. This may occur in the Bureau's 'field contacts' with customers, suppliers and

competitors, although such interviews are conducted in a manner that attempts to minimise disclosure of any confidential information.

The Commissioner's interpretation of the confidentiality safeguards in the Act is articulated in the Bureau's 2013 information bulletin on the Communication of Confidential Information Under the Competition Act. The Bureau asserts that it has the power to share confidential information with foreign antitrust agencies without receiving a waiver from the parties providing the information, pursuant to the 'administration and enforcement' exemption. This interpretation is perceived by some as controversial and has not been tested before the courts.

The Bureau does not announce the receipt of filings or commencement of investigations in the merger context. Once a merger review has been completed, the Bureau publishes the names of merger parties, the industry in which they operate and the outcome of the Bureau's review in a monthly online registry. The Bureau also publishes press releases or 'position statements' regarding decisions in high-profile cases.

Where a challenge occurs or a remedy is embodied in a consent agreement, most of the relevant materials will be filed on the public record at the Tribunal. However, commercial or competitively sensitive material may be filed on a confidential basis if a protective order is obtained.

### Cross-border regulatory cooperation

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

The Bureau routinely cooperates with other antitrust authorities on mergers that have multi-jurisdictional aspects. Specific antitrust cooperation instruments (cooperation agreements or memoranda of understanding) exist between Canada and three jurisdictions that give rise to a significant number of cross-border reviews: the United States, the European Union and the United Kingdom, as well as between Canada and each of Australia, Brazil, Chile, China, Colombia, Hong Kong, India, Japan, Mexico, New Zealand, South Korea and Taiwan. Unlike many of its sister agencies, as noted in question 30, the Bureau asserts that it does not require a waiver to share confidential information with foreign agencies, as long as such sharing of information is likely to result in assistance to the Bureau in its review of a transaction. However, it frequently requests that merging parties grant confidentiality waivers to foreign agencies to enable them to engage in two-way communications with Bureau staff.

## JUDICIAL REVIEW

### Available avenues

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

The Tribunal Act provides for an appeal from the Tribunal on questions of law and of mixed fact and law to the Federal Court of Appeal as of right, and on questions of fact alone by leave of the court. An appeal from a decision of the Federal Court of Appeal is only available if leave is obtained from the Supreme Court of Canada. In its recent decision in *CCS/Tervita*, the Supreme Court of Canada held that Tribunal decisions on questions of law are to be reviewed for correctness and questions of fact and mixed law and fact are to be reviewed for reasonableness.

Although it is theoretically possible to obtain judicial review of the Commissioner's decisions or actions, in practice he or she is accorded a very high amount of deference because the Commissioner's activities are investigative rather than adjudicative.

### Time frame

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

An appeal from a decision of the Tribunal can be a relatively long process. For example, in the *Superior Propane* case, the Federal Court of Appeal took eight months to render its decision on the Commissioner's initial appeal of the Tribunal's decision from the date of the Tribunal's judgment. Similarly, in the more recent appeal of the Tribunal's order in the *CCS/Tervita* case, the Federal Court of Appeal released its decision nine months from the date of the Tribunal order.

An appeal from the Federal Court of Appeal to the Supreme Court of Canada would be expected to take a few months before leave is granted, many more months before a hearing is held, and several additional months before the court renders its decision. In the *CCS/Tervita* case, almost two years elapsed from the date of the Federal Court of Appeal decision until the Supreme Court of Canada released its decision (five months for leave to be granted, eight months for the case to be heard, and 10 months under reserve).

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

Merging parties (both domestic and foreign) will typically work with the Commissioner to address any concerns he or she might have with their transaction, rather than face a lengthy and uncertain process of defending their merger through litigation before the Tribunal. As a result, the Commissioner has litigated very few contested proceedings before the Tribunal. The Commissioner obtained mixed results in the *Southam* newspaper case. However, the Commissioner failed to obtain a remedy in the *CCS/Tervita*, *Hillsdown* and *Superior Propane* cases. The Commissioner was also unsuccessful in attempting to obtain a temporary injunction against the *Labatt/Lakeport* merger and subsequently decided not to challenge this merger. More recently, the Commissioner did obtain a partial injunction, and ultimately a consent resolution, in the *Parkland* case.

In the vast majority of cases in which the Commissioner has had concerns, the Bureau has been successful in negotiating consent divestitures or behavioural remedies. This has occurred in numerous foreign-to-foreign mergers including: *Linde/Praxair*, *BASF/Bayer*, *Bayer/Monsanto*, *Abbott/St Jude*, *Abbott/Alere*, *DuPont/Dow*, *Valspar/Sherwin-Williams*, *Teva/Allergan*, *Iron Mountain/Recall*, *Medtronic/Covidien*, *Novartis/Alcon*, *The Coca-Cola Company/Coca-Cola Enterprises*, *Teva/Ratiopharm* and *Live Nation/Ticketmaster*. Transactions have also occasionally been abandoned in the face of opposition by the Commissioner (eg, Bell's proposed reacquisition of 50 per cent interests in two television channels from Corus in 2018, and the *LP/Ainsworth* and *Bragg/Kincardine* mergers in 2014).

The current merger review process was adopted in March 2009. From March 2009 to March 2019, SIRs were issued in connection with 109 transactions. In the Bureau's most recently reported fiscal year ending 31 March 2019, SIRs were issued in approximately 5 per cent of all transactions. Responding to these requests requires a significant investment of time and resources (similar to, although usually not as extensive as, the US 'second request' process). The time frame for the completion of the Bureau's review of a transaction subject to a SIR has ranged from three months to seven-and-a-half months.

The substantive merger enforcement framework is set out in the 2011 Merger Enforcement Guidelines discussed above. The Bureau remains focused primarily on horizontal cases that could substantially lessen or prevent competition through unilateral or coordinated effects.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

As of 1 May 2018, technical changes were implemented in the Act's provisions to expand the definitions related to affiliated entities. The earlier version of the Act did not fully capture affiliates held through trusts and partnerships.

There are no further proposed changes pending.

## UPDATE AND TRENDS

### Key developments of the past year

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

The previous Commissioner of Competition, John Pecman, retired at the end of his term as Commissioner in June 2018. Matthew Boswell was appointed as Interim Commissioner and was subsequently appointed to a five-year term as Commissioner in March 2019. Commissioner Boswell joined the Bureau in January 2011, primarily serving as the head of the Bureau's Cartels and Deceptive Marketing Practices branch, but he also led the Mergers and Monopolistic Practices branch for a year. Prior to joining the Bureau, Commissioner Boswell served as senior litigation counsel within the enforcement branch of the Ontario Securities Commission and served as an Assistant Crown Attorney with Ontario's Attorney General after working in private legal practice.

In May 2019, Commissioner Boswell signalled a more aggressive enforcement stance, promising that 'active enforcement will be an area of primary focus, and the Bureau will not hesitate to take appropriate action to safeguard Canadians against anticompetitive conduct'. Importantly, he added that '[w]e will use all of the tools at our disposal to address what we believe to be problematic conduct. This will include increased consideration of the use of tools such as injunction applications in our work. Moreover, we will use these tools more frequently, as resources permit, to interrupt or halt the conduct in question, pending a full hearing.'

Consistent with the trend towards more aggressive enforcement, the Bureau has recently announced the creation of the position of Chief Digital Enforcement Officer to support enforcement actions involving the digital economy. In addition, the Bureau has expanded the remit of the Merger Notification Unit and re-named it the Merger Intelligence and Notification Unit. Its mandate includes a broader focus on intelligence gathering, particularly in respect of transactions that do not trigger mandatory notification obligations but that may potentially be anticompetitive. The Commissioner noted that 'the unit has been operating for less than two months now, and already two of the unit's reviews have captured two potentially problematic transactions.'

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# China

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

The Chinese Antimonopoly Law (AML) (which entered into force on 1 August 2008) contains a chapter entitled 'Concentration of undertakings'. This chapter deals with the merger control regime in China. The AML is supplemented by implementing regulations, including the Rules on Notification Thresholds for Concentrations of Undertakings published by the State Council (the Notification Thresholds Rules) in August 2008.

In March 2018, as part of wider institutional reform in China, the Antimonopoly Bureau of the Ministry of Commerce (MOFCOM), which was formerly responsible for the enforcement of the merger control rules under the AML, and the two other competition authorities in China, the Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (NDRC) and the Antimonopoly and Anti-unfair Competition Bureau of the State Administration for Industry and Commerce (SAIC) were merged into one new super authority called the State Administration for Market Regulation (SAMR). Following the merger, SAMR is now responsible for the enforcement of merger control in China.

In addition to the AML itself, MOFCOM published a range of secondary legislation, some of which has been slightly amended by SAMR to reflect the institutional change. The legislation includes, among others, implementation rules, interim rules and guidance notices that complement the AML and the Notification Thresholds Rules and address procedural and substantive issues as well as information requirements related to the merger control procedure in China.

In 2009, MOFCOM published several implementing measures (such as the 2009 Notification Measures and 2009 Review Measures) covering a range of issues such as the information the notifying party is required to include in merger filings submitted to MOFCOM, a number of key substantive and procedural issues regarding merger control reviews, rules on the calculation of turnover for financial institutions and voluntary filing of non-reportable mergers. In addition to the implementing rules published by MOFCOM, the Antimonopoly Commission of the State Council (which is the authority under the AML that is generally responsible for coordinating and guiding antitrust policy within China) published guidelines on the definition of the relevant market in 2009.

In 2011, MOFCOM published implementation rules for national security review of mergers and acquisitions of domestic enterprises by foreign investors. In the same year, it published interim provisions to assess the effects of concentrations on competition (the 2011 Interim Provisions for the Assessment of the Effect of a Concentration of Undertakings on Competition).

In 2012, MOFCOM published interim rules to empower it to investigate concentrations that meet the jurisdictional thresholds but where

the relevant party or parties have failed to notify. Also in 2012, MOFCOM published a new notification form (the Notification Form), which contains more burdensome information and document requirements.

In February 2014, MOFCOM published interim provisions on standards for simple cases (the Interim Provisions on Standards for Simple Cases). These provisions provide criteria for defining 'simple cases', namely transactions that do not give rise to significant competition concerns and therefore merit streamlined review by the authority. In April 2014, MOFCOM published the Tentative Guidelines on the Notification of Simple Cases. These guidelines provide procedural guidance on the notification of simple cases, but do not set any deadlines for the authority to complete its review in these cases. That said, in practice, the authority seeks to complete its review of 'simple' cases in Phase I. MOFCOM also adopted a new notification form for notifying simple cases as well as a public notice form for notifying transactions under the simple case procedure.

In June 2014, MOFCOM published Guidance for Notification of Concentrations of Undertakings (the Notification Guidance). The Notification Guidance specifies the factors to consider when determining whether there is an acquisition of control and provides procedures for pre-notification consultation meetings with the authority.

In December 2014, MOFCOM adopted the Interim Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings (the 2014 Interim Remedy Provisions), which provide guidance in relation to the types of remedies that can be imposed, the conduct of remedy negotiations, the implementation and monitoring of remedies, the varying and lifting of remedies, and the legal liabilities to which undertakings and trustees are subject. They took effect from 5 January 2015.

In February 2015, MOFCOM published the Guidance on the Notification Name of Concentrations of Undertakings (the Naming Guidance), amended in February 2017, which provides rules on how to name a transaction for notification purposes.

In September 2018, the State Council and SAMR amended parts of the regulations and measures set out above to reflect the change from MOFCOM to SAMR. The substantive rules remain unchanged for now. The amended regulations and measures include the Notification Thresholds Rules, the Notification Guidance, the Notification Form, the Naming Guidance and the Tentative Guidelines on the Notification of Simple Cases (the name of the latter was amended and is now known as the Guidelines on the Notification of Simple Cases). References to these regulations and measures in this document refer to the newly amended secondary legislation.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Mergers and acquisitions that are characterised as a 'concentration of undertakings' are caught by the AML and require notification to SAMR if they meet the relevant turnover thresholds.

A concentration of undertakings is defined in the AML as:

- a merger of undertakings;
- an undertaking acquiring control over one or more undertakings by acquiring equity interests or assets; or
- an undertaking acquiring control or being able to exercise decisive influence over one or more undertakings by contract or any other means.

### 3 | What types of joint ventures are caught?

The AML is silent on whether joint ventures are subject to notification. However, this issue was clarified in the Notification Guidance. This provides that a newly established joint venture constitutes a concentration of undertakings if at least two undertakings jointly control the joint venture. If, however, only one undertaking solely controls a joint venture and other shareholders have no control, then such a joint venture does not constitute a concentration of undertakings. The Notification Form also provides that both greenfield joint ventures and joint ventures formed by way of acquisition or change of control are reportable transactions and that the 'undertakings concerned' in joint venture transactions will vary depending on the nature and type of the transaction structure. MOFCOM imposed remedies in several cases involving the establishment of a joint venture, such as *Corun/Toyota China/PEVE, Sinogy/Toyota Tsusho* in July 2014. Several companies have also since been fined for failure to file reportable joint ventures.

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

The AML does not provide a definition of 'control'.

However, the Notification Guidance explains that control in the context of China merger control includes both sole control and joint control and that control or decisive influence is determined by reference to legal and factual circumstances. Factors that are taken into consideration include the corporate governance procedures of the undertakings concerned as reflected in transaction documents and articles of association (eg, the voting mechanism at the general meeting of shareholders, board of directors or other supervisory board, the appointment and removal of senior management), the objective and the future plan of the transaction, the shareholding structure of the undertakings concerned before and after the transaction (eg, if an acquisition of control cannot be determined on the basis of concentration agreements and articles of association, but factors such as the shareholding being dispersed give an undertaking de facto control, such a transaction also constitutes an acquisition of control), the relationship between the shareholders and directors of other undertakings; whether there exist significant commercial relationships, cooperation agreements, etc, between the undertakings concerned. Accordingly, the issue of whether a transaction leads to an acquisition of control or decisive influence must be determined on a case-by-case basis.

## Thresholds, triggers and approvals

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

For any merger or acquisition of control that is considered a 'concentration of undertakings', a pre-merger notification must be filed with SAMR if the relevant parties' turnover exceeds any of the following thresholds, as set out in the Notification Thresholds Rules and the Notification Guidance:

- the total worldwide turnover of all parties to the transaction in the previous financial year exceeded 10 billion yuan and the PRC

turnover of each of at least two parties to the transaction in the previous financial year exceeded 400 million yuan; or

- the combined PRC turnover of all parties to the transaction in the previous financial year exceeded 2 billion yuan and the PRC turnover of each of at least two of the parties to the transaction in the previous financial year exceeded 400 million yuan.

The Notification Guidance and the 2009 Notification Measures also provide that, in cases where a concentration does not meet the notification thresholds, the undertakings participating in the concentration may nevertheless notify the transaction voluntarily to SAMR. Parties may choose to file on a voluntary basis in circumstances where the transaction may give rise to competition concerns.

Further, SAMR has the discretion under the Notification Thresholds Rules to review non-reportable transactions that are not voluntarily notified by the parties, if SAMR considers that the transaction is likely to result in the 'elimination or restriction of competition'. Such a discretionary review may, for example, be initiated in the event of complaints from third parties including customers, suppliers or competitors.

See question 8 for details of the national security review regime that took effect in March 2011. This may apply to transactions that do not trigger a merger control filing requirement, or those transactions that do trigger such a requirement, but involve the acquisition of control of a PRC domestic enterprise in certain specified sensitive sectors.

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

Filing is mandatory for any 'concentration of undertakings' that meets any of the notification triggers specified in the Notification Thresholds Rules.

The AML provides for an exemption from pre-merger filing for intragroup transactions in specific circumstances, namely where:

- among all undertakings involved in the concentration, one undertaking possesses 50 per cent or more of the voting shares or assets of every other undertaking; or
- one undertaking not involved in the concentration possesses 50 per cent or more of the voting shares or assets of every undertaking involved in the concentration.

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

Yes. Foreign-to-foreign mergers must be notified if the turnover thresholds are met. The Notification Thresholds Rules require two parties to generate turnover in China (albeit low amounts – see question 5). Otherwise, there is no additional 'effects test'. However, under the Interim Provisions on Standards for Simple Cases, certain foreign-to-foreign transactions may qualify as 'simple cases' on the basis that the transaction does not give rise to significant competition concerns. Transactions that qualify for simple treatment are subject to less burdensome information requirements under the Guidelines on the Notification of Simple Cases and a streamlined review process.

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

Yes. All foreign investment in China must be filed with or approved by MOFCOM or one of its local branches. Foreign investment is regulated under the Foreign Investment Law (passed on 15 March 2019 and which will come into effect on 1 January 2020) and Foreign Investment Catalogue (2017) including the Negative List (amended in 2018). Certain sectors are closed to foreign investment or subject to foreign ownership

restrictions, while foreign investment is encouraged in other sectors through preferential policies. Foreign investment falls under four categories in China: encouraged, permitted, restricted and prohibited. The last two categories are prescribed in the Negative List. The 2018 Negative List has reduced the number of restricted and prohibited sectors from 63 to 48, including for sectors such as financial services, transportation, energy, agriculture and infrastructure. This highlights an increasing trend towards fewer restrictions for inbound investment. Foreign investment in restricted sectors must be approved by MOFCOM or its local branches, while only a filing is required for foreign investment in sectors outside the Negative List.

Another relevant approval that needs to be considered is the national security review regime, which applies to an acquisition of Chinese domestic businesses by foreign investors if (i) the transaction involves the military sector (including enterprises located near key and sensitive military facilities and other enterprises active in connection with national defence); or (ii) it involves key agricultural products, as well as sectors involving key energy infrastructure, transport, technology and equipment manufacturing, and the transaction will result in the acquisition of 'actual control' by the foreign investor over the Chinese domestic business. If a transaction needs to be reviewed on national security grounds, it will be conducted by an inter-Ministerial Committee, led by NDRC as well as MOFCOM (the Committee).

MOFCOM has a key role in the national security review regime, as it is responsible for determining whether a transaction falls within the regime. However, according to an announcement published on NDRC's website on 30 April 2019, resulting from a re-assignment of responsibilities among government ministries, NDRC will be responsible for receiving national security review filings going forward. While no further details are currently available on the precise scope of NDRC's responsibilities, the announcement suggests that NDRC will play a more important role under the national security review regime.

In August 2011, MOFCOM published a set of implementing rules, which include an 'anti-circumvention' clause, prohibiting foreign investors from circumventing national security review by relying on mechanisms such as trusts, multi-level reinvestments, leasing and loan arrangements, contractual control structures or offshore transactions. This makes clear that national security review is concerned with the substance and actual effect of a transaction rather than its form.

National security review is conducted in two phases: a 'general review' (Phase I), which lasts up to 30 working days, and a 'special review' (Phase II), which lasts up to 60 working days. Where the Committee cannot reach consensus, the transaction may be referred to the State Council for final determination, for which there is no time limit for a decision. According to the Foreign Investment Law (2019), the national security review decision is the final decision once made. This means it is non-appealable.

Where the Committee determines that a transaction gives rise to national security concerns, parties may be required to abandon or (in cases where completion has already occurred) unwind the transaction, or to put in place remedial measures to address the concern.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

The AML does not provide any deadlines for filing, but provides that notifiable transactions cannot be closed without being notified to and cleared by the authority.

Undertakings that fail to notify a qualifying transaction to SAMR may be subject to various penalties. SAMR has the power to order the

undertakings to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and adopt other necessary measures to restore the pre-merger market situation. SAMR may also impose a fine of a maximum of 500,000 yuan. The more serious implication for most businesses is the adverse impact on relations with SAMR, potentially on a long-term basis.

Both MOFCOM and SAMR's published decisions for failure to file to date involve not only domestic transactions and Sino-foreign transactions, but also foreign-to-foreign transactions.

In 2014, MOFCOM adopted its first public failure to notify decision. It imposed a fine of 300,000 yuan on Tsinghua Unigroup for failure to notify its acquisition of RDA Microelectronics (both are Chinese companies). Fines were imposed notwithstanding the fact that MOFCOM found that the transaction had no adverse impact on competition in China, making it clear that 'lack of impact' on competition is not a basis for not filing in China if the transaction constitutes a concentration of undertakings and the turnover thresholds are met. Since then, MOFCOM and SAMR have to date published 36 decisions for failure to notify. The maximum fine of 500,000 yuan has not been imposed so far. In practice, fines have generally ranged from 150,000 yuan to 400,000 yuan.

In January 2017, MOFCOM adopted its first penalty decision involving a foreign-to-foreign transaction for failure to notify. Canon was fined 300,000 yuan for failure to file its acquisition of Toshiba Medical. The case involved a multi-step transaction. There have been two further cases involving foreign-to-foreign transactions: on 3 May 2017, MOFCOM announced that it had imposed a fine of 150,000 yuan on OCI Corporation for failure to file its acquisition of Tokuyama Malaysia; and on 10 August 2018, SAMR fined Paper Excellence BV, a company registered in the Netherlands, for failure to file its acquisition of Eldorado Brasil Celulose SA, a Brazilian company, prior to closing.

In 2018, MOFCOM/SAMR imposed penalties in 15 cases for failure to notify, a record number in a year since the AML entered into force in 2008. It highlights the authority's strict stance on failure to notify reportable transactions.

In some cases, the merging parties voluntarily submitted a notification after completing their underlying transactions, and actively cooperated during the investigation with MOFCOM or SAMR, as the case may be. However, the merging parties were still fined despite these mitigating factors.

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

According to the 2009 Notification Measures, the Notification Form and the Notification Guidance, the notification of a concentration effected by way of merger is made by all undertakings involved in the merger. For a concentration effected by other means, the notification is made by the undertaking that will acquire control or will exercise decisive influence, with the assistance of other undertakings to the concentration. Undertakings involved in the concentration that serve merely as an acquisition or investment vehicle are not considered as an appropriate notifying party. The Notification Guidance further provides that if two or more of the undertakings have the obligation to notify, the undertakings may jointly notify or appoint one of the undertakings to make the notification. It should be noted that where parties agree that one of them should notify the transaction on behalf of all of them, the others are not exempt from their obligation to notify. Other undertakings participating in the transaction may submit a notification where the parties obliged to file the notification fail to do so.

It is not unusual in practice for the target to be involved as a joint filing party. At present, there are no filing fees.

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

SAMR has a statutory review period of 180 calendar days.

The initial review period is 30 days (Phase I), commencing from acceptance of the filing as complete. In practice, the period between notification and acceptance of the case is unpredictable. The pre-acceptance period normally takes up to six to eight weeks or longer depending on, among other things, the complexity of the transaction, the completeness of the notification, supplemental questions raised during the market inquiry and the merging parties' response to those questions. The pre-acceptance period can be shorter (approximately up to four weeks) if the transaction is a simple case. The authority has intensified its pre-acceptance review for data completeness in recent years, which may potentially impact the duration of the pre-acceptance period for both normal and simple cases.

At the end of the initial Phase I review period, SAMR must either issue a written decision to clear the transaction or issue a written notice of 'further review'. If the notifying party does not receive any written notice of further review at the end of the review period, the transaction is deemed to have been cleared and the parties are free to implement the concentration. If the notifying party receives such a notice, which, unlike in the European Union for example, does not necessarily indicate that SAMR has concerns about the concentration, the review period can be extended for another 90 days (Phase II), commencing from the date of the decision for 'further review' of the transaction. In certain circumstances, the 90-day Phase II review period may be extended by another 60 days.

However, some conditional clearance decisions show that in practice the total review period can take a longer time than the maximum statutory review period of 180 days. This is the case, for example, where the authority is running out of the time to complete its review owing to complex remedy negotiations. In such a case, the notifying party may need to agree to withdraw and refile the notification, which restarts a further 180-day review period. Recent examples of cases where the parties have withdrawn their notification and re-filed include *KLA-Tencor/Orbotech* (2019), *UTC/Rockwell Collins* (2018), *Linde/Praxair* (2018) and *Essilor/Luxottica* (2018).

There is no provision under the AML or its implementing rules for expedited review. However, transactions that qualify as simple cases under the Guidelines on the Notification of Simple Cases benefit from quicker review. The simple case procedure is proving effective so far in shortening the review period. In 2018, simple cases accounted for approximately 80 per cent of the authority's case load, and more than 98 per cent of them were cleared within Phase I.

### Pre-clearance closing

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

The completion of a concentration, subject to a notification duty, prior to clearance can lead to the sanctions described in question 9.

MOFCOM, and SAMR, have imposed fines for closing before clearance. In the context of transactions involving failure to notify before closing, the published penalty decisions to date involve domestic transactions, Sino-foreign transactions and foreign-to-foreign transactions.

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

Yes. The sanctions described in question 9 also apply to foreign-to-foreign mergers. In January 2017, MOFCOM published the first penalty

decision involving a foreign-to-foreign transaction for failure to notify prior to clearance (ie, Canon's acquisition of Toshiba Medical).

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

There is little track record to date on this question and there is no formal 'hold-separate' arrangement that might be acceptable to remedy local issues in a foreign-to-foreign merger.

### Public takeovers

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

No. Although there is no official position on this, in practice, the review process can be expedited when a transaction is subject to public takeover bid rules.

### Documentation

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

Under the AML, the 2009 Notification Measures and the Notification Guidance, the notification and documents to be submitted include the following:

- a notification form, containing the names of the parties, registered business addresses, scope of business, the identity certificates or registration certificates of the notifying parties, as well as the date on which the concentration will take place – in the case of offshore notifying parties, certificates notarised and authenticated by the relevant local authorities must be submitted;
- explanation of the transaction's impact on competition in the relevant market;
- the transaction agreement and other relevant documents;
- the financial and accounting reports for the previous accounting year of the participating undertakings, audited by public accountants; and
- other documents and materials as may be required by the authority.

The Notification Form requires a significant amount of information and documents to be provided such as details of the parties' Chinese activities and foreign entities active in the relevant sectors, details of the joint venture (if applicable), general information on other undertakings involved in the transaction (eg, the seller), internal documents and materials prepared by third parties in relation to the transaction, and detailed information about customers and suppliers. This may result in more time and resources being required to prepare a filing. While some of the information required is optional, SAMR may ask for explanations if the optional information is not provided.

As mentioned above, 'simple cases' are subject to less burdensome information requirements. According to the Guidelines on Notification of Simple Cases, SAMR will not review a notification as a simple case on its own initiative. Notifying parties that would like their transaction to be treated as a simple case must submit an application to SAMR using a 'simple case notification form'. Some of the information and documents required to be submitted in the normal notification form are not required in the simple case notification form. This, to some extent, eases the administrative burden for notifying parties. Information and documents that do not need to be provided in a simple case notification form include:

- information on the parties' affiliates if not active in the business relevant to the notified transaction;

- the business licences and certificates of approval of the parties' affiliates within China;
- the demand and supply structure of the relevant market and information on the parties' major suppliers and customers;
- information on market entry;
- information on horizontal or vertical cooperation agreements; and
- potential efficiencies of the transaction.

However, a simple case notification still requires substantial corporate and competition-related information; in particular, market definition analyses and a full set of data including total market sizes and the market shares of the parties and their major competitors. In addition, a 'public notice form' must be submitted alongside the simple case notification form. The notice identifies the notifying parties and includes a summary of their activities, the transaction and the reasons for notifying the transaction as a simple case (with reference to one or more of the criteria for qualifying as a simple case). After the transaction is accepted by SAMR as a simple case, SAMR will publish the public notice form on its website for a period of 10 days for public comments. See also question 30.

### Investigation phases and timetable

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

See question 11. The AML contemplates a two-phase review process. The 2009 Review Measures provide guidance on the procedures to follow when the authority conducts its review. They also recognise a notifying party's right to be heard and to make known its views on concerns raised by the authority.

Prior to a formal notification of a concentration, a notifying party may consult SAMR on matters related to the notification. The application for pre-notification consultation is made in writing. This is not a mandatory procedure. In complex cases, for example, where the notifying parties are uncertain as to whether a transaction is reportable, or the precise scope of the relevant markets involved are difficult to delineate, it may be helpful to consult SAMR prior to filing. This may facilitate preparation of the filing and streamline the review process. The decision to consult SAMR is made on a case-by-case basis.

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

See question 11 for the review periods.

In practice, a large majority of reviews (including 'no-issue' cases) extend well beyond the initial 30-day Phase I review period – unless the transaction is a simple case. For a case without significant competition concerns and that does not qualify for simple treatment, the usual time taken from notification to clearance is approximately four to six months depending on the facts of the case. It is commonly understood that the delay is largely caused by a combination of factors such as capacity constraints at SAMR, the complexity of the cases and the broad scope of involvement of other government agencies and third parties that the authority consults during its review process.

Although the Guidelines on Notification of Simple Cases do not provide any formal guidance regarding the timetable for review of simple cases, this is proving effective in shortening the review period. The usual time taken from notification to clearance is approximately two to three months and the vast majority of simple cases are cleared within Phase I. Some cases are cleared shortly after the start of Phase II if SAMR is unable to complete its review within Phase I. SAMR does not usually conduct extensive consultation with stakeholders such as other government agencies for simple cases as it does for normal cases. This is one of the key factors that facilitates the shortened review.

Administrative time limits have been set for case teams to request information and for notifying parties to respond to information requests. This serves to streamline and speed up the review process.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

Under the AML, a concentration must be prohibited if it has or is likely to have 'the effect of eliminating or restricting competition', unless the parties can show that the concentration may generate efficiencies and that its positive effects on competition significantly outweigh its negative effects on competition, or that the concentration is in the public interest.

The AML provides that the following factors shall be taken into consideration in reviewing a concentration:

- the market shares of the participating undertakings in the relevant market and their ability to control the market;
- the degree of concentration in the relevant market;
- the effect of the proposed concentration on market access and technological development;
- the effect of the proposed concentration on consumers and other relevant undertakings;
- the effect of the proposed concentration on the development of the national economy; and
- other factors that affect market competition that are considered relevant by the authority.

Industrial policy and other non-competition factors also play a prominent role, and can often cause delays in the review process. See question 22.

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

Joint ventures are not subject to any special standard of review distinct from other types of transactions. However, unlike in the European Union, both full-function and non-full function joint ventures require notification.

### Theories of harm

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

Under the AML, a concentration may be challenged on the ground that it has or is likely to have 'the effect of eliminating or restricting competition'. SAMR is familiar with concepts such as unilateral and coordinated effects, with MOFCOM having published draft guidelines on them in June 2011 and its conditional clearance decision in *Uralkali/Silvinit* (2011) showing the application of these concepts in practice. The conditional clearance decisions in *Baxter/Gambro* (2013), *Thermo Fischer/Life Technologies* (2014), *NXP Semiconductors/Freescale* (2015), *ABI/SABMiller* (2016), *Abbott/St Jude Medical* (2016), *Agrium/Potash Corporation* (2017) and *Linde/Praxair* (2018) similarly show a willingness to apply these concepts. In *Henkel/Tiande* (2012), *Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho* (2014) and *KLA Tencor/Orbotech* (2019), MOFCOM and SAMR respectively analysed foreclosure effects resulting from vertical integration. There is renewed interest in leveraging and tying/bundling effects, as evidenced by the conditional clearance decisions in *Merck/AZ* (2014) and, more recently, *Brocade/Broadcom* (2017), *HP/Samsung* (2017), *Essilor/Luxottica* (2018), *UTC/Rockwell Collins* (2018) and *KLA Tencor/Orbotech* (2019). In *Brocade/Broadcom*, MOFCOM also raised concerns over the potential misuse of third-party competitors' confidential information and the risk of undermining interoperability of complementary products in the relevant markets.

In *Google/Motorola Mobility* (2012), *Microsoft/Nokia* (2014) and *Nokia/Alcatel Lucent* (2015), MOFCOM dealt with the complex question of the licensing of standard essential patents in the IT sector.

In June 2014, MOFCOM published a decision to block the proposed *Maersk/MSK/CMA CGM P3 Network* shipping alliance (the P3 Prohibition). This was the second prohibition decision in the history of merger review in China and the first time MOFCOM prohibited a global foreign-to-foreign transaction. The decision analyses the alliance as an integration of the three major container liner shipping companies' businesses (as opposed to a typical loose alliance in the shipping industry). MOFCOM analysed the horizontal overlaps between the parties on particular trades and relied on the resulting post-transaction high market shares and market concentration levels as primary grounds to oppose the transaction. In *Maersk Line/Hamburg Süd*, MOFCOM considered the potential anticompetitive effects of vessel sharing agreements to which the merging parties are members.

In *Dow Chemical/DuPont* (2017), *Becton Dickinson/CR Bard* (2017), *Bayer/Monsanto* (2018) and *UTC/Rockwell Collins* (2018), MOFCOM and SAMR, as the case may be, each examined the transaction's potential adverse impact on innovation.

In addition, the authority will investigate factors that may affect the development of the national economy, as well as the public interest (see also question 22).

### Non-competition issues

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

Non-competition issues are relevant to both domestic consolidation, where industrial policy factors may be supportive, and to inbound investment, where industrial policy factors may create additional challenges in securing merger clearance.

The AML provides that 'undertakings may implement a concentration through fair competition and voluntary coalition in accordance with law to expand their business scale and increase their market competitiveness'. Such a provision is understood to reflect the state's policy of encouraging consolidation and concentrations between Chinese domestic companies and supporting successful domestic companies to compete with foreign multinational companies. In addition, SAMR may decide not to prohibit a concentration that creates serious competition issues where there is proof that the concentration is in the public interest. The AML also provides that the state must protect the legitimate operation of industries that are vital to the national economy and national security where mainly state-owned enterprises are active. Relevant guidance also provides that specific explanations should be given in the notification if the concentration is related to national security, industrial policy, state-owned assets, etc. National security review is also potentially applicable under the national security review regime – see question 8.

Investments by foreign companies in China and foreign-to-foreign transactions may also be reviewed in light of industrial policy considerations where it is considered that broader interests in China may be adversely affected by the concentration. Examples might include the acquisition of well-known Chinese brands or R&D facilities located in China. This can create delays in the process and, at worst, can derail the transaction.

As evidenced by two notable conditional clearances (*Glencore/Xstrata* and *Marubeni/Gavilon*) in 2013, global transactions involving commodities that are strategically important to China will be subject to close scrutiny during the transaction's review. In both cases, although the parties did not enjoy a significant combined market share, each transaction was subject to a long review process and remedies. This is possibly owing to sensitivity regarding transactions involving strategically important industrial and agricultural raw materials, the import of

which China relies on heavily. In both decisions, MOFCOM referred to China's dependence on the import of the relevant products. Although MOFCOM did not explicitly present China's reliance on imports as a concern, its decisions are nonetheless indicative that transactions involving supply of strategically important products may be subject to stricter scrutiny.

In addition, non-competition issues can become a complicating factor in high-profile, transformational deals in sensitive or strategic sectors deemed important to China's economy. In July 2018, Qualcomm aborted its US\$44 billion acquisition of NXP Semiconductors after failing to secure Chinese merger control approval before the long stop date. There has been widespread speculation that the *Qualcomm/NXP* deal was impacted by the Sino-US trade dispute. During the Sino-US trade dispute in 2018 and 2019, some other high-profile US deals experienced delays in obtaining merger control approval in China.

### Economic efficiencies

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

The AML allows SAMR to clear a concentration that gives rise to competition concerns if there is proof that the concentration may generate efficiencies and that its positive effects on competition significantly outweigh its negative effects on competition. In practice, notifying parties must provide relevant information and evidence on the possible efficiencies that may arise from the concentration, including how the efficiencies are to be achieved, the time required, quantification, the level of the resulting benefit to consumers and whether such efficiencies can be achieved without the concentration. The 2011 Interim Provisions for the Assessment of the Effect of a Concentration of Undertakings on Competition also make reference to the possibility of transactions giving rise to economic efficiency through economies of scale, economies of scope and reduced production costs, without specifying to what degree such considerations are relevant in assessing transactions. Economic efficiencies have not been discussed in any detail in remedy decisions to date.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

Under the AML, a concentration cannot be implemented until clearance has been obtained from SAMR. SAMR can block a concentration or impose remedies as a condition to clearing the concentration. To date, two transactions have been prohibited and remedies have been imposed in 40 cases.

### Remedies and conditions

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

Yes. SAMR may clear a concentration subject to remedies. According to the 2014 Interim Remedy Provisions, the authority may impose divestiture remedies, behavioural remedies (eg, security of supply-type remedies, access to essential facilities such as networks or platforms, licensing key technologies and terminating exclusive agreements) or a combination of both. There are many examples of both types of remedies in China's decisional practice.

MOFCOM and SAMR have imposed a range of behavioural remedies including security of supply remedies, remedies preventing bundling/tying or imposing unreasonable transaction conditions, remedies that

impose restrictions on future acquisitions, access remedies and remedies that seek to address unique or sector-specific concerns. In *Uralkali/Silvinit* (2011), for example, MOFCOM imposed behavioural remedies that aimed to maintain the status quo for the sale of the parties' products in China, including requirements as to volume, quality, product type and contract negotiation practices. In *Agrium/Potash Corporation* (2017) and *HP/Samsung* (2017), MOFCOM similarly imposed remedies related to the terms and conditions of supply of certain overlap products and in addition required the merging parties to commit not to acquire a competing business for a prescribed number of years. Another notable case is *Google/Motorola Mobility* (2012). MOFCOM imposed behavioural remedies to ensure, in particular, that Google would continue to offer its 'Android' platform on a free and open-source basis, and that it would continue to comply with the fair, reasonable and non-discriminatory licensing terms in connection with Motorola Mobility's significant portfolio of standard essential patents in the telecommunications sector. In *Microsoft/Nokia* (2014) and *Nokia/Alcatel Lucent* (2015), MOFCOM also imposed behavioural remedies to address the licensing of standard essential patents. In *Maersk Line/Hamburg Süd* (2017), MOFCOM imposed a set of behavioural remedies requiring the merging parties to withdraw from two vessel sharing agreements on trades between the Far East and South America and not to enter into any vessel sharing agreement with major competitors on these trades for five years, and ordered Maersk Line to reduce and maintain its reefer capacity shares below a certain level for three years post-closing. In *Brocade/Broadcom* (2017), *Essilor/Luxottica* (2018) and *KLA Tencor/Orbotech* (2019), behavioural remedies were imposed including requiring the merging parties not to engage in bundling/tying nor impose unreasonable terms. In *Brocade/Broadcom* (2017), the merging parties also committed to erect firewalls to protect confidential information of third parties and to maintain the interoperability level of relevant products.

In terms of divestment remedies, SAMR may require merging parties to commit to divest a business, assets or minority interests within a specified time frame post-closing. In recent cases, buyer upfront divestiture remedies have been imposed (eg, *NXP/Freescale* (2015)) as well as 'fix-it-first' divestiture remedies (eg, *ABI/SABMiller* (2016) in the brewery sector, the first such case, *Abbott/St Jude Medical* (2016) in the medical devices sector and *Dow Chemical/DuPont* (2017) in the agrichemical sector).

Often a combination of behavioural and divestment remedies are imposed. In *Glencore/Xstrata* (2013), for example, MOFCOM imposed both divestiture remedies and behavioural remedies (ie, commitment to supply the Chinese market). This approach has been adopted in a number of recent remedy cases (eg, *Dow Chemical/DuPont* (2017), *UTC/Rockwell Collins* (2018), *Linde/Praxair* (2018) and *Bayer/Monsanto* (2018)).

MOFCOM has also imposed 'hold-separate' remedies in the past, although there is no mention of hold-separate remedies in the 2014 Interim Remedy Provisions among the examples of the types of remedies that can be imposed. Hold-separate remedies are potentially far-reaching in that they oblige merging parties to operate separately and independently after closing (eg, with respect to management, sales, products and R&D) and prevent full integration until and unless the remedy is lifted. Hold-separate remedies can remain in force for a relatively long period of time. For example, in *Seagate/Samsung* (2011), which concerned the global hard disk drive (HDD) market, MOFCOM required complex hold-separate remedies, which essentially required Seagate to hold the Samsung HDD business separate from its own HDD business for a period of at least a year from the decision. The hold-separate remedies were lifted in 2015, approximately four years after they were imposed.

Shortly after the *Seagate/Samsung* decision, MOFCOM imposed extensive hold-separate remedies in *Western Digital Corporation/HGST*

(2012), which prohibited Western Digital Corporation from combining its operations with HGST's HDD business for a period of at least two years from the decision. The hold-separate remedies were eventually partially lifted in 2015; the remaining elements of the hold-separate remedies expired in 2017.

Similarly, in *Marubeni/Gavilon* (2013), *MediaTek/MStar* (2013) and *Advanced Semiconductor Engineering/Siliconware Precision Industries* (2017), MOFCOM imposed hold-separate remedies.

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

According to the 2009 Review Measures, remedies proposed by undertakings should be able to remove or reduce the negative effects that the concentration has or may have on competition and must be capable of being implemented. Written versions of the remedies should be clear and precise to allow their effectiveness and practicability to be properly evaluated.

The 2014 Interim Remedy Provisions set out the procedure to be followed to implement remedies including the conduct of remedy negotiations, the implementation and monitoring of remedies, the varying and lifting of remedies, and the legal liabilities to which the undertakings and trustees are subject. For example, the notifying parties must provide a final remedy proposal 20 days before the end of the 'further review', which assumes that the authority has made known its concerns. It is unclear whether, from the authority's perspective, this further review period includes the additional 60 days, which can be added to the Phase II 90-days review period. The 2014 Interim Remedy Provisions also enable the notifying parties to submit remedies proposals before competition concerns are raised about the transaction. Notifying parties can be required to offer 'crown jewel' remedies. SAMR may solicit opinions on the remedy proposal from a broad spectrum of stakeholders, including government agencies or departments, industry associations, competitors, suppliers and customers. Specifically with respect to structural remedies, the 2014 Interim Remedy Provisions require companies to find a buyer for the divested business within the time frame specified in the conditional clearance decision or, where no time frame is specified, within six months of conditional clearance (SAMR has the discretion to extend this period by a further three months). If the merging parties are unable to find a buyer in time, SAMR can appoint a divestiture trustee to do so. The divestment must be implemented within three months after the sales agreement is executed. SAMR can also require the parties to complete a divestment prior to implementation of the main transaction.

The 2014 Interim Remedy Provisions also provide detailed guidance on the selection of supervisory trustees and trustees' obligations.

Undertakings may apply to vary or lift remedies when there are material changes to the parties, the transaction, or market conditions. In January 2015, MOFCOM announced that it had agreed to lift one of the remedies imposed in *Google/Motorola Mobility* in 2012 following Google's sale of its shares in Motorola Mobility to Lenovo on the grounds that Google was no longer active in the smartphone business to which the remedy applied. In October 2015, considering the changes in the competitive dynamics of the relevant markets, MOFCOM agreed to partially lift the hold-separate remedies in relation to Western Digital's acquisition of Hitachi's HDD business in 2012. It set a two-year period for the remaining elements of the hold-separate remedies to expire. In the same month, MOFCOM agreed to lift entirely the hold-separate conditions imposed on Seagate in relation to its acquisition of Samsung's HDD business in 2011. In June 2016, MOFCOM announced that it had agreed to lift all remedies imposed on Walmart following Walmart's acquisition of a 33.6 per cent stake in NewHeight in 2012. In February 2018, MOFCOM lifted the respective remedies imposed in *Henkel/*

*Tiande Chemical*, following Tiande's acquisition of sole control over the joint venture, and *MediaTek/Mstar*, owing to changes in the market.

Finally, the provisions also set out the legal liabilities for undertakings that do not comply with the remedies imposed, which include a fine of no more than 500,000 yuan, in addition to an order to correct the non-compliance. In December 2014, MOFCOM adopted two decisions against Western Digital Corporation for two separate instances of non-compliance with the hold-separate remedies imposed by MOFCOM in 2012 in *Western Digital Corporation/HGST*. In February 2018, MOFCOM fined Thermo Fisher Scientific 150,000 yuan for its failure to comply with one of the conditions imposed for its acquisition of Life Technologies.

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

To date, the vast majority of concentrations cleared subject to remedies involve foreign-to-foreign mergers. Since the AML entered into force in 2008, 40 transactions have been cleared conditionally, of which 38 were foreign-to-foreign transactions.

Recent examples include *Dow Chemical/DuPont* (2017), *Brocade/Broadcom* (2017), *HP/Samsung* (2017), *Agrium/Potash Corporation* (2017), *Maersk Line/Hamburg Süd* (2017), *Advanced Semiconductor Engineering/Siliconware Precision Industries* (2017), *Becton Dickinson/CR Bard* (2017), *Bayer/Monsanto* (2018), *Essilor/Luxottica* (2018), *UTC/Rockwell Collins* (2018), *Linde/Praxair* (2018) and *KLA Tencor/Orbotech* (2019). In 2017, the highest number of remedies in any given year were imposed.

### Ancillary restrictions

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

There is no track record to date on this question. Neither the AML nor the regulations or guidelines address ancillary restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

Customers and competitors are routinely contacted for their views during the merger review process and are often invited to attend meetings with the authority.

As noted in question 5, SAMR has the authority to review a concentration that does not meet the relevant notification thresholds. Such discretionary review may be initiated in the event of complaints from customers or competitors. Further, implementing regulations are expected to clarify third parties' rights to make representations, access documents or to be heard.

The *Microsoft/Nokia* decision in 2014 was the first time that MOFCOM seemingly highlighted specific concerns raised by third parties in its decision. In this case, several leading Chinese technology companies reportedly submitted opinions and complaints to MOFCOM flagging concerns over the potential impact of the transaction on patent licensing. Similarly, in the *P3 Prohibition* case in 2014, MOFCOM reportedly asked Chinese trade associations, shippers and container liner shipping companies to comment on the proposed P3 Network shipping alliance during its review, and two of China's largest container liner shipping companies and the China Shippers Association reportedly opposed the deal. In more recent remedy decisions, the authority explicitly notes that it consulted with relevant government departments or authorities, industry associations, and relevant enterprises regarding the definition

of the relevant markets, market participants, market structure, and characteristics and future development of the relevant market.

These decisions illustrate the importance of third-party opinions in China's merger review process. The decisions are also a reminder of the importance of taking into account the potential reaction of different stakeholders and preparing, in advance, a strategy to deal with potential complaints from customers, suppliers or competitors.

### Publicity and confidentiality

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

The AML does not require SAMR to make public pre-merger notifications received, nor does it require it to publish unconditional clearance decisions. Only prohibition decisions and conditional clearance decisions are required to be published. In 2012, MOFCOM started to publish a list of unconditionally cleared concentrations on a quarterly basis, although the information it discloses is fairly limited (mainly relating to the undertakings' names and nature of the transaction). SAMR continued the same practice until April 2019, when SAMR started to publish a list of unconditionally cleared cases on a monthly basis.

Further to the Guidelines on Notification of Simple Cases, SAMR will publish a notice of simple cases on its website for public comments for a period of 10 days. This is intended to enable third parties to challenge the simple treatment determination and raise any potential competition concerns about the contemplated transaction. The notice identifies the parties and includes a summary of their activities, the transaction and the basis on which the notifying parties sought simple treatment.

Notifying parties are required to mark content in their notification or in annexes to the notification as confidential if they do not wish the information provided to be published or disclosed to a third party. A non-confidential version of the notification and annexes must be provided at the same time. Guidance published by MOFCOM indicates, for example, ranges to use when redacting market shares in the non-confidential version of the notification and annexes.

The AML provides that the competition authority and its staff shall keep confidential commercial secrets obtained during an investigation. The 2009 Review Measures and Notification Guidance also impose confidentiality obligations on other organisations and individuals if they become aware of business secrets and other confidential information during the review process.

### Cross-border regulatory cooperation

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

While China is currently not a member of the International Competition Network, it has regular bilateral or multilateral meetings with other competition authorities, covering both general issues and also, on occasion, specific cases. MOFCOM entered into a memorandum of understanding (MOU) with the US Department of Justice and Federal Trade Commission in 2011 to enhance bilateral cooperation between China and the United States in the merger area. MOFCOM entered into similar arrangements in 2012 with the UK Office of Fair Trading (now the Competition and Markets Authority) and with the South Korean Federal Trade Commission. In May 2014, MOFCOM and the Australian Competition and Consumer Commission signed an MOU, which allows for information sharing between the two authorities, subject to confidentiality restrictions. MOFCOM and the Competition Authority of Kenya entered into an MOU in June 2014. In May 2015, MOFCOM and Canada's Competition Bureau entered into an MOU on antitrust cooperation. In April 2016, MOFCOM and the Japan Fair Trade Commission entered into an MOU. In

May 2016, MOFCOM and the antitrust authorities of Russia, Brazil, India and South Africa entered into an MOU. In a recent press release, SAMR noted that China has to date entered into 14 bilateral MOUs with other jurisdictions in relation to merger control. SAMR has indicated that it will continue to strengthen international cooperation with other jurisdictions.

In specific cases, SAMR may ask the notifying parties to grant a waiver so that it can discuss non-confidential aspects of a transaction with other competition authorities. In 2017, MOFCOM noted that it had cooperated with other competition authorities in more than 20 matters including *Dow Chemical/DuPont*.

## JUDICIAL REVIEW

### Available avenues

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

Under the AML, a notifying party who wishes to contest the authority's decision must appeal to SAMR for 'administrative reconsideration' in the first instance. If the notifying party is still not satisfied after this, it can then bring an administrative action to challenge SAMR's decision before a People's Court.

### Time frame

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

A notifying party may appeal to SAMR for 'administrative reconsideration' within 60 days of becoming aware of the decision. The time frame for administrative reconsideration is 60 days.

If a notifying party is not satisfied after this, it may bring an administrative action within 15 days of receipt of SAMR's 'administrative reconsideration' decision. The time frame for the administrative action is three months.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

As noted above, the single most important development is the merger of the Antimonopoly Bureau at MOFCOM and the two other competition authorities in China, the Price Supervision and Antimonopoly Bureau of NDRC and the Antimonopoly and Anti-unfair Competition Bureau of SAIC into SAMR. The former Director General of the Antimonopoly Bureau at MOFCOM, Mr Zhenguo Wu, was appointed Director General of the Antimonopoly Bureau at SAMR. Given that the three former merger divisions within the Antimonopoly Bureau at MOFCOM have been kept and many of the officials involved in mergers have remained in office including the former leadership of the Antimonopoly Bureau at MOFCOM, the changes that will be brought to China's merger control enforcement policy, if any, are expected to be gradual and incremental.

Since the entry into force of the AML in 2008, the number of notifications reviewed by MOFCOM and now SAMR annually has increased. By the end of April 2019, MOFCOM and SAMR had between them concluded more than 2,500 cases, among which 40 cases were approved subject to remedies (38 of them concerned foreign-to-foreign transactions) and two were prohibited.

According to a press release by Director General Zhenguo Wu, in 2018, MOFCOM and SAMR combined received 513 notifications (28 per cent higher than 2017), concluded 468 of them and approved four cases subject to remedies. In 2018, MOFCOM and SAMR combined imposed penalties in 15 cases for failure to notify, hitting a record high since the AML entered into force in 2008 (see also question 9 and 12).

In December 2014, MOFCOM published its decision to fine Western Digital Corporation for two instances of non-compliance with the hold-separate remedies imposed in connection with its acquisition of Hitachi's HDD business. In February 2018, MOFCOM fined Thermo Fisher Scientific 150,000 yuan for its failure to comply with one of the conditions imposed for its acquisition of Life Technologies (see question 26). These cases highlight the authority's willingness to impose fines to ensure compliance with remedies imposed, particularly in the case of hold-separate commitments.

The simple case procedure represents a significant improvement in the time taken to review transactions, given that previously the vast majority of such transactions resulted in clearance in Phase II. Recent experience shows that for 'simple cases', it may take SAMR approximately four weeks to declare the notification complete. Declaration of completeness and case acceptance starts the 10-calendar-day public consultation period during which any third party may challenge the transaction's status as a 'simple case' and raise objections about the transaction. The transaction is cleared currently within about two to three weeks of the expiry of the 10-day public consultation period. This has enabled most simple cases to be cleared within Phase I. From the adoption of the simple case review procedure in April 2014 to the end of 2018, nearly 1,200 simple cases have been concluded.

MOFCOM and now SAMR has vigorously enforced the merger control law. 2017 saw the largest number of remedies imposed in a given year. Following the *Glencore/Xstrata* and *Marubeni/Gavilon* decisions, it is expected that global transactions involving commodities that are strategically important to China are likely to be subject to close scrutiny. The *Google/Motorola*, *Microsoft/Nokia* and *Nokia/Alcatel Lucent* transactions also suggest that the authority will pay close attention to transactions in the IT sector, particularly where standard essential patents (SEPs) (and in some cases non-SEPs) are in issue. In addition, the authority continues to pay close attention to leveraging and tying/bundling effects theories of harm in conglomerate mergers, such as *Essilor/Luxottica* (2018), *UTC/Rockwell Collins* (2018) and *KLA-Tencor/Orbotech* (2018), as well as a transaction's potential adverse impact on innovation; for example, in *Dow Chemical/DuPont* (2017), *Becton Dickinson/CR Bard* (2017) and *Bayer/Monsanto* (2018).

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

In April 2017, the NDRC organised a seminar to discuss possible amendments to the AML. Experts from the State Council's Antimonopoly Commission (the ultimate authority responsible for competition law enforcement in China) attended the seminar and participated in the discussions. Details of the timing of the eventual publication of proposed amendments to the AML have yet to be made public.

In July 2018, SAMR publicised a draft of the revised Notification Measures of Concentration of Undertakings for comments. Details of the timing of adopting the revised Notification Measures is not known.

## UPDATE AND TRENDS

### Key developments of the past year

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

On 13 March 2018, MOFCOM conditionally cleared the *Bayer/Monsanto* deal after over one year in review. MOFCOM assessed the parties' market power, competition dynamics, entry barriers and Bayer's ability and incentive to foreclose competitors post-transaction. MOFCOM was concerned that the transaction would have anticompetitive effects in several relevant markets. As in *Dow Chemical/DuPont*, MOFCOM raised

innovation theory concerns. It found that the parties' combined R&D capabilities would act as an entry barrier in several markets and the parties' incentives to innovate would be reduced. As a result, MOFCOM required Bayer to divest certain business units, and to commit to grant access to its digital agricultural platform to Chinese developers on fair, reasonable and non-discriminatory terms. The decision highlights an interest in innovation theories of harm. It will be important to assess whether there is any scope for such theory in future deals.

On 25 July 2018, SAMR conditionally approved the merger between lens producer Essilor and eyewear producer Luxottica. This decision concerned a transaction that was largely conglomerate in nature. SAMR found, despite the limited horizontal overlap, the transaction would eliminate potential horizontal competition as both parties had made significant R&D investments in each other's markets. In addition, SAMR was concerned that the parties might be incentivised to engage in tying and bundling practices, and that the transaction might harm Chinese retailers by placing them at a competitive disadvantage. As a result, SAMR cleared the transaction subject to a set of behavioural remedies including prohibiting the merging entities from engaging in tying and bundling practices, restricting their customers from supplying their competitors' products, refusing to supply or supplying at below-costs prices without justification, as well as commitments to ensure their transaction counterparties are treated fairly.

On 30 September 2018, SAMR conditionally cleared the *Linde/Praxair* merger involving the industrial gas sector. SAMR was concerned mainly by the high concentration level of the relevant markets post-transaction, and imposed remedies including divestiture and behavioural remedies to ensure stable supply to Chinese customers under reasonable terms and conditions. The approach to geographic market definition is of interest. In relation to certain types of gases, SAMR defined geographic markets based on a cluster of overlapping circles centered on the parties' respective relevant production facilities given identified limitations as regards transportation.

On 23 November 2018, SAMR conditionally cleared UTC's acquisition of Rockwell Collins in the aviation components sector. In addition to identifying horizontal overlaps, SAMR also raised concerns about the conglomerate effects of the transaction. In particular, SAMR was concerned that, post-transaction, UTC would have the most comprehensive product range in the industry (comprising avionics equipment, engine nacelles, auxiliary flight control actuators, ice detection systems, power generation systems and fire prevention systems). Given the parties' significant combined market share, UTC would have the ability and the incentive to engage in tying and bundling practices and thereby marginalise competitors. In addition, SAMR was also concerned by the loss of potential competition in relation to oxygen systems. SAMR found that in a particular market where Rockwell Collins held a dominant position, UTC was developing a competing product, which would challenge Rockwell Collins' dominant position. SAMR was concerned that the transaction would eliminate such potential competition. To address the identified concerns, in addition to certain divestment remedies, SAMR also required UTC to, among others, commit not to engage in tying and bundling practices or lower the interoperability and compatibility of certain of its products with third party products, and divest its R&D programme related to oxygen systems.

Each of these transactions was similarly approved with remedies in some other jurisdictions including the US and the EU, except in *Essilor/Luxottica* where China was the only jurisdiction that imposed remedies. In *Bayer/Monsanto*, *Linde/Praxair* and *UTC/Rockwell Collins*, in addition to structural remedies, MOFCOM and SAMR, as the case may be, also imposed behavioural remedies. In comparison with other jurisdictions, behavioural remedies are more commonly seen in China.

As noted above, in July 2018, Qualcomm aborted its US\$44 billion acquisition of NXP Semiconductors after failing to secure Chinese



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merger control approval before the long stop date. There has been widespread speculation that the *Qualcomm/NXP* deal was impacted by the Sino-US trade dispute. Non-competition issues can become a complicating factor in high-profile, transformational deals in sensitive or strategic sectors deemed important to China's economy. This is because SAMR is required by the AML to consider a transaction's impact on national economic development. During the Sino-US trade dispute in 2018 and 2019, other certain high-profile US deals experienced delays in obtaining merger control approval in China. Notwithstanding the trade tensions, most US-related deals continue to be cleared, particularly transactions that are not high-profile, transformational or do not relate to sensitive or strategic sectors.

# Colombia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

For merger control, the relevant legislation is set forth primarily in Law 1340 of 2009, with additional regulations in Resolution No. 10930 of 2015 and Resolution No. 93503 of 2018, issued by the national competition authority, the Superintendency of Industry and Commerce (SIC).

In Colombia, SIC acts as the main enforcer of merger control rules; however, there are two exceptions: the Superintendency of Finance regarding mergers between financial institutions or other entities subject to its surveillance and the Civil Aviation Authority for mergers between aircraft operators. Whenever a merger is under review by the Superintendency of Finance, it has to request a non-binding opinion from SIC; this request is not mandatory in the case of the Civil Aviation Authority, but it is nonetheless a common practice.

Besides antitrust merger control, SIC has powers in matters such as:

- investigation of anticompetitive conducts (administrative powers);
- unfair competition (judicial and administrative powers);
- consumer protection (judicial and administrative powers);
- IP (judicial and administrative powers regarding trademarks and patents);
- legal metrology (administrative powers); and
- data privacy (administrative powers).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Mergers are subject to merger control by SIC if the following conditions are met (these criteria differ for the finance and aviation sectors):

- market overlap: the companies involved in the transaction develop the same business activity (horizontal merger) or carry out activities within the same value chain (vertical merger). In Colombia, conglomerate mergers are not caught by merger control;
- economic threshold: during the fiscal year preceding the merger, the parties to the transaction and all the companies that are controlled or have control over the parties and perform the same business activity or carry out activities within the same value chain, had, individually or in the aggregate, operating income or total assets amounting to an equivalent of 60,000 Colombian minimum legal wages (approximately US\$17 million for 2019). As a general rule, SIC only takes into account income and assets from undertakings in Colombia; however, if either one of the parties participate in the Colombian market only through exports and does not have any corporate vehicles in Colombia, global assets and operating income should be considered; and
- acquisition of competitive control: one of the parties in the transaction acquires competitive control over the economic activity of

the target (including acquisition of competitive control over essential assets). For further information on the concept of 'competitive control', see question 4.

#### 3 | What types of joint ventures are caught?

According to SIC's case law and guidelines, joint ventures are deemed as business mergers if they meet the full-functionality test, with the following conditions:

- merger of a business line: the joint venture must have the effect of merging a business line or market, instead of just specific operations of the parent companies' economic activities;
- full-functionality: the joint venture must be autonomous or at least have the potential to develop its activity independently in the market, as a business separate from its parents; and
- lasting basis: elimination of competition between the parties to the transaction should take place on a lasting basis.

If the aforementioned conditions are not met, joint ventures would not be caught under merger control, and the transaction would be deemed as a cooperation agreement among competitors, subject to ex post control by SIC.

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

For antitrust purposes, 'control' is understood as the mere de facto possibility of influencing strategic decisions, regarding: corporate policy (including prices, investments, indebtedness, or similar); initiation, variation or termination of business activity; and management of goods or rights that are considered essential for the development of the company's economic activity. Therefore, even holding veto rights over certain strategic decisions or appointing members in the board of directors could constitute competitive control (negative control), which should be assessed on a case-by-case basis.

### Thresholds, triggers and approvals

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

The two relevant thresholds to be considered for merger control purposes are the following:

- economic threshold: during the fiscal year preceding the merger, the parties to the transaction and all the companies that are controlled or have control over the parties to the transaction and develop the same business activity or carry out activities within the same value chain, had, individually or in the aggregate, operating incomes or total assets amounting to an equivalent of 60,000

Colombian minimum legal wages (approximately US\$17 million for 2019). As a general rule, SIC only takes into account operating incomes and assets in Colombia, unless the parties participate in the Colombian market only through exports and do not have a corporate vehicle in Colombia, in which case, assets and income are calculated on a global basis; and

- market threshold: if the parties' aggregated relevant market share is 20 per cent or higher in any of the overlapping markets, the transaction requires prior approval from SIC (Prior Approval). On the contrary, if joint market shares fall below 20 per cent in all of the overlapping markets, the transaction is deemed as authorised by law, and only an authorisation to SIC is required.

Taking all the aforementioned into consideration, it is very important for the parties to conduct the correct market assessment to avoid investigations and sanctions, and to be certain of the accuracy of their joint participation in the relevant markets.

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

Filings are mandatory whenever the conditions specified in answer to question 2 are met.

Transactions between entities belonging to the same corporate group or under the same orbit of corporate control are exempted from merger control rules.

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

The local effects doctrine (article 2 of Law 1340 of 2009) applies in Colombia; consequently, if the undertakings concerned are engaged in economic or commercial activities that have effects in Colombian markets, such undertakings are considered as market participants, regardless of whether the undertakings concerned are domiciled outside of Colombia.

Consequently, foreign-to-foreign mergers may be subject to merger control whenever the undertakings:

- have corporate vehicles in Colombia;
- have permanent investments in corporations incorporated under Colombian Law; or
- conduct business in Colombia through subsidiaries;
- make imports into or exports to Colombia; and
- own goods or assets in Colombia; and
- perform business operations that have effects in the Colombian market.

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

Regarding foreign investments, no specific rules for merger control exist. However, Colombian regulations prohibit foreign investment in national security activities and for the processing or disposal of toxic, dangerous or radioactive waste.

Specific sectors are excluded from SIC's jurisdiction as described in question 1. Furthermore, Prior Approval proceedings that take place in regulated or sensitive sectors require non-binding legal opinions from the relevant agency bodies, even in sectors where SIC brings forward merger control.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

There is no specific deadline for filing; however, submission has to be made before closing. The breach of this duty is regarded as a violation of Colombian Competition Law, which may result in investigations against the parties and the responsible individuals (see question 12). In practice, gun-jumping is the most usual kind of antitrust infringement sanctioned by SIC.

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

All the undertakings taking part in the transaction are responsible for filing. Notwithstanding the latter, the filing could be made by just one of the parties, as long as this party manages to submit all the required information before SIC.

There are no filing fees in Colombia.

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

Colombia has a suspensory system, on behalf of which clearance is required prior to closing. However, for Notifications (when the parties have joint market shares below 20 per cent in all of the relevant markets), parties can close immediately after filing, with the risk that SIC orders a Prior Approval proceeding within 10 business days.

### Pre-clearance closing

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

Closing the proposed transaction and any kinds of pre-merger coordination before clearance are a violation of Colombian Competition Law and the following sanctions may apply:

- fines against the parties: up to 100,000 monthly minimum legal wages (approximately US\$25 million for 2019), or 150 per cent of the revenue or profit obtained from the infraction;
- fines against individuals: up to 2,000 monthly minimum legal wages (approximately US\$600,000 for 2019); or
- reversion of the transaction: SIC could order the reversion of the transaction if it is determined that it produced an undue restriction on competition (there are no legal precedents).

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

For all mergers that have effects in Colombia, regardless of the parties' domicile, the breach of the obligation to file before the transaction becomes effective is a violation of Competition Law. Therefore, penalties are theoretically applicable in cases involving foreign-to-foreign mergers.

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

Closing before clearance in a foreign-to-foreign merger is possible when the parties to the transaction have previously executed a carve-out, aiming to avoid the acquisition of competitive control in Colombia.

In the framework of a Prior Approval proceeding, parties can either file a formal carve-out proposal to SIC, to obtain its approval within five business days, informally notify SIC about the carve-out remedies to be implemented, or apply private remedies without informing SIC, facing higher risks of gun jumping sanctions. For successful carve-outs, it is essential for the parties to guarantee that no transfer of control or exchange of sensitive information will occur in respect to the business in Colombia on a lasting basis.

**Public takeovers**

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

For public takeover bids, SIC can, on behalf of the interested party, request the target to submit the relevant information for the merger control proceeding (or otherwise subject to sanctions). It is important to clarify that these provisions apply to any kind of transaction and not only to public takeover bids.

**Documentation**

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

The level of detail depends on many factors and should be evaluated on a case-by-case basis. In general terms, Resolution No. 10930 of 2015 establishes the minimum required information to start the proceeding. For Prior Approvals, the filing must include detailed information regarding the proposed transaction, the parties, relevant markets, competitors, customers and distribution channels. For Notifications, it is necessary to provide the financial statements of the parties to the transaction, a description of the transaction, relevant market definition and market shares of the parties to the transaction and their competitors.

Providing incomplete information may delay SIC’s decision, as decision timings do not start until all information has been filed before SIC. On the other hand, providing false information may lead to sanctions and even criminal prosecutions.

**Investigation phases and timetable**

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

For Notifications, SIC has 10 business days to issue an acknowledgement of receipt or to order a Prior Approval, in case it does not agree with the methodology used by the parties to define relevant markets, or to calculate their market shares therein.

Prior approvals are organised in phases, during which information burdens and the level of assessment gradually increases. During the initial stage or Phase I, SIC may bring forward a preliminary assessment of the transaction within 30 business days (Phase I). SIC can thereafter decide to perform an in-depth analysis of the transaction by requiring additional statutory information (Phase II), as a result of which it has three additional months to take a decision from the time Phase II information has been provided in full form. In exceptional circumstances, SIC can make a single request for supplementary information to the parties, extending the time it has to make a decision for an additional three-month period (formally, this second request is also part of Phase II; however, for understanding purposes, we prefer to consider this situation as an additional phase or Phase III). If SIC fails to issue a decision within three months from the date the parties submit the information for Phase II or Phase III, it is understood that the transaction has been authorised by Law.

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

While a decision can be issued at any time during a Prior Approval proceeding, the following is a timetable summarising each phase:

<b>Phase I</b>	<ul style="list-style-type: none"> <li>Phase I information provided by the parties.</li> <li>Public announcement: the filing goes public for third parties to comment.</li> <li>Preliminary assessment: 30 business days – duration defined by law and cannot be modified.</li> </ul>
<b>Phase II</b>	<ul style="list-style-type: none"> <li>Phase II information provided by the parties.</li> <li>Comments by other regulatory authorities (when applicable).</li> <li>In-depth study (remedies proposal).</li> </ul> <p>Three months from the time all Phase II information request has been provided.</p>
<b>Phase III</b>	<ul style="list-style-type: none"> <li>Additional information request, which resets the three-month period once only.</li> <li>Final decision. (Three months)</li> </ul>

**SUBSTANTIVE ASSESSMENT**

**Substantive test**

**19 | What is the substantive test for clearance?**

Law 1340 of 2009 requires the transaction not to produce an ‘undue restriction on competition’ as the substantive test for antitrust analysis. This test has to be assessed in accordance with the objectives form Colombian Competition Law, set forth in article 3 of Law 1340 of 2009 (ie, to protect free participation of businesses in the market, consumer welfare and economic efficiency).

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

No.

**Theories of harm**

**21 | What are the ‘theories of harm’ that the authorities will investigate?**

The substantive test and goals of Colombian Competition Law have led to considering unilateral effects, coordinated effects, vertical effects and, occasionally, portfolio effects, as plausible theories of harm to competition.

**Non-competition issues**

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

There are no cases that have been decided based on explicit non-competition arguments.

**Economic efficiencies**

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

Economic efficiency is a possible defence for a transaction. However, the burden of proof lies with the interested parties. Therefore, the parties must demonstrate within the process that the transaction is indispensable to produce positive or pro-competitive effects that benefit consumers, which outweigh any anticompetitive impact that the transaction may have on the market.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

SIC has the power to impose remedies or to prohibit a transaction, by means of a reasoned resolution. The parties may file internal administrative appeals (reconsideration petitions) against such decisions, which will be decided by SIC.

SIC's decisions could be subject to judicial review, but in practice it is not a commonly used alternative, taking into account that judicial decisions take a long time, and the judicial review process is usually non-suspensory of the decision.

### Remedies and conditions

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

Yes. Structural, behavioural and hybrid remedies may be offered by the parties or directly imposed by SIC.

If market conditions change over time, the parties can ask SIC to remove the remedies imposed, given that they no longer fulfil the purpose for which they were initially imposed.

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

There are no specific conditions or timing issues stated by the law. It depends on the criteria adopted by SIC on a case-by-case basis.

In most cases, remedies could be satisfied upon closing, but SIC has required compliance with certain remedies as a prior condition for the parties to close the transaction.

Besides remedies, SIC also imposes obligations to monitor compliance. Usually external audits, insurance contracts and periodical reports are ordered for these purposes. Surveillance efforts are to be paid by the parties through a yearly contribution, which rates are fixed depending on the complexity of the remedies to be verified; however, they cannot exceed one per thousand of the current assets of each company.

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

There are no records of remedies imposed on strictly foreign-to-foreign mergers with no corporate vehicles or assets in Colombia; however, it is common to see remedies imposed on foreign companies with locally incorporated companies.

### Ancillary restrictions

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

In general practice, clearance is only issued in relation to the market effect of the merger (in Colombia, contracts are not required by the authority). It is still a matter of debate whether ancillary restraints could be cleared as part of the process or are instead always subject to ex post control by SIC.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

Yes. Third parties can, by providing information and comments regarding the proposed transaction, within 10 business days after the transaction is made public. Likewise, SIC may request information from third parties. These market enquiries may include consultations with competitors, suppliers, customers, industry and consumer associations, government agencies, among others.

### Publicity and confidentiality

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

Prior Approval proceedings require general details from the proposed transaction to be published in a newspaper or, more commonly, on SIC's website ([www.sic.gov.co](http://www.sic.gov.co)). Nevertheless, the parties can ask SIC to refrain from making the transaction public only for reasons of public economic order.

Additionally, the information submitted by the parties may be kept confidential, but it is necessary to make an explicit request justifying the legal grounds on which confidentiality must be granted. In that event, the parties have also to submit an executive summary of the confidential information for it to be incorporated into a public file.

### Cross-border regulatory cooperation

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

Colombia is part of several international antitrust cooperation agreements. Most of these agreements were established through free trade agreements (FTAs) subscribed by the country. Some of these FTAs have a competition chapter that includes cooperation provisions. Additionally, there are several agreements with antitrust authorities, including the authorities of Brazil, Chile, Ecuador, Mexico, Panama, Peru, Spain, South Africa and the United States, and, in general, authorities of countries that are members of the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development.

Most of these agreements make reference to technical assistance programmes where officials from SIC receive training from other antitrust agencies.

Nonetheless, information exchange between authorities is limited. For instance, SIC is not entitled to exchange the parties' information, unless they expressly provide waivers over such information.

On 2018, Colombia became a member of the OECD. The Competition Committee from this organisation provides a framework for international cooperation among competition agencies.

In addition, the 2019 ICN Annual Conference was held in Cartagena, Colombia.

## JUDICIAL REVIEW

### Available avenues

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

Against SIC's decision, a reconsideration petition can be presented, which is resolved by the same authority.

If the parties do not agree with the outcome, they can request judicial courts to review the decision, but in the meantime the decision comes into effect.

It is important to point out that, in practice, challenging a decision before the courts is not common owing to the fact that, in most cases, judicial decisions take a long time.

### Time frame

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

The parties have 10 business days to file reconsideration petitions before the Superintendent of Industry and Commerce, once the decision has been notified. The term during which the Superintendent is expected to reach a decision is two months.

Judicial review may take years; therefore, parties are not always keen to request a court to review the decision.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

SIC has been applying ICN's remedies and best practice standards in its decisions. In addition, SIC has started to use remedies as a tool to correct markets rather than to counteract the anticompetitive effects related to the theory of harm linked to the merger at hand.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The draft Bill of the 2018–2022 National Plan considers a new system of fines for violations to Competition Law, including gun-jumping, of up to 10 per cent of the operating income or assets of the offender, whichever is higher.

## UPDATE AND TRENDS

### Key developments of the past year

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

Within the past year, SIC has issued decisions with innovative market definitions. This authority has also re-assessed third-party engagement in the prior approval proceeding.

In *Energizer/Spectrum Brands*, SIC assessed supply-substitutability when it defined the relevant market for batteries in Colombia. In *Quimpac/Mexichem*, SIC denied Brinsa's request to be considered as an interested party for the transaction, arguing that, in merger control proceedings, competitors may only provide information and comments regarding the proposed transaction, and cannot directly engage in the Prior Approval proceeding.

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# Costa Rica

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

The Act for the Promotion of Competition and Consumer Protection and its Regulations are the main legislation. The Commission for the Promotion of Competition (Coprocom) is the authority that enforces Competition Law in Costa Rica.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The legislation uses a very broad definition of a 'concentration', defining it in very general terms as any transaction that results in an acquisition of control of one entity over another, or the formation of a new economic agent under joint control. As such, almost all mergers may be caught under that definition, as long as they meet the thresholds set forth by the law.

#### 3 | What types of joint ventures are caught?

Any joint venture that results in a change of control or joint control, and reach the thresholds, may be caught by the law.

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

There is a definition of control in the Guidelines for the Analysis of Concentrations. Economic control is defined as the possibility, de facto or de jure, to execute a decisive influence over an economic agent or its assets, understood as the power to adopt or block a decision related to the entity's strategic commercial behaviour.

### Thresholds, triggers and approvals

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

There are two thresholds: assets and turnover.

#### Assets

The sum of all productive assets of all involved economic agents exceeds 30,000 minimum wages (approximately US\$15.4 million).

#### Turnover

Turnover generated in Costa Rica during the previous fiscal period by the involved economic agents exceeds 30,000 minimum wages (approximately US\$15.4 million).

Transactions that fall below this threshold are not subject to notification.

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

The filing is mandatory. If the obligation to notify is triggered, there are no exceptions.

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

Foreign-to-foreign mergers have to be notified if the merger has an effect in the local market.

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

There are no special rules on foreign investment. There are special sectors on which the merger authorisation process is either conducted by a different superintendence than Coprocom, or that the specific superintendence has to issue its opinion regarding the concentration. These sectors are: banking and finance, telecommunications, insurance, pensions and securities.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

The deadline is five days after closing. There are sanctions for not filing. The sanction consists of a fine, which may be up to 410 minimum wages (approximately US\$211,000).

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

All parties are responsible for filing. There are no filing fees.

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

The transaction is not suspended prior to clearance. The waiting period is 30 days after all the required information has been submitted. However, this period may be extended up to 60 additional days, in cases of special complexity.

## Pre-clearance closing

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

One possible sanction is a fine of up to 410 minimum wages (approximately US\$210,000). Also, the Commission may order the reversion of the merger.

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

Cases may be closed before clearance as long as the merger notification is submitted no longer than five days after closing.

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

The Costa Rican legislation allows closing before clearance.

## Public takeovers

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

There are no applicable special rules for public takeover bids.

## Documentation

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

If the filing is incomplete, Coprocom will issue a request for information. However, if the filing contains wrong or false information, there is a risk of a fine.

## Investigation phases and timetable

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

The different phases are as follows:

- filing;
- Coprocom has 10 calendar days to determine whether the submitted information is complete or, on the other hand, issue a request for information;
- once the information is complete, Coprocom has 30 days to resolve or extend that term in cases of special complexity; and
- Coprocom issues final resolution, which may approve, reject or request the submission of conditions to counteract the potential anticompetitive effects of the transaction.

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

The statutory timetable is 30 calendar days after the information is complete. This term may be extended only once, for up to an additional 60 calendar days in cases of special complexity (although extensions can be for shorter terms). Extensions are relatively common and also additional requests of information are common. On average, the term to obtain a favourable ruling is around 45 days after the application is submitted.

## SUBSTANTIVE ASSESSMENT

### Substantive test

- 19 | What is the substantive test for clearance?

The substantive test for clearance consists of an analysis of the anti-competitive effects and the procompetitive effects of the transaction. If the transaction does not generate significant anticompetitive effects, or if the procompetitive effects offset those anticompetitive effects, the transaction is approved. Coprocom may also impose additional conditions to mitigate the anticompetitive effects.

The failing firm defence may be used as an argument to obtain authorisation of a concentration that may have anticompetitive effects.

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

There is no special substantive test for joint ventures.

### Theories of harm

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

There is no definite list set forth by the law that states the theories of harm that Coprocom will investigate. However, its precedents have shown that Coprocom analyses market dominance, unilateral effects (over prices, negotiation mechanisms, capacity, innovation and expansion possibilities of competitors), coordinated effects, vertical foreclosure and conglomerate effects.

### Non-competition issues

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

In theory, non-competition issues should not be relevant in the review process. However, the Competition Authority is part of the Ministry of Economy and, as such, there have been some situations in which the industrial policy or the Ministry's goals do merge into the Competition Authority's acts (not strictly limited to merger authorisations but to other actions executed by Coprocom). This is something that was reviewed by the OECD and it recommended a legal amendment. Currently, that amendment is being discussed at Congress.

### Economic efficiencies

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

Economic efficiencies are considered whenever the transaction may result in an anticompetitive effect. If the transaction does not generate anticompetitive effects, there is no need for Coprocom to analyse economic efficiencies.

An example of how economic efficiencies are reviewed would be a transaction that generates economies of scale that enable a company to reduce its costs and lower its final prices.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

Coprocom has the powers to reject the transaction. To execute this, it may impose fines upon the companies. If the companies do not observe the resolutions or orders of Coprocom, they run the risk of being processed for disobedience, which is a criminal felony.

### Remedies and conditions

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

It is possible to remedy competition issues. The law establishes the following potential remedies; however, the parties or Coprocom may suggest a remedy that is not expressly stated:

- divestment of undertakings or sale of assets;
- restrictions or limitations related to the sale of services or goods;
- obligation to supply certain goods or services to specific customers or competitors; and
- introduction of specific clauses in agreements signed with clients or suppliers.

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

The conditions and timing are determined on a case-by-case basis.

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

The authority has required remedies in some transactions. However, none of those transactions have been foreign-to-foreign mergers.

### Ancillary restrictions

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

There is no legal framework that establishes this beforehand. It would be determined by Coprocom on a case-by-case basis.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

The concentration authorisation process requires that a notice is published in a national newspaper, with the purpose of allowing any third party to appear before the authority and express its arguments in relation to the concentration. Their right is to manifest their position. They may provide proof against the transaction, as well as their arguments as to the reasons why the concentration should be admitted or rejected.

### Publicity and confidentiality

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

Coprocom creates two case files: one confidential casefile that may be accessed only by the authority and the notifying parties; and another non-confidential, which is accessible to the public.

### Cross-border regulatory cooperation

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

There are internal agreements between authorities to exchange information and also to seek advice related to similar cases that other authorities may have reviewed. However, whenever such cooperation occurs, it is rarely something that is disclosed.

## JUDICIAL REVIEW

### Available avenues

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

The ruling by Coprocom is subject to an administrative appeal before Coprocom, and then it is subject to judicial review. There have not been appeals on rulings related to concentration authorisation processes.

### Time frame

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

An appeal is generally resolved within five business days. The judicial review does not have a clear time frame, and it may take between six months and two years.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

There does not seem to be a specific focus on a certain industry or sector. In the last five years there was one transaction rejected, and there have been other transactions that were accepted under certain conditions. However, over 95 per cent of the reported concentrations have been admitted without any conditions.

### Reform proposals

35 | Are there current proposals to change the legislation?

There is a draft bill under discussion. This bill has been promoted in observance of some recommendations made by the OECD, which aim to have a more independent competition authority.

## UPDATE AND TRENDS

### Key developments of the past year

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

Last year marked the first significant merger that was rejected by Coprocom. This merger involved Walmart and another local super-market chain. The Commission considered that Walmart's already dominant position would be reinforced to an extent that generated

anticompetitive effects, and those effects were not considered to be offset by the efficiencies mentioned by the parties.

Regarding legal reforms, the bill for the new Competition Act is still in discussion at Congress. This bill introduces some changes mostly in relation to the independence of the Competition Commission. However, there are some modifications also being discussed in connection to the merger authorisation process. One of those possible amendments is moving from the current process, which enables companies to close before clearance, to a process that would not enable closing before clearance.



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# Croatia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

Merger control, as well as other aspects of competition law, has been substantially governed by the Competition Act, which entered into force on 1 October 2010. In addition, there are numerous regulations that set out the procedural framework and define the standards for its application. One of the most relevant regulations is the Regulation on the Notification and Assessment of Concentrations (Official Gazette 38/11), which provides information on the content and form of the notification and the assessment criteria for concentrations. In preparation for Croatia's accession to the EU on 1 July 2013, the Competition Act was amended to comply with EU competition law.

Since Croatia's accession to the European Union, the EU Merger Regulation (EUMR) has been directly applicable. Hence, mergers falling within the scope of the EUMR are reviewed by the European Commission (one-stop-shop principle) and not by the Croatian Competition Agency (CCA) which, however, remains competent to review national merger control cases under the Competition Act as further described below. The CCA is an independent authority. The decision-making body within the CCA is the Competition Council (the Council), which consists of five members, one of whom is the president of the Council.

More information about the CCA and its activities can be found at [www.aztn.hr](http://www.aztn.hr).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

A concentration is constituted by:

- a merger of two or more independent undertakings or parts thereof;
- the acquisition of control or decisive influence of one or more undertakings over one or more other undertakings or a part of an undertaking, in particular by:
  - acquisition of the majority of shares or share capital;
  - obtaining the majority of voting rights; or
  - in any other way according to the provisions of the Croatian company law and other regulations; or
- the creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity.

A concentration does not arise if:

- banks or other financial institutions, investment funds or insurance companies, in their ordinary course of business, which includes transactions and dealing with securities, for their own account or for the account of third parties, hold shares on a temporary basis with a view toward reselling them, provided that they do not exercise

their voting rights in respect of those shares for the purpose of determining the competitive behaviour of that undertaking (ie, they exercise such voting rights solely with a view toward preparing the disposal of the entire or a part of the undertaking or its shares, do not undertake any operation that may distort, restrict or prevent competition, and carry out the disposal within one year following the acquisition). If the disposal is not reasonably possible within this period, it may – upon request – be extended by the CCA;

- the acquisition of shares or share capital is the result of internal restructuring of an undertaking (intra-group merger); or
- control is acquired by an office holder or administrative officer in the event of a bankruptcy, liquidation or winding up of an undertaking in accordance with the bankruptcy laws and the Company Act.

#### 3 | What types of joint ventures are caught?

The creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration (see question 2).

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

In general, 'control' may be obtained through the transfer of rights, contracts or other means, by which one or more undertakings, either separately or jointly, taking into account all legal and factual circumstances, gain the ability to exercise decisive influence over one or more undertakings on a lasting basis.

An undertaking is deemed to be controlled by another undertaking if the controlling undertaking, directly or indirectly:

- holds more than half of the share capital or half of the shares;
- may exercise more than half of the voting rights;
- has the right to appoint more than half of the members of the management board, supervisory committee or a similar administrative or managing body; or
- in any other way exercises a decisive influence on the right to manage the business operations of the undertaking.

Minority interests (including board or management representation and contractual arrangements) are caught, provided that they confer control by any means described above.

## Thresholds, triggers and approvals

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

The CCA must be notified of a concentration where in the business year preceding the concentration:

- the combined worldwide turnover of the undertakings concerned amounted to at least 1 billion kunas and at least one of the undertakings concerned has its seat or a subsidiary in Croatia; and
- the individual total turnover realised in Croatia by each of at least two undertakings concerned amounted to at least 100 million kunas.

For the purpose of turnover calculation, the revenues from the sale of goods or the provision of services have to be taken into account. The turnover of an undertaking concerned includes:

- the turnover of the undertaking concerned;
- those undertakings in which the undertaking concerned, directly or indirectly owns more than half the shares or capital or business assets, or has the power to exercise more than half the voting rights, or has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or has the right to manage the undertakings' affairs;
- those undertakings that have in the undertaking concerned (acquiring or controlling undertaking) rights or powers listed in (ii); and
- those undertakings that have in the undertaking referred to in (iii) the rights or powers listed in (ii).

Turnover generated by sales or services between companies belonging to the same group is not taken into account. In case of an acquisition of one or more parts of an undertaking or of a group of undertakings, irrespective of whether such parts constitute independent legal entities, only the turnover pertaining to the parts subject to the concentration are taken into account for the purpose of the turnover calculation.

For the purpose of the turnover calculation of banks and other institutions that provide financial services, after the deduction of indirect taxes related to them, the sum of the following income items has to be taken into account:

- income from interest rates and similar income;
- income from securities (ie, income from shares and other variable yield securities, income from participating interests in economic entities, and income from shares in affiliated economic entities);
- commissions receivable;
- net profit on financial operations; and
- other operating income.

For insurance companies and companies that perform reinsurance activities, the value of the gross premiums, which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including reinsurance premiums, after the deduction of taxes and parafiscal contributions charged by reference to the amounts of individual premiums or in relation to the total premium volume, have to be taken into account.

Concentrations falling within the jurisdiction of the European Commission are not subject to Croatian merger control (one-stop-shop principle). According to article 19, paragraph 7 of the Competition Act, the European Commission may, however, decide to refer the assessment of a concentration to the CCA, irrespective of the concentration having a Community dimension, provided that Croatian national thresholds are met. Should this be the case, the parties to the concentration

must submit a respective Croatian merger notification to the CCA within 30 days of the date of the receipt of the relevant decision of the Commission.

Irrespective of whether the above-mentioned turnover thresholds are met, in specific situations in the media, postal or electronic communications sectors a filing with the CCA or the Croatian Post and Electronic Communications Agency (HAKOM) may be required. (For more detail see question 8.)

Except the situations described above, the general rule is that there is no obligation to notify the merger to the CCA if the thresholds from article 17 of the Competition Act are not met.

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

If a transaction constitutes a concentration within the meaning of the Act (see question 2) and exceeds the jurisdictional thresholds (see question 5), filing is mandatory. For specifics applicable in certain sectors, see question 8.

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

The Competition Act requires local effects insofar that – in addition to a certain domestic minimum turnover generated by at least two of the undertakings concerned – at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia (see question 5). As a result, purely foreign-to-foreign mergers usually fall outside of the scope of the CCA's jurisdiction.

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

There are no provisions that would relate specifically to foreign investments. Inter alia, in the following sectors, provisions related to merger control exist.

#### Media sector

The CCA has sole competence to decide on concentrations involving media companies. However, the Electronic Media Act (Official Gazette, No. 136/13) defines in articles 54 and 55 specific threshold requirements for certain types of media undertakings that deviate from the general turnover thresholds described in question 5. Moreover, according to article 57 of the Electronic Media Act, the Electronic Media Agency is authorised to order the shareholding structure of a media company to be changed (otherwise its media licence could be withdrawn). Furthermore, the Media Act (Official Gazette, No. 81/13) prohibits concentrations that would result in a combined market share of more than 40 per cent in the markets comprising all daily or all weekly newspapers in Croatia, respectively.

#### Postal and electronic communications sectors

According to article 68 of the Electronic Communications Act (Official Gazette, No. 72/17), operators with significant market power and operators who have been granted licences to use radio frequencies are obligated to notify HAKOM of any intention to merge or consolidate or of any other type of joint or coordinated action (irrespective of whether the turnover thresholds in question 5 are met). Prior to the implementation of any such operation, HAKOM must issue an approval. If the intended operation also qualifies as a concentration exceeding the jurisdictional thresholds (see questions 2 and 5), a notification also has to be filed with the CCA. In the course of the assessment, the CCA may invite HAKOM to comment on the case.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

There is no explicit filing deadline. However, the notification has to be submitted to the CCA prior to the intended implementation of the concentration and following the conclusion of the merger agreement on the basis of which control or decisive influence will be acquired or following the publication of the invitation to tender. The parties may submit the notification even before the conclusion of the merger agreement or the publication of the invitation to tender, if they are able to provide, in good faith, evidence of the proposed conclusion of the merger agreement or the announcement of the invitation to tender. In the case of a breach of the filing obligation, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover realised in the preceding business year.

With regard to the sanctions for closing before clearance, see question 12.

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

There are two scenarios to consider.

In case of an acquisition of an entire undertaking or parts of one or more undertakings by another undertaking, the notification has to be submitted by the undertaking acquiring control.

In all other cases, the parties to the concentration have to submit a joint notification in relation to the concentration.

An initial filing fee of 7,000 kunas is payable prior to the submission of the notification, and proof of payment must be submitted to the CCA together with the notification. For notifications in the media sector where the general turnover thresholds as set out in question 5 are not met (see question 8), the initial filing fee amounts to 3,500 kunas.

A fee of 105,000 kunas is payable if the CCA adopts its decision after an in-depth investigation.

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

The intended concentration must not be implemented prior to clearance (suspension obligation).

As to the waiting periods, there are two periods to consider.

First, following the submission of the notification, the CCA first assesses the completeness of the merger notification. The law does not provide for a specific time frame; in practice, it is thus recommended to be in contact with the authority during this stage to ensure that this period is short.

Second, once the CCA has issued the confirmation of completeness, it then assesses the intended concentration in one or two phases, depending on whether the concentration raises competition concerns or not.

In Phase I, the CCA has 30 days to clear the concentration. If no decision has been adopted prior to the expiry of this waiting period, the concentration is presumed by law to be approved in Phase I.

If, however, the authority takes the view that the concentration gives rise to competition law concerns, it shall adopt a procedural order on the initiation of Phase II proceedings. Once the CCA has initiated Phase II proceedings, it must issue a decision within three months (which may be extended by an additional three months, if this is necessary to carry out additional market analysis). If no decision has been adopted prior to the expiry of the waiting period, the concentration is presumed by law to have obtained clearance in Phase II.

According to article 19(6) of the Competition Act, the CCA may, in particularly justified cases, upon the request of the parties, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period. When deciding on such a request, the CCA takes into account all circumstances of the case, in particular the nature and gravity of the damages that might be posed to the parties to the concentration or third parties, and the effects of the concentration on competition. From publicly available information one can derive that such pre-clearance implementation is rarely granted.

### Pre-clearance closing

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

There are two principal categories of sanctions for closing or integrating the activities of the merging businesses prior to clearance. The distinction between the two is made based on whether the notifiable concentration would have to be prohibited or not.

In case a prohibition decision would have to be adopted (ie, the requirements for clearance are not met, see question 19) and where the concentration has been closed prior to clearance (irrespective of whether a notification has been submitted to the CCA or not), the CCA may impose a fine of up to 10 per cent of the undertaking's total annual turnover generated in the preceding business year. Where the concentration could in principle obtain clearance but has been closed prior to clearance (irrespective of whether a notification has been submitted to the CCA), the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover generated in the preceding business year. A similar fine will be adopted if the merger filing provides incorrect or false information about the parties and their businesses. Individuals are not subject to fines.

In addition, the CCA may order (by separate decision) any indispensable measures aimed at restoring effective competition in the relevant market, and set deadlines for their adoption. In particular, the CCA may:

- order acquired shares or share capital to be transferred or divested; or
- prohibit or restrict the exercise of voting rights attached to the shares or share capital, and order the joint venture or any other form of control by which the concentration has been put into effect to be removed.

There are no publicly available cases in which the CCA has recently imposed such sanctions to restore competition.

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

The sanctions for closing before clearance are also applicable in foreign-to-foreign mergers. However, we are not aware of these sanctions having been applied in practice to such mergers since the introduction of the Competition Act, as they usually fall outside the scope of the Croatian merger control regime (inter alia, a merger filing is only required if at least one of the undertakings concerned has its seat or a subsidiary in Croatia, see question 5).

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

The Competition Act does not explicitly provide for hold-separate (carve-out) solutions. Foreign-to-foreign concentrations are therefore assessed and treated in the same way as local concentrations. The Competition

Act includes an additional local jurisdictional threshold requirement, according to which at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia (see question 5). If this (additional) requirement is not met, a concentration does not require a notification in Croatia. As a result, since the introduction of the Competition Act, most foreign-to-foreign mergers that could require hold-separate (carve-out) solutions fall outside the scope of the application of the Croatian merger control regime. The CCA may, in particularly justified cases, upon the request of the parties, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period (see question 11).

### Public takeovers

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

The Croatian Takeover Act (Official Gazette, No. 148/13) stipulates that the deadline for requesting an approval from the Croatian Financial Services Agency to publish the public offer for shares in stock companies is suspended until merger clearance is granted by the CCA. Therefore, potential acquirers are not required to submit their public offers before the CCA has issued the merger clearance.

### Documentation

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

The information and documentation to be submitted in a merger notification is set out in article 20 of the Competition Act and in the Regulation on the Notification and Assessment of Concentrations (the Regulation).

Inter alia, the following needs to be provided:

- information on the parties to the concentration (eg, names, registered seats, excerpts from the commercial register, nature of the business, ownership and control; description of the distribution and retail networks; annual financial reports for the last preceding business year);
- power of attorney;
- description of the intended concentration;
- certified copies or originals of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- market shares held by the undertakings concerned on the relevant markets;
- information on main competitors and their market shares in the relevant markets;
- description of the distribution and retail networks in the relevant markets, relevance of research and development;
- economic rationale of the concentration;
- description of the benefits expected to result from the concentration for consumers; and
- (if available) copies of analyses, reports or studies related to the relevant markets.

The CCA may request additional information from the undertakings concerned, such as information on the number of their employees, their top five suppliers and customers, or sales figures (value and volume). If some of the information requested in the Regulation is not available to the parties, this must be stated in the filing, together with information as to where the undertakings tried to collect the data concerned, the reasons why this collection was not successful, and where the CCA may obtain the missing information.

The notification and all documents attached thereto need to be submitted in the Croatian language. In addition, all documents submitted to the CCA must be in the form of an original or a certified copy bearing an apostille (depending on the jurisdiction of origin of a particular document). If a document requires translation, both the original or a certified copy and its certified Croatian translation have to be provided.

The Competition Act also envisages the possibility to submit a short-form notification in cases that – from experience – usually do not give rise to competition law concerns. The Regulation, defining the precise content of short-form notifications, has been published in the Official Gazette (No. 38/2011) and came into force on 9 April 2011.

According to article 20 of the Competition Act, a short-form notification may be submitted if:

- none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (ie, no horizontal overlaps), or in a market that is upstream or downstream of a market in which another party to the concentration is engaged (ie, no vertical relationship);
- two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationship), provided that their combined market share is less than 15 per cent, or when one or more of the parties to the concentration are engaged in business activities in a relevant product market that is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationship), provided that none of their individual or combined market shares at either level is 25 per cent or more;
- a party to the concentration is to acquire sole control of an undertaking over which it already has joint control; or
- in cases in which two or more undertakings acquire control over a joint venture, where the joint venture has no, or negligible, actual or foreseen activities within Croatia.

However, even in these cases, the CCA may require a full notification to be made if it finds that the concentration may lead to a significant impediment of effective competition.

In case the merger filing provides incorrect or false information about the parties and their businesses, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover generated in the preceding business year (see question 12).

### Investigation phases and timetable

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

See question 11.

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

For the statutory timetable for clearance, see question 11. From publicly available information one can see that the CCA usually strives to clear concentrations in Phase I (ie, within 30 days as of the day when the complete filing was submitted).

The Competition Act does not provide the possibility for the parties to obtain a waiver or to apply for expedited proceedings.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The Competition Act introduced to the Croatian merger control regime the substantive test for the assessment of concentrations that is applied by the EUMR. According to article 16 of the Competition Act, the CCA assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.

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

Similar to the rules under the EUMR, if the effect or object of a full-function joint venture (see question 3) is the coordination of the competitive behaviour of undertakings that remain independent, such coordination will be appraised in the review process under rules on prohibited agreements.

### Theories of harm

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

In essence, the CCA investigates the intended concentration on the basis of the following:

- the structure of the relevant market;
- actual and potential competitors in the relevant market;
- supply and potential market supply;
- costs, risks, technical, economic and legal conditions necessary to enter into or withdraw from the relevant market;
- possible effects of the intended concentration on competition in the relevant market;
- market shares and market position, economic and financial power, business activities of the undertakings concerned in the relevant market;
- internal and external advantages for the parties to the concentration in relation to their competitors;
- possible changes in the business operations of the parties to the concentration following the implementation of the concentration; and
- effects of the concentration on other undertakings, especially relating to consumers' benefit, as well as other objectives and effects of the intended concentration, in particular:
  - decrease in prices of goods or services;
  - decrease in transportation, distribution or other costs;
  - specialisation in production; and
  - other benefits directly deriving from the implementation of the intended concentration.

### Non-competition issues

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

The Competition Act does not expressly mention non-competition issues such as industrial policy or public interest issues as being relevant for the assessment process. In practice, however, it is not unlikely that the CCA would take into account non-competition issues in a way similar to the European Commission.

### Economic efficiencies

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

Economic efficiencies are part of the appraisal of the concentration and are taken into account under the condition that they are advantageous to consumers (see question 20).

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

Based on the assessment of the concentration under the substantive test (see question 19), the CCA may, following the initiation of Phase II proceedings, issue:

- a clearance decision;
- a decision declaring the concentration conditionally compatible with the Croatian competition rules, provided that within given time limits certain measures are taken and conditions are met (provisional measures); or
- a decision prohibiting the implementation of concentration.

The CCA may also on its own initiative or upon request of a party to the concentration withdraw or amend a decision when the decision is based on incorrect or false information that has been essential for the decision-making, any of the parties to the concentration have not fulfilled the conditions and obligations determined in the decision of the CCA, or the parties to the concentration cannot duly fulfil the proposed conditions or observe the set deadlines because of unpredictable circumstances beyond their control.

### Remedies and conditions

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

In practice, the CCA accepts both structural and behavioural remedies.

An example is the acquisition of a Slovenian food retail business by a Croatian major food production and retail conglomerate. In its decision, the CCA rendered a complex economic and behavioural analysis of the merger and its potential effects on the relevant market and ordered a number of measures to counter-balance anticompetitive effects of this concentration. In particular, these measures included the divestment of 96 retail outlets in the combined network of both undertakings (by either terminating lease agreements with landlords, renting or sale of the shops to third parties) and the obligation imposed on the acquirer to ensure that three bestselling products of five of the target's largest suppliers are offered in its retail network for a period not shorter than three years. The CCA has also appointed a monitoring trustee who is in charge of ensuring that the ordered measures are duly implemented and observed.

In 2009, in the course of the acquisition of a local Croatian oil company by a Hungarian oil company, the CCA demanded that the Croatian company (target) sells one of its local Croatian subsidiaries. The CCA listed in the clearance decision certain requirements to be observed to ensure the future business integrity of the disposed local Croatian subsidiary after being sold to third parties. In the same year, in a case regarding the acquisition of a local retail chain, the CCA ordered the disposal of certain retail stores. In both cases, the acquirer was ordered to nominate a monitoring trustee (whose role was to submit regular audit reports to the CCA).

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

There are two scenarios relating to remedies (including divestments) that may apply.

First, the parties to a concentration may at any time during the proceedings (eg, already in the notification) offer commitments, upon their own initiative, to remove serious doubts as to the compatibility of the concentration with Croatian competition rules.

Secondly, the CCA may, if it reaches the preliminary conclusion that a concentration may be cleared only subject to conditions or obligations, invite the undertakings concerned to suggest certain remedies to obtain merger clearance. Upon such notice, the parties have one month to propose suitable remedies to the CCA.

When assessing remedies, the CCA takes into account whether they are adequate to restore efficient competition. In the event the CCA does not or only partly accepts the proposed remedies, the CCA is authorised to impose other behavioural or structural measures, conditions, obligations and deadlines, to ensure effective competition (article 24 of the Competition Act).

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

We are not aware of any foreign-to-foreign mergers in which the CCA has requested remedies. According to the CCA, in 2013 only two 'foreign-to-foreign' mergers were assessed (and subsequently cleared in Phase I without remedies). For recent remedies imposed by the CCA in foreign-to-local mergers, see question 25.

### Ancillary restrictions

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

The Competition Act does not contain explicit provisions on ancillary restrictions. However, the CCA generally takes the European Commission's decisional practice into account. Therefore, in practice, ancillary restraints directly related to and necessary for the concentration are usually covered by the CCA's clearance decision.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

The CCA may gather information ex officio and also require from the undertakings concerned, as well as from third parties (eg, customers and competitors), additional information that it considers necessary for the assessment of the concentration.

Also, both the fact that a notification has been submitted and the fact that Phase II proceedings have been initiated are made public on the website of the CCA inviting third parties to submit their observations and comments on the intended concentration.

Access to the CCA's file may only be granted to parties to the proceedings. It is not clear whether and under what circumstances third parties can be admitted as parties to merger control proceedings. According to Croatian general administrative rules, a 'party' may be an entity that has a right to be such to protect its legal interests. In practice, however, only the undertakings concerned are admitted as parties to merger control proceedings. They have the right to access the case files only once they have received a statement of objections in Phase II. Besides the provisions of the General Administrative Act, the general

rules from the Competition Act on third parties' rights in the proceedings apply.

### Publicity and confidentiality

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

The CCA may not disclose business secrets, namely, information that is defined to be a business secret by law or by the undertakings concerned. Business secrets, inter alia, encompass any business information that has actual or potential economic and market value, and the disclosure of which could result in an economic advantage for other undertakings.

In particular, the CCA does not consider the following to be covered by the secrecy obligation:

- information that is publicly available, including information available through specialised information services or information that is common knowledge among specialists in the field;
- historical information, in particular information that is at least five years old;
- statistical information; and
- data and documentation on which the decision of the CCA is based.

Against this background, it is generally advisable to explicitly mark any confidential information as such in the merger notification and any other comments, statements and documents sent to the CCA. Case-related information that is made public by the CCA is generally published in a non-confidential version. As to the publicity given to the process, see question 29.

### Cross-border regulatory cooperation

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

The CCA has concluded cooperation agreements with several national competition authorities, for example, Albania, Austria, Bosnia and Herzegovina, Bulgaria, Hungary, Kosovo, Northern Macedonia, Montenegro, Romania, Serbia and Turkey. In addition, the CCA is a member of the International Competition Network. Since 1 July 2013, the CCA has been a member of the European Competition Network (ECN), inter alia, participating in the ECN's Merger Working Group. The CCA also has participant's status in the OECD Competition Committee and it actively participates in its work and attends the meetings of the OECD Competition Committee. Members of the CCA also regularly participate in conferences, summits and other high-level meetings organised by other competition authorities, thereby ensuring that Croatia is involved in the international competition law dialogue.

## JUDICIAL REVIEW

### Available avenues

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

A legal action for judicial review against the decision of the CCA must be filed directly with the Croatian High Administrative Court within 30 days from the date on which the decision of the CCA was served. In past years, most of the appeals brought before the then-competent Croatian Administrative Court (which was the competent court to decide in competition law cases until mid-2013) were dismissed, and the recent practice of the Croatian High Administrative Court has shown that the tendency of the judges to mostly reject these appeals has not changed.

## Time frame

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

Previously, the judicial review performed by the Croatian Administrative Court could take up to two years. Depending on the complexity of the case, it could take even longer. Although the Croatian High Administrative Court (which took over the respective competency in 2013, see question 32) has performed several judicial reviews in a much shorter period of time (ie, within a few months of the submission of the request for judicial review), other recent cases have shown that the judicial review process still tends to be rather lengthy.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

Because of the relatively high domestic notification thresholds, the number of merger control cases is small in Croatia. According to publicly available data, the CCA cleared 11 concentrations in 2018 and 12 concentrations in 2017 in Phase I. In 2017, the CCA imposed a comprehensive set of measures, conditions and deadlines in one Phase II merger clearance decision and, in addition, partially repealed Phase II clearance in relation to a previous decision from 2014 and imposed a revised set of remedies. Both of these aimed at eliminating negative effects on competition in the telecommunications sector. In 2016 and 2015, all cases were cleared in Phase I (there were around 12 cases in 2016 and 14 cases in 2015). In 2014, in two cases, a Phase II investigation was opened and clearance was granted subject to commitments. While in 2014 no cases were reported where the CCA imposed fines for implementing a concentration prior to the CCA's approval, as of 2015 the CCA imposed a number of (symbolic) administrative fines ranging from approximately €130 to €4,000 on undertakings operating in the media sector for violations of the merger filing obligation.

Foreign-to-foreign mergers usually fall outside of the scope of the Croatian merger control regime (inter alia, a merger filing is only required if at least one of the undertakings concerned has its seat or a subsidiary in Croatia, see question 5). According to the CCA, in 2012 it assessed one 'foreign-to-foreign' merger between a Japanese and Swedish company active in the consumer electronics sector (the case was cleared in Phase I). In 2013, there were two foreign-to-foreign mergers; the first one between an Austrian and a South African company active in the furniture and domestic goods retail business and the second between US and Bermudian undertakings active in the broadcasting business.

A significant part of the CCA's work includes analysis of the notifications of concentrations with the EU dimension regularly received by the European Commission.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The latest amendment of the Competition Act entered into force on 1 July 2013. We are currently not aware of any proposals to change the legislation.

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## UPDATE AND TRENDS

### Key developments of the past year

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

According to public data, in 2018 the CCA cleared all concentrations in Phase I (a total of 11), and imposed two symbolic fines on undertakings for breach of the merger filing obligation in the media sector.

In 2018, the European Commission referred the assessment of a concentration that had a Community dimension to the CCA. The referral was made upon request of the undertakings concerned, under the provision of article 4, paragraph 4 of the EU Merger Regulation. The reason for the referral was that the concentration was deemed to have an impact primarily on the upstream retail market for the supply of gas to large industrial customers in the relevant geographic area of the Republic of Croatia, as well as on the downstream fertiliser production market the relevant geographic scope of which was found to comprise the whole European Economic Area. The CCA cleared the concentration in Phase I.

In 2019, the CCA cleared the creation of a joint venture that was related to the markets for the production and wholesale of sugar. In this case, after conducting a market investigation, especially regarding customer demand patterns, the CCA reached the conclusion that the relevant geographic markets comprised (at least) the territory of the European Economic Area. These findings were contrary to the CCA's initial view according to which the relevant geographic market was deemed national (ie, included only the territory of the Republic of Croatia). Also in 2019, the CCA cleared a concentration involving non-performing loans (NPL) in a mixed share and asset deal. This was the first NPL transaction that was filed under the merger control regime in Croatia.

# Cyprus

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

The Control of Concentrations Between Undertakings, Law 83(I) of 2014 (the Law), is the statute regulating the control of concentrations between undertakings in Cyprus.

Enforcement of the legislation rests with the Commission for the Protection of Competition (CPC), initially established in 1990 and re-established pursuant to the provisions of the Protection of Competition Law No. 13(I) of 2008, as amended by Law No. 4(I) of 2014. The CPC has overall responsibility for implementing the Law and is the competent independent authority for the control of concentrations. The CPC declares that a concentration is compatible or incompatible with the functioning of competition in the market. The investigation and procedural aspects of the notification of concentrations are implemented by the CPC's civil service (the Service).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Law is applicable to transactions resulting in a permanent change of control. Such transactions include mergers of two previously independent undertakings or parts thereof, and acquisitions by one or more persons already controlling at least one undertaking, or by one or more undertakings, directly or indirectly, whether by purchase of securities or assets, by agreement or otherwise, of control of one or more other undertakings. The definition of 'control' is addressed in question 4.

#### 3 | What types of joint ventures are caught?

Joint ventures performing all functions of an autonomous economic entity in a permanent manner are caught under the Law.

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

Pursuant to section 6(2) of the Law, 'control' is defined as control stemming from any rights, agreements or other means which, either severally or jointly, confer the possibility of exercising decisive influence over an undertaking through:

- ownership or enjoyment rights over the whole or part of the assets of the undertaking; or
- rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the bodies of an undertaking.

### Thresholds, triggers and approvals

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

Transactions falling under those specified in questions 2 and 3 constitute concentrations for the purposes of the Law. Nevertheless, only concentrations of major importance must be notified to the CPC.

For the purposes of the Law, a concentration of undertakings is deemed to be of major importance and therefore meets the jurisdictional thresholds if:

- the aggregate turnover achieved by at least two of the undertakings concerned exceeds, in relation to each one of them, €3.5 million;
- at least two of the undertakings concerned achieve a turnover in Cyprus; and
- at least €3.5 million of the aggregate turnover of all undertakings concerned is achieved in Cyprus.

The Law vests the Minister of Energy, Commerce, Industry and Tourism with the power to declare a concentration as being of major importance even where the thresholds are not met.

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

Filing of concentrations of major importance is mandatory.

However, notification is not required in the following cases, where, pursuant to section 6(4)(a) of the Law, a concentration between undertakings is not deemed to arise if:

- a credit or financial institution or an insurance company, the normal activities of which include transactions and dealing in securities on its own account or for the account of third parties, holds on a temporary basis securities that it has acquired in an undertaking with a view to reselling them, provided that the institution does not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that it exercises such voting rights only with a view to facilitating the disposal of all or part of that undertaking or of its assets or the disposal of those securities, and that any such disposal takes place within one year of the date of acquisition – a period that can be extended by the CPC on request, where it can be shown that the disposal was not reasonably possible within the period set;
- control is exercised by a person authorised under the legislation relating to liquidation, bankruptcy or any other similar procedure;
- the concentration of undertakings between one or more persons already controlling at least one or more undertakings is carried out by investment companies;
- property is transferred owing to death by a will or by intestate devolution; or

- it is a concentration between two or more undertakings, each of which is a subsidiary undertaking of the same entity.

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

Foreign-to-foreign mergers are caught under the Law. The test as to whether a foreign-to-foreign merger is caught as a concentration of major importance is satisfied where the jurisdictional thresholds are met, with the local effects dimension being the achievement of a turnover of at least two undertakings concerned in Cyprus and the combined Cyprus-achieved turnover of all undertakings concerned is at least €3.5 million.

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

Notwithstanding the exceptions discussed in question 6 in relation to credit and financial institutions or insurance companies, there are no specific rules on foreign investments, special sectors or other approvals.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

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

Concentrations of major importance must be notified to the Service prior to their implementation, following the conclusion of the relevant agreement or the publication of the relevant takeover or the acquisition of a controlling interest. Notification can also take place where the undertakings concerned prove to the Service their bona fide intention to conclude an agreement or, in the case of a takeover offer or of an offer for the acquisition of a controlling interest, following a public announcement of an intention or final decision to make such offer.

Upon becoming aware of a concentration of major importance that ought to be notified but the undertakings concerned have failed to do so, the Service immediately notifies the undertakings concerned of their obligation to proceed with notifying such a concentration in accordance with the provisions of the Law. The time limit for the assessment of the concentration would then commence at the time of the Service receiving such notification.

Although failure to notify a concentration does not by itself give rise to sanctions, where the concentration has been partially or entirely implemented in the absence of clearance by the CPC, administrative fines may be imposed. These fines are discussed in detail under question 12.

The CPC has the power to order the partial or total dissolution of a concentration of major importance to secure the restoration of the functioning of competition in the market, provided that the requirements of the Law are met.

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

Concentrations of major importance must be notified to the Service in writing, either jointly or separately by the undertakings participating in a merger or in the joint acquisition of control of another undertaking. In all other cases, the party responsible for notification is the undertaking acquiring control.

Filing fees are fixed by the Law at €1,000. Where a concentration becomes subject to a full investigation (Phase II), the undertakings concerned are bound to pay a fee of €6,000 to the CPC.

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

The Service shall, within one month of the date of receipt of the notification and the filing fees or the date on which the Service receives additional information necessary towards achieving conformity of the notification to the requirements of the Law, inform the notifying undertakings regarding the decision of the CPC of whether the concentration is cleared or whether it will proceed to a full investigation of the concentration.

If, owing to the volume of work or the complexity of the information contained in the notification, the Service is unable to comply with the aforementioned time frame, it shall, within seven days prior to the lapse of the one-month period, inform the notifying undertaking of an extension to the said period by a further period of 14 days.

The Law expressly prohibits the partial or entire implementation of the concentration prior to clearance, infringement of which prohibition entails administrative fines, as discussed under question 12.

#### Pre-clearance closing

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

Where a concentration is either partially or entirely implemented prior to the clearance of the CPC or prior to the lapse of the time frame within which the Service ought to inform the notifying undertaking of whether the concentration is cleared or shall be fully investigated but the Service has not so informed, administrative sanctions may be imposed by the CPC.

An administrative fine of up to 10 per cent of the aggregate turnover achieved by the notifying undertaking during the immediately preceding financial year may be imposed on the notifying undertaking for the discussed infringement, which may be followed by additional administrative fines of €8,000 for each day the infringement persists.

There have been no cases where the undertakings concerned implemented a concentration prior to clearance by the CPC under the new regime. Nevertheless, taking into account the approach followed under the previous framework, it can be certain that the CPC will exercise its powers in relation to the implementation of concentrations in violation of the statutory provisions in a rigorous manner.

Moreover, the CPC has the power to order the partial or total dissolution of a concentration that has been implemented prior to obtaining clearance by the CPC.

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

Closing before clearance could lead to administrative fines being imposed, as discussed under question 12, irrespective of whether such concentration is a foreign-to-foreign merger or not.

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

Closing prior to clearance is not possible unless the Service fails to inform the notifying undertaking of whether the concentration is cleared or a Phase II investigation will be carried out within the one-month period discussed in question 11, in which case the concentration is deemed as cleared. Nevertheless, a temporary approval of a concentration is possible pursuant to the provisions of section 31 of the Law, in the case where a full (Phase II) investigation is decided by the CPC, where the undertakings concerned can establish, upon a relevant application to the CPC, that they shall suffer substantial damage as a result of any

additional delay to the concentration. Such temporary approval may be accompanied by conditions decided at the CPC's discretion and it does not affect the final decision of the CPC.

### Public takeovers

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

In the case of public takeover bids, concentrations of major importance arising from the publication of a public takeover or the acquisition of a controlling interest must be notified to the CPC prior to their implementation and following such publication. Notification can also take place where the undertakings concerned prove to the Service of the CPC their bona fide intention of a takeover offer or of an offer for the acquisition of a controlling interest, following a public announcement of an intention or final decision to make such an offer.

### Documentation

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

The notification of a concentration of major importance should include the information prescribed in Appendix III to the Law. The notification must be made in Greek and must be accompanied by various supporting documents and other information, which may be in Greek or English, including but not limited to the following:

- a copy of all final or most recent documents that brought about the concentration either by agreement or following a public bid;
- in the case of a public bid, a copy of the public bid document;
- copies of the most recent annual reports and audited financial statements of all the undertakings participating in the concentration;
- copies of reports or analyses prepared for the purposes of the concentration;
- a list and short description of the contents of all analyses, reports, studies and surveys that were prepared by or for any of persons responsible for notification for the purpose of evaluating or analysing the proposed concentration in relation to the market and competition conditions;
- details of the concentration (including the nature and scope of the concentration, the financial and structural details of the concentration, and details regarding the turnover in Cyprus and worldwide of each undertaking);
- details of relationships of ownership and control as between each participant in the concentration and the undertakings connected with it;
- personal and economic ties as between each group of undertakings and any other undertaking operating within the affected market in which such group holds, inter alia, at least 10 per cent of the voting rights or shares;
- a description and analysis of the relevant markets; and
- a description and analysis of the affected relevant markets.

A fine of up to €50,000 may be imposed for a failure to provide requested information or clarifications, or for providing misleading or inaccurate information.

### Investigation phases and timetable

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

Phase I entails the preparation of a written report by the Service to the CPC and an assessment of the concentration by the CPC upon receiving

the said report by the Service. The CPC's assessment shall lead to a decision that the concentration is not one of major importance and therefore does not fall within the scope of the Law, that the concentration is of major importance but does not raise any doubts as to its compatibility with competition in the market and is therefore declared compatible and cleared, or that doubts as to such compatibility are raised and a full investigation must be initiated.

Phase II entails the preparation of a report of findings by the Service, which is submitted to the CPC within three months of the date of receipt of the notification, provided that the fees applicable in the case of a full investigation are paid. The CPC is then bound to assess the concentration under the light of the findings of the Service and accordingly declare the concentration as compatible, subject to conditions that it may decide to impose upon the undertakings concerned, or incompatible with competition in the market and thus not cleared.

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

Within one month of the date of receipt of the notification and the filing fees or the date of receipt of additional information necessary towards achieving conformity of the notification to the requirements of the Law, the Service is required to inform the notifying undertakings of whether the concentration is cleared or whether the notification will proceed to a full investigation of the concentration.

If, owing to the volume of work or the complexity of the information contained in the notification, the Service is unable to comply with this time frame, it shall, within seven days prior to the lapse of the one-month notice period, inform the notifying undertaking of an extension of 14 days. On the basis of the CPC's practice during Phase I investigations, only rarely will the CPC extend the aforesaid deadline for issuance of its decision. Provided a notification is complete and the Service has no requests for clarifications, decisions are issued in a timely manner, within the statutory timetable.

Where a Phase II investigation is initiated by virtue of section 25 of the Law, the Service is bound to prepare a report of findings to the CPC within three months as of the date of receipt the notification, provided that the fees payable towards a full investigation are settled. In the case of full investigation, the notifying party or parties must be informed of the CPC's decision no later than four months from the date of receipt by the Service of the original notification application. Where additional information is requested by the Service, the period is extended to four months from receipt of the additional information.

The Law does not provide for a fast-track procedure of clearance of concentrations.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A concentration that would significantly impede effective competition in Cyprus, or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the functioning of competition in the market.

In assessing the compatibility of a concentration, there are no special circumstances that would be taken into account. The CPC takes into consideration the following criteria:

- the need to maintain and develop conditions of effective competition in the relevant markets, taking into account, inter alia, the structure of the affected markets, other markets upon which the concentration may have significant effects and the potential competition on behalf of undertakings within or outside Cyprus;

- the position in the market of the undertakings concerned and undertakings connected to it in a manner prescribed under Annex II to the Law;
- the financial power of such undertakings;
- the alternative sources of supply of products or services in the affected markets or other markets upon which the concentration may have significant effects;
- any barriers of entry to the affected markets or other markets upon which the concentration may have significant effects;
- the interests of the intermediate and end consumers of the relevant products and services;
- the contribution to technical and economic progress and the possibility of such contribution being in the interest of consumers and not obstructing competition;
- the supply and demand trends for the relevant markets; and
- the contribution on the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

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

To the extent a full-function joint venture that constitutes a concentration has as its object or effect the coordination of competitive conduct of undertakings that remain independent, this coordination is examined in accordance with the provisions of sections 3 and 4 of the Protection of Competition Law No. 13(I) of 2008, as amended by Law No. 4(I) of 2014. In assessing a joint venture, the Service shall particularly take into account:

- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market that is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and
- whether the coordination that directly emanates from the creation of the joint venture provides the undertakings concerned with the ability to eliminate competition for a substantial part of the relevant products or services.

### Theories of harm

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

While the Law is silent in this regard, the CPC's approach and analysis of harm is substantially aligned with the respective approach of the European Commission. Besides high market shares, the assessment usually takes into account the anticompetitive effects that could potentially arise out of a concentration, such as coordinated effects as well as unilateral effects.

### Non-competition issues

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

The CPC only takes competition issues into account when considering the Service's report and issuing its decision. However, the Minister of Energy, Commerce, Industry and Tourism can, by issuing a justified order, declare a concentration as being of major public interest with regard to the effects it might have on public security, pluralism of the mass media and the principles of sound administration.

### Economic efficiencies

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

In reviewing the compatibility of a concentration with the competitive market, the CPC takes into account the following:

- the structure of the affected markets, the structure of other markets where the notified concentration might have significant implications and the actual or potential competition from undertakings located either within or outside the Republic;
- the market position of the participants;
- the economic power of all the undertakings in the market;
- any barriers of entry to the affected market;
- the interests of the intermediate and end consumers of the products and services;
- the alternative sources of supply of the products and services that are traded in the affected markets and of their substitutes;
- the supply and demand trends for the relevant markets; and
- the contribution on the development of technical and economic progress provided that it is to the consumer's advantage and does not form an obstacle to competition.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

Before reaching its final decision and subject to the time limits provided by the Law, the CPC may, if it considers it expedient to do so, carry out negotiations, hearings or discussions with any of the interested parties or other persons. Furthermore, the CPC has wide investigative powers when assessing a concentration, including access to any premises, property, means of transport, books or records in the possession of the undertakings concerned or third parties.

In declaring a concentration compatible with the operation of competition in the market, the CPC may impose conditions or remedies in relation to the implementation of the transaction, thus having the ability to interfere with the essence of the transaction. The CPC has at any given time the power to revoke decisions related to the compatibility of any concentration and to amend any of the terms of its decision if it determines that:

- its initial decision was based on false or misleading information or that necessary information relating to the concentration at hand was withheld by the notifying party or by any other undertaking concerned or by any interested person; or
- any condition attached to the decision and imposed on the participants to the concentration has not been satisfied or has ceased to be satisfied.

Where the CPC exercises its power of revocation, it may, following a study of the Service's report, order either a partial or complete dissolution of the concentration to secure the restoration of the competitive market. It may do this, either in the course of exercising its powers of revocation of a previous decision of clearing a concentration or upon establishing that a concentration has been implemented in violation of an obligation to notify such concentration to the CPC or is duly notified but implemented prior to clearance by the CPC. The CPC also has the power to prohibit a concentration by declaring it incompatible with the operation of competition in the market.

## Remedies and conditions

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

Competition issues can be remedied through the CPC exercising its discretionary power. In the course of remedying competition issues, the CPC may order the dissolution or partial dissolution of the concentration concerned to secure the restoration of the functioning of competition in the market, through the deprivation of any participation, shares, assets or rights acquired by any person participating in the concentration, or by the cancellation of any contracts that created the concentration or that arose from it, or by a combination of the two, or any other way the CPC deems necessary.

If the CPC ascertains that the notified concentration falls within the scope of the Law and raises doubts as to its compatibility with the competitive market, it will inform the Service of the need to conduct a full investigation. In such an event, the Service will request further information from the participants as well as other entities involved in the specific sector for the purpose of completing its investigation. Also, the Service notifies the participants that they may make suggestions to undertake remedies that will remove the CPC doubts as to the compatibility of the transaction within the time-limit defined by the Service. Appendix IV of the Law is a form that the participants will be asked to submit when they are willing to undertake any remedies. The CPC accepts both divestiture and behaviour remedies. If, following its review of the additional information provided to it, the CPC's doubts as to compatibility have not been removed, the Service if it finds any differentiations or modifications in the circumstances under which the concentration has been established that may result in the removal of the doubts, will commence negotiations with the participating undertakings.

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

The CPC is required to provide written notification to the undertakings concerned of any remedies as part of its decision, which it is bound to issue within four months as of the date of receiving the notification of the concentration and payment of the filing fees. Should the merger be cross-border, the CPC may liaise with the relevant foreign authority in relation to applicable remedies. Furthermore, any remedies have to be limited to those that are reasonably necessary for the protection of the competitive market.

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

Although there is an increasing number of local transactions in which remedies have been required, there is no case at present where the CPC has requested remedies of a material nature in foreign-to-foreign mergers.

## Ancillary restrictions

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

The clearance decision issued by the CPC covers related agreements if such agreements are related to, and are necessary for, the implementation of the merger.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

Yes, parties having a legitimate interest may be invited to comment, but only in the event of a full investigation. Parties having a legitimate interest may on a voluntary basis submit views at any phase of the evaluation of a concentration or they may be asked to supply information by the Service of the CPC. In the case of a full investigation, the Service is required to provide any person having a legitimate interest, but who is not a participant in the concentration, with an appropriate opportunity to submit their views at the second phase of the investigation.

### Publicity and confidentiality

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

The CPC publishes a description of the notification in the Official Gazette of the Republic and on its website, indicating the names of the participants, the nature of the concentration and the economic sectors involved. In so doing, the CPC takes into account, as far as possible, the legitimate interest of the affected undertakings in the protection of their business secrets. The CPC also publishes in the Official Gazette of the Republic and on its website a non-confidential version of its decision. The undertakings concerned may request that any part of the decision remains confidential and the CPC will decide whether such information should be treated as confidential. The party to which the CPC addresses a written request for information should identify documents, statements and any material it considers to contain confidential information or business secrets, justifying its opinion, and provide a separate, non-confidential version within the time limit set by the CPC for the notification of its opinion.

The CPC and the Service are under a statutory duty of confidentiality, infringement of which is a criminal offence punishable with imprisonment of up to six months or a fine of up to €1,500 or both.

### Cross-border regulatory cooperation

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

Pursuant to section 54 of the Law and the relevant provisions of the EU Merger Control Regulation No. 139/2004, the CPC cooperates with other national competition authorities in the European Union and the European Commission on the basis of the system of parallel competences and the exchange of views and information between them via the European Competition Network.

## JUDICIAL REVIEW

### Available avenues

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

The decisions of the CPC are administrative executive acts issued by a public authority. As such, an aggrieved party having legitimate interest and seeking to annul a CPC decision has the right to file for administrative recourse to the Supreme Court under article 146 of the Constitution of the Republic of Cyprus. Appendix 5 of the Law is relevant to this purpose.

## Time frame

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

The time limit for commencing an administrative appeal is 75 days from receipt of notification of the CPC's final decision or its publication in the Official Gazette.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

Concentrations notified to the CPC are assessed under the legislative and policy rules in place and described above. The CPC is particularly keen to ensure, in the course of exercising its powers under the Law, that effective competition in the Republic or in a substantial part of it, is not significantly impeded, in particular as a result of the creation or strengthening of a dominant position. As had been the case under the previous merger control framework, a considerable number of the notified concentrations concern foreign-to-foreign transactions.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The Law came into effect in June 2014 and replaced the previous merger control regime in place since 1999. There are no current proposals to change the legislation.

## UPDATE AND TRENDS

### Key developments of the past year

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

A number of important issues have been considered by the CPC recently, which have shed more light on its decision-making practice.

Specifically, the CPC dealt with the first non-performing loans servicing transaction in Cyprus, which essentially created the relevant market. In the *APS/Hellenic Bank* case, the CPC defined the relevant product market as being (i) the management of immovable property acquired by credit institutions through enforcement proceedings or payment of credit rights derived from mortgages and (ii) the management of non-performing loans granted by credit institutions or other persons.

In the *VLPG* case, in which the CPC carried out a full investigation, clearance was granted subject to commitments by the participating undertakings. The case concerned the creation of a joint venture by Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd, Intergaz Ltd and Synergkaz Ltd, in which the said undertakings shifted part of their activities relating to the storage and handling of liquefied petroleum gas to the joint venture. The joint venture was held to potentially have the ability and motivation to exploit its dominant position and to hinder the expansion of other companies and potential competitors. The CPC also highlighted the potential for significant obstruction of competition as a result of the creation of the joint venture's dominant position.

The transaction was cleared subject to a number of remedies, including the exclusion of members of the boards of the parent undertakings from sitting on the board of the joint venture, confidentiality undertakings by the joint venture in relation to the parent undertakings, the appointment of a trustee and the introduction of criteria for the assessment of storage capacity requests from third parties, together with providing any new entrant that constructs LPG storage facilities in



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the area, access to the anchor and unloading pipes, to the extent that it will be under the control of the joint venture.

# Czech Republic

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

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

In the Czech Republic, merger control is primarily regulated in sections 12 to 19 of the Czech Competition Act No. 143/2001 (the Act).

The merger regulation in the Act is implemented in Decree No. 294/2016, which primarily provides for the form of a merger notification and specification of the documents required for a merger filing.

Soft law of the Czech Competition Authority is also relevant to merger control, but is not binding. The Czech Competition Authority has so far published the following soft law concerning merger control:

- notice on requirements of the proposal to approve the concentration;
- notice on pre-notification contacts;
- notice on the calculation of turnover;
- notice on the concept of a concentration;
- notice on the concept of parties to the concentration;
- notice on implementation of a concentration prior to the approval;
- notice on the competition defence for undertakings in economic difficulties; and
- notice on simplified procedure.

The authority responsible for enforcing merger control legislation is the Czech Competition Authority – the Office for the Protection of Competition (the Office; [www.uohs.cz](http://www.uohs.cz)).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Pursuant to section 12 of the Act, the following types of transactions are subject to the notification obligation:

- the merger of two or more independent undertakings;
- the acquisition by one undertaking of an enterprise of another undertaking or a part thereof on the basis of an agreement, in a public auction or in another manner;
- the acquisition by one or more persons already controlling at least one undertaking, or by one or more undertakings, of direct or indirect control over another undertaking either by acquisition of shares or ownership interest or by an agreement or by any other means; and
- the establishment of a full-function joint venture.

The following transactions are not covered by the merger control rules:

- the temporal acquisition of shares by a bank in an undertaking by setting off its claims against the undertaking, if the acquisition is made in the context of a restructuring process for a period not exceeding one year;

- the temporal acquisition not exceeding a period of one year by an investment undertaking of shares in another undertaking only for the purpose of their sale, provided that the investment undertaking does not exercise its voting right to influence the competitive conduct of the controlled undertaking; and
- the transfer of certain powers of statutory bodies of an undertaking to third parties pursuant to special legislation, particularly to a liquidator or an insolvency administrator.

The Office can extend the deadline of one year in the first two bullet points under certain conditions.

#### 3 | What types of joint ventures are caught?

The merger control rules apply to the formation of a joint venture performing on a lasting basis all functions of an autonomous economic entity. Pursuant to section 12(6) of the Act, pertinent coordinative aspects of a full-function joint venture are assessed pursuant to the provisions of the Act regulating prohibited agreements.

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

In section 12(4), the Act defines 'control' as the possibility to exercise decisive influence over another undertaking, in particular by:

- ownership or the right to use an enterprise of the controlled undertaking or a part thereof; or
- rights or other legal facts that confer decisive influence on the composition, voting or decision of the bodies of the controlled undertaking.

The Act does not stipulate a fixed shareholding threshold or any specific board and management representation, meeting of which would constitute control. The Office always assesses the actual situation.

Not only the acquisition of control, but also the change in quality of control is deemed a concentration within the meaning of the Act.

### Thresholds, triggers and approvals

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

A concentration is subject to approval by the Office, if:

- the aggregate net turnover of all parties to the concentration in the last completed accounting period within the market of the Czech Republic exceeds 1.5 billion Czech koruna and the aggregate net turnover of each of at least two of the parties to the concentration for the last completed accounting period within the market of the Czech Republic exceeds 250 million Czech koruna; or

- the aggregate net turnover of:
  - at least one undertaking being party to the merger (consolidation);
  - an enterprise or its part being acquired;
  - an undertaking whose control is being acquired; or
  - at least one of the undertakings creating a concentrative joint venture, for the last completed accounting period within the market of the Czech Republic exceeds 1.5 billion Czech koruna and the aggregate worldwide net turnover of the other party to the concentration for the last completed accounting period exceeds 1.5 billion Czech koruna.

Aggregate net turnover is composed of the net turnover:

- of all parties to the concentration;
- of all persons that will control the parties to the concentration and persons that will be controlled by the parties to the concentration after completion of the concentration;
- of all persons controlled by the same person that will control the parties to the concentration after completion of the concentration; and
- of all persons jointly controlled by two or more persons referred to in the previous items.

For the purpose of calculating the turnover, the turnover resulting from the sale of products between the parties to the concentration and those persons listed above in respect of the calculation of the net turnover shall not be taken into account.

If only part of an undertaking is subject to the concentration, only that portion of the turnover achieved by this part shall be taken into account when calculating the turnover.

The rules for the calculation of turnover of banks also apply to the calculation of turnover of credit and other financial institutions, with the exception of insurance companies. For banks, the net turnover is understood as the sum of the incomes, particularly interest incomes, incomes from securities, incomes from participating interest, incomes from charges and commissions and incomes from financial operations. For insurance undertakings, the net turnover should be understood as the total sum of premiums written resulting from all concluded insurance contracts.

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

If a transaction constitutes a concentration within the meaning of the Act and exceeds the notification thresholds mentioned under question 5, filing is mandatory. No exemptions from the notification obligation apply.

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

No special rules apply to foreign-to-foreign mergers. No local effects tests nor any kind of nexus test exist. Therefore, if a foreign-to-foreign transaction constitutes a concentration within the meaning of the Act and exceeds the notification thresholds stipulated by the Act, filing such a transaction is mandatory.

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

No. There are no special rules with respect to foreign investment or special sectors. As explained above, there are only special rules for certain temporal transactions involving banks or investment undertakings as well as liquidation and insolvency situations. According to other

special legislation, transactions in sectors such as banking may further require special approval from regulatory bodies other than the Office.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

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

A concentration cannot be implemented, neither before it is approved by the Office nor also before a clearance decision of the Office enters into force. The notifying party may file the notification as soon as the legally binding transaction documents have been signed. The notification may even be submitted prior to the signing of the relevant transaction documents, provided the parties have, in principle, agreed on the structure and timing of the concentration.

There are no specific sanctions for not filing a notifiable merger. Failure to file is seen by the Act as breach of the suspension clause. For the sanction for implementing a transaction prior to clearance, see question 12.

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

A notification has to be submitted:

- in case of a merger by the merging parties;
- in case of acquisition of sole control by the parties acquiring sole control;
- in case of acquisition of joint control by the parties acquiring joint control;
- in case of acquisition of an enterprise of another undertaking or a part thereof by the acquiring party or parties; and
- in the case of creation of a full-function joint venture, jointly by all undertakings participating in the creation of a full-function joint venture.

The notification is subject to payment of an administrative fee of 100,000 Czech koruna.

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

There is a deadline of 30 days from the date of opening the notification proceedings for the Office to assess a concentration within Phase I and decide:

- that the concentration does not constitute a concentration that must be notified pursuant to the Act;
- to clear the concentration; or
- to open Phase II of the investigation, because there are serious concerns that the concentration would significantly impede competition.

If the Office does not issue the decision according to the first two points above or does not open Phase II within the 30-day deadline, the concentration is deemed to be cleared.

The Phase II decision must be issued no later than five months from the date when the notification proceedings are opened. If the Office does not issue the decision within the given deadline, the concentration is deemed to be cleared.

If the notifying party proposes remedies, the respective deadline for Phase I or Phase II will be extended by another 15 days.

In case of a simplified procedure, the Office has to issue a decision within 20 days.

If the Office requires amendment of the notification by the notifying party, the Office's time frame for issuing the decision is suspended.

In our experience, the Office typically issues the respective decision shortly before the deadline.

The concentration may not be implemented until it has been approved by an effective decision of the Office.

Pursuant to section 18(3) and (4) of the Act, the Office might grant an exemption from the standstill obligation on the request of the notifying party if the parties to the concentration or any third party runs the risk of suffering substantial damage or another serious detriment. The Office has 30 days from the receipt of the request to decide. The Office might also grant only partial exemption or grant the exemption subject to certain conditions.

A request for exemption from the standstill obligation is subject to payment of an administrative fee of 10,000 Czech koruna.

### Pre-clearance closing

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

For closing the concentration before clearance, the Office may impose a fine of up to 10 million Czech koruna or 10 per cent of the net turnover of the undertakings that are in breach of the standstill obligation. The Office may further take measures that it considers necessary to restore effective competition on the relevant market, particularly a demerger obligation. There is also a risk that the respective transaction agreement will be deemed invalid. This question, however, is still not clear under Czech law.

In practice, the Office uses the right to impose a fine for breach of standstill clause. When setting the fine, it takes into account the circumstances of the breach, if the parties knew about the breach, as well as the length of the breach.

There has not been any recent case law on this issue. The last case where the Office imposed a fine of 5,383,000 Czech koruna for 'gun-jumping' was S104/2015 *Bohemia Energy entity sro* from 2016.

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

The same rules and sanctions for implementation of the notified concentration prior to clearance apply to foreign-to-foreign concentrations. To the best of our knowledge, there has been no such case so far.

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

The Act provides for a worldwide bar on closing. However, as already mentioned in question 11, the Office may grant an exception from the standstill clause.

Because the Office is obliged to assess negative effects of mergers only on markets within the Czech Republic, merging parties could be convicted by the Office for breach of the standstill obligation only if a merger closing before the adoption of the Office's clearance decision has effect on markets within the Czech Republic. Therefore a 'hold-separate agreement' for the Czech part of a foreign transaction would probably not be seen as gun jumping.

### Public takeovers

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

The same rules and requirements apply to public takeover bids; however, pursuant to section 18(2) of the Act, the ban on closing does not apply to implementing a public offer to purchase or exchange stocks provided that the transaction was notified immediately and that the buyer does not exercise the voting rights arising from the acquired stocks.

### Documentation

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

The notification must be made on a notification form prescribed by Decree No. 294/2016. It can be downloaded at [www.uohs.cz](http://www.uohs.cz). The notification form must be filed in Czech.

The Decree also specifies the documents that must accompany the filed notification. It is necessary to submit to the Office either the original documents or their authenticated copies. If any document is in a foreign language, it must be translated into Czech by an authorised translator. Long documents such as annual reports and consolidated financial statements do not have to be translated into Czech, if the originals provided to the Office are in English or German. The Office may also decide on a case-by-case basis that parts of the agreements establishing the notified concentration or relevant studies and analysis, which are not necessary for the assessment of the notified concentration, do not need to be translated into Czech if the originals provided to the Office are in English or German. Detailed information is set out in the Office's notice on requirements of the proposal to approve the concentration.

The level of detail required in the preparation of a filing depends on the circumstances of the concentration. If there is no overlap in the activities of the parties to the concentration or their aggregate market share is below 15 per cent in case of a horizontal concentration or the market share of any party to the concentration is below 25 per cent in case of a vertical concentration, it is not necessary to fill in parts 6 and 7 of the notification form.

The Act also foresees a simplified procedure for certain types of concentrations, which allows the parties to the concentration to provide less information and fewer supporting documents. The simplified notification of the concentration may be filed when:

- none of the undertakings involved is operating in the same relevant market, or their combined share in such a market does not exceed 15 per cent, and at the same time none of the undertakings concerned is operating in a market vertically connected to the relevant market in which another undertaking operates, or their share in every such market does not exceed 25 per cent; or
- the undertaking acquires exclusive control over the joint venture in which it has participated in joint control so far.

Detailed information and requirements concerning the simplified procedure are set out in the Office's notice on the simplified procedure.

The sanction for not supplying full, correct and true business information is a fine of up to 300,000 Czech koruna or 1 per cent of net turnover achieved in the last accounting period.

## Investigation phases and timetable

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

The Office recommends the notifying party to have pre-notification contacts with it prior to filing the notification, details of which are described in the Office's notice on pre-notification contacts.

Clearance procedure could be divided into two phases. The Office initiates Phase I after its receipt of the notification by parties to the concentration. Specifically, upon receipt of the notification, the Office publishes a short summary of the notification on its website ([www.uohs.cz](http://www.uohs.cz)) as well as in the Commercial Gazette. In case of a simplified procedure, the summary is published only on the website. The summary contains the names of the parties, a brief description of the type of concentration and the business sector concerned. Third parties are invited to provide their pertinent objections by a set deadline, usually five days.

The Office informs the notifying party in writing about the opening of the investigation, which constitutes Phase I. The Office within the Phase I assesses whether the concentration falls within the scope of the Act and whether the concentration would significantly impede competition. In the event that the concentration might raise serious doubts of significant impediment of competition, the Office opens Phase II, otherwise the concentration is cleared. If the Office needs clarifications, further information or documents, it shall approach the notifying party in writing. In such a case, the Office's time frame for issuing the decision is suspended.

The parties to the concentration can offer remedies to the Office either prior to the notification or at any time in the course of the investigation; however, at the latest within 15 days from obtaining the statement of objections.

If the Office intends to open Phase II, it shall inform the notifying party about this in writing in the course of Phase I.

Prior to issuing the decision, the Office will invite the notifying party to make itself acquainted with information and documents contained in the administrative file, which will be the basis for its decision.

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

The Office has 30 days from the date of opening the notification proceedings to assess a concentration within Phase I and decide:

- that the concentration does not constitute a concentration that must be notified pursuant to the Act;
- to clear the concentration; or
- to open Phase II of the investigation, because there are serious concerns that the concentration would significantly impede competition.

If the Office does not issue the decision according to the first two points above or does not open Phase II within the 30-day deadline, the concentration is deemed to be cleared.

The Phase II decision must be issued no later than five months from the date when the notification proceedings are opened. If the Office does not issue the decision within the given deadline, the concentration is deemed to be cleared.

If the notifying party proposes remedies, the respective deadline for Phase I or Phase II will be extended by another 15 days.

In case of a simplified procedure, the Office has to issue a decision within 20 days.

If the Office requires amendment of the notification by the notifying party, the Office's time frame for issuing the decision is suspended.

In our experience, the Office typically issues the respective decision shortly before the deadline. There is no other possibility for speeding up the proceedings besides using the simplified procedure.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The Office assesses the notified concentrations against a test that basically corresponds to the 'substantial impediment to effective competition' test under the EU Merger Regulation. The Office shall prohibit implementation of concentrations that would significantly impede competition in the relevant market. A significant impediment to competition can be caused particularly by the creation or strengthening of a dominant position. The Act presumes that a concentration will not have as its result the significant impediment of competition where the aggregate market share of the parties to the concentration on the relevant market does not exceed 25 per cent.

Nevertheless, the substantive test is not only restricted to the creation or strengthening of a dominant position. There are a number of legal and economic aspects that must be taken into account when pursuing the test, such as the necessity of maintaining and further developing competition, the structure of all affected markets, the market shares of the parties to the concentration, the economic and financial power of the parties, the legal and other barriers to entry to the market, the ability of suppliers and customers of the parties to switch, the development of supply and demand in the affected markets, the needs and interests of consumers, and research and development. A concentration's impact on competition must be assessed with regard to all these combined criteria.

A concentration that otherwise does not meet the requirements for clearance may be cleared by the Office subject to conditions and obligations.

Regarding the 'failing firm defence' the Office published a soft law document available at [www.uohs.cz](http://www.uohs.cz). Thus, the Office recognises this specific situation and after consideration of all relevant circumstances is willing to clear the concentration. Although, the conditions to satisfy 'failing firm defence' are strict and the Office is thoroughly assessing characteristics of the market and also potential impacts that the concentration might have.

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

No, there is no special substantive test for joint ventures. It is not only theories of harm arising from the creation or strengthening of a unilateral or collective dominant position that are the subject of the Office's investigation; the possibility of the elimination of important competitive constraints on oligopolistic markets caused by a merger is also examined by the Office within the assessment of merger effects on relevant markets.

### Theories of harm

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

The test for clearance is whether the concentration significantly impedes effective competition. Within the scope of the test, the Office may rely on a number of theories of harm (eg, vertical foreclosure, conglomerate effects, collective dominance) to prove that the concentration would significantly impede effective competition. Thus, the Office investigates all potential risks and impacts on the relevant markets the concentrations might have.

## Non-competition issues

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

In merger cases, the Office does not consider any non-competition issue as a criterion for assessing whether a merger can or cannot be declared to be compatible with the Czech market. The only thing that is checked is whether a merger significantly impedes economic competition. When deciding on a concentration notification, the Office shall primarily assess the necessity of preservation and further development of effective competition, the structure of all markets affected by the concentration, the shares of the parties to the concentration in such markets, their economic and financial power, legal and other barriers to enter relevant markets by other undertakings, the alternatives available to suppliers and customers of the parties to the concentration, the development of supply and demand in the affected markets, the needs and interests of consumers, and research and development, provided that it is to the consumers' advantage and does not form an obstacle to effective competition.

## Economic efficiencies

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

The Office might take economic efficiencies into account in the review process. Where efficiencies are invoked in favour of a concentration, the party alleging the efficiencies bears the burden of proof. In practice, it is advisable to document the efficiencies through the opinions of economic experts.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

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

The Office will issue a prohibition decision if it considers that a concentration would significantly impede competition on the relevant market, particularly through the creation or strengthening of a dominant position of the parties to the concentration or some of them.

If the decision is not complied with, the Office may impose restorative measures to restore effective competition; for example, an order to sell the shares of the acquired undertaking or to abolish the agreement on which the concentration is based.

In addition, the Office may impose a fine of up to 10 million Czech koruna or 10 per cent of the net turnover if the transaction is closed despite its veto (see also question 12).

### Remedies and conditions

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

To address the Office's competition concerns about the notified concentration, the parties to the concentration may offer remedies. The decision to accept the proposed remedies is fully at the discretion of the Office. The parties to the concentration may offer remedies prior to the notification of the concentration or at any time in the course of the investigation; however, it must be at the latest 15 days from the receipt of the statement of objections.

The Act does not specify the nature of the remedies that might be proposed. Both structural and behavioural remedies are possible.

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

The Act does not specify which remedies are acceptable. Both structural and behavioural remedies can be proposed, but the Office prefers structural remedies.

Remedies may be proposed prior to the notification of the concentration or any time in the course of the Office's investigation; however, they must be proposed at the latest 15 days after obtaining the statement of objections.

If remedies are proposed, the deadline for the decision of the Office within Phase I or Phase II shall be extended by 15 days.

The Office shall respect remedies proposed by the parties to concentration and only those shall be binding. In practice, it is advisable to discuss intended remedies with the Office during pre-notification contacts.

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

In the past 10 years there has been no such record. In 2003, the Office requested commitments or remedies in a few foreign-to-foreign mergers (S008/2003 *General Electric Company/AGFA Geavert*, S029/2003 *DSM/division Vitamins and Fine Chemicals Roche Group*).

## Ancillary restrictions

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

Pursuant to section 17(2) of the Act, the clearance decision also covers those restrictions to competition that the notifying party identified in the notification and that are directly related and necessary to the concentration. The Office accepts the European Commission's Notice on Restrictions Directly Related and Necessary to Concentrations as useful guidance on this matter.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

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

The Office publishes an announcement regarding the initiation of the notification proceeding on its website and in the Commercial Gazette without delay after the receipt of the concentration notification. In case of a simplified procedure, the summary is published only on the website. The announcement contains the names of the parties to the concentration, a brief description of the type of concentration and the business sector concerned. The announcement also contains an invitation for third parties to submit any potential objections within the set deadline. Third parties may provide objections to or comments on the notified concentration at any time during the investigation, although the Office is not obliged to deal with them.

The Office may, on its own initiative, address information requests to competitors and customers or any third parties in the course of its investigation.

According to the case law of the Regional Court in Brno (62 Af 55/2011-174 and 62 Af 42/2012-116), which is in charge of reviewing the Office's decisions, third parties who provide their objections against the concentration within the set deadline and who are of the opinion that the Office did not properly deal with them in its first instance decision on the concentration can appeal the clearance decision of the Office. However, this case law was heavily criticised and was eventually

dismissed by the Supreme Administrative Court (6 As 47/2014-82). At the same time, however, the Supreme Administrative Court suggested that third parties must have other possibilities to challenge the clearance decision. The specification of such possibilities was, however, left open.

### Publicity and confidentiality

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

During the investigation, parties to the concentration are obliged to disclose all information and documents available, including those that might contain business secrets. To protect business secrets, the notifying party is obliged to provide the notification both in a version with business secrets and in a version with business secrets redacted.

The Office publishes an announcement regarding the initiation of the notification proceeding on its website and in the Commercial Gazette. For further details, see questions 17 and 29.

The final decision of the Office is published on its website, but without business secrets indicated by the parties to the concentration.

As regards access by third parties, it was generally accepted for a long time that only the notifying party could see the file. However, according to case law of the Supreme Administrative Court (9 Afs 29/2012-53), if a third party demonstrates a strong interest in obtaining access to the file, the Office must allow the third party to have such access, but only to documents in which business secrets have been redacted. This conclusion has been confirmed by another case law of the Supreme Administrative Court (eg, 6 As 42/2015-75 and 6 As 47/2014-82).

### Cross-border regulatory cooperation

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

At the level of know-how exchange, the Office cooperates with the European Commission and with the competition authorities of other countries within the European Competition Network, the International Competition Network and the Organisation for Economic Co-operation and Development.

## JUDICIAL REVIEW

### Available avenues

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

The notifying party is entitled to appeal the decision of the Office within 15 days from the date of delivery of the decision on the concentration. The appeal body is the Chairman of the Office.

The decision of the Chairman of the Office can then be challenged by bringing an administrative action to the Regional Court in Brno. However, the administrative action has no suspensive effect on the decision of the Office unless the court grants it at the special request of the plaintiff.

As already mentioned in question 29, according to the current case law of the Supreme Administrative Court, third parties shall have other possibilities to challenge the clearance decision. The specification of such possibilities was, however, left open. Therefore, such specification needs to be clarified in the next decision-making practice.

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### Time frame

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

An appeal of the first instance decision of the Office must be lodged within 15 days from the date of delivery of the decision. Administrative action against the second instance decision of the Office (ie, the decision of the chairman of the Office) must be lodged within two months. There is no deadline for the chairman of the Office to decide about the appeal against the first instance decision. There is also no deadline for a decision of the court about the administrative action against the second instance decision. The court usually decides within a year or so.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

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

In 2018, the Office issued 55 decisions concerning concentrations, 40 of them within the simplified procedure. One clearance was subject to commitments. There have been no prohibition decisions by the Office in the past eight years.

There is no particular focus on any industries or sectors or issues in the Office's decision-making practice.

### Reform proposals

**35** | Are there current proposals to change the legislation?

No, there are currently no such proposals.

## UPDATE AND TRENDS

### Key developments of the past year

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

Czech legal practitioners kept watching the first outcomes of the adopted thresholds based on value of transaction in Germany and later in Austria. In addition, a potential change of the actual merger control regime was discussed in the light of the opposing decision of

the European Commission in the *ALSTOM/Siemens* case. However, no particular proposals to amend the Act in this regard have been made.

Competition law on digital markets and related issues remain as the hot topics. The Office also continues to cooperate with other competition authorities from neighboring countries and with other public authorities. Regarding the complexity of competition law issues, it will be necessary for competition enforcers as well as other practitioners to cooperate crosswise and find new experts in diverse areas.

On 25 April 2018, the Office published its new soft-law document 'Methodology on Imposing the Fines' (the Methodology). The Office took account of the related case law of the administrative courts as well as its own decision-making practice. According to the Office, the Methodology should bring transparency and overall clarity in imposing fines.

The Czech economy still seems to be in a phase of economic growth, which has also been illustrated by the high number of announced concentrations between undertakings active in all industries. Healthcare, IT, media, water services and real estate are key industries where undertakings have decided to merge. Overall, the Czech Republic constitutes a stable and positive opportunity for foreign investments.

# Denmark

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The main legislation on Danish merger control is contained in the Danish Competition Act (Consolidated Competition Act No. 155 of 1 March 2018), which is modelled on EU competition law. The Competition Act can be accessed online at [www.kfst.dk](http://www.kfst.dk), which is the website of the Danish Competition and Consumer Authority (DCCA).

In the field of merger control, the provisions of the Competition Act are accompanied by the Executive Order on the Calculation of Turnover in the Competition Act (No. 808 of 14 August 2009) and the Executive Order on the Notification of Concentrations (No. 1005 of 15 August 2013). The European Commission's jurisdictional notice and ancillary restraints notice provide guidance.

The DCCA is the principal enforcer of competition law in Denmark. The Competition Council, which is part of the DCCA, consists of seven members appointed by the Minister for Business and Growth: a chairman, a vice chairman and two additional members with knowledge of competition law or other relevant academic background, two members with managerial background from the business world, and one member with special knowledge of consumer affairs. The Competition Council has the overall responsibility for the administration of the Competition Act and regulations issued thereunder. In addition, the Council shall make decisions on matters of principle or of particular importance.

The DCCA, which is also the secretariat of the Competition Council, is in charge of day-to-day administration of the Competition Act. The DCCA prepares the decisions of the Council and issues decisions in matters not dealt with by the Competition Council. The DCCA is divided into units in charge of different areas of business and industry. The DCCA also has transversal units and a management and administration secretariat.

The decisions of the competition authorities are subject to appeal before the Competition Appeals Tribunal, which is made up of a Supreme Court judge, and four other members with expertise in either economics or law. The Appeals Tribunal forms part of the administration and its decisions are in turn subject to appeals by the undertakings before the ordinary courts.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The provisions of merger control apply to 'concentrations'. In accordance with the EU Merger Regulation, a concentration will be deemed to arise where either:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of

securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

The preparatory documents accompanying the Competition Act explicitly refer to the European Commission's notices on merger regulation.

#### 3 | What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a concentration. In this respect, the preparatory documents make explicit reference to the European Commission's notices.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Act contains a precise definition of control that is consistent with the law and practice under the EU Merger Regulation: control shall be constituted by rights, contracts or any other means that, either separately or jointly, confer the possibility of exercising decisive influence over an undertaking.

In cases where outright legal control is not acquired, rights attached to shares or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues may be considered. In the case of the acquisition of minority shareholdings, the Competition Council will assess the situation by looking at the strength of voting rights and other factors. Such considerations may lead to the conclusion that the possibility of exercising control as defined exists. It does not matter whether control has actually been exercised. The European Commission's practice will be followed.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions apply to concentrations where either:

- the combined aggregate turnover in Denmark of all the undertakings concerned is at least 900 million kroner and the aggregate turnover in Denmark of each of at least two of the undertakings concerned is at least 100 million kroner; or
- the aggregate turnover in Denmark of at least one of the undertakings concerned is at least 3.8 billion kroner and the aggregate worldwide turnover of at least one of the other undertakings concerned is at least 3.8 billion kroner.

The preparatory work to the Danish Competition Act states that 'undertakings concerned' is to be interpreted in accordance with the Commission's practice. Moreover, it is stated explicitly in the Competition

Act that where the concentration consists of the acquisition of parts (regardless of whether they are constituted as legal entities such as assets constituting a separate business) of one or more undertakings, only the turnover relating to the parts that are the subject of the transaction will be taken into account with regard to the seller or sellers. Two or more transactions that take place within a two-year period between the same persons or undertakings will be treated as one and the same concentration arising on the date of the last transaction.

Concentrations below the thresholds may in exceptional circumstances be referred to the European Commission under article 22 of the EU Merger Regulation. To date, no such concentration has been referred to the Commission.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of merger notifications in Denmark is mandatory if the turnover thresholds are met.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers satisfying the turnover thresholds are subject to Danish merger control even where no actual effects in the Danish market can be shown. The thresholds have been defined so as to require actual turnover in Denmark (generally interpreted as sales to customers located in Denmark) of a substantial magnitude.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

On 1 July 2015, a sector-specific threshold was introduced. Within the sector of public electronic communications networks, the second limb of the primary thresholds (ie, that each of at least two of the undertakings concerned is more than 100 million kroner) has been abolished. If a merger is within this sector, and the combined aggregate turnover in Denmark of all the undertakings concerned is more than 900 million kroner, the jurisdictional threshold is met and the merger must be notified (regardless of the aggregate turnover of the individual undertakings, see question 5).

Furthermore, exemptions apply with regard to the calculation of the turnover of (i) trade associations, (ii) financial institutions and (iii) the Danish State, Regions and Municipalities. These exemptions are set out in the Executive Order on the Calculation of Turnover in the Competition Act (No. 808 of 14 August 2009), sections 6 to 8.

Foreign Direct Investment screening mechanisms apply to the weapons industry and the financial sector. However, the central administration is currently working towards the introduction of a more general Foreign Direct Investment regime.

The acquisition of a controlling shareholding in a public limited liability company registered on the Copenhagen Stock Exchange creates an obligation to make a general bid to purchase the remaining shares.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations falling within the thresholds must be notified to the DCCA after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest; and in any event before implementation.

Fines may be imposed for failure to notify and unlawful implementation. To date, three fines in the range of 4 million to 6 million kroner have been imposed on companies that had failed to notify a merger to the DCCA.

#### 10 | Which parties are responsible for filing and are filing fees required?

In principle, all the parties involved in a concentration are responsible for filing. In practice, however, the filing of acquisitions is often made by the acquiring party. The fee amounts to 50,000 kroner for simplified notifications and 0.015 per cent of the parties' turnover for non-simplified notifications. However, the filing fee is capped at a maximum of 1.5 million kroner.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A concentration that is notifiable to the DCCA must not be put into effect before it has been approved by the DCCA or the Competition Council's time limits have expired.

This creates waiting periods of 25 working days (Phase I) or additionally 90 working days (Phase II) after the expiry of the first waiting period. A Phase I review can be extended by 10 working days if the undertakings propose new or revised commitments. A Phase II review can be extended by 20 working days in three scenarios:

- if the undertakings propose new or revised commitments late in the process (ie, if 70 working days or more have passed from the decision to initiate Phase II);
- at the request by the parties; or
- with the parties' consent.

Hence, the maximum extension in Phase II is 2 × 20 working days (ie, if 70 working days or more have passed from the decision to initiate Phase II). The DCCA must declare whether a notification is complete within 10 working days. In practice, the DCCA may have several additional questions and sometimes even begin negotiations with the parties on possible commitments with the effect that the deadlines are not triggered.

There are two exceptions to this rule: first, a (conditional) derogation may be granted by the DCCA; second, an exception applies in respect of public bids that have been notified, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DCCA.

#### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Fines may be imposed for unlawful implementation of a concentration prior to clearance. However, since the introduction of merger control in Denmark in 2000, the Competition Authority has only once used its powers to ask the Public Prosecutor's Office to pursue matters of failure to notify. (We are aware of at least one instance where the parties to a 'foreign-to-foreign' transaction notified considerably later than the one-week deadline, which applied at the time.)

Generally, the size of any fine will depend on factors such as the size and turnover of the undertakings concerned, the duration of the violation and whether the merger has impeded effective competition in the relevant market. Aggravating and mitigating circumstances may also be taken into account. However, the fine imposed can amount to

up to 10 per cent of the undertaking's revenue. Substantive violations of the competition rules may trigger fines according to the following base amounts: up to 4 million kroner for minor violations, 4 million to 20 million kroner for serious violations, and more than 20 million kroner for very serious violations. However, fines for procedural infringements are likely to be significantly lower than these base amounts, probably in the magnitude of some 10,000 to 500,000 kroner.

Where clearance is subsequently denied or made conditional, the transaction will have to be annulled or otherwise reopened and modified.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In principle, the same sanctions are applicable to notifiable foreign-to-foreign mergers as to other notifiable mergers. However, the administrative practice and case law hold no examples of sanctions for filing late in foreign-to-foreign merger cases.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Solutions such as 'ring fencing' or 'hold separate' would normally not be acceptable to merit a derogation from the 'stand-still' obligation. Most often, the best way to proceed is to demonstrate the absence of any effect on Danish markets, which may likely accelerate the process of obtaining an early clearance decision.

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

The Competition Act does not prevent the implementation of a public bid that has been notified to the DCCA, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DCCA.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filing under the Competition Act requires the use of a specific form known as Annex 1. The form requires the provision of information about the parties, the markets, customers, suppliers and competitors, and is only a little less detailed than the form CO used under the EU Merger Regulation. For straightforward cases that are unlikely to raise competition concerns, a simplified 'short-form' filing using a form known as Annex 2 is also possible. This form is similar in structure to Annex 1 but requires less information to be submitted. Both forms require the lodging of a non-confidential version, which is intended to be used for market testing.

Fines may be imposed for supplying wrong or missing information. Fines of 50,000 kroner have been imposed in two unrelated merger cases involving the submission of incomplete information in one instance and omitting to correct previously submitted incorrect information in another.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

It is clear that pre-notification consultations with the DCCA may and should take place. Very often these consultations can have a significant impact on the outcome and provide the undertakings concerned with the opportunity to address possible competition concerns early in the process so as to ensure that the review process is accelerated. The informal pre-notification consultation is often initiated on the basis of a briefing paper or an early draft of the notification, which is shared with the DCCA.

The time frames (Phases I and II) are inspired by article 10(1) and (3) of the EU Merger Regulation. The Competition Authority may approve a concentration before the expiry of the initial investigation (Phase I). The Competition Authority cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if there are serious doubts regarding the concentration's compatibility with the Competition Act. The Competition Authority may 'stop the clock' at any time during the formal review periods in Phase I and II if the parties do not provide requested additional information within the time frame given.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance is the same whether the merger is filed under the simplified procedure or the full-form notification procedure. Within 10 working days of the filing, the DCCA shall either declare the notification complete – thereby confirming that the time began running upon notification – or specify any missing information to be submitted. In cases of simplified notifications, the Competition Authority has 10 working days to decide whether to accept the simplified procedure or demand a full-form notification.

Unless the notification has been accepted as complete during the pre-merger notification consultation, the parties are often sent such requests, which will in effect extend the waiting period.

The DCCA must make its decision on the substance within 25 working days (Phase I) of the receipt of a complete notification. The Phase I deadline of 25 working days can be extended to 35 working days (extended Phase I) if one or more of the participating undertakings are proposing commitments. The Competition Council will decide to either approve the concentration or initiate further proceedings. In the latter case, the Competition Council must make a final decision within 90 working days (Phase II) after the expiry of the original 25 working days.

The time limit of 90 working days may be extended by 20 days if the undertakings propose new or revised commitments at a late stage (ie, if 70 working days or more have passed from the decision to initiate Phase II). The review period is thereby deadline is then extended to 110 days irrespective of the number of days remaining of the original deadline. The deadline can also be extended by up to 20 days on request by the parties or with the parties' consent.

Similarly to the EU Merger Regulation, the Danish merger control scheme builds on close contacts as early in the process as possible. Cases that do not pose any substantive issues can often be cleared according to a simplified procedure. After a complete notification has been received, the DCCA decides within 25 working days whether a concentration may be approved on the basis of a simplified procedure. In practice, an approval on the basis of a simplified procedure will be given quickly, depending on the nature of the pre-notification.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test to be applied by the Competition Council is whether the concentration significantly impedes effective competition (SIEC), in particular as a result of the creation or strengthening of a dominant position. Unless this is the case, the concentration must be approved.

In the case of full-function joint ventures, which may also have the object or effect of coordinating the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions of the Competition Act applying to anticompetitive agreements (similar to article 101(1) of the Treaty on the Functioning of the European Union (TFEU)).

#### 20 | Is there a special substantive test for joint ventures?

The substantive test for clearance of concentrations that have as their object or effect the coordination of the competitive behaviour of undertakings is similar to that set out in the EU Merger Regulation. Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of the Competition Act, which are the domestic equivalents of article 101(1) and (3) TFEU. This test applies in addition to the SIEC test.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The DCCA and the Competition Council tend to follow the European Commission's practice with regard to the applicable 'theories of harm'.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The Competition Authority is expected to apply the above substantive test without taking account of non-competition issues.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

There is no express efficiency defence. However, section 1 of the Competition Act states that the purpose of the Competition Act is to promote 'efficient resource allocation' and, consequently, it can be argued that efficiency should be considered. In practical terms, an efficiency argument can be raised if available, and will be considered in the assessment of the case. However, in raising the efficiency defence the undertakings concerned might risk the competition authorities interpreting the argument as an indication of increased dominance, as the efficiency gained will make competition even more difficult for competitors that do not benefit from similar efficiencies. Therefore, the efficiency defence should be applied with due caution.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The transaction may be approved, approved with conditions, or prohibited. Commitments may be offered to eliminate competition concerns. The Competition Council has the power and duty to impose conditions; therefore, it may not, according to the principle of proportionality, prohibit the transaction if the parties can design suitable remedies that eliminate competition concerns. The parties to the merger might therefore be in the position of deciding whether to proceed with the transaction on the basis of remedies accepted by the Competition Council.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the competition authorities assess that the concentration cannot be approved without conditions, the undertakings concerned will enter into a dialogue or negotiation with the competition authorities to agree on suitable commitments. The commitments agreed with the competition authorities will be formulated as conditions in the approval of the concentration. Such conditions can be appealed separately after approval of the concentration, even though they are agreed during the negotiations with the competition authorities. The Competition Authority may attach conditions including divestment orders or behavioural remedies for clearance of a concentration and may also issue orders to ensure that the parties fulfil these.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Based on the administrative practice to date, it appears that where relevant, divestments are conducted by way of an irrevocable power of attorney granted to an independent trustee. The trustee will generally be entitled to sell the relevant activity within a certain period, although the length of this period will not be publicly disclosed. In one case, the DCCA has accepted that if it is not possible to fulfil the divestment order within a certain period, the remedy is considered to have lapsed.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Only on rare occasions have remedies been necessary in foreign-to-foreign mergers. However, in one foreign-to-foreign merger with the acquirer having a subsidiary and the target having sales in Denmark, the parties were required to give an undertaking not to discriminate between customers to avoid a possible vertical foreclosure problem.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is for the undertakings concerned to assess whether any individual terms of the merger agreement are to be categorised as ancillary restrictions. The practice in previous Danish merger decisions, as well as decisions made by the Commission, may serve as guidance to the undertakings in their assessment of ancillary restrictions associated with a merger. If a merger involves restrictions of a nature that is not covered by prior practice or that has not been dealt with by the Commission in its Notice on restrictions directly related and necessary

to concentrations, the Competition Council may, upon request from the parties, assess the ancillary restrictions at the same time as it assesses the merger itself. Merger notifications in which the undertakings concerned request an assessment of ancillary restrictions cannot be processed by the simplified procedure.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Depending on the particular circumstances, the DCCA may conduct market tests. Customers and competitors also frequently submit their observations to the DCCA. In practice, these processes may well affect the design of any remedies attached to a conditional clearance decision.

Third parties do not have a right to appeal the DCCA's decisions to the Competition Appeals Tribunal, but can lodge a complaint with the courts.

### Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The DCCA will make a public statement about the fact that a merger notification has been made and invite comments from third parties. The statement includes information on the identity of the parties, the nature of the concentration and the affected industry. As part of the review process, the DCCA will often seek comments from the market and perhaps perform 'market testing'.

All merger decisions are published on the DCCA's website. Generally, the DCCA issues press releases after it adopts decisions in important cases. Pre-merger notification consultations take place secretly. Confidential information is always omitted in public versions of decisions.

### Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Subject to reciprocity, the DCCA may exchange information with competition authorities in other countries. This right applies explicitly to information covered by the DCCA's secrecy obligations. An agreement dated 16 March 2001 (as amended on 9 April 2003) exists between Denmark, Iceland, Norway and Sweden for exchange of data. The DCCA also generally cooperates with the Commission and competition authorities in other member states.

## JUDICIAL REVIEW

### Available avenues

32 | What are the opportunities for appeal or judicial review?

The Competition Authorities' decisions may generally be appealed to the Competition Appeals Tribunal and its decisions may in turn be appealed to the ordinary courts by the undertakings.

Commitments in merger cases agreed to by the undertakings during negotiations with the competition authorities can be appealed independently to the Competition Appeals Tribunal. A recent example is the *Nykredit* case in which the Nykredit Group claimed that commitments made in connection with a 2003 merger had been fulfilled after some eight years in force. This was challenged before both the

Competition Appeals Tribunal and the Maritime and Commercial Court, and appealed to the Supreme Court. The Supreme Court recently ruled that the commitments were given without any time limit, as such a time limit was not explicitly stated as part of the commitments. In its ruling, the Supreme Court made it clear that the commitments form part of the basis for the authority's decision and that it is the undertakings that bear the risk of any ambiguities.

### Time frame

33 | What is the usual time frame for appeal or judicial review?

To date, no merger decisions have been subject to judicial review. In most antitrust cases, an appeal to the Competition Appeals Tribunal should be expected to take between three and 12 months, while a subsequent appeal to the ordinary courts can take between one and three years.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

From 2000, when merger control was introduced in Denmark, until 1 October 2010 when thresholds were lowered, the Danish competition authorities approved approximately 95 mergers; approximately four out of five were cleared without commitments or other conditions, and the rest were approved after the undertakings concerned agreed to commitments. Since 1 October 2010 (and the introduction of new merger rules), the Danish competition authorities have approved approximately 260 mergers. So far, only one merger has been prohibited formally (in 2008), but we are aware of some five to 10 cases that were abandoned late in the filing process in recognition of the fact that substantive assessment posed serious challenges.

For mergers, the authorities' enforcement concerns will always depend on the concentrations notified. Over the past year or so, financial services and foodstuffs have continued to dominate the area, but industries such as energy, transport and telecommunications remain as important as always.

Another area of focus is notification – specifically, striking the right balance between allowing the use of the simplified procedure as opposed to requiring a full notification.

### Reform proposals

35 | Are there current proposals to change the legislation?

Most recently, amendments to the Competition Act were made on 19 December 2017. In the field of merger control, these changes have had an impact on the time limits in relation to Phase I and II. The amendments entered into force on 1 January 2018. Currently, there are no proposals or plans for further amendment of the legislation.

## UPDATE AND TRENDS

### Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

A recent trend in Danish merger control is the increased application of economics and econometric models in the DCCA's merger decisions. The DCCA is thereby following in the European Commission's footsteps.

The use of comprehensive data collections and econometric modelling are particularly apparent in two recent decisions by the DCCA:

- in *SE/Boxer* (2017), a merger between two Danish television and broadband providers, the DCCA attempted to estimate the consumers' demand and price sensitivity with an econometric model. Additionally, the DCCA made a comprehensive mapping of the Danish television providers' geographical coverage; and
- in *Tryg/Alka* (2018), a merger between two Danish insurance companies, the DCCA used insurance data to estimate the relative price differences between Danish insurance companies and did also attempt to estimate an entire demand system for subsequent use in a merger simulation.

For the parties and their legal advisers, this trend illustrates the importance of teaming up with economists in all but the 'clear-cut' concentrations.

Otherwise, the trend continues that the vast majority of merger notifications continue to be filed in the simplified format and are subjected by the authority to a 'simplified review' without any real market investigation.

Finally, minor amendments are expected to be made in the Executive Orders on the Notification of Concentrations and the Calculation of Turnover to ensure conformity with the equivalent provisions of EU law. Also, as in other jurisdictions, the Danish Competition and Consumer Authority have begun to consider the introduction of a 'size-of-the-transaction-test' as part of the merger thresholds. According to the authority's 'pre-hearing proposal', a concentration (below the current thresholds) may become notifiable if the following cumulative conditions are met: the transaction value exceeds a new threshold of presumably 300 million kroner; the target company has significant activities in Denmark; and the merging entities have an aggregate annual revenue in Denmark in excess of presumably 900 million kroner. To adopt the proposal, a bill for the amendment of the Competition Act would have to be introduced, which is not yet scheduled.

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# Ecuador

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The primary law regulating the control of economic concentrations in Ecuador is the Organic Law for Market Power Control (Antitrust Law), which was enacted on 13 October 2011. The main secondary laws are:

- the Regulation of the Antitrust Law, published on 7 May 2012;
- Resolution No. 002 by the Antitrust Regulation Entity, with respect to Turnover Thresholds for Concentration Operations, published on 22 October 2013;
- the oversight entity in antitrust matters is the Superintendency for Market Power Control (SCPM), which is the antitrust entity, while the regulatory entity is the Antitrust Regulation Entity; and
- the investigation entity of the SCPM is the Economic Concentrations Investigation and Control Intendancy and the resolution entities are the First-Instance Resolution Committee and the SCPM (Second Instance at the Administrative Stage).

The Economic Concentrations Investigation and Control Intendancy is the entity in charge of investigating and processing economic concentrations' control procedures and the First-Instance Resolution Committee is in charge of approving, rejecting or subordinating approval to compliance with behavioural or structural conditions.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The kinds of mergers caught include:

- transfers of an entire business;
- acquisitions of rights representing capital, shares or equity interests;
- relationships stemming from common administration; and
- any other agreement for transferring assets from one economic operator to another or granting the decisive control or influence in making decisions.

Premised on Ecuadorian antitrust legislation, economic concentration is defined basically by a change of control of one or more economic operators through the acts mentioned in question 1.

To be considered an economic concentration under Ecuadorian antitrust legislation, the concentration must be between local economic operators or, if between foreign companies, must produce effects in Ecuador. The Antitrust Law establishes two thresholds that economic concentration operations must meet to determine whether the operation requires the prior approval of the SCPM. Both of these thresholds need not be met, but rather only one needs to be fulfilled for the operation to be subjected to analysis and approval by the Oversight Authority.

One threshold concerns the market share of the economic operators participating in the operation, while the other involves business turnover.

With respect to which party is obligated to notify the economic concentration operation, notification to the SCPM must be provided by the party acquiring control of the company and that wishes to carry out the economic concentration, or the acquirer, depending on each case.

#### 3 | What types of joint ventures are caught?

Joint ventures that produce effects in Ecuador, surpass the thresholds established in the Antitrust Law and cause a change in the control in one of the economic operations by decisively influencing the decisions of the other are obligated to notify the SCPM. The scope of application of the Antitrust Law includes state-owned enterprises. Therefore, joint ventures involving this kind of economic operation are also subject to prior control by the SCPM.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Article 12 of the Regulation of the Antitrust Law defines control as 'the result of contracts, acts or any other means which, taking factual and legal circumstances into account, confer the possibility of asserting substantial or decisive influence over a company or economic operator. Control may be joint or exclusive'. The position of the SCPM is that control implies the power resulting from the economic concentration that the acquirer has to decisively influence the decisions of the economic operator emerging from the transaction. There are no minority and other interests less than control caught under the Ecuadorian Merger Control Regulation.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Antitrust Law stipulates that if an economic concentration operation complies with one of the following conditions, the operation must be subjected to analysis and the prior approval of the SCPM:

- the turnover in Ecuador of all participants in the economic concentration in the preceding fiscal year exceeds the amount expressed in Unified Basic Salaries (RBU) (US\$394 for 2019) established by the Antitrust Regulation Entity; and
- in case the economic concentration involves economic operators engaged in the same economic activity and, as a consequence thereof, the acquired or increased share in the relevant market is equal to or surpasses 30 per cent.

By way of Resolution 009, the Antitrust Regulation Entity set the thresholds in terms of the amount of the turnover in Ecuador of all participants in the economic concentration operation, over which prior notification to the SCPM is mandatory:

- when the turnover of all participants in the economic concentration in the fiscal year preceding the transaction is more than 3.2 million RBUs (US\$1.2352 billion) for economic concentrations involving the domestic financial system and securities market;
- 214,000 RBUs (US\$82.604 million) for concentrations involving insurance and reinsurance companies; and
- 200,000 RBUs (US\$78.8 million) for economic operations not falling under either of the above.

To calculate the turnover of economic operators participating in the economic concentration, the turnover of the following economic operators must be added together:

- (i) the economic operator in question;
- (ii) economic operators in which the economic operator in question directly or indirectly has:
  - more than half of subscribed and paid-in capital;
  - the power of exercising more than half of voting rights;
  - the power of designating more than half of the members on administration bodies; or
  - the right to direct the economic operator's business;
- (iii) companies or economic operators with the rights and powers listed in (ii) with regard to a company or economic operator involved;
- (iv) economic operators in which an economic operator listed in (iii) has the rights listed in (ii); and
- (v) economic operators in question in which various economic operators listed in (i) to (iv) jointly have the rights listed in (ii).

The Antitrust Law requires presenting the economic concentration notification within eight calendar days of the date of execution of the agreement, irrespective of the method of the economic concentration. The notification must be made in writing.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The economic concentration notification is mandatory when the concentration produces effects in Ecuador, so long as it exceeds the thresholds set by the antitrust regulation entity. Although the law stipulates that, in case the concentration does not surpass the thresholds, no prior authorisation from the SCPM will be required, the SCPM may, directly or upon the petition of a party, request that the economic operators involved in the concentration notify the concentration for informative purposes. In the case that the SCPM requests notification for informative purposes, then notification must be submitted within 15 days of the date that the SCPM serves notice of such request.

The Antitrust Law also establishes that when an economic concentration exceeds the thresholds but involves the acquisition of shares, bonds, obligations or other convertible bonds without voting rights, as well as acquisitions of economic operators liquidated or that have not reported any activities in the country in the last three years, it is exempt from the mandatory notification to the SCPM.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Provided that the foreign-to-foreign mergers produce effects in Ecuador, the operation must be notified to the SCPM and the prior authorisation of the SCPM must be requested. It should be noted that the thresholds established in the Law for determining whether an economic operation

is subject to notification are calculated based on economic figures in Ecuador.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

In Ecuador, there is no special rule or law that exclusively governs economic concentrations for foreign investment. The regulation for all kinds of economic concentrations (including economic concentrations outside Ecuador that produce effects in the country) is found in the Antitrust Law, and the entity that analyses and resolves in that regard is the SCPM.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentration operations requiring prior approval have to be notified to the SCPM within a period of eight days from the execution of the agreement. The Antitrust Law states that executing an economic operation before notifying the Antitrust Law will be regarded as a serious offence punishable by law with a fine of up to 10 per cent of the breaching economic operator's total turnover in the fiscal year preceding that of the fine. All offences listed in the Antitrust Law are, in practice, sanctioned by the SCPM.

## 10 | Which parties are responsible for filing and are filing fees required?

In the case of a merger, the party responsible for notifying the SCPM is the acquiring economic operator; for transfers of the assets of a business, the economic operator that is the recipient of the transfer; for the acquisition of rights representing capital, shares, or equity interests, the acquiring economic operator; for relationships because of common administration, the economic operator whose members on the administrative board become part of the administrative boards of the other economic operator; and, for the transfer of assets from one economic operator to another, the economic operator acquiring such assets.

When there are various economic operators involved in the acquisition of control of another or other economic operators, the notification must be made collectively, for which a common attorney must be appointed.

For the notification of economic concentrations, the economic operator providing notification must pay filing fees to the SCPM in a sum equal to the higher outcome of the following: 0.25 per cent of income tax, 0.005 per cent of sales volume, 0.01 per cent of assets, or 0.05 per cent of equity. These sums are calculated taking the economic operators with presence in Ecuador into account. The fee payment voucher must be attached to the notification.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In accordance with the Antitrust Law, the SCPM has to issue its decision with respect to the economic operation within a term of 60 working days from the date the SCPM acknowledges receipt of the submitted notification. The SCPM may suspend the term for up to 60 calendar days. In addition, the initial term of 60 working days may, on an exceptional basis, be extended for up to 60 working days. The SCPM usually takes about three months between the date of the notification of the economic operation and the date of the resolution. The economic concentration

operation can neither be closed nor perfected until authorisation from the SCPM is secured.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Antitrust Law stipulates that executing an economic concentration operation that must be notified but has not been authorised by the SCPM is a serious offence. This kind of offence, pursuant to the Law cited above, is sanctioned with a fine of up to 10 per cent of the breaching economic operator's total turnover in the fiscal year preceding that of the fine. To date, no economic operators that have closed the transaction before securing SCPM approval have been sanctioned; nonetheless, the SCPM has the power to start administrative procedures to sanction.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions described in question 12 also apply to foreign-to-foreign economic concentrations that produce effects in Ecuador. The SCPM has signed cooperation agreements with other antitrust authorities for collaborating in this type of case.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Premised on its legal power to subject the approval of an economic concentration to compliance with structural conditions, and as part of the conditions for approving an economic concentration in which the divestment of an asset package to be transferred to a third party had been ordered, in 2016 the SCPM resolved that the economic operators involved in an economic concentration had to sign a hold-separate arrangement until the ordered divestment was made. The reason was that the parties forming part of the economic concentration in Ecuador had to maintain their independence and competition at the market to avoid a monopoly. This took place in a stock purchase in the parent company between two subsidiaries that held the entire market share in Ecuador.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

There is only one economic concentration system in Ecuador, and there are no special rules or systems for public takeover bids. In other words, if as a consequence of a public takeover bid the thresholds and conditions set by the Antitrust Law are met, then it would have to be notified to the SCPM. Nonetheless, there are no secondary competition rules in Ecuador governing the execution of or compliance with a structural condition ordered by the SCPM that have to be observed for a public takeover bid.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There is a form pre-established by the authority for notifying an economic concentration that was approved by way of an SCPM resolution. The form requests information related to the economic sector in which the economic operators involved in the concentration do

business, a summary of the terms and conditions under which the operation will be carried out, the total value of the economic concentration, information regarding the goods or services offered, the chain of distribution, list of the providers of the economic agents involved in the concentration, general data of all operators forming part of the concentration operation, the relevant market, the total turnover of the participants, their market shares, the level at which the operation applies (national, regional, international), competitors at each one of the markets and the existence of barriers to entry. Together with the form, copies of the financial statements, draft of the legal document or agreement concerning the economic concentration, sworn statement that the information furnished is true, market analysis supporting the information supplied and confidentiality request must be submitted in the Spanish language.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

Once the economic concentration notification is filed, it will be investigated by the Concentrations Control Intendancy, which will follow the process and request information from the notifying economic operator, as well as from its competitors, providers and clients. Once the analysis stage is completed, it will submit a report to the First-Instance Resolution Committee. That committee will either approve, reject or subject the request to compliance with a behavioural or structural condition.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

In accordance with the Antitrust Law, an economic concentration must be resolved within a term of 60 working days upon notification by the SCPM that it has received the filing. The SCPM, however, may suspend that term up to 60 calendar days and may also request an extension of up to 60 working days. No other time periods apply. The time it takes the authority to complete the administrative procedure for analysing the concentration will depend on the magnitude thereof.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

Normally, the SCPM performs an analysis of the defined relevant market structure, concentration indexes, barriers to entry, efficiencies, supply and demand structure of the relevant market, benefits for or detriment to consumers as a result of the concentration, and competitive pressures.

In its analyses of economic concentration operations, the SCPM has used economic concentration indexes of the relevant market as its tool for calculating. For this purpose, it uses the Stenbacka threshold calculation and the Herfindahl-Hirschman Index.

#### 20 | Is there a special substantive test for joint ventures?

There is no specific test in Ecuador for joint ventures. All concentration tests are conducted pursuant to the same system explained above.

## Theories of harm

### 21 | What are the 'theories of harm' that the authorities will investigate?

The SCPM analyses and investigates all economic concentration indexes of the defined relevant market, the degree of market power of the operators doing business in that market, tendency to abuse such market power, unilateral effects, coordinated effects and so on.

## Non-competition issues

### 22 | To what extent are non-competition issues relevant in the review process?

When analysing and deciding on economic concentration interests, the SCPM always looks at the public interest or general interest of consumers and users. This is because the purpose of the Antitrust Law is precisely to procure the general wellbeing of consumers and users.

## Economic efficiencies

### 23 | To what extent does the authority take into account economic efficiencies in the review process?

When analysing economic concentration operations, the SCPM examines the effects that the operation will bear on the relevant market and, among those effects, its analysis considers efficiency in supply that could entail minor costs, productive efficiency, dynamic efficiency and so forth. After reviewing SCPM resolutions within this ambit, it may be noted that the authority has considered that a large part of concentrations generate efficiencies and, therefore, most cases have been approved.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The SCPM has the power to either approve, reject or subject the approval of an economic concentration to compliance with the conditions that it orders. In that context, based on an analysis of a case in question, the authority has the power to reject a concentration operation should it find it detrimental to the market. Obviously, if the SCPM denies an economic concentration, the concentration may not be perfected in Ecuador.

In the case that the SCPM subjects approval of the economic concentration to compliance with conditions, such conditions will be either behavioural or structural.

With these conditions, the SCPM looks to maintain the competitive pressures existing at the relevant market prior to the concentration.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible. In fact, the Antitrust Law confers upon the resolution entity the power to implement structural and behavioural remedies to stop an economic concentration from causing distortions at the market in question as a consequence. This power is broad, and the Antitrust Law does not specifically describe the type of conditions that the SCPM could order.

With respect to structural remedies, the SCPM has ordered the sale of industrial plants, assets for product distribution, transfer of intellectual property rights, intellectual property licences and so on. In turn, with regard to behavioural remedies, the SCPM has banned the implementation of exclusivity clauses and agreements with clauses

conditioning the obligation of clients to acquire a minimum percentage of monthly purchases or clauses aimed at giving benefits to the concentrated economic operator to the detriment of its competitors, suppliers or clients.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The conditions are clearly described in detail in the SCPM resolution subjecting approval of an economic concentration to compliance with such conditions. The resolution grants the notifying economic operator a term of 90 days to sign and submit a commitment to the SCPM that must specifically describe how each condition will be met and executed. During that term, the notifying party has to write up the commitment and send it to the SCPM for its review. Nonetheless, approval by the SCPM must be given within a maximum term of 90 days from the date of issuance of the resolution. There must be a time period for implementing and complying with each condition.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, the SCPM has not had a case in which all parties in an economic concentration operation were foreign companies without any assets in Ecuador. The economic concentration of foreign companies with subsidiaries or assets in Ecuador have, in certain cases, been subject to the conditions explained above.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

To date, the SCPM has not had an economic concentration case where it had to analyse ancillary restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

In its analysis, the SCPM reviews the information provided by the notifying party with regard to its competitors and providers, as well as the supply and demand structure at the market in question. Furthermore, when analysing an economic concentration, the SCPM will repeatedly require information from the competitors of the economic operators involved. The clients or competitors with a legitimate interest are entitled to file a special review appeal against the economic concentration resolution issued by the SCPM.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

With the economic concentration notified to the SCPM, the notifying economic operator will then have to submit a confidentiality request concerning all the information furnished or that part thereof that it deems pertinent. The SCPM keeps confidential the sensitive information with which it is furnished, and only the parties involved in the process have access to the information not declared by the SCPM as confidential. The SCPM publishes on a webpage an extract of the resolutions available to the public in general. Such resolutions do not contain

information that the SCPM has declared confidential, which is the sensitive information of economic operators.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Presently, the SCPM has cooperation agreements signed with the antitrust authorities of Argentina, Austria, Brazil, Chile, the Dominican Republic, El Salvador, France, Greece, Honduras, Italy, Mexico, Paraguay, Russia, Spain, Tunisia and Uruguay. The SCPM frequently holds meetings with sister authorities to exchange opinions and benefit from the experience of other countries in antitrust matters. The SCPM may sign agreements with sister authorities to share information that could be of benefit to both parties.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

The Antitrust Law offers three appeal remedies at the administrative level:

- reconsideration motion filed with the First-Instance Resolution Committee;
- appeal review filed with the SCPM; and
- special appeal review filed with the SCPM.

Resolutions may also be appealed at the judicial level before the Administrative Litigation Jurisdiction.

All remedies, whether at the administrative or judicial level, bear devolutive but not suspensive effects.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

Reconsideration motions and review appeals must be filed within 20 working days of the date the resolution is served. Special review appeals may be filed within three years of the date the resolution becomes final. This means when a resolution was not the subject of an appeal, the parties were served notice thereof within 20 days thereafter.

The term for filing a subjective appeal at the judicial level before the Administrative Litigation Jurisdiction is 90 days from the date the resolution is notified, while the period for filing an objective or nullity appeal at the judicial level before the Administrative Litigation Jurisdiction is three years from the time the resolution comes into effect.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In view of the seven years the Antitrust Law has been in effect and the six years of operation of the SCPM, we may conclude that the majority of economic concentration notifications in Ecuador have been approved by the authority; however, some have been denied, while others were the subject of significant structural or behavioural conditions.

Considering that the SCPM has been operating a little under seven years, the economic concentration system in Ecuador faces many challenges, particularly with regard to educating economic operators about the rules governing this area of the law and the prior concentration notification processes. In this regard, the SCPM has focused on training and



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has also published a technical guide for analysing economic concentration operations. The guide is a public document containing a clear explanation about how concentrations are examined, the thresholds for notification, definition of relevant market, turnover calculations, offences, sanctions and so on.

The treatment given to foreign-to-foreign mergers is the same as that of a local merger, as explained above.

Especially in terms of concentration indexes, the SCPM has ongoing analyses being performed in the following economic sectors: food, biotechnology, clothing, footwear, energy, pharmaceutical, metal mechanic, transportation, construction, forest timber products, environmental services, technology, automobile and petrochemical.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

In 2016, the Antitrust Law was amended by eliminating the possibility of the SCPM ordering the sale of a stock percentage in companies involved in a concentration operation to their workers as part of a structural condition. Currently, one concern about the Antitrust Law is the eight-day term that starts to run from the agreement execution date, as required by said law, to notify the concentration, as it is usually too short. There is also some ambiguity regarding the Spanish term *conclusión del acuerdo*, translated herein as 'agreement execution'.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There have been no material changes in the law. The same principles still apply.

# Egypt

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The overarching competition regulation is promulgated by virtue of Law No. 3 of 2005 (the Competition Law). The Competition Law has since been amended on three occasions: in 2008, 2010 and 2014. The Egyptian Competition Authority (ECA) is entrusted with the task of overseeing the implementation of the Competition Law and is therefore considered as the primary designated regulator of competition in Egypt. Although the ECA administratively follows the Ministry of Trade and Industry, it is actually managed by a board of directors constituted by the Minister himself, which includes representatives of various ministries, independent experts and representatives of trade unions and industry associations. An amendment to the Competition Law was issued, in July 2014, that grants the ECA more autonomy by allowing its board of directors to initiate criminal procedures without the previous prerequisite approval of the Minister of Trade and Industry.

The Competition Law is not the only competition-related regulation in Egypt, nor is the ECA the only regulator. Sectors such as telecommunications and banking are also regulated by other regulators that work in close coordination with the ECA to ensure application of the principles of the Competition Law, albeit in wide and general terms, and also in the banking and telecommunications regulations. Yet, despite the overlapping jurisdiction of the various regulators with respect to competition matters, the merger notification regime instated by article 19 of the Competition Law remains applicable to all sectors under the sole jurisdiction of the ECA.

For telecommunications, the National Telecommunications Regulatory Authority (NTRA) applies articles 4 and 24 of Telecommunications Law No. 10 of 2003 to regulate competition and to ensure economic freedom in the sector. In fact, the NTRA controls mergers indirectly through reviewing the licence requirements of any given operator. Although there are no particular provisions in the Telecommunications Law regarding merger control, the NTRA usually assesses and evaluates any merger on the basis of its possible impact on competition. In the absence of specific penalties, the NTRA may simply block any merger by revoking or threatening to revoke the merging entities' licences.

In the banking sector, the Central Bank of Egypt (CBE) exerts more power in managing competition in the sector and explicitly approving or disapproving transactions over shares in banks and financial institutions operating under the Banking Law umbrella. Basing itself on article 12 of the Banking Law No. 101 of 2004, the CBE has the right to review all applications to own more than a 10 per cent stake in a bank or any other percentage that would enable the acquirer to exert control over the management and the decision-making within said bank. The CBE retains all discretion to evaluate said application technically, financially

and from a competition impact point of view. According to article 12, applications to own more than 10 per cent (or any controlling stake) must be presented to the CBE along with a long list of required documents (strategic plans, financial statements of the acquirer, credentials in the banking business, etc) 60 days prior to the date on which the acquisition is planned to take place. Historically, the CBE has demonstrated a high level of selectivity by imposing strict qualitative requirements before approving any merger or acquisition in the banking sector.

Finally, public utilities are excluded from the scope of application of the Competition Law either automatically by law, if they are managed by a public sector entity, or by explicit request if they are managed by private sector companies. If a private sector company runs a public utility, it should file an application with the ECA requesting its exclusion from the application of the Competition Law, and the ECA may grant this exclusion on the grounds of public interest alone.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

According to article 19 of the Competition Law introduced by Law No. 190 of 2008 as an amendment to Law No. 3 of 2005, each party – with an annual turnover of more than 100 million Egyptian pounds generated in Egypt – that acquires assets, proprietary rights, usufruct, shares or sets up a union, a merger, an amalgamation or a joint management transaction, must notify the ECA within 30 days after its date of completion. The scope and extent of applicability of the merger notification requirement is quite vast and may include a very wide range of transactions undertaken or contemplated by medium-sized and large businesses. Although the notification is simple and not disruptive to business, it remains a mandatory endeavour that requires a certain level of disclosure on a probably recurrent basis for active companies on the Egyptian market. No approval from the ECA is currently required, but this may change in the near future as a new law is expected to pass shortly. Although the text of the Competition Law itself suggest extraterritoriality, the ECA has initially published its notification guidelines explicitly excluding foreign-to-foreign transactions from the scope of notification even if said transactions have an impact on the Egyptian market. The notification guidelines have been however modified in June 2018 to impose notification to foreign transactions in case either party generates a turnover in Egypt in excess of 100 million Egyptian pounds. The new guidelines took effect on 1 September 2018. Despite the currently applicable post-merger notification framework instated by the Competition Law, the ECA has issued on 23 October 2018, a first-of-its-kind decision by virtue of which the ECA have explicitly requested Uber and its regional competitor Careem to obtain a pre-approval from the ECA before they complete their contemplated merger, which the ECA learnt about through media reports. In an unexpected turn of events, the ECA threatened to use the provisions of article 6 related to collusions and cartels to go after the two ride hailing giants if they go through with the notification without the approval of the ECA. The ECA

approach is yet to be tested in court and may be ultimately deemed an overstepping of authority based on a wrongful interpretation of the Law. See subsequent questions for more on this.

### 3 | What types of joint ventures are caught?

See question 2.

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

From a competition protection perspective, only the Banking Law specifies a threshold of an acquired stake above which the approval of the regulator is required. There are, however, in Capital Market Law No. 95 of 1992, provisions that oblige the acquirer of a stake exceeding 33 per cent of any listed company to launch a mandatory tender offer to acquire up to 100 per cent of the shares of said company. The requirement is intended for transparency purposes and to provide minority shareholders with an equal opportunity to cash in on their investments at the same level of economic benefit available to majority shareholders. The Financial Regulatory Authority (FRA) regulates the tender offer process and must grant its approval before any such process is launched. The tender offer approval requirements are listed in article 334 et seq of the Capital Market Law (as regularly amended) and the full application must be presented to the FRA, which must examine and approve, reject or modify the application within set time limits.

#### Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

As mentioned in question 2, the threshold for the required notification of the merger is the size of the annual cumulative turnover of parties involved generated in Egypt. According to article 19 of the Competition Law, when the annual turnover of the acquirer or merging entity exceeds 100 million Egyptian pounds, the notification becomes mandatory and failure to make said notification is a criminal offence that is punishable by a fine ranging between 20,000 and 500,000 Egyptian pounds, which can be doubled in case of a repeated offence. The threshold for notification is 100 million Egyptian pounds in combined turnover generated in Egypt. Theoretically, there are no circumstances when a notification would be due if such quantitative threshold is not met; however, the recent *Uber/Careem* decision may suggest that notification may be conceptually required, if the two parties to the merger are the sole actors on a given market, regardless of the currently generated turnover.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notification is mandatory by law. It should be served within 30 days of completion. In principle, no approval from the ECA is to be sought. However, the recent ECA approach, following the *Uber/Careem* decision, suggests that the ECA will force itself into having a say about certain high-profile transactions.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Based on the principle of extraterritoriality of the Competition Law, foreign-to-foreign transactions are theoretically supposed to fall within the scope of application of article 19 of the Competition Law if they are considered to have an impact on the Egyptian market.

The wording of the Competition Law itself is quite far-reaching and general with respect to the notification requirement. It does not state that the annual turnover that triggers the notification requirement must be generated in Egypt; it also does not state otherwise. However, the ECA latest guidelines explicitly include foreign-to-foreign transaction in the scope of notification. According to the guidelines, the threshold for notification is the turnover generated in Egypt alone.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The acquisition of public-owned assets or shares in public sector companies by foreign investors (privatisation) is subject to the approval of the Cabinet of ministers and is usually granted after a thorough set of procedures. The acquisition of state-owned assets is generally subject to the Public Tendering Law and may not be authorised through a direct order without a duly publicised bidding process, unless in cases where public interest so requires.

## NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Transactions must be notified within 30 days of closing. The notification is merely informative in principle, and no clearance or approval would be a priori sought or granted. The sanction for failing to notify is a criminal penalty that ranges between 20,000 and 500,000 Egyptian pounds. In practice, the ECA actively seeks to enforce the provisions of article 19 and have brought many entities to admit breach and settle out of court against a fine that the ECA deems appropriate. The amount of settlement fine usually being considered negligible (ie, almost 1 per thousand of the minimum turnover threshold on average – based on ECA statistics published on the website: [www.eca.org.eg](http://www.eca.org.eg)) means that all of those accused in recent years have opted to settle out of court with the ECA. The alternative route would be litigious and involves being investigated by the Public Prosecutor and eventually referred to the criminal economic court, with all the associated reputational damage, cost and expense. Having said that, we note that the ECA have, through the *Uber/Careem* decision, requested that their merger must be approved before closing. The application will be reviewed by the ECA and a response would be given within 60 days from the date on which all supporting documents requested from the ECA are provided. The ECA emphasised in the above mentioned decision that its request to review and pre-approve the *Uber/Careem* merger is based on the fact that those two are the only actors in the relevant market and that their agreement to merge is a form of disguised collusion (penalised by a fine that does not exceed 500 million Egyptian pounds). The ECA based its decision on article 20(2) of the Competition Law, which allows the ECA to proactively anticipate and prevent all acts or transactions that the ECA reasonably suspects would have harmful effects on consumers and on the competition itself.

### 10 | Which parties are responsible for filing and are filing fees required?

The acquirer of assets or shares and the merging entity of a merger process are required to make the notification. In case of joint management or joint venture, any of the parties to the transaction, especially those with an annual turnover exceeding 100 million Egyptian pounds are obliged to make the filing.

In the latter case, they may opt to undertake the process jointly or each on their own.

No filing fees are required, but lawyers' services may be needed to follow up with the ECA and to make sure that the notification process has been duly completed to the satisfaction of the ECA after fulfilling all mandatory requirements and providing all requested information and documents. Partial or incomplete notification may not avert the risk of prosecution.

**11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?**

The notification obligation is post-closing and therefore there is no suspending effect on the transaction itself. However, if the ECA get their way, certain transactions would have to wait for 60 days before being cleared by the ECA. Practically speaking, the ECA have gone after one case so far, which is the case of Uber and Careem. The ECA decision provided the sole ground based on which Uber and Careem know they had to obtain a clearance from the ECA or face prosecution for illicit collusion.

**Pre-clearance closing**

**12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?**

Not applicable. When approvals of special regulators are required, such as the approval of the NTRA or the CBE, the parties attempting to execute the transaction before obtaining the mentioned approvals would be blocked at the share transfer level, which must be undertaken through the stock exchange even if the concerned target is not publicly listed. If in the unlikely scenario where a transaction takes place without due approval, the regulators always retain the right to cancel operational licences in case of unauthorised change of control (for banks, the threshold is 10 per cent – see question 1). In the *Uber/Careem* case, failing to notify and file for the ECA clearance prior to closing would expose the two undertakings to a criminal fine that can go up to 500 million Egyptian pounds to be doubled for ignoring the ECA decision requesting them explicitly to obtain the clearance.

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

The obligation to notify is a post-closing obligation. In the case where the notification is explicitly requested to be made before closing, penalties would apply irrespective of whether the transaction has a local component or merely foreign-to-foreign.

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

Not applicable a priori. But if the ECA request a pre-notification, there would be technically no solution but either to challenge the ECA decision in court or file for their approval. According to media sources, Uber and Careem may have decided to follow the latter route.

**Public takeovers**

**15 | Are there any special merger control rules applicable to public takeover bids?**

Other than the requirements stipulated under the Capital Market Law, which are intended to guarantee transparency and equal opportunity for both bidders and sellers, the standard notification requirements apply as far as the ECA are concerned. The approval of the FRA before the launching of the tender offer is mandatory and no public takeover

bid may be launched without the terms of takeovers and all necessary disclosure being approved by the FRA and published as part of the invitation to sell shares to the offering buyer.

**Documentation**

**16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?**

According to article 44 of the Executive Regulations of the Law No. 3 for 2005, the notification must include the following information:

- the name of the notifying party and their related parties, their respective nationalities, the addresses of their headquarters and their main places of business;
- the details of the transaction along with its date and the legal position it creates;
- the licences and approvals obtained from other regulators;
- the annual turnover of the concerned entities; and
- all supporting documents.

Failure to supply the required documents would be deemed as failure to meet the obligation to notify and is punishable by a fine not exceeding 500,000 Egyptian pounds. If false information is intentionally provided to the ECA, the fine can reach 1 million Egyptian pounds.

**Investigation phases and timetable**

**17 | What are the typical steps and different phases of the investigation?**

If it comes to the knowledge of the ECA, either independently or through a third party's complaint, or through its constant monitoring of the M&A market, that a transaction has occurred but not notified in accordance with the Competition Law or is contemplated in a manner to cause harm to consumers or competition, it would notify the concerned parties that they are being investigated for breach of article 19 of the Law, or in the latter case, issue a preventive decision forcing the parties to the contemplated transaction to file for the ECA approval prior to closing. The ECA would then initiate a criminal procedure against the infringing party and the file would be sent to the Public Prosecutor's Office, which would confirm the infringement and would refer the matter to the competent court. In practice, all the accused so far have opted to settle the matter out of court with the ECA against payment of a fine to be determined by the latter.

**18 | What is the statutory timetable for clearance? Can it be speeded up?**

There is no time limit in the law itself, but the notification process typically takes up to one week between the date the notification is filed and the date on which the ECA confirms receipt of said notification, if no further documents or information are required.

**SUBSTANTIVE ASSESSMENT**

**Substantive test**

**19 | What is the substantive test for clearance?**

Not applicable in general but when explicitly required via a decision of the ECA, the merger must not cause harm to consumers nor to competition.

**20 | Is there a special substantive test for joint ventures?**

Not applicable.

**Theories of harm****21 | What are the 'theories of harm' that the authorities will investigate?**

Not applicable in general but may be applicable under the new ECA approach on selective transactions.

**Non-competition issues****22 | To what extent are non-competition issues relevant in the review process?**

The industrial policy, the public interest, the national security, economic efficiencies, the user or consumer interest and the protection of minority shareholders are all factors considered when clearance and pre-approval are needed in specific sectors such as telecommunications and banking, as previously stated. Other than in those cases, those factors are not of consequence from a strict competition law perspective, as the approval and the clearance of the ECA is neither required nor granted.

**Economic efficiencies****23 | To what extent does the authority take into account economic efficiencies in the review process?**

See question 22.

**REMEDIES AND ANCILLARY RESTRAINTS****Regulatory powers****24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?**

Not applicable, except in certain fields of industry as discussed above. The NTRA and CBE may block the execution of the transaction in the cases where their written authorisation is required to proceed with said execution. To our knowledge, all banking and most telecommunication licences contain provisions that would require the approval of the CBE and the NTRA respectively. Having said that, the new approach of the ECA suggests that the ECA will try to give itself the power to block certain transactions if it deems that those transactions are harmful to the consumer and to the competition and to the labour market in general, as alluded to in one of the ECA press statements. The Law does not explicitly grant the ECA such power, but this would have to be confirmed through court once the ECA approach is challenged in court.

**Remedies and conditions****25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?**

Not applicable in general but the ECA may conceptually request certain remedies to allow certain transactions to go through. There is no precedent to confirm or deny the same. See question 24.

**26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?**

Not applicable in general and no precedent exists. See question 24.

**27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?**

Not applicable. See question 24. In specialist fields of industry, foreign-to-foreign transactions rarely come to the attention of the regulators, as the laws regulating those fields are strictly territorial by essence. However, if the regulators (including recently the ECA) conclude that a foreign-to-foreign transaction would fundamentally hurt competition or affect the strategic ownership and management of the locally based entities subject to their jurisdiction, the ECA would go after the foreign entities for colluding on the Egyptian market but no action would be directly taken against the foreign entity by the other regulators, although the operating licences of the local entities would be revoked or suspended for reasons related to transparency, public interest or national security, for example.

**Ancillary restrictions****28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?**

Not applicable in general and no precedent to support the ECA new perception and approach.

**INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES****Third-party involvement and rights****29 | Are customers and competitors involved in the review process and what rights do complainants have?**

Not applicable in general but the ECA new approach in the *Uber/ Careem* case invited all stakeholders to express their feelings and concerns about the contemplated merger and gave them until April 2019 to present their feedback.

**Publicity and confidentiality****30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?**

Commercially sensitive information is not usually required for the purpose of the notification. Generally, the ECA seems to be reasonable in addressing the notifying parties' concerns regarding sensitive commercial information. Furthermore, according to article 16 of the Competition Law, the ECA and all its employees are bound with a strict confidentiality obligation. Any ECA employee having access to commercial information of a given entity is also prohibited from working for a competitor of the concerned party for a period of two years from the date said employee gained access to the confidential information. The breach of the confidentiality of information about the filing party is a criminal offence.

**Cross-border regulatory cooperation****31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?**

Generally, yes. To the author's knowledge there are a few protocols of cooperation that have been signed with various regulators in other jurisdictions, the details of which have not been publicised or made publicly available. Egypt is also party to the COMESA treaty and the COMESA notification theoretically supersedes and replaces the local Egyptian notification. In practice, the ECA would still require local notification but because, unlike the COMESA notification, the ECA notification is a priori post-closing, the ECA would require sight of the COMESA clearance as part of the required local filing documentation.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Because the sanctions are not administrative in nature and may only be imposed through a criminal court order, the means of appeal are those generally available for defendants in criminal law cases. The deadline for filing an appeal of a first-degree court ruling is 10 days from the date of issuance of said ruling.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

There is no specific time frame, but in criminal law matters, procedures are fairly expeditious. Between the first-instance court and final appeal, the usual time frame is around 12 to 16 months.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The ECA is actively seeking to enforce article 19 on all sectors of industry (telecommunications, healthcare, building materials, transport, etc.). A published list of investigated cases and their outcome are listed in the ECA activity report published on their website: [www.eca.org.eg](http://www.eca.org.eg). The ECA has also issued a first of its kind decision to force Uber and Careem to obtain the ECA clearance prior to merging. Uber and Careem seem to be complying with the ECA decision, whereas they had a very obvious alternative of challenging the ECA decision in court because the ECA are trying to create a new notification framework without appropriate legislative cover.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The ECA has been lobbying for years to instate a legislatively supported pre-closing merger control regime and this may come to fruition shortly.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The most important update is the ECA decision that ordered Uber and Careem to get their contemplated merger approved by the ECA prior to closing despite the fact that the law only provides for a post-merger notification. The ECA approach basically relies on two elements: (i) the power granted to the ECA to proactively prevent any act or transaction that it reasonably suspects will have an adverse impact on consumers or on competition (article 20 of the Competition Law); and (ii) its interpretation that the agreement to merger is a disguised agreement to collude on a given market to dominate the market and thwart competition.

Practically speaking, parties contemplating a merger are supposed to follow the normal post-notification process as required by law, but they will have to consider whether or not to obtain the approval of the ECA before closing if and once the ECA issue a decision explicitly requiring them to do so. In the only case on record so far, the ECA issued a decision to force Uber and Careem to file for pre-approval on the basis of the high-profile nature of the transaction and the fact that Uber and



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Careem are the only competitors in the ride hailing market. Uber and Careem have so far been reported to comply with the ECA decision and to file for their pre-approval, creating therefore a precedent in this respect. We are not sure whether or not Uber and Careem will challenge the ECA refusal to grant their merger the requested clearance and whether similar high-profile cases would follow on the ECA agenda.

For more on the subject, please visit: [www.zulficarpartners.com/wp-content/uploads/2019/04/FRS-Final-TheUber\\_CareemCase.pdf](http://www.zulficarpartners.com/wp-content/uploads/2019/04/FRS-Final-TheUber_CareemCase.pdf).

# European Union

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The EU merger control regime, which applies to large-scale transactions (see question 5), is set out in Council Regulation (EC) No. 139/2004 (EUMR). The regime applies to the European Economic Area (EEA; that is, the 28 EU member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (subject to Brexit)) together with the three members of EFTA (Iceland, Liechtenstein and Norway).

The EUMR is enforced by the Directorate General for Competition of the European Commission (DG Comp or the Commission) in Brussels.

EUMR notifications are reviewed by sector-specific units within DG Comp, which have integrated merger control competence. In addition to the sector-specific merger units, the Commission's internal decision-making process involves a number of other stakeholders: the chief economist team and the case support and policy unit (within DG Comp), and the Legal Service and the sectoral directorates general (eg, Transport and Energy) (outside DG Comp). The Commission also uses 'peer review panels' in Phase II cases to test the validity of the case team's arguments. The panels consist of a team of lawyers and economists from DG Comp, who are independent from the original case team. In addition, two hearing officers, who are independent of DG Comp and report directly to the competition commissioner, organise and conduct oral hearings in Phase II cases and act as an independent arbitrator where a dispute on the effective exercise of procedural rights between parties and DG Comp arises.

The Commission has published a series of notices and guidelines to assist in the interpretation of a number of key issues under the EUMR. These include: notices on jurisdictional and procedural issues (including the Consolidated Jurisdictional Notice (2008), the Notice on the Simplified Procedure (2013) and the Notice on Case Referrals (2005)); guidelines on issues of substance (including the Guidelines on the Assessment of Horizontal Mergers (2004) and the Guidelines on the Assessment of Non-horizontal Mergers (2008)); as well as the Remedies Notice (2008) and the Notice on Ancillary Restraints (2005). In addition, the Commission has published a number of 'Best Practices', including the Best Practices on the Conduct of Merger Proceedings (2004) and the Best Practices for the Submission of Economic Evidence (2011). These and other notices are important reading in all potential transactions. They are available on the Commission's website.

The EUMR is based on the 'one-stop-shop' principle, whereby once a transaction has triggered notification to the Commission, the national authorities of the member states are precluded from applying their own competition laws to the transaction (except in the circumstances

described in question 5). In addition, the ability of national authorities to apply other non-competition laws is circumscribed (see question 31). However, member states have tested the ambit of these principles (eg, Spain in *E.ON/Endesa*, Italy in *Abertis/Autostrade* and Poland in *Unicredito/HVB*).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

A concentration is defined in the EUMR as a merger of two or more previously independent undertakings (or parts of undertakings) or the acquisition of direct or indirect control (see question 4) of the whole or parts of another undertaking, which brings about a durable change in the structure of the undertakings concerned. The EUMR applies to concentrations that have a 'Union dimension' (ie, meet certain turnover thresholds (see question 5)).

#### 3 | What types of joint ventures are caught?

Provided that the applicable turnover thresholds are met (see question 5), the creation and change of control over 'full-function' joint ventures are caught by the EUMR. A 'full-function' joint venture is an autonomous economic entity resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents.

Non-full-function joint ventures, such as strategic alliances and cooperative joint ventures (eg, production joint ventures), are not governed by the EUMR but by the Treaty on the Functioning of the European Union (TFEU) rules on restrictive practices, notably article 101 TFEU, which prohibits agreements between undertakings that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition. According to Regulation 1/2003, article 101 TFEU can be enforced by the Commission or by national competition authorities. However, non-full-function joint ventures can trigger merger control in a number of member states (eg, Germany, the United Kingdom and, in some circumstances, Austria) by the acquisition of a minority interest (see individual country chapters).

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control means the possibility of exercising 'decisive influence' over an undertaking on the basis of rights, contracts or other means. When outright legal control is not acquired (eg, through the acquisition of shares with the majority of the voting rights), the Commission will consider whether the acquirer can still exercise legal or de facto control over the undertaking through special rights attaching to shares or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues.

There is no precise shareholding or other test for decisive influence and each case is decided on its facts. For example, in *News Corp/Premiere* (2008), the Commission found that, based on the historic pattern of attendance at annual general meetings, the acquisition by News Corp of a 24.2 per cent shareholding was sufficient to confer on it a de facto majority of the voting rights, resulting in a notifiable concentration; by contrast, in *Ryanair/Aer Lingus* (2007), a holding of over 25 per cent was deemed not to amount to either de jure or de facto control. The definition of control was considered by the General Court, upheld by the Court of Justice of the European Union, C-84/13 P, when it confirmed the Commission's decision to fine Electrabel for closing a transaction prior to notification and clearance (*Electrabel/Compagnie Nationale du Rhône*). The court agreed with the Commission that Electrabel had obtained de facto control of the target in 2003, three years prior to notification, and said that the relevant question was the ability of Electrabel, at that time, to impose its decisions on the target. The shareholding structure was the key factor in support of this conclusion: Electrabel held 49.95 per cent of the target's shares, had a voting agreement in place with the next largest shareholder (with 22 per cent) and the remaining shares and voting rights were widely dispersed among almost 200 entities with a poor track record of participation at general meetings.

The General Court has also considered the extent to which minority shareholdings come within the scope of the EUMR. Following *Aer Lingus'* appeal against the Commission's decision not to order Ryanair to divest its minority shareholding in the wake of its 2007 prohibition decision, the court confirmed that the EUMR does not empower the Commission to deal with minority shareholdings, where these do not lead to an acquisition of control under article 3(2) EUMR.

## Thresholds, triggers and approvals

### 5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The purpose of the EUMR is to review those concentrations that have a 'Union dimension', the criteria being designed to ensure that only large-scale acquisitions, mergers and joint ventures are caught. Thus, a concentration will be caught by the EUMR where:

- the aggregate worldwide turnover of all the parties exceeds €5 billion; and
- the aggregate Union-wide turnover of each of at least two parties exceeds €250 million; unless
- each of the parties achieves more than two-thirds of its aggregate Union-wide turnover in one and the same member state.

In an attempt to reduce the need for businesses to make multiple applications for clearance at the national level within the European Union, the EUMR also applies to smaller concentrations that have an impact in at least three member states. These concentrations are caught by the EUMR where:

- the aggregate worldwide turnover of all the parties exceeds €2.5 billion;
- the aggregate Union-wide turnover of each of at least two parties exceeds €100 million;
- in each of at least three member states, the aggregate turnover of all the parties exceeds €100 million; and
- in each of at least three member states mentioned immediately above, the turnover of each of at least two parties exceeds €25 million; unless
- each of the parties achieves more than two-thirds of its aggregate Union-wide turnover in one and the same member state.

Turnover is deemed to be the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year. The turnover of the whole group to which the relevant undertaking belongs is taken into account according to detailed tests set out in the EUMR. The calculation can be complex and may involve certain adjustments being made to the turnover figure in the latest audited accounts, for example, to account for certain recent disposals or acquisitions.

In an acquisition, the turnover of the vendor is irrelevant except for that of the business being acquired. In the case of joint ventures, the whole turnover of the parents (and their groups) intending to share joint control of the venture is taken into account. In addition, there are rules for the calculation of turnover in specific sectors, in particular for banks and other financial institutions and insurance undertakings, as well as principles based on case experience for the geographic allocation of turnover in particular sectors such as airlines, telecommunications and financial services.

The EUMR establishes a system of referrals to ensure that a concentration is examined by the authority best placed to conduct the assessment (in line with the principle of subsidiarity). Under articles 4(4) and 9 of the EUMR, in certain cases, the national competition authority or the merging parties can request that a transaction that meets the EUMR thresholds is reviewed – in whole or in part – by the national competition authority. By the same token, under articles 4(5) and 22 of the EUMR, provided that certain conditions are met, the merging parties or one or more member states may request the Commission to review a merger that does not meet the EUMR thresholds (eg, *Dolby/Doremy/Highlands* (2014), *Facebook/WhatsApp* (2014), *SCJ/Sara Lee* (2010)). Despite the existence of these referral mechanisms, the Commission has reported that a significant number of cases are still subject to review in three or more member states.

In July 2017, the Commission published the results of a public consultation that sought feedback on, among other things, the effectiveness of the current turnover-based notification thresholds and the current EUMR referral mechanism. The majority of respondents did not see any need to introduce complementary jurisdictional thresholds.

### 6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for concentrations with a Union dimension. There are no exceptions and the EUMR empowers the Commission to fine undertakings that fail to notify (see question 9). In certain circumstances, however, parties may request that a transaction that meets the EUMR thresholds be referred wholly or partly to a member state (see question 5).

### 7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The EUMR applies to all concentrations that have a Union dimension. Because the turnover thresholds are based on geographic turnover and not on the location or registered office of the parties, even foreign-to-foreign transactions essentially involving non-EU groups are caught if the financial thresholds are met (see question 5).

### 8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The EUMR applies to all transactions that meet the relevant turnover thresholds (see question 5). There are no sector-specific rules nor special rules on foreign direct investment (FDI), as this matter is governed at the member state level. As from October 2020, the

European Commission will have the power to issue an opinion when an investment poses a threat to the security or public order of more than one member state (see question 36).

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for making a filing under the EUMR. According to article 4 of the EUMR, proposed concentrations (with a Union dimension) 'shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest'. A notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement, or in the case of a public bid, where they have publicly announced an intention to make such a bid.

However, the proposed concentration must be notified and cleared prior to implementation (this is known as the 'suspensory effect' of the EUMR; see question 11 on derogations from this obligation). The EUMR provides the Commission with powers to impose fines of up to 10 per cent of aggregate worldwide turnover on the parties if they intentionally or negligently fail to notify a merger with a Union dimension. In 2014, the Commission imposed a fine of €20 million on Marine Harvest for acquiring de facto sole control of Morpol prior to formal notification. This decision was upheld by the General Court (T-704/14) in 2017; an appeal before the court is currently pending. Similarly, in 2018, the Commission imposed a fine of €125 million on Altice for implementing the acquisition of PT Portugal before obtaining the Commission's clearance, and in some instances prior to the notification of the transaction (*Altice/PT Portugal*).

#### 10 | Which parties are responsible for filing and are filing fees required?

In the case of either the acquisition of joint control or of a merger that creates a new undertaking, the notification must be jointly submitted by the parties to the merger or by the undertakings acquiring joint control. In the case of acquisition of sole control, the acquirer alone must notify. No filing fees are required.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Notification under the EUMR has a suspensory effect, meaning that a transaction that is subject to notification may not be implemented until clearance is obtained. Public takeover bids, however, are not subject to the full suspension obligation (see question 15). The Commission can and will investigate any mergers that have closed without prior notification, and could order the unwinding of any notifiable merger that has been implemented prior to clearance. The Commission has shown its willingness to prevent 'gun jumping' in the form of early implementation between the merging parties. The EUMR empowers the Commission to conduct inspections (ie, 'dawn raids') if it suspects that the parties have implemented the transaction prior to clearance. The Commission carried out dawn raids at the premises of merging parties suspected of gun jumping in the *Ineos/Kerling* case in 2008 and in the *Caterpillar/MWM* case in 2011 (these acquisitions were ultimately cleared without conditions, and no finding of gun jumping was reached).

In exceptional circumstances, the Commission may grant a derogation from this suspension obligation if it is satisfied that the detriment

to the notifying parties or to a third party resulting from the suspension exceeds the threats to competition posed by the transaction. According to the Commission, an applicant must demonstrate that the standstill obligation poses a real threat to the business, not merely a hypothetical one (eg, *SCJ/Sara Lee* (2011)). The Commission has recognised that undue delay could potentially be fatal to a proposed emergency rescue package and has granted derogations on a limited number of occasions – mostly during the global economic downturn in 2008 and 2009.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Commission may impose fines on companies (of up to 10 per cent of aggregate worldwide turnover) for closing a transaction before clearance has been obtained, irrespective of whether clearance is ultimately obtained. The Commission may also order interim measures to restore or maintain conditions of effective competition.

The General Court has confirmed that the fact that a concentration has no adverse effect on competition and is ultimately cleared by the Commission is pertinent only insofar as it may be a relevant factor in determining the amount of the fine to be imposed (see *Electrabel/Compagnie Nationale du Rhône*). Similarly, the court also took the view that a finding that an infringement was committed negligently, rather than intentionally, does not prevent a characterisation of that infringement as grave or serious (see also question 9).

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The Commission has the same powers to impose sanctions in cases involving closing before clearance in foreign-to-foreign mergers as in mergers of domestic (EEA/EFTA) companies (see question 12). To date there are no examples of such sanctions having been applied in foreign-to-foreign mergers, but most companies take care not to breach the notification obligations in such cases.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign-to-foreign mergers cannot be implemented outside the EU without breaching the EUMR suspension obligation, unless the Commission grants a derogation (but see question 11 and question 15 in relation to public bids). At a late stage in the investigation, the Commission may be prepared to grant a derogation to allow closure of a transaction if the competition issues have been resolved. However, these situations are rare, and parties must usually await clearance before closing. It is not permissible under EU merger control rules to close a transaction globally while suspending implementation of closing in the European Union (ie, by way of a carveout).

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

The EUMR does not prevent the implementation of a public bid that has been notified to the Commission, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission. These derogations are difficult to obtain and do not apply where a controlling stake is acquired by the purchaser through the acquisition of a single package

of shares from one seller only (*Yara/Kemira Growhow* (2007)). In 2008, the Commission exceptionally granted such a derogation in the context of a Phase II investigation (*STX/Aker Yards* (2008)).

## Documentation

### 16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Notification is made to DG Comp using a Form CO. The parties are required to provide the Commission with detailed information regarding the transaction, the undertakings involved (corporate details and structure), the definition of the relevant markets, the effect of the merger on the affected markets (including information on competitors and customers and economic evidence in more complex cases) and possible efficiencies arising from the transaction. The parties must submit one original of the Form CO, three hard copies and two copies on CD or DVD-ROM together with supporting documentation. This includes the transaction documents, audited accounts and relevant internal documents such as board presentations and the parties' ordinary course analyses, reports and strategic plans relating to any potentially affected market. The filing must be complete for the review clock to start running. Notification can be made in any of the EU official languages.

Although the Commission can grant waivers from the obligation to provide information (a process that has been formalised and clarified) the significant amount of detail and senior management time required to complete a Form CO should not be underestimated. In complex cases, it is not uncommon for the review process to last seven to eight months; this is in addition to the time it takes to complete 'pre-notification' discussions, which are not subject to any statutory time limits. The Commission has implemented changes as part of a 'merger simplification project' with the aim of streamlining the notification process and reducing the administrative burden on notifying parties.

Mergers that qualify for assessment under the simplified procedure (broadly, when the merger is unlikely to raise competition concerns, according to prescribed criteria set out in the notice on the simplified procedure) are notified through the submission of a Short Form CO, which requires less detailed information from the parties. Recent amendments to the notice on simplified procedure and the Short Form CO have extended the categories of merger cases suitable for the simplified procedure. The Commission may, however, require the submission of a full Form CO where it appears either that the conditions for using the Short Form CO are not met, or, exceptionally, where they are met but the Commission nonetheless determines that a full Form CO notification is required for an adequate investigation of possible competition concerns.

The Commission can impose a fine of up to 1 per cent of aggregate worldwide turnover if incorrect or misleading information is supplied during its review. Periodic penalty payments not exceeding 5 per cent of average daily turnover can also be imposed for each day that the infringement persists. For these purposes, the EUMR empowers the Commission to conduct inspections (ie, dawn raids) if it suspects that the parties have provided incorrect or misleading information. The Commission has recently been active in penalising procedural infringements, imposing sizable fines in *Facebook/Whatsapp* (2017) and in *General Electric/LM Wind* (2019).

The Commission's Best Practice Guidelines 2004 and the Notice on the Simplified Procedure summarise key aspects of the notification procedure, in particular the desirability (and usually the necessity) of pre-notification contacts with the Commission.

## Investigation phases and timetable

### 17 What are the typical steps and different phases of the investigation?

Most (if not all) proceedings begin with pre-notification contacts with the Commission. These contacts are not strictly mandatory, but are nonetheless highly advisable and, in practice, essential, even for simplified procedure cases. Depending on the complexity of the transaction, this pre-notification stage may involve the submission of a finalised draft Form CO or a briefing memorandum for the Commission's consideration and possibly attending a meeting with Commission officials. The Best Practice Guidelines also provide that the Commission may undertake informal fact-finding exercises in the pre-notification period, so long as the transaction is in the public domain and the merging parties have had the opportunity to express their views on such measures.

Following the formal notification, the Commission will initiate a Phase I review. In this context, the Commission will contact relevant third parties such as customers, suppliers and competitors to collect their views on the transaction (see question 29) and may require them to complete detailed questionnaires on the relevant markets (see question 18 on the review timetable). During the course of the investigation, the Commission will often demand further information at short notice. Calls and meetings are also frequently held with the case team. As explained in the Best Practice Guidelines, 'state-of-play meetings' may be held with the parties at various key stages of the investigation and the Commission may also instigate tripartite or 'triangular meetings' with the merging parties and interested third parties to allow points of concern to be discussed. In complex merger cases, the Commission commonly issues extensive and tailored document requests (see question 36). Following the Phase I investigation, the Commission may decide to clear the merger unconditionally, to clear the merger subject to conditions and obligations offered by the parties, or to initiate an in-depth investigation if it considers that the transaction raises 'serious doubts' as to whether it may give rise to a significant impediment to effective competition (Phase II) (see question 19).

For the notifying parties, a Phase II inquiry will involve responding to many requests for information and may lead to a statement of objections. If a statement of objections is issued, the parties will be granted access to the Commission's file and with the agreement of the parties an oral hearing will take place (often involving complainants). The oral hearing is organised and conducted by one of the two hearing officers (see question 1). Following the Phase II investigation, the Commission may decide to clear the merger unconditionally, to clear the merger subject to conditions and obligations or to prohibit the merger (see question 24).

### 18 What is the statutory timetable for clearance? Can it be speeded up?

The Commission must reach a Phase I decision within 25 working days of the effective date of notification. This period may be increased to 35 working days if the Commission receives a referral request from a member state (see questions 5 and 31) or the parties submit commitments (remedies) to resolve competition issues (see questions 25 and 26). The review period under the simplified procedure is also 25 working days.

Should the Commission initiate a Phase II investigation, the decision must be taken within 90 working days of the date on which the proceedings were initiated (ie, from the beginning of Phase II). This period may be extended to 105 working days if the parties offer commitments after the 55th day of Phase II proceedings. Further, the investigation period may be extended if the parties request a one-off extension of the investigation period (they must do so within 15 working days of initiation of Phase II proceedings) or if the Commission decides to extend the Phase

II investigation period with the consent of the parties. In both cases, the cumulative extension cannot exceed 20 working days.

These time periods may be suspended (thereby 'stopping the clock') if, for circumstances imputable to one of the undertakings involved, the Commission has to issue a decision to request information or to order an inspection.

Pre-notification discussions with the Commission are a standard part of all merger review processes (including simplified cases) and can be expected to take a minimum of two weeks. This period can be considerably extended even for relatively straightforward cases.

There is no formal means of accelerating the review under the EUMR. However, the Commission has showed some flexibility in certain cases, notably by issuing 'accelerated' clearance decisions during the financial crisis even in cases that raised significant competition concerns and required remedies (eg, *BNP Paribas/Fortis* (2008)).

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The EUMR prohibits concentrations that significantly impede effective competition in the EEA, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. Full-function joint ventures are appraised under the same test (see question 20). In its appraisal, the Commission must (formally) take into account substantiated claims of efficiencies brought about by the merger (see question 23) and evidence that one of the merging parties (or the acquired undertaking) is a 'failing firm' (also referred to as a 'rescue merger'). In practice, such 'defences' play a limited role in merger review and, up until now, the Commission has never cleared an otherwise problematic merger only on the basis of efficiencies claimed by the parties for all markets where competition concerns were found (see question 23) and has accepted the failing firm defence only in very few cases.

#### 20 | Is there a special substantive test for joint ventures?

In addition to examining whether the joint venture will significantly impede effective competition, the Commission will also assess under article 101 TFEU whether it is the object or effect of the transaction to coordinate the competitive behaviour of two or more parents to the joint venture. Such coordination can occur where two or more parents retain activities in candidate markets; namely, activities either in the same market, or on an upstream, downstream or closely related neighbouring market to that of the joint venture. The significance of this 'spill-over' effect is assessed and can be cleared with the merger – if justified – under the criteria set out in article 101(3) TFEU. Full details of overlapping activities of the parents in candidate markets must be given in the notification.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

In accordance with the guidance set out in the Commission's guidelines on horizontal mergers and non-horizontal mergers, the Commission will consider, in its assessment, whether the merger will have unilateral or coordinated anticompetitive effects.

Anticompetitive unilateral effects may occur when the merger removes relevant competitive constraints over the merging firms to the extent that it contributes to the creation or strengthening of a dominant position (eg, *London Stock Exchange/Deutsche Börse* (2017), *Pfizer/Hospira* (2015), *Ryanair/Aer Lingus III* (2013) and *Deutsche Börse/*

*NYSE Euronext* (2012)) or to the weakening of competitive pressure in an oligopolistic market (eg, *Orange/Jazztel* (2015), *UPS/TNT Express* (2013) (Commission decision overturned by General Court on appeal, T-194/13), *Hutchison 3G Austria/Orange Austria* (2012), *EDF/Segebel* (2009) and *T-Mobile Austria/Tele Ring* (2006)). The Commission assesses the parties' ability and incentives to profitably increase prices, reduce output, choice or quality of goods and services, but also to diminish innovation. Potential loss of innovation as a result of the merger is increasingly investigated by the Commission (eg, *Dow/Dupont, J&J/Actelion* (both 2017), *Bayer/Monsanto* (2018)).

In non-horizontal mergers, the main concern of the Commission with regard to unilateral effects lies in the ability and incentive of the merging firms to engage in input or customer foreclosure, owing to vertical links (*BASF/Cognis* (2010), *TLP/Ermeva* (2010), *RWE/Essent* (2009), *TomTom/Tele Atlas, Google/DoubleClick* (both in 2008)) or to portfolio effects (*Qualcomm/NXP* (2018), *Essilor/Luxottica* (2018), *Microsoft/LinkedIn* (2016), *Intel/McAfee* (2011)).

Coordinated effects may arise when the merger alters the competitive conditions prevailing on the market, allowing competitors to coordinate their behaviour (eg, *Celanese/Blackstone/JV* (2017), *AB InBev/SAB Miller* (2016), *ABF/GBI Business* (2008), *Sony/BMG* (2007 and 2004), *Johnson & Johnson/Guidant* (2005)).

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

Under the EUMR, the Commission can only prohibit a concentration that significantly impedes effective competition in the European Union, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. When applying the test, the Commission looks only at competition-related criteria (see questions 19 to 21), and economic efficiencies are also relevant (see question 23). In certain cases, however, member states may have limited jurisdiction to intervene to protect their non-competition legitimate interests (see question 31). In Phase II cases, the full College of Commissioners, rather than just the commissioner for competition, is involved in the final decision, and they may consider issues other than pure antitrust in forming their views. The competition portfolio (under Commissioner Vestager) is part of project teams concerning digital, energy, jobs, growth, investment and competitiveness. The Commissioner must therefore cooperate with colleagues with responsibilities for these other portfolios.

In the context of the global economic downturn after 2008, the Commission was required to consider how the grant of state aid (ie, support from government) might affect the substantive analysis in merger control proceedings (eg, in relation to the financial strength and future market positions of the parties). However, in most cases (eg, *BNP Paribas/Fortis, Santander/Bradford & Bingley Assets* (both in 2008)) DG Comp concluded that the state measures in question did not affect its competition analysis, as such aid was the subject of a separate assessment under the state aid rules.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Commission, in its Horizontal Guidelines, has stated that it will consider substantiated efficiency claims in its overall assessment of the merger. According to the Horizontal Guidelines, the Commission will only take into account efficiencies that are of direct benefit to consumers, merger-specific, substantial, timely and verifiable, thereby counteracting the adverse effects of the merger. Efficiency considerations are highly unlikely to be taken into account where the merger results in the

creation of a monopoly or a quasi-monopoly. In practice, this means that significant evidence will need to be adduced by the parties to satisfy the requisite criteria. The Form CO includes a section specifically dealing with efficiencies, although it is not obligatory for parties to complete this section.

The Commission has accepted the parties' efficiencies claims in a very few cases (eg, *FedEx/TNT* (2016), *UPS/TNT Express* (2013), *Microsoft/Yahoo!*, *Search Business* (2010) and *TomTom/Tele Atlas* (2008)) but it has never cleared an otherwise problematic merger purely on the basis of efficiencies claimed by the parties.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission is empowered to prohibit a concentration that will significantly impede effective competition in the European Union, or a substantial part of it. Since the entry into force of the first EU merger control regime in 1990, the Commission has blocked 30 mergers (as of 30 June 2019). Even though the Commission recently blocked several mergers (*London Stock Exchange/Deutsche Börse* (2017), *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* (2017), *Siemens/Alstom* (2019) and *Wieland/Aurubis Rolled Products/Schwermetall* (2019)), prohibition decisions are expected to remain relatively rare. This statistic does not, however, take into account transactions that were abandoned by notifying parties as a result of initial objections raised by the Commission either during 'pre-notification' discussions or during the course of a formal notification.

If the parties implement a notifiable merger before clearance has been obtained or after a prohibition decision has been issued, the companies concerned may not only incur fines (see questions 9 and 11) but may also be ordered to dissolve the merger in its entirety. The Commission may also impose interim measures or take any other action that it considers appropriate to restore conditions of effective competition.

The Commission may revoke its clearance decision (whether granted in Phase I or II) if it subsequently transpires that the decision was based on incorrect information, or where there has been a breach of an obligation attached to the decision. In such a case, the Commission may also order the dissolution of the merger.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

During the course of a Commission investigation, the parties can offer undertakings to the Commission to remedy competition issues identified by the latter. Proposed remedies will need to be submitted in a Form RM, introduced by the Remedies Notice (2008). Remedies have regularly been accepted to avoid prohibiting a transaction, or indeed a Phase II referral. The Commission has a strong preference for structural rather than behavioural undertakings, but in its Remedies Notice (2008) and Best Practice Guidelines for Divestiture Commitments (2013), states that it will also accept behavioural undertakings in limited circumstances (see question 26).

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The most basic condition applicable to a divestment or other remedy is that it must be capable of restoring effective competition in a timely

fashion, while being simple enough to allow the Commission to determine this with sufficient certainty.

The Commission has a clear preference for structural remedies, in particular divestments, as it believes that the most effective way of restoring competition will be either to create new competitive entry or strengthen existing competitors through divestments. According to the Commission's Best Practice Guidelines for Divestiture Commitments, divested activities must constitute a viable business able to compete over the long term on a stand-alone basis. In this regard, the Commission will consider a broad range of divestiture remedies and where appropriate alternative structural remedies to facilitate market access, such as the granting of licences. In *T-Mobile/Orange* (2010), in addition to a divestment remedy, the parties concluded a revised network sharing agreement with a competitor to secure its position as a competitive force on the market. In *Hutchison 3G Austria/Orange Austria* (2012), in addition to a divestment remedy, Hutchison committed to provide wholesale access to up to 30 per cent of its network to 16 mobile virtual network operators for a period of 10 years. Divestments can only be made to a suitable purchaser, approved by the Commission, and the sale must be completed within a specified time limit (usually six months). If the parties do not find an acceptable purchaser within the disposal deadline, a 'divestiture trustee' will handle the disposal of the business at no minimum price. Any divestment remedy must be accompanied by a proposal to safeguard the business in the interim and the parties will need to propose a monitoring trustee to oversee compliance with the preservation measures.

A principal concern of the Commission is the practical efficacy of the remedies proposed by the parties and, in particular, the need to ensure the long-term viability of the 'remedy-taker' or divestment purchaser. When there are doubts about the viability of the business to be divested, an 'upfront purchaser' may be required. The Commission may also require a 'fix-it-first' remedy, meaning that the parties must identify a purchaser for the divestment business and enter into a binding agreement with that purchaser during the Commission's merger control review. The viability of the business to be divested was an important part of the Commission's assessment in the cases of *GE/Alstom* (2015), *Chemchina/Syngenta* (2016), *London Stock Exchange/Deutsche Börse* and *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* (both 2017).

The Commission may also accept other non-divestment structural remedies such as the severing of links with competitors or important players in a supply chain. For example, the Commission intervened in *Glencore/Xstrata* (2012) because of concerns that the merged entity would have the ability and incentive to raise prices of zinc metal. To remedy concerns, Glencore committed to sever links with Nyrstar (the largest European zinc metal producer). This included inter alia the termination of an exclusive long-term offtake agreement and committing not to buy zinc metal quantities from Nyrstar for 10 years.

In certain (but more limited) circumstances, behavioural remedies can be accepted, such as in *Microsoft/LinkedIn* (2016), which was granted conditional clearance in Phase I on the basis of the parties' commitments to allow PC OEMs using Windows not to install the LinkedIn application and to ensure interoperability and provide access to all necessary information to LinkedIn's competitors. Similarly, in *ASL/Arianespace* (2016) the Commission was satisfied with behavioural commitments that included the implementation of information firewalls and restrictions to employee mobility between the merging parties. In other cases (eg, *Universal Music Group/EMI Music* (2012)) the Commission has accepted behavioural remedies as part of a package including other divestment and structural commitments.

Alternatively, primary and secondary remedies can be offered in circumstances where the preferred primary remedy may be difficult to implement owing to external factors. The second alternative remedy

must be equal to or better than the first remedy, and will typically involve divestiture of the parties' 'crown jewels'. This twofold structure has been used in a number of cases including *Pfizer/Wyeth* (2009), *Teva/Ratiopharm* (2010) and *Swissport/Servisair* (2013).

Under the Remedies Notice, the Commission has discretion to review the need for commitments when the parties are able to establish that a 'significant change in market circumstances' has occurred. This review is of particular relevance for non-divestment type remedies (see, for instance, *Newscorp/Telepiu* (2010) and *Hoffmann-La Roche/Boehringer Mannheim* (2011)). Typically, such commitments will include a review clause and the Commission has been willing to accept detailed review clauses specifying certain criteria of particular relevance for the future assessment of the need for the commitments (see, for instance, *T-Mobile/Orange* (2010) and *SNCF/LCR/Eurostar* (2010)).

The Commission will accept undertakings both in Phase I and Phase II. In Phase I, the commitments must be submitted to the Commission within 20 working days from the date of receipt of the notification (and in practice in draft form earlier). The notifying parties can also in some circumstances withdraw their notification and resubmit it following appropriate changes to the original concentration in an attempt to avoid the need for second-stage proceedings. In Phase II, undertakings must be submitted to the Commission at the latest within 65 working days of initiation of the Phase II investigation.

The court has shown a willingness to accept deviations from the strict procedural rules, particularly in relation to timing in cases of 'late remedies' (Case T-87/05 *EDP v Commission* (2005), and Case T-212/03 *MyTravel* (2008)).

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Commission can require the same type of remedies in foreign-to-foreign mergers as in domestic EU mergers. When analysing remedies, the Commission may liaise with other competition authorities that are examining the same merger on the basis of confidentiality waivers by the parties. For example, in *UTC/Goodrich* (2012), the Commission cooperated with the US and Canadian authorities on remedies and in *Panasonic/Sanyo* (2009) the Commission cooperated with the Japanese and US authorities including as to the identity of a suitable purchaser for divested assets. Other examples of EU-US cooperation include *Johnson & Johnson/Guidant* (2005), *Inco/Falconbridge* (2006), *Agilent/Varian* (2010), *Intel/McAfee* (2011) and *Thermo Fisher Scientific/Life Technologies* (2013).

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The treatment of ancillary restraints (such as non-compete obligations or transitional supply agreements) is set out in the EUMR and the Commission's notice on restrictions directly related and necessary to concentrations, published in March 2005 (the Ancillary Restraints Notice). The EUMR provides that any Commission decision approving a merger will automatically cover restrictions that are directly related and necessary to the implementation of the merger. The Commission is obliged to assess the restrictions only if the parties so request and the issues raised are novel and give rise to genuine uncertainty. Consequently, merging parties will usually need to assess for themselves, by reference to the Ancillary Restraints Notice, whether or not their restrictions are permissible.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties can play a significant role in EUMR proceedings. The Commission publishes a summary of all notifications in the Official Journal of the European Union. This provides a preliminary opportunity for third parties to express their opinions on the likely impact of the transaction. In publishing the notice, the Commission is obliged to consider the parties' legitimate interests in relation to the protection of business secrets.

More importantly, the Commission also sends out detailed questionnaires to third parties (usually to customers, suppliers, competitors and trade associations) seeking their views on the transaction. This is done by means of a web-based eQuestionnaire, which provides respondents with a secure web-based workspace to submit their replies to the Commission. Third parties who show a sufficient interest (including worker representatives) may also apply to be heard by the Commission, by giving oral or written evidence. They may further be given a non-confidential copy of the statement of objections in Phase II proceedings, enabling them to submit comments to the Commission on its preliminary assessment. Active complainants will often attend the oral hearing with the notifying parties.

Third parties can also appeal a Commission clearance decision to the General Court if they can show sufficient interest. Examples include *Impala's* appeal against the Commission clearance decision of *Sony/BMG*, Editions Odile Jacob's appeal in relation to the *Lagardère/Vivendi Universal Publishing* (2004) merger against the Commission's clearance decision (rejected by the General Court T-279/04, which was confirmed by the CJEU C-551/10) and the Commission's approval of *Wendel* as the purchaser of certain divestment assets (upheld by the General Court T-452/04 and confirmed by the CJEU C-553/10) and *Cisco Systems'* appeal against the Commission clearance decision of *Microsoft/Skype* (rejected by the General Court T-79/12). Another example is *KPN's* successful appeal of the Phase II clearance decision *Liberty Global/Ziggo* (2015) (T-394/15). Third parties will usually need to have played an active role in the Commission's proceedings to have standing to appeal. The General Court rejected an application by *Canonical*, an open-source software developer, to intervene in support of the Commission in the proceedings brought by *Monty Program* against the *Oracle/Sun Microsystems* clearance decision. In 2011, the General Court clarified that consumer associations enjoy a right to be heard during the administrative proceedings provided that they lodge a written application to be heard by the Commission during the administrative proceedings (*Association belge des consommateurs test-achats/European Commission*, T-224/10).

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Upon receipt of a notification, the Commission publishes a non-confidential notice of the fact of notification in the Official Journal inviting third-party comments. The parties to the transaction provide a draft of this notice as part of the Form CO (section 1.2 of the Form CO). The Commission also issues a press release following the adoption of its decision at the end of every Phase I and Phase II examination (and upon referring a case to a Phase II investigation). A non-confidential copy of the final decision is made available on the Commission's website, after the Commission and the parties have agreed on which information qualifies

as business secrets and therefore should be redacted. In addition, final decisions issued following a Phase II examination are published in the Official Journal (with business secrets redacted). In the case of a short-form decision for simplified procedure cases, the Commission will publish a notice of the fact of the decision in the Official Journal.

Dedicated antitrust press follow cases very closely and report on developments and speculation on a daily basis.

The confidentiality of business secrets is protected under article 339 TFEU and under article 17 of the EUMR (see also articles 18 and 19, and recital 42). These provisions require the Commission (and the member states, the EFTA Surveillance Authority and the EFTA states, their officials and other servants) not to disclose information covered by the obligation of professional secrecy that they have acquired through the application of the EUMR.

If a party believes that its interests would be harmed if any of the information supplied were to be published or otherwise divulged to other parties, this information should be submitted separately with each page clearly marked 'business secrets'.

Parties should also give reasons why this information should not be divulged or published. In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

The Commission has published 'Guidance on the preparation of public versions of Commission decisions under the Merger Regulation' as well as 'Best practices on the disclosure of information in data rooms' (both 2015).

## Cross-border regulatory cooperation

### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

#### Cooperation with national competition authorities in the European Union

The member states' national competition authorities (NCAs) have the opportunity throughout the Commission's investigation to express their views on the concentration. Within three days of receipt of a notification, copies are sent to the NCAs for their comments. The NCAs have a particularly active role to play in Phase II decisions as part of an advisory committee that opines on the Commission's draft decision and any commitments before its final adoption. This opinion is published.

In addition, despite the one-stop-shop principle, a member state may have limited jurisdiction to intervene to protect its non-competition legitimate interests, such as public security, plurality of the media and the prudential supervision of financial institutions (see article 21 EUMR), and in certain defence-related matters (see article 346 TFEU). The list of legitimate interests in article 21 EUMR is not exhaustive and a member state can claim additional legitimate interests in consultation with the Commission, though the Commission has attempted to limit a wider application. This provision has received scrutiny recently.

The national competition authorities also cooperate with the Commission in the context of the referral system foreseen in the EUMR (see question 5).

For other instances where a transaction does not qualify for review by the Commission but does require merger clearance at the national level in several member states, the Commission published Best Practices on Cooperation between EU National Competition Authorities in Merger Review (2011) with a view to improving cooperation between the European NCAs, streamlining the approval process across the different jurisdictions and avoiding conflicting outcomes, in particular by facilitating information sharing between the national authorities.

## Cooperation with the United States

The Commission routinely seeks to cooperate with the US antitrust authorities that are also reviewing a proposed transaction. Cooperation is based on the 1991 US-European Community Agreement on the Application of Competition Laws (as amended), under which the Commission is required to keep the US antitrust authorities informed of mergers involving US interests, and vice versa, and also on the US-EU Best Practice Guidelines on Bilateral Cooperation published in October 2011, which aim to enhance coordination on the timing of reviews, collection and evaluation of evidence and communication between the reviewing agencies. In view of this cooperation, and in particular the exchange of information between the EU and US authorities, parties to transatlantic mergers should carefully coordinate their merger clearance procedures and, to the extent possible, ensure that any remedies offered will not produce inconsistent results in the United States and European Union. Examples of high-profile cases in which the EU and US agencies have closely cooperated include *Intel/McAfee* (2011), *Medtronic/Covidien* (2014), *NXP/Freescale* (2015), *Wabtec/Faiveley* (2016), *Smiths/Morpha* (2017), *Dow/Dupont* (2017) and *Bayer/Monsanto* (2018).

## Cooperation with Brazil, Canada, China, India, Japan, South Korea and Switzerland

Several other cooperation agreements with third countries exist. The EC-Canada cooperation agreement was signed in June 1999 and contains similar provisions to the US agreement. An agreement with Japan on cooperation and anticompetitive activities entered into force in August 2003 (currently under review by the EU and Japan), with the aim of facilitating bilateral cooperation in major merger and acquisition cases. Close cooperation with the Japanese Fair Trade Commission proved successful in the *Sanyo/Panasonic* case (2009), which was granted a Phase I clearance subject to conditions. For several years, the EU and China have been increasing their cooperation on competition policy (agreement on the terms of reference of a bilateral competition policy dialogue from May 2004; memorandum of understanding on cooperation from September 2012; best practices cooperation framework from October 2015). In April 2019, the EU and China agreed, on a memorandum of understanding on dialogue in the area of the state aid control regime and the fair competition review system, and on the terms of reference of the EU-China competition policy dialogue. The European Union has also entered into a bilateral competition cooperation agreement with South Korea, and into a memorandum of understanding with the Brazilian Ministry of Justice and the heads of the Brazilian Competition Authorities to ensure closer cooperation. In March 2011, the European Union and Russia signed a memorandum of understanding for cooperation in the area of competition policy, legislation and enforcement. The European Union has been working in close technical cooperation with the Competition Commission of India. On 1 December 2014, a cooperation agreement entered into force between the European Union and the Swiss Confederation.

In addition, the Commission actively participates in the International Competition Network's working group on multi-jurisdictional merger control, which was established in 2001 with the aim of promoting best practices and international cooperation.

The Commission played a key role in the adoption in 2015 of the ICN Merger Working Group Practical Guide to International Enforcement Cooperation.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

The EUMR provides for appeal to the General Court against Commission decisions on both procedural and substantive grounds. A further appeal

can be made to the CJEU. An appeal can be made either by way of an expedited procedure (only suitable for cases where the appeal is based on limited grounds), or following the normal appeal procedure.

Both merging parties and third parties who show standing can lodge an appeal before the General Court to challenge Commission decisions. Member states can also appeal merger decisions.

The appeal process for substantive appeals is rigorous, with the General Court engaging in a detailed forensic analysis of the Commission's decision. The judgments have led to a clarification of the standard of review and the type of evidence that the Commission can rely upon. For example, in February 2005, in *Commission v Tetra Laval BV*, the CJEU confirmed that, even though the Commission has a margin of discretion with regard to economic matters, the General Court must establish whether the evidence relied upon by the Commission is factually accurate, reliable and consistent, whether that evidence contains all the information necessary to assess a complex situation and whether it is sufficiently capable of substantiating the Commission's conclusions.

In more recent cases, the General Court has put emphasis on procedural grounds and reinforced due process and transparency standards in merger control procedures. In *UPS v Commission* (2017), the General Court held that the Commission had infringed UPS's rights of defence when handling economic evidence and it annulled the Commission's decision. The General Court has also recently asserted the Commission's obligation to lay out a complete reasoning justifying its decisions in *KPN v Commission* (2017).

If the EU courts annul a merger decision, the parties need to re-notify their deal, as was the case in *Sony/BMG*, approved by the Commission in October 2007 after reassessment subsequent to the court's decision.

In addition to judicial review remedies, actions have been brought against the Commission for non-contractual liability arising from its decisions in the merger control area (article 340 TFEU).

See also question 29.

## Time frame

### 33 | What is the usual time frame for appeal or judicial review?

The average time for the adjudication of a merger decision case before the General Court is about 30 months, although in some cases the process can take a number of years. When used, the expedited procedure has shortened the waiting period to between seven and 18 months from the date of the Commission's decision. Consequently, for cases that are not expedited (and even some that are), the delay involved will usually represent a major factor against bringing an appeal.

Appeals to the CJEU of the General Court's findings generally take in excess of two years to be concluded.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The majority of mergers notified to the Commission are cleared in Phase I without commitments. For example, in 2018, 366 cases were approved in Phase I (without commitments), 17 were cleared in Phase I (with commitments) and 10 were decided upon in Phase II (of which four were cleared without commitments and six were cleared with commitments; none were prohibited). Further, the large majority of Phase I clearances (302 out of 366) were subject to the simplified procedure (see question 16). Prohibition decisions are rare – there have been two in 2019 (as of 30 June 2019), none in 2018, and 30 in total since the EUMR entered into force in 1990.

The Commission analyses foreign-to-foreign mergers in the same way as EU-to-EU mergers. Notable examples of foreign-to-foreign cases that have qualified for EU merger review include *GE/Honeywell* (2001), *Johnson & Johnson/Guidant* (2005), *Oracle/Sun Microsystems* (2010) and *Intel/McAfee* (2011).

EU merger control applies equally to all industries and sectors.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

There are no pending changes to the EUMR.

In January 2018, the Commissioner for competition Margrethe Vestager announced that the Commission was preparing a set of best practices to provide practical guidance to companies on how to reply to the Commission's requests for internal documents during a merger review. The Commission's requests for information increasingly require the production of thousands, and sometimes hundreds of thousands, of internal documents, particularly during Phase II proceedings. The Commission has indicated that it is increasingly relying on internal documents obtained during merger reviews. For example, in *Dow/Dupont* (2017) the Commission relied on the parties' internal documents to support its conclusion that the merger would reduce the parties' research efforts.

On 18 December 2018, in the context of the discussions accompanying the *Siemens/Alstom* proceedings, ministers from 18 member states issued a joint statement calling for updated merger rules that better take into account international markets and competition (see question 36).

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

#### Increasing M&A activity

The trend of increasing M&A activity in recent times continues to be reflected in an increasing number of merger notifications to the Commission. 2018 again saw an increase compared to previous years: 414 cases were notified in 2018, compared to 380 cases in 2017, 362 cases in 2016, and 337 in 2015.

#### Simplified merger cases

The share of mergers reviewed under the European Commission's simplified procedure has increased steadily since the rules were updated in 2014. In 2018, 75 per cent of notified deals qualified for a simplified procedure, up from 69 per cent in 2014 and 67 per cent in 2015. The trend appears to have continued in the first quarter of 2019: 78 per cent of the 92 deals filed between January and March were under the simplified procedure. Reviews for 58 cleared mergers lasted an average of 17.52 working days. Looking at sectors, non-financial services topped the list, followed by the energy, financial services and automotive sectors.

#### Siemens/Alstom

On 6 February 2019, the European Commission announced the prohibition of the proposed acquisition of Alstom by Siemens. In the wake of the decision, German and French Economic and Finance Ministers, Peter Altmaier and Bruno Le Maire, voiced their dissatisfaction with the Commission's approach. In particular, Le Maire made critical statements about the Commission's decision to block the proposed merger, saying that it was an 'economic and political mistake' and that the underlying rules were 'obsolete'.

On 18 December 2018, ministers from 18 member states issued a joint statement calling for updated merger rules that better take into account international markets and competition. On 19 February 2019, France and Germany unveiled a 'Common manifesto for a European industrial policy fit for the 21st century' to facilitate the creation of 'European champions'. The manifesto suggested that competition law should take greater account of competition at the global level as well as potential future competition. Furthermore, it should be considered whether a right of appeal of the Council, which could ultimately override Commission decisions, could be appropriate in certain cases. Currently, there are no plans to amend the existing EU merger control rules in light of these criticisms.

### Investment screening

In March 2019, the EU adopted Regulation 2019/452 on the screening of FDI. Investments completed after 11 April 2019 may be subject to the Regulation once it enters into force on 11 October 2020. While 14 EU member states already have national screening mechanisms, the new framework creates the first EU-wide system that supports member states' screening of FDI on grounds of security and public order. The European Commission will be able to ask for information and deliver its opinion to the member state where the investment is planned, but the final decision remains with the country concerned.



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# Faroe Islands

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The main legislation on Faroese merger control is contained in the Faroese Competition Act (No. 35 of 3 May 2007, as amended on 27 April 2012). The Faroese Competition Act has been modelled on the Danish Competition Act, with the intention to also ensure conformity with competition law in the European Union and EEA. An English version of the Faroese Competition Act can be accessed on the Faroese Competition Authority's website: [www.kapping.fo](http://www.kapping.fo).

The Faroese Competition Council is the principal enforcer of competition law in the Faroe Islands. It consists of a chairman and four members appointed by the Minister of Trade and Industry. The Council must have comprehensive insight into public as well as private enterprise activity, including expertise in legal, economic, financial and consumer-related matters. The chairman and two members of the Council must be independent of commercial and consumer interests. In practice, however, the Competition Authority, which is the secretariat of the Competition Council, is in charge of the day-to-day administration of the Competition Act and prepares the decisions of the Council.

The decisions of the competition authorities are subject to appeal before the Competition Appeals Council, which is made up of four members appointed by the Minister of Trade and Industry. The chairman and the vice chairman of the Appeals Council must be qualified lawyers.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The provisions on merger control apply to 'concentrations' where either:

- two or more previously independent undertakings merge (amalgamate); or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, or by contract or any other means, direct or indirect control of the whole or parts of one or more other undertakings.

#### 3 | What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a merger. Non-full-function joint ventures are not encompassed by the Faroese Competition Act. The distinction between full-function joint ventures and non-full-function joint ventures is made in accordance with EU competition law.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is constituted by rights, contracts or any other means that, either separately or jointly, confer the possibility of exercising decisive influence over the operations of an undertaking. Minority shareholdings are caught if the possibility of exercising decisive influence over the operations of an undertaking is conferred upon a minority shareholder.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions apply to concentrations where the participating undertakings have a total turnover of 75 million kroner in the Faroe Islands and at least two participating undertakings have a turnover of at least 15 million kroner in the Faroe Islands, or at least one of the participating undertakings has a turnover of 75 million kroner in the Faroe Islands and at least one other of the participating undertakings has a turnover of 75 million kroner worldwide. The Competition Authority does not have the power to investigate transactions falling below the thresholds.

The Minister of Trade and Industry has issued Executive Order No. 9 of 11 March 2008 laying down detailed rules on the notion of a concentration and the calculation of turnover.

Official guidelines have been published in the Faroese language only.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing a merger notification is mandatory if the turnover thresholds are met. Clearly unproblematic mergers may be notified by short notice, the rules of which are laid down in accordance with EU competition law.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are caught, if at least one of the parties to the transaction is active in the Faroe Islands. Where no actual effects on the market can be shown, the merger can generally be notified – and approved – by short notice.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special merger control rules relating to foreign investment. The fishing industry is subject to specific antitrust rules, which are stricter than the merger control regime under the Faroese Competition

Act. Mergers that are permissible under the specific fishing industry rules are therefore generally also permissible under the Faroese Competition Act. Such mergers may be notified by short notice.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations falling within the threshold must be notified to the Competition Authority no later than one week after:

- the conclusion of the merger agreement;
- the merger is publicly notified; or
- the acquisition of control over the target company.

Fines may be imposed for implementation before clearance.

The Faroese and Danish languages are of equal status in the Faroe Islands. Filing can therefore be made in either language. It may also be possible on a case-by-case basis to make arrangements with the Faroese Competition Authority to file in other languages (such as English).

10 | Which parties are responsible for filing and are filing fees required?

In principle, all the parties involved in a concentration are responsible for filing. No filing fees apply.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The implementation of the transaction is suspended prior to clearance. The parties can ask for dispensation from this rule. The Competition Authority has the power to make dispensations conditional upon specific terms.

### Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Fines may be imposed for implementation before clearance. Where the Competition Council finds that the merger will significantly impede effective competition, the Competition Council has the power to annul the merger, and issue an order demanding the undertakings already merged to separate their businesses. Furthermore, the Competition Council is entitled to make approval of the merger subject to conditions.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

To date, no sanctions have been applied in foreign-to-foreign mergers.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

So far, there has not been an opportunity to test under which circumstances a dispensation (see question 11) may be obtained.

### Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

The Competition Act does not prevent the implementation of a public bid that has been notified to the Competition Authority.

### Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The level of detail depends on the filing form. For a merger that can be filed by short notice, the level of detail is less than when the merger must be filed by ordinary notice. The provisions on whether a merger can be filed by short or by ordinary notice are in Executive Order No. 2 of 17 May 2012, section 3.

With the permission of the Faroese Competition Authority, the participating undertakings can omit information from a notice. The competition authorities will then assess the short-form notification, and may require a full notification if the merger has an impact on the Faroese market.

### Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Pre-notification consultations with the Competition Authority may and should take place. Very often these consultations can have a significant impact on the outcome and provide the undertakings concerned with the opportunity to address possible competition concerns in the notification – with the effect that the procedure is accelerated. To initiate this informal procedure, a briefing paper is often delivered to the Competition Authority.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Within 30 working days of the Faroese authorities' receipt of a complete filing submission, the Competition Council will notify the participating undertakings if further investigations are required, or alternatively whether the merger can be approved. If the authorities have not given this notification within the 30-day time limit, the authorities can no longer annul the merger. Merger notifications submitted by short notice are generally approved before the expiry of the 30-day period.

The Competition Council must make its final decision within 90 working days of the above-mentioned notification being sent to the participating undertakings. This deadline can be extended by up to 20 working days when commitments are proposed, and again by up to 20 working days with the parties' consent.

## SUBSTANTIVE ASSESSMENT

### Substantive test

19 | What is the substantive test for clearance?

Section 15 of the Faroese Competition Act applies the substantial impediment of effective competition (SIEC) test.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for full-function joint ventures.

## Theories of harm

### 21 | What are the 'theories of harm' that the authorities will investigate?

A concentration that will not significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, will be declared compatible with the Faroese Competition Act. The creation or strengthening of a dominant position alone is therefore not a sufficient reason to prohibit a concentration, nor is it a requirement to prohibit a concentration. In its substantive assessment, the Competition Authority also considers the likely impact of the concentration on third parties and the affected markets in general. In that respect, documented efficiency gains that will be passed on to the consumers can speak in favour of approving the concentration.

In connection with the Competition Authority's assessment of the market, it should be considered whether the market is open for potential international competition.

Due to the application of the SIEC test and the intention to ensure conformity with competition law in the European Union and EEA, the Faroese Competition Council relies heavily on the case law of the European Courts and the administrative practice of the European Commission.

## Non-competition issues

### 22 | To what extent are non-competition issues relevant in the review process?

The Competition Council is expected to apply the above substantive test without taking into account non-competition issues.

## Economic efficiencies

### 23 | To what extent does the authority take into account economic efficiencies in the review process?

There is no express efficiency defence. However, section 15 of the Competition Act provides that the SIEC test is applicable. Furthermore, the Faroese Competition Authority has stated that documented efficiency gains that are passed on to consumers can have an exempting effect on a concentration that otherwise would have been prohibited.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The transaction may be approved unconditionally, conditionally or prohibited.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the competition authorities assess that the concentration cannot be approved without conditions, the Competition Council may attach conditions to their approval of the concentration.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Faroese Competition Authority has stated that an approval of a concentration can be made subject to certain conditions, including:

- divestments of companies or parts of companies;

- dissolving of cooperation with other companies on the market; and
- admission of third-party access to, for example, distribution systems, production systems or other systems of strategic importance for the participating undertakings.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

No practice is available on this issue.

## Ancillary restrictions

### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The merger control provisions in the Faroese Competition Act do not contain any regulation on ancillary restraints. However, the Faroese Competition Authority has confirmed that reasonable necessary ancillary restraints that do not have a harmful effect on competition can be accepted. The Faroese Competition Authority uses the rules laid down in Council Regulation No. 139/2004 and the Commission Notice No. 2008/C 95/01 as guidelines.

The Faroese Competition Authority has considered several cases where competition clauses have been modified. In one particular case, the Competition Council has confirmed that competition clauses should be limited to no more than two years where goodwill is the subject of the transfer, and no more than three years if both know-how and goodwill are included.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Faroese authorities have not promulgated any procedures on this issue. However, it is likely that customers and competitors will be heard in connection with the Competition Authority's review.

So far, the Competition Authority has only involved customers in the review process.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Faroese Competition Authority and the Council publish all decisions with the exception of sensitive information, business secrets and the like, which are redacted. The authorities can also allow the merging parties to exclude other information.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Faroese Competition Authority maintains close cooperation with the competition authorities in the other Nordic countries, and according to the Faroese Competition Act, the Authority can also cooperate with other jurisdictions, such as in relation to the exchange of information. Knowledge-sharing is common practice.

## JUDICIAL REVIEW

### Available avenues

32 | What are the opportunities for appeal or judicial review?

Generally, the Competition Council's decisions may be appealed to the Competition Appeals Council and its decisions may in turn be appealed to the ordinary courts.

There are currently no cases where this has occurred.

### Time frame

33 | What is the usual time frame for appeal or judicial review?

To date, no merger decisions have been subject to judicial review.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

There has only been one case in 2015, and there is no recent practice in relation to foreign-to-foreign mergers.

### Reform proposals

35 | Are there current proposals to change the legislation?

The Faroese Competition Act was amended as of 27 April 2012. There are no current proposals for any further changes.

# KROMANN REUMERT

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# Finland

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Act (No. 948/2011) (the Competition Act), which entered into force on 1 November 2011 repealing the Act on Restrictions on Competition (No. 480/92). Provisions on merger control were first included in the now repealed Act on Restrictions on Competition on 1 October 1998. The Competition Act introduced a few substantive amendments to the merger control provisions, which further harmonise the Competition Act with EU rules.

The Finnish Competition and Consumer Authority (FCCA) investigates a concentration in the first stage and either clears it, with or without conditions, or requests the Market Court to prohibit it. Only the Market Court is empowered to block concentrations.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Competition Act applies to concentrations defined as:

- the acquisition of control of an undertaking;
- the acquisition of the whole or part of the business of an undertaking;
- a merger; and
- the creation of a joint venture performing all the functions of an autonomous economic entity on a lasting basis.

#### 3 | What types of joint ventures are caught?

The establishment of a joint venture that performs all the functions of an autonomous economic entity on a lasting basis, that is, a full-function joint venture, will be caught by the Competition Act. A full-function joint venture must have sufficient resources, be independent of its parent companies, have its own staff, including operative management and operate on a permanent basis. The competition authorities interpret the concept of full-function joint venture in accordance with the guidelines set out by the European Commission.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

There is no definition of control in the Competition Act. In practice, the competition authorities interpret the concept of control in accordance with the European Commission's practice. Consequently, acquisitions of minority shareholdings and other interests less than control may establish joint or sole control, and therefore be caught by the merger control rules.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration must be notified to the FCCA if the combined aggregate worldwide turnover of the parties exceeds €350 million and the aggregate turnover in Finland (including, for example, imports into Finland) of each of at least two of the parties exceeds €20 million.

In the calculation of the relevant turnovers, the turnover of the whole buyer group will be taken into account, whereas of the seller's turnover only the amount relating to the target of the acquisition is relevant. The rules concerning the parties whose turnover will be taken into account as well as the manner of calculating the turnover correspond for the most part with the provisions of the EU Merger Regulation.

If the target company is acquired in stages, all the acquisitions from the same seller over a period of two years are taken into account in the turnover calculation.

In cases of uncertainty as to whether the turnover thresholds are exceeded or not, the matter can be discussed with the FCCA.

The FCCA cannot under any circumstances investigate transactions that fall below the turnover thresholds.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory if the turnover thresholds are met, with no exceptions. However, concentrations meeting the thresholds set down in the EU Merger Regulation fall under the exclusive jurisdiction of the European Commission.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions will be caught if the turnover thresholds are met. The Competition Act does not contain any provisions on a particular local effects test. In practice, the FCCA applies a similar substantive test to foreign-to-foreign transactions as it applies to other transactions (see question 19).

As to joint ventures, it should be noted that joint ventures may have to be notified in Finland even if the joint venture does not have any operations in or sales into Finland. It is sufficient that the turnovers of the parent companies of the joint venture (which are the undertakings concerned) exceed the turnover thresholds.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

In certain insurance transactions, a notification to the FCCA is exempted if the Financial Supervisory Authority has requested a statement from the FCCA, and the FCCA has found no objections to the concentration. If such statement has not been requested, the concentration shall be notified to the FCCA after the parties have received an approval or a non-opposition decision from the Financial Supervisory Authority.

Foreign acquisitions of defence industry companies as well as companies in the civil sector considered critical to securing functions fundamental to society are subject to the Act on the Monitoring of Foreign Corporate Acquisitions in Finland (No. 172/2012). A foreign acquirer of a Finnish defence industry company must apply for an approval from the Finnish Ministry of Economic Affairs and Employment prior to the acquisition. Foreign acquisitions of non-defence industry companies are only subject to notification. In the defence industry, monitoring covers all foreign acquirers and domestic corporate acquirers in which a foreign owner holds at least 10 per cent of votes or has a corresponding de facto influence. In the civil sector, monitoring applies only to foreign acquirers domiciled outside EU and EFTA states and corporate acquirers domiciled in such states, in which a non-EEA or non-EFTA owner has the shareholding or de facto influence referred to above. The Act applies to acquisitions of at least 10 per cent, at least 33 per cent or at least 50 per cent of votes in a limited liability company or a corresponding de facto influence. In addition, the authority handling the matter may require an application for approval or a notification to be submitted if the buyer subsequently increases its influence in the target company even if the increase does not exceed the above thresholds.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for filing a notification. Notification must be submitted to the FCCA following the conclusion of the acquisition agreement, the acquisition of control, or the announcement of the public bid but prior to the implementation of the concentration. A concentration may also be notified to the FCCA as soon as the parties demonstrate with sufficient certainty their intention to conclude a concentration, for example, by a letter of intent or a memorandum of understanding signed by all parties to the concentration or by a public announcement of the intention to make a public bid. As there is no specific deadline for filing, sanctions are only relevant when the concentration is implemented before the FCCA has cleared it.

## 10 | Which parties are responsible for filing and are filing fees required?

The acquirer of control, or those acquiring joint control, the acquirer of business, the parties to the merger or the founders of a full-function joint venture are responsible for filing. There are no filing fees.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Under the main rule, no steps may be taken to implement the transaction prior to its clearance. However, when the Market Court is investigating a transaction on the basis of the FCCA's request to block it, the prohibition on the implementation ceases in one month from such request, unless the Market Court orders the suspension to continue.

The FCCA and the Market Court may, upon request, permit certain implementing measures to be taken during the investigation period. Further, a party that has launched a public bid can purchase the shares offered prior to clearance, even though it may not use its voting rights to determine the competitive behaviour of the target company. The same rule applies in certain cases where shares are redeemed.

#### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the transaction is closed before clearance, a fine of up to 10 per cent of the total turnover of the relevant undertakings may be imposed. The fine is imposed by the Market Court on the basis of the FCCA's request. When the amount of the fine is set, attention is paid to the nature, extent, degree of gravity and duration of the infringement. The fine will be imposed, unless the infringement is considered minor or the imposition of the fine is otherwise unnecessary in view of safeguarding competition.

Furthermore, the Market Court may – at the request of the FCCA – prohibit the concentration or order the concentration to be dissolved or annulled; for example, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of the joint control to restore the conditions of effective competition. The Market Court may, instead of prohibiting the concentration, attach conditions on its clearance. The request of the FCCA must be notified to the parties within one year from the closing of the transaction.

There are no decisions so far where sanctions would have been imposed for closing before clearance.

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same rules apply to foreign-to-foreign mergers. However, there are no decisions so far where sanctions have been imposed for closing before clearance in foreign-to-foreign mergers.

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Implementation of a merger before clearance is, under the main rule, prohibited also in foreign-to-foreign mergers. However, under the Competition Act, the FCCA has the possibility to decide to grant permission to implement a merger before clearance.

#### Public takeovers

## 15 | Are there any special merger control rules applicable to public takeover bids?

No (except for what is described under question 11).

#### Documentation

## 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification form is broadly similar to Form CO of the EU Merger Regulation. Various types of information must be given – depending on the details of each case – inter alia, on the parties, the transaction structure, relevant markets, competitors, customers, suppliers, market conditions, entry barriers, trade associations and ancillary restraints. The notification form must be completed in Finnish or Swedish; appendices to the notification are generally also accepted in English. Standard

appendices include corporate documents of the parties, the agreements bringing about the transaction being notified, certain internal analysis of the transaction itself, as well as the markets relevant to the assessment of the transaction. Generally, the FCCA has been less stringent on requiring internal documents to be produced (in comparison, for example, to the European Commission).

In certain circumstances, the notification may be filed with the FCCA using the 'short-form' notification. The short-form notification is mainly used in notifying joint ventures that do not have connections to the Finnish markets. Such a situation may be deemed to exist where the joint venture – or the jointly controlled undertaking, as the case may be – has no business activities in Finland and generates no turnover from Finland.

The FCCA may, in individual cases, grant waivers in respect of the information to be given if certain information is deemed unnecessary for the investigation or if the transaction affects competition only to an insignificant extent.

Supplying wrong or misleading information to the FCCA is sanctioned in the Criminal Act (39/1889).

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

Under the main rule, the FCCA will, after it has received a notification, send a market inquiry to the competitors, customers and suppliers of the parties to the concentration. The aim of the procedure is to establish the structure of the market and the competition conditions therein, and to afford the relevant market players the possibility to be heard on the planned concentration.

Should the FCCA decide to initiate a second-phase investigation, more detailed questions may be sent to competitors, customers and suppliers. The statements as well as other issues pertinent to the case will be discussed with the parties (see question 16).

Parties are generally advised to engage in pre-notification consultations with the FCCA in all cases and in cases where the horizontal overlap or vertical links between the parties' activities are considerable, it is recommended to approach the FCCA as early as possible, even prior to definitive signing of the transactional agreements, so as to ensure that the process starts as early as possible.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

In the first phase, the concentration will be examined by the FCCA. The FCCA's investigation deadlines were amended by an amendment of the Competition Act that entered into force on 17 June 2019. Under the new provisions, the FCCA has a period of 23 working days during which it has to clear the concentration as such or with conditions, conclude that the transaction will not be caught by the Competition Act or decide to initiate a second-phase investigation.

If the FCCA decides to initiate a second-phase investigation it must, within 69 working days of such decision, either clear the concentration as such or with conditions, or request the Market Court to block it. The Market Court can extend the deadline by 46 working days, giving the FCCA a maximum of 115 working days for a Phase II investigation. Having received the FCCA's request to block a concentration, the Market Court has three months to clear the concentration as is, clear it with conditions or prohibit it.

With the Market Court procedure included, the maximum aggregate investigation period of a concentration may amount to over nine months (which includes the possible 46-working-day extension of the FCCA's second-phase investigation period). However, this is expected

only in cases where there is significant overlap between the parties' activities and the resulting market shares are high; under the main rule, most concentrations are cleared in the first phase. Depending on the complexity of the case, the FCCA's first phase investigations typically take approximately two to four weeks.

It should be noted that the time limits set for the FCCA's decision-making will not start running until a complete notification has been filed. In addition, the FCCA has the power to 'stop the clock' if the parties fail to respond to the FCCA's request for additional information within the set time limit or provide essentially insufficient or incorrect information. In such cases, the FCCA may extend the time limits for decision-making by the corresponding number of days during which the requested information was outstanding.

The merger review procedure in the FCCA may be speeded up by pre-notification discussions, to which the parties are generally encouraged by the FCCA. Also, it might be worth noticing that pre-notification discussions will in most cases de facto speed up the merger review, but they do not affect or change the time limits prescribed for the review.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A concentration may be prohibited if it significantly impedes effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position (SIEC test). The SIEC test, also applied by the European Commission, was introduced in the 2011 reform of the Competition Act and replaced the dominance test applied previously. However, finding of a dominant position remains as a typical example of a situation amounting to a significant impediment of effective competition. Under the Competition Act, an undertaking is considered dominant if it can significantly influence the price level, terms of delivery or other conditions of competition at a given level of production or distribution. In addition to dominance cases, the SIEC test is primarily intended to enable intervention in certain arrangements between competitors on markets that can be considered as oligopolistic, where, however, the market leader is not involved and no dominant position is created.

The substantive test may be countered with the failing, or 'flailing', firm defence. In the recent *Kesko/Lähikauppa* case, the FCCA allowed the acquisition of Lähikauppa by one of the major retail grocery chains Kesko even though the market shares of the combined entity in some of the relevant regional markets was nearly 100 per cent.

#### 20 | Is there a special substantive test for joint ventures?

No. The competition authorities will apply the SIEC test as with respect to other concentrations.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The 'theories of harm' based on which the FCCA assesses the notified transactions and the increase in market power include the horizontal effects as well as the vertical and conglomerate effects of the transaction. When assessing whether the concentration may significantly impede effective competition based on these effects, the FCCA takes into account, for example, the market shares of the parties, the economic and financial strength of the concentration, the amount and nature of residual competition, the bargaining power of customers and suppliers, potential competition, barriers to entry and saturation of the markets.

## Non-competition issues

### 22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the FCCA's review process.

## Economic efficiencies

### 23 | To what extent does the authority take into account economic efficiencies in the review process?

In the review process, the authorities will take into consideration the increase in production efficiency and dynamic efficiency resulting from the concentration that appear in the Finnish market, provided that the efficiency gains are passed on to customers and may only be achieved through the concentration. The weight given to economic efficiency considerations depends, inter alia, on the significance of the efficiencies and the likelihood of their achievement. In general, the principles established in the European Commission's Horizontal Merger Guidelines are also applicable in Finland.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The FCCA investigates a concentration and either clears it, with or without conditions, or requests the Market Court to prohibit it. If the impediment to competition may be avoided by attaching conditions to the implementation of the concentration, the FCCA shall primarily order such conditions to be followed. However, the FCCA can only impose conditions that the parties have approved. Thus, if the FCCA and the parties cannot agree on suitable conditions, the FCCA has to make a proposal to the Market Court to prohibit the concentration.

If the Market Court finds that the concentration would significantly impede effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, the Market Court may prohibit the concentration. If the transaction has already been implemented, the Market Court may order it to be dissolved, for example, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of joint control, to restore the conditions of effective competition. Further, the Market Court may, instead of prohibiting or ordering the dissolution of the concentration, attach conditions for its clearance.

It should also be noted that if the parties implement a transaction before clearance or without regard to a prohibition of the concentration or conditions imposed by the competition authorities, an administrative fine of up to 10 per cent of the total turnover of the relevant undertakings may be imposed.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Both the FCCA and the Market Court may clear a concentration on the condition that certain undertakings are given by the parties to the concentration. In fact, under the Competition Act, the FCCA should always endeavour to impose conditions rather than request that the Market Court prohibits a concentration. Typically, competition concerns identified by the FCCA may be resolved by imposing conditions on the clearance. Thus far, the FCCA has proposed that a concentration be prohibited only three times, although several cases have entered

the second-phase investigation and have been resolved by commitments given by the parties. The Market Court, and its predecessor, has approved, subject to conditions, all the concentrations that the FCCA has proposed to be prohibited. However, one of the concentrations was abandoned owing to the strict conditions imposed and one restructured and re-notified to the FCCA. Where conditions are imposed, the authorities usually prefer structural remedies, such as divestments, but behavioural undertakings have also been accepted.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The FCCA may impose conditions on the implementation of a concentration if the harmful effects on competition (the significant impediment of effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position) can thus be avoided. The FCCA may not require a remedy that does not strictly address and have an effect on the harmful effects that the Competition Act aims to avoid. The remedies may be structural or behavioural. The possibility of imposing conditions should be explored prior to prohibiting the concentration. The conditions imposed should not be more severe than necessary for the removal of the anticompetitive effects of the concentration. The FCCA can only impose conditions that the parties have approved.

The FCCA may decide that a condition (eg, divestment requirement) imposed on an involved party is to be fulfilled within a certain time period, for example, six months for a divestment. The FCCA supervises the implementation of the conditions in accordance with its decision to approve the concentration and may, for instance, nominate a trustee to monitor the implementation of the conditions and to report to the FCCA thereof.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Up to this point, there have been no foreign-to-foreign merger cases in which the FCCA would have required remedies.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is possible to request in the notification form that the FCCA also clears any restrictions ancillary to the notified concentration. Typically accepted ancillary restrictions are limited to non-compete obligations on the seller, supply or purchase agreements and licence agreements.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Under the main rule, competitors, customers and suppliers of the parties to the concentration will be heard in the investigation. However, the Supreme Administrative Court has held that competitors are normally not allowed to appeal against a decision to clear a concentration, as the right to complain requires that the decision may have had a direct effect on the complainant's rights, obligations or interests.

## Publicity and confidentiality

### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The FCCA lists the received notifications on its website (the names of the parties and the notification date). Otherwise, the FCCA is reluctant to comment publicly on pending merger control procedures. Confidential information is protected by clearly indicating the business secrets in all documents submitted to the FCCA.

## Cross-border regulatory cooperation

### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Yes, the FCCA cooperates on a regular basis with other antitrust authorities in other jurisdictions. The FCCA is part of the European Competition Network (ECN), which is a cooperation forum of the European Commission and the national competition authorities of the member states. The operation of the ECN is based on Council Regulation No. 1/2003 and facilitates the exchange of information and case allocation between the participating authorities. While the work of the ECN does not directly relate to merger control, the members of the ECN engage in cooperation and exchange of best practices in the area of merger control in the context of the EU Merger Working Group. The FCCA is also a member of the European Competition Authorities (ECA). One of the main focuses of the ECA is the cooperation of national authorities in relation to multinational merger control processes. As regards the allocation of and information exchange between the national authorities and the European Commission in merger cases, please refer to the EU Merger Regulation. In addition to the European cooperation networks, the FCCA cooperates closely with competition authorities in other Nordic countries and, in 2017, joined the Cooperation in Competition Cases Agreement between Denmark, Iceland, Norway and Sweden. The Nordic competition authorities meet annually and form special working groups to facilitate the cooperation. All in all, the FCCA participates in approximately 30 different international working groups relating to competition policy.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

The FCCA's decision on whether it will initiate a second-phase investigation may not be appealed. Further, in the 2011 reform of the Competition Act, the right of the notifying party to appeal a decision whereby the FCCA has conditionally approved a transaction was removed.

As a general rule, other decisions of the FCCA made under the merger control rules may be appealed to the Market Court by such parties whose rights, obligations or interests the FCCA's decision has directly affected. Decisions of the Market Court may be further appealed to the Supreme Administrative Court.

Both the Market Court and the Supreme Administrative Court have confirmed that the FCCA's clearance decision does not normally have a direct effect on the rights, obligations or interests of the competitors of the undertakings concerned, and thereby the competitors do not generally have the right to appeal such decisions to the Market Court.

## Time frame

### 33 | What is the usual time frame for appeal or judicial review?

When decisions of the FCCA are appealed to the Market Court, the Market Court does not have a time limit on its decision making. However, when the FCCA proposes to the Market Court that a concentration be prohibited, the Competition Act sets a three-month time limit on the Market Court to rule on the case.

The Market Court did not rule on any merger control cases during the first half of 2019 or in 2018. The most recent ruling of the Market Court in a merger control matter is from 2013, when the Market Court rejected the FCCA's request to prohibit the creation of a joint venture by Uponor Oyj and KWH-Yhtymä Oy and approved the concentration subject to conditions. The decision was delivered in three months owing to the time limit set in the Competition Act for such decisions.

In other types of cases, the handling times in the Market Court vary greatly depending on the nature of the case. To give some examples, in 2009 the Market Court delivered a decision concerning an appeal against the conditions imposed by the FCCA on the clearance of an acquisition (acquisition of C More Group AB by TV4 AB, MAO:525/09), which was delivered in approximately 10 months. A similar decision on appeal against conditions imposed on the clearance of an acquisition delivered in 2008 (acquisition of E.ON Finland Oyj by Fortum Power and Heat Oy, MAO:123/08) took approximately 20 months. Interim decisions, such as interim injunctions concerning remedies, are typically made within one to three months. For example, in 2009, a decision concerning an application for an interim injunction to avoid implementing conditions imposed on the clearance of an acquisition while the appeal against the conditions was pending (acquisition of C More Group AB by TV4 AB, MAO:580/08/KR) was delivered in approximately two months.

The Market Court's decisions (eg, decisions to prohibit a transaction) are appealed to the Supreme Administrative Court. The handling times of the Supreme Administrative Court vary significantly depending on the nature of the case. The Supreme Administrative Court did not rule on any merger control cases between 2011 and the first half of 2019. In 2010, the Supreme Administrative Court ruled on only one merger control case, where it dismissed the FCCA's appeal against the Market Court's decision that removed the conditions imposed on the acquisition of E.ON Finland Oyj by Fortum Power and Heat Oy. The decision was issued by the Supreme Administrative Court in approximately 28 months. In 2009, the Supreme Administrative Court delivered one merger control decision concerning an interim injunction, where the decision was issued in approximately three months owing to its urgent nature. In all competition law cases decided by the Supreme Administrative Court in 2018, the average decision-making time was 35.8 months.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

During the first half of 2019, the FCCA issued a total of 13 merger control decisions. Two of these cases were approved subject to conditions after a second-phase investigation initiated in 2018 (*Parma Oy/AS TMB* and *Posti Group Oyj/Suomen Transval Group Oy*).

In 2018, the FCCA issued a total of 39 merger clearance decisions. Out of these cases, eight were moved to Phase II and five were cleared subject to conditions (*Eurofins Product Testing Lux Holding SARL/VTT Expert Services Oy/Labtium Oy*, *Colosseum Dental Group AS/Med Group Hammaslääkärit Oy*, *Avarn Security Holding AS/Prevent 360 Holding Oy* and the two cases cleared conditionally in the beginning of

2019). The number of cases taken to second phase thus continued to increase. During 2018 and the first half of 2019, the FCCA did not make any proposals to the Market Court to prohibit a concentration.

The FCCA has not officially identified any particular sectors or issues as its current enforcement concerns. However, on the basis of the recent decisions by the FCCA and the statements given by officials of the authority in the national media, it appears that the FCCA has a particular interest in the social and health services, grocery market, transportation, telecommunications, intellectual property rights, digital goods and services, energy, construction, primary production and competition neutrality of public sector services.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

The reform of the Competition Act, which was initiated in 2015, reached an important juncture on 14 March 2017 when a working group appointed by the Finnish Ministry of Economic Affairs and Employment (MEE) published its final report (Final Report). In the Final Report, the working group proposed a full spectrum of changes to the Competition Act concerning inspections, sanctions and information exchange between competition authorities, among others. The reform of the Competition Act takes place in two phases.

The first phase was initiated in December 2017 when the MEE submitted a draft government bill based on the Final Report for public consultation. The government bill was presented on 24 May 2018 and passed by the Finnish Parliament on 7 March 2019. The legislative package passed by the Parliament also includes amendments to the merger control investigation deadlines, which are described above under question 18. The amendments entered into force on 17 June 2019.

The second phase concerns the implementation of the Directive to empower the competition authorities of member states to be more effective enforcers and to ensure the proper functioning of the internal market (2019/1) (the ECN+ Directive). This phase is expected to proceed during 2019.

Another notable legislative development includes a government bill concerning the inclusion of sector-specific merger control rules for the social and healthcare sector in the Competition Act for a fixed term, which was submitted by the MEE on 15 June 2017. However, this bill has been declared lapsed.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The consistent trend towards the FCCA launching an increasing number of Phase II investigations continued in 2018 and 2019. In 2018, the FCCA moved eight transactions into Phase II, out of which five were cleared subject to conditions (*Eurofins Product Testing Lux Holding/VTT Expert Services/Labtium, Colosseum Dental Group/Med Group Hammaslääkärit, Avarn Security Holding/Prevent 360 Holding, Posti Group/Suomen Transval Group and Parma/AS TMB* (the last two of which were approved in the beginning of 2019)). The *Avarn/Prevent* case, which concerned manned guarding and security services, is interesting in that the Phase II deadline was already approaching its end when the FCCA declared the original merger control notification incomplete, forcing the parties to submit a new notification. The original notification had been submitted to the FCCA in late January 2018 and the FCCA did not declare it incomplete until mid-May, just two weeks before the end of Phase II. The merger was ultimately approved conditionally in October 2018, almost 10 months after the original notification

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had been submitted. This is a good example of the FCCA's new and more stringent approach to the assessment of completeness of notifications.

Two of the eight Phase II cases were approved unconditionally. Among the unconditional Phase II clearance cases was the *Terveystalo/Attendo* transaction, which concerned healthcare services. The case attracted attention because of, inter alia, the large ongoing social and healthcare reform in Finland. The FCCA spent six months investigating the merger, which is the maximum time currently allowed pursuant to the Competition Act. However, the FCCA ultimately cleared the merger without conditions in December 2018. Although there was a high number of conditional Phase II clearances during 2018, the *Terveystalo/Attendo* case shows that the FCCA may very well also approve mergers unconditionally following a lengthy review process.

The remaining Phase II case, a transaction between Danish Agro Machinery Holding and Konekesko, was withdrawn during Phase II, as it turned out that the European Commission had jurisdiction to review the transaction. The transaction had initially been notified to national competition authorities in Finland, Estonia, Latvia and Lithuania. The investigation was suspended shortly after the Phase II investigation had been initiated, when the FCCA received information that the European Commission might have jurisdiction to review the transaction. The parties ultimately withdrew their notification in February 2019 and confirmed that the transaction would be notified to the European Commission together with the transactions in the Baltics.

On 7 March 2019, the Finnish Parliament passed a bill on the amendment of the Competition Act. In respect of merger control, the legislative package includes amendments to the investigation deadlines changing them from calendar months to working days (see question 18). The amendments entered into force on 17 June 2019.

# France

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

French merger control rules are set out in the French Commercial Code (the Code).

An independent administrative authority, the Competition Authority (the Authority), has jurisdiction over merger control cases in France pursuant to the Code. However, the Minister for the Economy holds residual powers in two circumstances: even if the concentration is cleared by the Authority at the end of the first phase, the Minister can ask that the Authority open a second phase in-depth review of the concentration (although the Authority has discretion to act upon this request or not) and, in addition, whatever the final decision of the Authority at the end of the second phase, the Minister can substitute his or her own decision based on public interest grounds (see question 18).

On 10 July 2013, the Authority published revised merger guidelines (the Guidelines). Although non-binding, these should generally be followed by the Authority.

Following a public consultation in 2018, a decree simplifying the merger control procedure entered into force on 20 April 2019. Reflection is still ongoing as to whether to issue new merger control guidelines and the possible introduction of ex-post merger review (see question 35).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The French definition of 'mergers' is aligned with the definition set out in the EU Merger Regulation (EUMR). The French legislation thus applies to 'concentrations', which may occur when:

- two or more formerly independent undertakings merge; or
- one or several persons who already control at least one undertaking, acquire, directly or indirectly, control of all or part of one or several other undertakings.

#### 3 | What types of joint ventures are caught?

Joint ventures are treated under French law as under the EUMR. It follows that the creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity, constitutes a concentration (see the notion of 'full-function' joint venture in the European Union chapter). A concentration also occurs when a joint venture that was not initially full-function becomes fully fledged (*DCNS/Priou* case, 2016).

The French *Adrexo* case (2008) involved an interesting scenario. There, it was considered that a shift from joint control to sole control over a joint venture could, even in the absence of any change in its shareholding, result solely from the change of control over another joint

venture, independent from the first one, but owned by the same parent companies.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The notion of 'control' under French law is similar to that of the EUMR – control arises from rights, contracts or any other means that enable the party to exercise a decisive influence on the activity of an undertaking, be it on an individual or joint basis, and having regard to the factual and legal circumstances, in particular:

- ownership rights and possession of all or part of the assets of an undertaking; and
- rights or contracts that confer a decisive influence on the composition or the resolutions of the decision-making bodies of an undertaking.

De jure or de facto control is relevant to qualify a concentration (see, for instance, the 2019 *AG2R La Mondiale/Matmut* case concerning a de facto merger).

As under the EUMR, joint control based on strategic veto rights is also caught by the French merger control regime.

Minority and other interests that do not reach the standard of negative sole control or joint control are not subject to merger control.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Three alternative sets of turnover-based thresholds currently exist in France. Following a public consultation (see question 1), the Authority concluded in June 2018 that the existing thresholds remain relevant and that the introduction of a transaction value-based threshold would not be relevant at this stage.

Turnover calculations under French law are very similar to those set out in the EUMR and the Code expressly refers to article 5 of the EUMR on this subject. The turnover of an undertaking is thus calculated by taking into account the whole group to which the undertaking belongs, and the seller is not taken into account.

Firstly, French merger control applies where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €150 million;
- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in France exceeding €50 million; and
- the transaction is not caught by the EUMR.

Secondly, lower thresholds apply to concentrations involving undertakings in the retail trade (ie, where two or more parties to a concentration operate retail premises). French merger control is thus applicable where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €75 million;
- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in the retail trade sector in France exceeding €15 million; and
- the transaction is not caught by the EUMR.

Thirdly, lower thresholds apply to concentrations involving undertakings operating in French overseas departments and French overseas communities (ie, where at least one party to a concentration is active in one or more French overseas departments, in the Mayotte department, in the Wallis-et-Futuna islands or in the French overseas communities of Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy). French merger control is thus applicable where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €75 million;
- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover exceeding €15 million (this threshold is reduced to €5 million in the retail trade sector) in at least one French overseas department or French overseas community concerned. These €15 million or €5 million thresholds do not have to be achieved by all the undertakings concerned within the same overseas department or community; and
- the transaction is not caught by the EUMR.

The scope and interpretation of these tests are clarified by the Guidelines, which contain very specific additional rules and illustrations of how the thresholds should be applied and interpreted.

Retail trade is primarily defined in the Guidelines as the sale of goods to consumers for domestic use, including a number of non-exhaustively listed activities such as the sale of second-hand goods and a number of handicraft activities, but excluding, inter alia, banking, insurance or travel agency services and restaurants, as well as undertakings achieving all their turnover through online sales. Premises qualify as retail premises where more than half of the turnover achieved in these premises (of which at least one must be located in France) is generated through such activities (the Guidelines take the view that if this 50 per cent threshold is met, 100 per cent of the turnover achieved in the premises, retail and non-retail alike, must be taken into account for checking whether the €15 million threshold is achieved – presumably, the same approach should prevail with respect to the €5 million threshold).

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory, and no exceptions are provided for by the law.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Where the relevant turnover thresholds are met, mergers, including foreign-to-foreign mergers, fall under French merger control rules, and must be notified and obtain clearance prior to completion. There is thus no need to conduct a 'local effects test' as such. It is not relevant whether or not the parties are incorporated under French law or have subsidiaries in France (see question 27).

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Under French Treasury rules, foreign investments in France are unrestricted. However, certain foreign investments must be declared, for administrative and statistical purposes, to the Ministry for the Economy and the Banque de France.

Where the foreign investment concerns a 'strategic' French sector (such as a sector that might affect public order), prior authorisation may be necessary. In a number of 'strategic' sectors (eg, defence, security, weapons and ammunition, cryptology, security of information systems, gambling, private security, research against bio-terrorism, materials used for intercepting correspondences and conversations, dual-use technologies) prior authorisation is required. This list was extended in 2014 to include procurement of energy (including gas, electricity, hydrocarbons), procurement of water, transport, electronic communications, vital construction works and protection of public health, where the concerned activity is crucial for the integrity, security and continuity of one of these sectors. The scope of the 'strategic' French sectors was further extended by the Decree of 29 November 2018, which added the following new sectors: technical devices for the interception of communications, remote sensing or capture of computer database, security of information systems, research and development for activities relating to weapons, ammunition, powder and explosive substances intended for military purposes or for war materials and related materials, space operations, specific electronic and computer systems necessary for the exercise of public security missions, activities of data hosting and research and development activities in the areas of cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, dual-use goods and technologies. All such investments must be formally approved by the Minister for the Economy prior to implementation. For this purpose, non-European investments fall under stricter requirements than European investments with, for instance, an obligation to obtain prior authorisation when 33.3 per cent of either the shareholding or the voting rights in a French-registered company is exceeded. Following notification, the Ministry for the Economy has a two-month period to review the notified foreign investment. Such review entails a standstill obligation. Where an investment is deemed to threaten national interests, approval may be conditional upon the parties' implementation of specific remedies, including divestments, set in proportion to the importance of the national interest at stake. Failure to comply with the notification requirement entails very significant risks (in particular, a fine of up to twice the amount of the investment, nullity of the relevant agreements and an injunction to restore the status quo ante). Recently, the law 'Pacte' (Action Plan for Business Growth and Transformation), adopted on 11 April 2019, strengthened and expanded the powers of the Ministry for the Economy. In particular, the law strengthens the power of injunction of the Ministry and also empowers the Minister to impose interim measures if the protection of national interests is compromised or likely to be compromised (eg, suspension of the voting rights attached to the shares acquired by the investor without approval). This law also expands the Minister's powers to fine the investor in the event of an acquisition without prior approval, approval obtained by fraud, non-compliance with remedies or breach of an injunction (the Minister may, in these circumstances, impose a fine capped at the highest of the following amounts: twice the amount of the investment, 10 per cent of the target's annual turnover, €1 million for natural persons and €5 million for legal persons).

In addition, there are a certain number of sectors in which specific merger rules apply, such as:

- the audiovisual sector, in which, unless otherwise agreed in international conventions to which France is a party, a foreign legal entity may not hold more than 20 per cent of the capital or voting

rights of an audiovisual company that exploits an audiovisual communication system in French. There are also specific rules on cross-media ownership. If a concentration in the audiovisual sector is reportable to the Authority, the Authority must seek the opinion of the French Audiovisual Authority;

- the press sector, in which a single individual or legal entity may not control daily publications that represent more than 30 per cent of the total circulation on the national market of similar publications; for publications in French, the 20 per cent rule as described above applies;
- investment services and insurance (where specific authorisation from the relevant French authorities is required); and
- in the banking sector, a non-binding opinion would be requested from the Credit Institutions Committee during the Authority's second phase investigation.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The obligation to notify is not framed within any particular time limits. Filing may be made at any time once the project is sufficiently well advanced, and in particular is normally possible when the parties have entered into a gentlemen's agreement or signed a letter of intent, or after the publication of the purchase or exchange offer.

Sanctions for not filing fall on the notifying parties (acquirers) and are as follows:

- the parties may be directed, subject to a periodic penalty, either to file the concentration or to demerge;
- in addition, the Authority may fine the concerned party as follows (maximum fines):
  - corporate entities: 5 per cent of pre-tax turnover in France from the previous financial year (plus, where applicable, the turnover in France of the acquired party over the same period); and
  - individuals: €1.5 million.

Failures to notify reportable mergers have been fined repeatedly (eg, a €57,700 fine imposed in 2006 on Pan Fish for failure to notify the acquisition of Fjord Seafood, a €250,000 fine imposed in 2008 on SNCF for failure to notify the acquisition of Novatrans, a €392,000 fine imposed in 2012 on Colruyt France for failure to notify the acquisition of UGCA Unifrais, and a €400,000 fine imposed in 2013 on the Reunica group for failure to notify the merger with the Arpège group). A €4 million fine was imposed in 2013 on Groupe Castel for deliberate failure to notify the acquisition of six companies of the group Patriarche so as to accelerate completion of the operation. The highest administrative court ultimately reduced the fine to €3 million in 2016, considering that the Groupe Castel did not intentionally omit to notify and that it was cooperative with the Authority when notifying the relevant operations.

In the *Colruyt France* case, which was confirmed by the highest administrative court in 2013, the Authority clarified that such infringements are subject to a five-year limitation period from the date when the change of control materialises.

Finally, to comply with French labour law, the labour or employees' organisation (works council) of a French company involved in a merger has to be informed and consulted before signing of the transaction and a meeting of the works council is compulsory following the publication of the notification release on the Authority's website.

#### 10 | Which parties are responsible for filing and are filing fees required?

Those subject to an obligation to notify are entities that acquire control of all or part of an undertaking. In the case of the creation of a joint venture, the parent companies are under an obligation of joint notification.

There is no filing fee.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Filing has a suspensive effect: a concentration that requires notification must not be completed before approval has been obtained from the Authority. In addition, the powers of the Minister for the Economy to intervene within a certain period (see question 18) may extend the suspension period. If the Authority clears the transaction expressly in the first phase, it should a priori be possible to complete the transaction without waiting for the end of the five-day period granted to the Minister to request the opening of a second phase in-depth review. If the time period for the Authority to authorise the transaction in the first phase has expired (tacit authorisation), the transaction remains suspended until the end of the Minister's five-day period. Should the Authority authorise the transaction in the second phase, whether the Minister intervenes or not, the transaction should not be completed before the end of the Minister's 25-day period. Should the Minister for the Economy ultimately intervene, transactions must not be completed before the Minister has issued its decision.

Derogations may be granted to make it possible to proceed with the completion of all or part of the concentration without awaiting the decision of the Authority, or of the Minister as the case may be, provided that these derogations are necessary and duly justified. Derogations, which remain exceptional, are generally granted in cases where the target is subject to insolvency proceedings. The law dated 6 August 2015 provides that exemption from the standstill obligation may be granted subject to conditions and that the exemption will cease to be valid if the Authority does not receive complete notification of the transaction within three months of its implementation. In 2017–2018, the Authority granted derogations in several cases. It is noteworthy that, in the *GPG/Tati Group* case, the Authority granted the derogation and subsequently required structural and behavioural remedies to approve the concentration and that, in the *Financière Cofigeo/groupe Agripole* case, the Authority granted the derogation and then imposed divestment injunctions after a Phase II investigation.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing before clearance (gun jumping) is considered as equivalent to an absence of filing and triggers the same sanctions as set out in question 9.

On 8 November 2016, the Authority jointly fined Altice Luxembourg and SFR Group €80 million for having prematurely implemented two mergers that had each been notified and cleared in 2014 (ie, the acquisition of SFR by Numericable (an Altice subsidiary) and that of OTL Group by Numericable).

This decision, which followed complaints from competitors and dawn raids, is the first decision of the Authority dealing with gun jumping (ie, completion of merger before clearance) practices and was then unprecedented internationally in terms of the scale of the practices concerned and of the amount of the fine imposed (which is, however, the result of a settlement).

This heavy fine in particular reflected: the accumulation of various gun jumping practices, the fact that the practices involved all the targets' activities and that they started before the notification and occurred throughout the merger control proceedings, the fact that certain practices related to competition law risks identified by the Authority in one clearance decision, the scale of the transactions concerned by the infringements (two large mergers were affected), and the fact the Authority found that the behaviour was deliberate.

The gun jumping practices sanctioned by the Authority in the *Altice* case notably consisted of:

- the intervention by Altice in SFR and OTL's operational management before clearance:
  - in the SFR transaction, the contract provided for an 'ordinary course of business' limitation, but the latter was applied in the sense that 'over the threshold' decisions were nevertheless permitted with the acquirer's prior authorisation; therefore, the actual implementation of the contract amounted to gun jumping; and
  - in the OTL transaction, the 'ordinary course of business' limitation had very low financial thresholds and the contracts provided that 'over the threshold' decisions were only possible with the acquirer's prior authorisation;
- exchange of confidential information: Altice and SFR exchanged large quantities of strategic information in readiness for their integration. Such information was confidential and concerned individualised data, SFR's recent commercial performance and forecasts for the coming months. In the OTL merger, Altice set up an economic performance reporting mechanism allowing it to access weekly OTL's commercially sensitive information (monitoring comparable to that exercised by a controlling shareholder);
- far-reaching closing preparation and premature anticipation of commercial opportunities: Altice asked and SFR agreed to suspend a promotion during the standstill period and also replaced Vivendi (SFR's owner before the transaction) in the acquisition of a third-party operator (OTL). The Authority accordingly held that SFR ceased to behave as an economic entity independent from Altice. Moreover, the two undertakings have jointly and systematically studied new commercial opportunities or the extension of existing contracts. The decision reports examples of two new projects that started with the announcement of the transaction (for instance, Altice and SFR took advantage of the suspensive period to negotiate and operationally prepare the launch of new offers under the SFR brand and using Numericable's network); and
- anticipated assignment of managers: OTL's managing director began to carry out his duties within the SFR-Numericable group before clearance and was involved in SFR's new commercial projects and also received commercially sensitive information.

The Authority, however, indicated after the decision was released that each of the above practices would not necessarily constitute a standalone gun-jumping infringement and that there had been an accumulation effect. In particular, pre-closing covenants should not be regarded as automatic gun jumping, and an assessment of the threshold is always necessary.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The fact that the transaction is foreign-to-foreign is irrelevant and sanctions would apply in cases of closing before clearance.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No specific solutions permitting closing before clearance are provided for under French law in foreign-to-foreign transactions, other than the general possibility available in any transaction to seek from the Authority a derogation from the suspension requirement (see question 11 and, for the sanctions, question 12).

#### Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

Public bids may fall within the scope of French merger control if they involve stocks or shares that confer sole or joint control over an undertaking listed on the French Stock Exchange and otherwise meet the applicable jurisdictional thresholds. As a derogation to the suspensive effect of the merger control process, the stocks or shares in question may be purchased and transferred, so long as the acquirer does not exercise the voting rights attached to them before the Authority clears the transaction. Where a transaction is realised in stages, namely, an acquisition of a first block of shares triggers an obligation to launch a public bid to purchase the rest of the share capital, the derogation applies to both stages; therefore, both the shares acquired privately and those acquired through the public bid can be transferred but are subject to the obligation not to exercise the voting rights.

Therefore, under merger control rules, a public bid may be approved by the French Stock Exchange regulatory authority and the stocks or shares transferred before the Authority's authorisation is granted. Theoretically, therefore, a public bid could be cancelled, or substantially modified, on competition law grounds after having been implemented, possibly obliging the acquirer to divest the stocks or shares purchased.

However, a provision making the offer conditional upon clearance of the transaction by the competition authorities (the European Commission, the competition authorities of EEA member states, US competition authorities and any other foreign competition authority provided that its merger control procedure is compatible with a maximum time frame of 10 weeks) at the end of the first phase of the review process can be inserted into the offer documents. In such case, the offer lapses and becomes void if any of the relevant competition authorities opens a second phase review. For these purposes, the offer period is extended until the end of the first phase.

#### Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filings have notably to include:

- a copy of the merger agreement or draft agreement and a memorandum giving details of the legal and financial aspects of the transaction and its likely impact, in particular on competition;
- the identity of the parties concerned (including the entities economically linked to them);
- a definition of the relevant product and geographic markets, as well as the criteria used to identify any substitutable products or services; and
- a description of the position in the relevant market of the parties involved in the transaction.

Filing most often involves the provision of detailed information about the parties and their business. The time necessary to prepare a non-complex filing will, in general, range from 15 days to a month, depending on the

size of the transaction, the markets concerned and the willingness of the parties to the transaction to cooperate. Filings also have to include a declaration certifying that the data provided is complete and accurate.

A distinction must be drawn between the markets 'concerned' by the concentration and those that are 'affected' by the transaction.

Markets 'concerned' are relevant markets on which the concentration will have an influence, either directly or indirectly. 'Affected' markets are those markets on which the notifying parties (or entities economically linked to them and that operate on a downstream or upstream market) together have a market share of 30 per cent or more (this threshold was raised from 25 to 30 per cent by the Decree of 18 April 2019 simplifying the notification of a merger to the Authority). The information required for the notification is much more detailed if the concentration involves 'affected' markets.

The Guidelines provide that transactions that should not, *prima facie*, raise anticompetitive issues may be eligible for a simplified procedure with less onerous information requirements.

In the Guidelines, the Authority emphasises the benefits of the simplified procedure and lists its conditions, allowing the concerned parties to obtain the transaction's clearance within a shorter time period (of 15 to 20 working days on average) where no competition issues are anticipated (ie, where there is no horizontal or vertical overlap and where the parties are not active in neighbouring markets). Each year, approximately half of the filings reviewed by the Authority are dealt with under the simplified procedure.

An online notification form is currently in its testing phase and should be operational shortly. It will only concern mergers that benefit from the simplified procedure in its current form.

The notifying party should indicate in the notification which information constitutes business secrets so that this information be treated as confidential.

Since the entry into force of the Decree of 18 April 2019, the parties only have to submit one copy of the filing (annexes enclosed) to the Authority. This decree also simplifies the financial data of the parties to be provided to the Authority.

Providing inaccurate information or omitting information may result in fines up to 5 per cent of the undertaking's turnover (taking into account the circumstances leading to the omission or misrepresentation, as well as the conduct of the undertakings with regard to the Authority). In addition, the clearance decision may be withdrawn, meaning that the parties must notify the transaction again within one month of the withdrawal (otherwise a fine may be imposed for gun jumping).

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

The Mergers Unit of the Authority examines concentrations notified to the Authority.

Informal pre-notification contacts are often necessary and highly recommended in the Guidelines to identify (and possibly resolve) potential issues. The Authority invites the parties to get in touch with its services at the earliest opportunity to anticipate any possible competition concerns (see question 35). Although not compulsory under the Code, pre-notification has now become systematic in practice.

Formal notification triggers the first phase review. The Authority may request information not only from the parties, but also from other market players, including the parties' suppliers, customers and competitors. This is done notably through 'market tests' performed by the Authority. There is also a notice posted on the Authority's website to allow for spontaneous comments by third parties. In addition, the Authority has the power to conduct onsite investigations, although the

use of such powers remains exceptional. In cases raising competition concerns, the parties may propose remedies to avoid a second phase.

Should the Authority consider that a case raises major competition difficulties or should the Minister decide to request a second phase review of a case despite the clearance granted by the Authority at the end of the first phase (and should the Authority accept such request), an in-depth investigation is conducted by the Authority's case handlers, who generally request additional information from the parties, in writing and, possibly, during hearings. The case handlers may also submit questions to the parties' suppliers, customers or competitors and, where necessary, conduct onsite investigations. The case team issues a report to which the parties may reply in writing, and a formal hearing is then organised at the end of the second phase, during which third parties (customers, experts, etc) may be heard in the absence of the notifying parties. In its final decision, the Authority can authorise the concentration with or without commitments proposed by the parties. It can otherwise prohibit the transaction. It may also, if need be, take injunctions that impose conditions that were not proposed by the notifying parties (in the 2018 *Financière Cofigeo/groupe Agripole* case, the Authority used, for the second time ever, its injunction power: in the absence of suitable commitments from the parties, it granted clearance subject to appropriate remedies it imposed to protect competition).

Finally, the Minister for the Economy has the power, after a second phase decision of the Authority, to review the case and to take the final decision on public interest grounds, which it did for the first time in 2018 in the *Financière Cofigeo/groupe Agripole* case (see question 22).

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The Authority's formal examination of a concentration takes place in up to two phases and the clearance timetable is as follows.

#### First phase (maximum 60 working days, unless clock is stopped by the Authority)

- This phase is common to all concentrations. The Authority may authorise the concentration within 25 working days of the date at which the notification is considered complete.
- This review period may be extended for an additional 15 working days if the notifying parties submit commitments.
- Two 'stop-the-clock' procedures exist:
  - the parties may ask for suspension of the review for a period of up to 15 working days if necessary for, *inter alia*, the finalisation of commitments. In this case, the first phase can last up to 60 working days (including the five working days granted to the Minister for the Economy under its intervention powers); and
  - the Authority may suspend the review period where the notifying parties fail to promptly inform the Authority of a new relevant fact or fail to provide requested information within the allocated deadline, or where third parties fail to do so for reasons pertaining to the notifying parties. Such a suspension lasts as long as its cause exists.

As explained in question 16, where no competition issues are anticipated, the simplified procedure allows the parties to obtain clearance within a shorter time period (ie, on average after 15 working days following the filing of a complete notification).

The Authority may also shorten its first phase review when one of the undertakings is facing financial difficulties or is subject to legal proceedings.

At the end of the first phase, the parties must still comply with the waiting period granted to the Minister (five working days, see below) if

the Authority does not adopt a decision in writing but instead does not issue any decision by the end of first phase (ie, grants tacit approval).

### Second phase (maximum 130 working days from the opening of the second phase, unless clock is stopped by the Authority)

- Where, after a first-phase review, the concentration raises serious doubts as to its compatibility with competition on the relevant markets in France, the Authority will initiate an in-depth examination of the concentration. This will be the case where the concentration may lead to the creation or strengthening of a dominant position or the creation or strengthening of purchasing power that may lead to a situation of economic dependence for suppliers. The factoring of efficiencies into the competitive assessment may be also considered.
- The Authority will issue its decision within 65 working days of the opening of the second phase. The parties may submit commitments. The period of 65 working days is maintained if the commitments are submitted within 45 working days following the beginning of the review period. If the commitments are submitted less than 20 working days from the expiry of the 65-working-day deadline, the review period is extended by 20 working days from the receipt of such commitments. This extension is also applicable in case of a modification of already submitted commitments proposed less than 20 working days from the expiry of the 65-working-day deadline. In any case, the review cannot extend further than 85 working days.
- Two 'stop-the-clock' procedures exist:
  - the parties may ask for suspension of the review for a period of up to 20 working days if necessary for, inter alia, the finalisation of commitments; and
  - without any time limit, the Authority may also suspend the review if the parties fail to inform it of a new fact as soon as it occurs or fail in their duty to provide information or if third parties, as a result of the parties' negligence, fail to provide the requested information. The review period starts to run again as soon as the issue giving rise to the suspension is resolved.

At the end of the second phase, the parties must still comply with the waiting period granted to the Minister (25 working days, see below).

### Powers of the Minister for the Economy

The Minister for the Economy no longer has jurisdiction over merger control. However:

- after the first phase, within five working days after the notification of the Authority's clearance decision to the Minister, the latter can ask the Authority for an in-depth examination of the case. However, the Authority has a discretion as to whether to allow this request or not and has indicated that it would decide on the fate of such request within five working days from receiving it; and
- after the second phase, within 25 working days from the notification of the decision of the Authority to the Minister, the latter has, at his or her initiative, the power to review the case and take the final decision on the concentration on public interest grounds. These may include industrial and technological progress, companies' competitiveness in an international context and social welfare, but not competition grounds. The law dated 6 August 2015 provides that, where the parties have failed to comply with the commitments provided for in the Minister's decision in a timely fashion, the latter may withdraw his or her decision (thus obliging the parties to re-notify the transaction within one month), or enjoin the parties to comply with the relevant commitments subject to periodic penalty, or enjoin the parties to comply with new injunctions (replacing the initial commitments that were not complied with) subject to periodic penalties.

Since these powers were introduced in 2008, the Minister has used its power to review a merger on public interest grounds only once (see question 22).

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for clearance is whether the transaction significantly lessens competition, especially by creating or strengthening an individual or collective dominant position. Unilateral effects, even in the absence of dominance, are taken into account in practice (see question 21). In addition, at the end of the second phase, the Minister is entitled to call the case and take into account the economic and social effects (ie, effects other than the impact on competition) of the concentration to prohibit or authorise it (see question 22).

#### 20 | Is there a special substantive test for joint ventures?

No, there is no special test for joint ventures. A joint venture performing, on a lasting basis, all the functions of an autonomous economic entity, is treated like any other type of merger. However, possible coordination issues between parent companies will be examined.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The Authority broadly uses the same analytical framework as the European Commission. In addition to the level of market shares, it may take into consideration a wide variety of elements in its assessment of unilateral and coordinated effects in horizontal, vertical and conglomerate mergers.

In the *Castel/Groupe Patriarche* second-phase case (2012) the Authority used the upward pricing pressure test to analyse the incentives of the new entity to increase the prices of wines. The 2013 Guidelines insist on the increasing importance of such tests in the competitive assessment of transactions.

The Authority used the gross upward pricing pressure index (GUPPI) test in the *Casino Guichard-Perrachon/Monoprix* (2013) case as part of its analysis to impose divestments (see question 25). Conversely, in *Orlait/Terra Lacta* (2014), the Authority also used the GUPPI test to conclude that a price increase was unlikely to result from the merger, in view of the highly competitive market structure and the strong countervailing buyer power.

To quantify online competition in local markets, the Authority used for the first time a 'scoring method' in the recent *Fnac/Darty* case (2017), in addition to the market shares and GUPPI methods. Based on diversion evidence, each competitor was thus applied a weight (or 'score') reflecting the different levels of competitive constraint they imposed on the parties to the merger.

In *Elsan/MediPôle-Partenaires* (2017), in the healthcare sector, the Authority for the first time took account of the impact of the concentration on the quality of the medical treatment offer and required corresponding divestiture commitments. The assessment of non-price effects of mergers is, however, not unprecedented. For instance, the Authority previously took into account media pluralism issues in its merger assessment.

Under the in-depth investigation (Phase II) of the *Axel Springer Group (SeLoger.com)/Concept Multimédia (Logic-Immo.com)* merger, which, for the first time, involved two online platforms, the Authority took into account network cross-effects and focused particularly on the importance of data.

Market definition is sometimes key in assessing the possible theories of harm and the Authority may accept innovative market definitions. In *Fnac/Darty* (2016), following an in-depth investigation, the acquisition of Darty by Fnac was cleared by the Authority subject to the divestment of six stores, to maintain sufficient competition in the market for retail distribution of electronic products in Paris and its suburbs. This was the first case in which the Authority has ever defined a relevant market as including both in-store and online retail channels. It held that competitive pressure exerted by online sales had become significant enough to be integrated in the relevant market, whether it comes from pure players or from the bricks and mortar stores' own websites. In 2019, the Authority also implemented this approach to the distribution of toys in the context of the *Luderix International (Picwic)/Jellej Jouets (Toys'R'Us)/undivided ownership Mulliez*. It considered that the characteristics of the toy distribution market justified analysing online sales and physical outlets as belonging to one and same relevant market, which was the first time such a conclusion was reached in the EU in the toy sector.

However, such conclusion as to online and physical sales channels is not systematic. For instance, in *Sarenza/Monoprix* (2018) and *André/Spartoo* (2018), while the Authority took into account the competition exerted by e-commerce players on the brick and mortar distributors, it did not conclude that there was a single relevant market for both channels. More recently, in *Dimeco/Cafom group* (2018), concerning a merger of two domestic electrical goods distributors active in Guadeloupe, the specificities of the French overseas markets (notably the low development of online sales and the insular location of Guadeloupe) led the Authority to define the relevant markets as brick-and-mortar retail points only.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The Authority only considers competition issues in its assessment, possibly with efficiency defence arguments.

However, since 2008, at the end of a second phase, the Minister for the Economy may decide to examine the case. Although the Minister cannot challenge the findings of the Authority on competition analysis, he or she can make a decision based on grounds of public interest justifications other than the maintenance of competition. Notably, the Minister's decision may be based on factors such as industrial development, maintaining of employment or the competitiveness of the undertakings in international competition. The decision of the Minister will then supersede that of the Authority.

For the first time, in June 2018, the Minister used this power in the *Financière Cofigeo/groupe Agripole* transaction. In this case, the Authority had cleared, following an in-depth investigation, the acquisition by Financière Cofigeo of certain securities and assets of Agripole group (carrying a ready-made meals business), subject to divestment injunctions (see question 17). On the very day of the clearance, the Minister announced that the transaction needed to be assessed on public interest grounds, in particular the maintaining of employment and industrial development. The Minister stressed that his review was taking place in the exceptional context of the serious fraud that led to the financial difficulties of the target, which required state intervention. On 19 July 2018, the Minister cleared the transaction, without divestment but subject to the maintenance of employment within the group for two years. The Minister considered that the divestment would have led to a material risk for employment. Besides, the Minister considered that his decision would allow Cofigeo to stimulate the markets on which it is active, which would have a positive impact on the whole sector.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Code requires the Authority, during the second phase, to assess whether the transaction makes a sufficient contribution to economic progress to offset the damage to competition. To be taken into account, efficiencies must be both quantifiable and verifiable, they must be specific to the concentration, and at least some of their benefit must be passed on to consumers. The Authority can compel the parties to respect requirements aimed at ensuring that a sufficient contribution is made to economic progress to offset the damage to competition.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

In addition to the standard a priori merger control review further to a notification, the Authority also has ex-post merger control powers for all concentrations in the following strictly defined scenario: the Authority may, in the event of an abuse of a dominant position or of a state of economic dependence, enjoin by a reasoned decision the undertaking or group of undertakings concerned to amend, supplement or terminate, within a specified timetable, all agreements and all acts by which the concentration of economic power allowing the abuse was brought about. This provision is applicable to concentrations below the notification thresholds that were not notified, as well as to those that have been subject to a merger control procedure. Under the former merger control regime, the Minister for the Economy, who used to be in charge of merger control in France, enjoyed similar powers, but used these only once, in 2002, to terminate joint venture arrangements on the market for drinking water supply. It must be highlighted that the Authority is currently considering the enlargement of its ex-post merger control review powers (see question 35).

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Between filing and the final decision of the Authority, the notifying parties may submit amendments to the transaction to remedy competition issues. The parties may put forward various remedies (behavioural as well as structural), such as commitments to sell assets to third parties (those third parties should then be approved by the Authority), to execute a contract (eg, a trademark or patent licence), to amend conditions of sale, to keep the Authority informed of any change in the structure of the relevant market (such as an increase in the parties' market share) or even sometimes to freeze their market share. Remedies can be submitted either in Phase I or in Phase II. However, not all second-phase investigations end in remedies, as shown by the *Axel Springer/Concept Multimedia* (2018) merger that was ultimately cleared without commitments.

The Authority can delay the concentration until the commitments are fulfilled. In the case of a divestment commitment, the parties may be required to prepare an equally or more effective alternative solution ('crown jewels'), where the initial divestment turns out to be either unlikely or impossible.

The Guidelines introduced a standard form of divestiture commitments and a standard form of trustee mandate to habilitate a trustee to monitor and audit fulfilment of the commitments.

A few recent cases illustrating the possible scope of remedies in France are set out below.

In *Vinci/Aéroports de Lyon* (2016), the Authority held that the vertical integration between a public works company and an airport management company would be harmful to competition in the absence of genuine competition in the context of calls for tender. Accordingly, Vinci undertook:

- to ensure greater transparency during the invitations to tender;
- to ensure a clear separation between members of the purchasing committee and the other Vinci group entities responding to invitations to tender; and
- to provide a list of the invitations to tender issued and of the successful bidders to a trustee.

These commitments were made binding until 2047 (ie, for the entire duration of the Lyon airport management and operating concession).

In *Elsan/MediPôle Partenaires* (2017), the Authority accepted alternative divestments (ie, the notifying party had to divest one healthcare facility it could choose among several identified in a given area, the divestment of any of them being able to solve the competitive concerns identified).

In *La Poste/Suez* (2017), the Authority cleared, subject to conditions, the creation of a full-function joint venture between La Poste and Suez. Interestingly, the commitments taken by the two merger parties for the creation of the joint venture were similar to those made legally binding, on the same day, by the Authority to close an antitrust procedure involving La Poste in the same sector (collection and recovery of office non-hazardous waste). In both cases, the identified concerns involved a risk of use of La Poste's competitive advantages linked to the universal postal service, that could not be reproduced by competitors, and issues around services possibly priced below cost. Similar behavioural commitments have been submitted in the two proceedings and, given the concomitance of the two cases, the Authority specifically ensured that the antitrust commitments would not be deprived of their effect as a result of the implementation of the merger.

In the retail sector of gardening, DIY, pet and landscaping products, the Authority cleared the *Groupe InVivo/Jardiland* transaction (2018) subject to commitments to divest six outlets and to terminate five franchise contracts, which must be taken on by one or more competing chains. Alternative divestment and termination (crown jewels) commitments were also agreed upon.

In 2018, the Authority cleared under conditions the creation of the joint venture Cash Paris Tax Refund by Global Blue and Planet Payment. The joint undertaking was to operate at the end of the refund process, acting as a 'desk' carrying out the VAT refund procedure for tourists. Its clients would be its parent companies and their competitors. The establishment of the joint venture, which would access information on the parent companies and their competitors, could have enabled its parent companies to coordinate their behaviour in the upstream markets of VAT refund services in France. To remedy this issue, a commitment was taken to erect a 'Chinese wall' between the common undertaking and the parent companies to bar the latter from access to strategic information on their competitors.

In 2019, and for the third time ever, the Authority required a 'fix-it-first' commitment to clear the acquisition of Alsa by Dr Oetker (Ancel) (2019). The new entity would have become the leader in the market for production and marketing of dessert mixes to supermarkets and hypermarkets, with a market share greatly superior to 50 per cent, by combining the two main brands of this market (Ancel and Alsa). Dr Oetker thus committed to enter into an exclusive trademark licensing agreement for Ancel dessert mixes for five years, renewable once. The Authority agreed the proposed licensee before giving its clearance. To further ensure the existence of a credible alternative supplier in this

market, Dr Oetker also notably committed to enter into an outsourcing contract with the licensee (for the supply of Ancel dessert mixes products) for a transitory period of three years, to avoid supply disruption and to enable the licensee to immediately stimulate competition, independently of the development of its own production capacities.

More recently, in *CDG Express/RATP Dev/Keolis* (2019), because the Authority identified a risk of tie-in sales between the future CDG (Paris airport) Express ticket and baggage registration and transport services (ie, the new entity may rely on its position on the market for the provision of public passenger transport services to sell, at the same time as a ticket for the CDG Express and on preferential terms, a check-in and baggage service to and from the airport), the parties committed to entrust the operation of the baggage service to an independent partner with autonomy in the determination of its commercial policy. This commitment was for the duration of the public service contract (ie, 15 years from the effective date of bringing the CDG Express connection into service).

From May 2018 to April 2019, the Authority was fairly active in the field of commitments, with seven clearances subject to remedies or injunctions, including one conditional clearance in Phase II (*Cofigeo/Groupe Agripole* merger in July 2018).

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Undertakings can be submitted to the Authority at any time from the notification of the case, during the first 25 working days in the first phase and 65 working days in the second phase. Where the parties submit undertakings in the first phase, the review period of 25 working days is extended by 15 additional working days. Parties may also ask for a 'stop the clock' of up to 15 working days to finalise undertakings. During the second phase, where undertakings are submitted or modified more than 45 working days after the opening of the second phase, such in-depth review period is extended by 20 working days from the date when such remedies are proposed. On a few occasions, the Authority required 'fix-it-first' commitments requiring the notifying party to identify, prior to the adoption of the decision, a suitable acquirer to take on the asset that it has committed to divest.

Undertakings imposed on the parties by the Authority (ie, injunctions) aim at remedying anticompetitive effects of the operation. Moreover, remedies can be imposed by the Minister for the Economy to deal with other negative consequences of the operation (see question 22).

- Failure to implement a remedy can result in the imposition of fines:
- for corporate entities – up to 5 per cent of their turnover in France in the previous financial year (plus, where applicable, the turnover in France over the same period of the acquired party); and
  - for individuals – up to €1.5 million.

Moreover, the Authority may also:

- withdraw the decision authorising the operation. In such case, and except where the situation that existed prior to the concentration is restored, the parties will be bound to notify the transaction a second time within one month of the withdrawal of the decision;
- enjoin the parties to comply, within a certain deadline, with the orders, injunctions or undertakings provided for under its decision, under periodic penalty; and
- enjoin the parties, subject to periodic penalty, to comply with new injunctions or orders that will replace the initial commitments that were not complied with.

In 2007, a company was sanctioned for the first time for a breach of its commitments with a fine of €100,000. A divestment was also required.

In 2008, a breach of merger remedies was sanctioned in the *TF1/AB Group/TMC* case. TF1 and AB were enjoined to comply with the unimplemented commitments within one month, under a daily penalty of €5,000. The companies were also fined a total amount of €265,000 for breach of remedies.

In 2011, further to remedies agreed by Canal Plus in the 2006 *Vivendi Universal/CanalSat/TPS* case, the Authority considered in the course of a monitoring process that Canal Plus had breached several remedies and therefore decided to withdraw its authorisation and to fine the company €30 million. Vivendi and Canal Plus then re-notified the operation and the Authority opened a second-phase investigation in March 2012. In July 2012, the Authority finally cleared the operation subject to several injunctions. The case was confirmed on appeal. The Authority's decision provided that the injunctions, taken for five years (until July 2017), could be renewed for five additional years (2017–2022), should the circumstances warrant it. Against this background, the Authority launched in July 2016 a public consultation to determine whether these obligations in force since 2012 should be lifted, adapted or renewed. The Authority's analysis revealed that Canal Plus's position is increasingly challenged, leading the Authority to modify on 22 June 2017 the injunctions initially imposed: certain injunctions have been lifted, or adapted to take into account the evolution of the markets, while others have been maintained. The new framework shall be applicable until 31 December 2019.

In April 2016, the Authority imposed a fine of €15 million on Altice/Numericable group for breach of remedies agreed in the 2014 *Numericable/SFR* case, relating to the divestment of Outremer Telecom. The Altice/Numericable group had undertaken to maintain the viability, market value and competitiveness of this business to favour its acquisition by a competitor. It subsequently appeared that Outremer Telecom's tariffs rose by 17 to 60 per cent, giving customers the opportunity to terminate their subscriptions without incurring cancellation fees. As a result, cancellation rates were three times higher in January 2015 than in January 2014. This constituted a reversal in Outremer's business strategy aiming at capturing new customers through aggressive competitive pricing. The Authority considered that this new strategy put the competitiveness of Outremer Telecom's offer at considerable risk, thus breaching the commitments.

In addition, in March 2017, the Authority jointly fined Altice and SFR Group €40 million for breach of other remedies made binding under the same 2014 *Numericable/SFR* decision. In this case, SFR had basically committed to continue to perform the contract it had entered into with Bouygues Telecom for their co-investment in the development of optical fibre infrastructure in high-density areas. However, the Authority held that Altice/SFR Group had only very partially fulfilled this commitment. This case was also the first in which the Authority imposed injunctions subject to periodic penalty payment, to further secure their implementation.

In July 2018, the Authority for the first time fined a company for non-compliance with structural commitments consisting of divesting assets within a given deadline. It fined Fnac Darty Group €20 million for failing to divest three stores, as per the commitments, and ordered it to divest two specific stores in lieu of those that were not disposed. The Authority notably considered that, confronted with difficulties in finding a buyer for these three other stores, it was Fnac Darty's responsibility to take the appropriate measures to fulfill its commitments (eg, by asking the Authority to substitute other stores for those it wasn't able to sell).

It is also possible for the Authority to review remedies adopted for clearance of an operation in view of changes in circumstances. The Authority used this possibility for the first time in the *Bigard/Socopa* case (2011) where it authorised the enforcement of a review clause included in the clearance decision, changing a trademark licence remedy into a trademark sale remedy. However, in this case, the Authority also

fined Bigard €1 million for various practices aimed at reducing the value of the trademark and at discouraging candidates.

As part of the re-examination of the commitments submitted in relation to the acquisition by Vivendi and Groupe Canal Plus (GCP) of Direct 8 and Direct Star, the Authority had to decide upon a proposal of modified commitments formulated by GCP. The Authority's investigation revealed that Canal Plus's position is increasingly challenged, leading the Authority to modify in June 2017 the initial commitments: certain of them have been lifted, or adapted to take into account the evolution of the markets, while others have been maintained. The new framework applies until the end of 2019. This review was made in parallel to the re-examination of the injunctions imposed by the Authority on GCP in the context of the *Vivendi Universal/CanalSat/TPS* case.

Likewise, in 2019 the Authority had to review remedies made binding in 2014 for the acquisition of Mediaserv (now Canal + Telecom) by Canal Plus Overseas (now Canal + International) for an initial duration of five years after which a new competitive analysis would be performed to examine whether or not they should be maintained. The Authority reviewed the new commitments proposed by Canal + and market tested them, concluding that certain existing obligations should be maintained, while others could be eased. All the commitments maintained or modified were renewed for a period of five years (ie, until 2024).

The Authority is clearly minded to exercise a more systematic ex-post control of the implementation of undertakings.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign mergers do not prevent the Authority reviewing the merger and, if necessary, requiring remedies (eg, the behavioural injunctions imposed in the *Boeing/Jeppesen* case (2001) and the divestment undertaking in the *GE/Invision Technologies* merger (2004)).

For obvious ease of enforcement purposes, remedies concerning the French national market are normally preferred. However, specific provisions exist for international coordination on remedies in cases where the affected markets are wider than national, or where competition on a single product market is affected in various countries.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

French decisional practice is not as developed as the European Commission's on the issue of ancillary restraints. However, it was considered on a number of occasions that restrictions that are both necessary and directly related to a merger are covered by the clearance decision. As to the types of arrangements that may be covered, national practice closely follows (and often expressly refers to) the approach of the European Commission.

The Guidelines for the first time dedicated specific provisions to ancillary restraints. The Authority is therefore ready to treat as ancillary restrictions provisions such as non-compete clauses in favour of the purchaser (provided their scope and duration are not excessive), licence agreements as well as purchase and supply contracts (provided they are of a limited duration and are not exclusive).

The Authority has used these provisions and examined ancillary restraints in several cases (eg, *Visa Europe/SAS Carte bleue* (2009), *Terrena/Groupe Bigard* (2010), *GFI-Bus/Thalès 'Business Solutions'* (2012), *Roullier/Fertilore* (2013) and *Carrefour/Unibail* (2014)).

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Authority may interview any third parties during the review of the concentration and it may also seek comments from any person who may be considered relevant for the review process. The Authority may hear third parties in the absence of the notifying parties. Moreover, the works council (employees' representative body) of the notifying parties shall be heard by the Authority at their request.

Third parties, such as complainants, are not directly involved in the merger control process as they have no automatic rights to be consulted or informed beyond the general information published on the Authority's website concerning pending procedures. Third parties do not have access to the notification file, but they can intervene through their response to the 'market test' that may be carried out by the Authority in the first and second phases (and, if the notifying party agrees, even in the pre-notification phase). Third parties may also challenge the Authority's decision before the administrative courts. There is, however, no legal obligation for the Authority to consult third parties when the commitments are amended. In the 2014 *Wienerberger* case, following the 2013 *Bouyer-Leroux/Imerys* clearance decision, a third party, the Wienerberger company, challenged the legality of the Authority's decision as it had not been consulted on the modified commitments submitted by the notifying parties. The complaint was dismissed on appeal by the French Supreme Administrative Court.

In 2018, the Authority opened an in-depth examination into the *Axel Springer Group (SeLoger.com)/Concept Multimédia (Logic-Immo.com)* merger in the online property portal sector. To evaluate the capacity of current potential competitors to stimulate competition following the merger of two of the main operators in the French online property advertising market, the Authority launched a broad consultation, analysed numerous internal documents of the parties and, for the first time, issued an online questionnaire to more than 30,000 estate agencies.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Information on previous and pending decisions of the Authority is publicly available on the Authority's website. When a transaction is notified, a brief release is published on the Authority's website. It includes the identity of the parties concerned, the nature of the operation and the markets concerned.

The Authority's decisions are made public and parties may ask the Authority not to refer to confidential information in the public version of the decision. The Authority's Rapporteur Général is in charge of the management of confidentiality of business secrets.

Decisions issued by the Minister for the Economy are published in the ministerial official publication, the electronic 'Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes' on the Ministry's website.

Press releases from both the Authority and the Minister, if any, may also be found online. For important decisions, the press release is also published in English.

## Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Within the framework of the European Competition Network, competition authorities of EU member states inform each other of merger cases pending before them, in particular to be able to jointly request the application of article 22 of the EUMR. The Authority also cooperates with non-EU antitrust agencies.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Decisions of the Authority and of the Minister may be challenged before the French Supreme Administrative Court (the Council of State) on the grounds of abuse of power or for breach of a procedural rule.

In 2007, the Council of State quashed the Minister's decision clearing the acquisition of Delaroche by EBRA, mainly on the grounds that the Minister failed to correctly apply the concept of control and thus failed to properly review the merger.

In December 2013, the Council of State annulled the clearance decision of the acquisition of Direct 8 and Direct Star by Group Vivendi and Canal Plus, on procedural grounds and because it considered the agreed commitments insufficient. A new clearance decision based on strengthened commitments was then issued in April 2014.

The Council of State has, however, rejected several appeals lodged against decisions of the Authority (emergency suspension procedures and appeals on the merits).

In 2016, the Council of State rejected two appeals on the merits and, in another case, partially annulled the decision of the Authority clearing the acquisition of Totalgaz by UGI (2015), in the liquefied petroleum gas sector. While the decision was confirmed for three of the four relevant markets, the Council of State considered that the scope of the competitive assessment was too narrow in relation to the fourth one and annulled the clearance decision and the relevant commitments in respect of this market.

In 2016, the Council of State also rejected one request for suspensive interim measures. The applicants sought to suspend the Authority's conditional clearance of the acquisition of Agri-Négoce by Axérial Participations, claiming that the commitments were insufficient to meet the competition concerns on the market for the seed collection in a given French area. The Council of State, however, rejected their application on the grounds that their claim was neither such as to characterize the urgency to suspend the decision's implementation, nor such as to raise a serious doubt as to the existence of an assessment error from the Authority.

In 2017 and 2018, the Council of State reviewed a number of appeals relating to the *Fnac/Darty* merger. As regards the scope of the commitments, a third party, who had entered into a lease agreement with Fnac, unsuccessfully lodged an appeal against the Authority's decision, in that it provided for the divestiture of the store concerned by the lease. Besides, as regards the implementation of the commitments, the Fnac/Darty group (as vendor) and the Dray group (as a contemplated acquirer of divested stores) respectively challenged the Authority's refusals to approve the contemplated purchaser as a suitable purchaser of the divested stores, and to extend the commitments' implementation deadline, which were both rejected.

In 2018, the Council of State also rejected the appeals against the clearance decisions in the *DCNS/Piriou* joint venture case and in the *Agri-Négoce/Axérial Participations* matter.

## Time frame

### 33 | What is the usual time frame for appeal or judicial review?

Appeals against decisions of the Authority and of the Minister can be brought by the parties within two months of the date when the decision is notified, and by third parties within two months of publication of the decision on the Authority's website. In principle, appeals do not result in the suspension of the decisions. However, an action aimed at suspending a decision issued by the Authority can be lodged before the Council of State through a specific procedure, the request for suspensive interim measures. Such a suspension can be granted if the parties demonstrate that there is an emergency and that there is a serious doubt concerning the legality of the decision. This emergency procedure was first used in the *Cegid/CCMX* case in 2004, in which the Council of State ruled that, in view of the high combined market share of the parties, the approval decision would have had irreversible effects on the structure of competition on the market. In this particular case, however, the merger was eventually cleared by the Council of State in its final decision of 13 February 2006.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Recently, the Authority has been fairly active: approximately 250 clearance decisions were rendered from May 2018 to April 2019, of which seven were conditional clearances, mainly in the wholesale and retail and waste management sectors, and also in the public passenger transport market and the VAT refund services sector.

Again this year, several concentrations taking place in French overseas territories were examined, these kinds of mergers being generally good candidates for commitments given the specificity of the overseas markets and local vertical integration issues. For instance, the Authority cleared the acquisition of a hypermarket in Martinique by Bernard Hayot Group (2018), which is a wholesaler and importer of consumer goods in Martinique and already operates several hypermarkets under the Carrefour banner, subject to the conditions to operate the acquired hypermarket under the distinct 'Euromarché' banner (with a commercial independence from Carrefour which owns the Euromarché brand), to allocate the commercial cooperation budgets among its own stores and those of its rivals without discrimination and finally to run its wholesale and importer activities and its retail distribution activities independently (notably through information barriers).

Several merger cases were referred by the European Commission to the Authority in 2018–2019, upon request of the Authority or of the parties. Since 2009, the European Commission has referred 28 concentrations to the Authority.

To address the question of retailers' buying power, the law dated 6 August 2015 and the subsequent Decree of 14 December 2015 (which were inspired in this respect by an opinion of the Authority) introduced the obligation for the parties to joint purchasing agreements in upstream retail to inform the Authority of their contemplated buying alliance, even though such arrangements do not fall within the scope of merger control (eg, because it is considered as a non-full-function joint venture). This obligation applies where the following cumulative thresholds are met:

- all the undertakings that are party to the contemplated arrangement achieved, during the previous financial year, a worldwide combined pre-tax turnover exceeding €10 billion; and
- all the undertakings that are party to the contemplated arrangement achieved in France, during the previous financial year, a combined pre-tax purchase turnover of over €3 billion.



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In July 2018, the Authority opened two market investigations in relation to purchasing alliances it was informed of on the basis of the above-mentioned provisions.

The law dated 30 October 2018 made some amendments to the existing framework (without however modifying the thresholds). The Authority must now be informed at least four months prior to completion (instead of two) and the Authority is entitled to carry out a competitive assessment of the implementation of the agreement and the parties shall also agree to undertake appropriate remedies where anticompetitive effects are identified. The Authority now also has the power to order interim measures (including an injunction to return to the status quo ante or to request a modification of said agreement).

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

In October 2017, the Authority launched a public consultation to modernise and simplify the French merger control rules. In light of this consultation, in June 2018, the Authority took the view that:

- the existing French merger control notification thresholds remain appropriate, and that introducing a transaction value notification threshold would not be relevant at this stage;
- the introduction of a targeted ex-post merger control review should be further explored;
- the current notification form should be simplified (notably by removing requests for certain financial information);
- the simplified procedure should be enlarged (eg, by including certain merger involving limited horizontal and vertical overlaps) and an 'ultra-simplified' online procedure should be introduced for the mergers that today fall within the scope of the simplified procedure (ie, those with no overlap); and
- the current merger control guidelines should be revised.

As a result of this process, the Decree of 18 April 2019 for the simplification of the national merger control procedure implemented a number of measures aiming at alleviating the burden on companies making a prior notification of their transaction to the Authority (see question 16).

As regards the simplified procedure, an online notification form is currently in testing phase and is expected to be operational shortly.

Also, the issuing of new merger control guidelines is still being considered by the Authority.

The possible introduction of an ex-post (ie, post-closing) merger control review by the Authority is still under discussion, following the dedicated public consultation on this subject that ended in September 2018. Numerous stakeholders have pointed out that an ex-post regime would generate significant legal uncertainty for undertakings. It is expected that the Authority will soon provide its views on this matter.

## UPDATE AND TRENDS

### Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

See question 35.

# Germany

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

German merger control provisions are enforced by the Bundeskartellamt (Federal Cartel Office – BKartA) in Bonn. The current legislation can be found in Chapter VII of the Act against Restraints of Competition, of 1958 (GWB). An English translation of the GWB is available at [www.bundeskartellamt.de](http://www.bundeskartellamt.de).

The BKartA is a federal authority that is responsible to the Federal Ministry for Economic Affairs and Energy, but is independent in its decision making and does not receive political orders. The BKartA is subdivided into 13 decision divisions. The first to ninth decision divisions have jurisdiction for the full range of competition law enforcement areas in a specific economic sector, including merger control. The 10th to 12th decision divisions specialise in prosecuting hardcore cartels. The last decision division is in charge of consumer protection. The BKartA is supported by its Chief Economist Team. Andreas Mundt has been President of the BKartA since 2009.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The GWB sets out a comprehensive list of events constituting a concentration, which includes not only the acquisition of control and the creation of joint ventures, but also the acquisition of minority shareholdings or of a material competitive influence below the level of control. The most important events constituting a concentration are:

- the acquisition of (direct or indirect) control over another enterprise or parts thereof by one or several enterprises;
- the acquisition of all or a substantial part of the assets of another enterprise;
- the acquisition of a share in a company's capital or voting rights resulting in an overall shareholding of 25 per cent (or more) or 50 per cent (or more); and
- any other combination of companies enabling one or several companies to directly or indirectly exercise a material competitive influence on another company (this covers some acquisitions of minority shareholdings of below 25 per cent).

#### 3 | What types of joint ventures are caught?

The creation of a joint venture or the acquisition of a share in an existing joint venture qualifies as a concentration if it involves the acquisition of a share in a company's capital or voting rights of 25 per cent (or more).

The acquisition of a share of 25 per cent or more is not only a concentration between the acquirer and the joint venture, but is also regarded as a concentration between the parent companies (ie, the

acquirer and those parent companies that hold a share of at least 25 per cent in the joint venture). This means that the other parent companies' consolidated turnover must also be taken into account – separately from the joint venture's turnover – for the calculation of the turnover thresholds. However, the latter concentration is limited to the markets in which the joint venture is active.

The GWB does not differentiate between full-function and non-full-function joint ventures so that the creation of a joint venture that does not perform all the functions of an autonomous economic entity on a lasting basis may be notifiable in Germany.

In addition, joint ventures are not only subject to merger control, but may also fall under the provisions on restrictive practices (GWB, section 1 and article 101 of the Treaty on the Functioning of the European Union (TFEU)). This means that they require merger control clearance by the BKartA and may also be challenged under the restrictive practices provisions.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The concept of acquisition of control has largely been adopted from the European merger control regime. Although there is no definition of 'acquisition of control' under the GWB, the provisions describe how control can be acquired, namely by rights, contracts or any other means that, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence over another enterprise, in particular through ownership or the right to use all or part of the assets of the enterprise; or rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of the enterprise. A change of control must occur on a lasting basis to be considered a 'concentration'.

German merger control also catches acquisitions of interests below the level of control. An acquisition resulting in an interest of 25 per cent (or more) constitutes a concentration. In addition, the acquisition by one or several enterprises of a material competitive influence over another enterprise constitutes a concentration. This covers situations where a shareholding of below 25 per cent is acquired, provided additional factors that make the situation comparable to an acquisition of 25 per cent are present. Such factors can include any that may give the acquirer the possibility of influencing the target (such as the right to appoint members of the supervisory board, information rights as a shareholder, specific rights agreed in the shareholders' agreement, etc, known as 'plus factors'). For example, in a 2008 decision (*A-TEC Industries AG/Norddeutsche Affinerie AG*), confirmed by the Higher Regional Court of Düsseldorf, the BKartA determined that both (together or taken independently) the acquisition of 13.75 per cent of the target's share capital (which amounted to a de facto blocking minority of 25 per cent because of consistently low shareholder attendance at the target's annual shareholder meetings) and the right to appoint three of

12 members of the target's supervisory board enabled the acquirer to exercise a material competitive influence over the target. Also decisive was the fact that the acquirer was the only shareholder in the target with market knowledge of the target's business and had a proven strategic interest in the target's competitive behaviour. The Higher Regional Court of Düsseldorf explicitly mentioned that for a material competitive influence to exist, the acquisition of the shares must confer an influence over the decision-making process and the market behaviour of the target, and that this is the case if the acquirer possesses an overwhelming market and industry knowledge that the other shareholders do not have. When assessing the existence of the 'plus factors', more weight will be given to qualitative considerations (representation and possibility of influence in the decision-making bodies, sector-specific knowledge of the minority acquirer) than to purely quantitative indicators (percentage of the shares acquired, distribution of the remaining shares). Another interesting case in that respect concerned the creation of a joint venture between EDEKA, the largest food retailer in Germany, and Budnikowsky, a drugstore company with 181 outlets in the Hamburg metropolitan area, which the BKartA cleared in May 2017. The two companies planned to hive off Budnikowsky's procurement, IT, e-commerce, administrative and logistic activities into the joint venture in which EDEKA would hold 25.1 percent. However, while EDEKA did not acquire any shares in Budnikowsky or vice versa, the BKartA still considered that EDEKA's shareholding in the joint venture allowed it to exert material competitive influence over Budnikowsky. The decision of the BKartA to even consider EDEKA's supposed influence over Budnikowsky under merger control rules can be described as game-changing, as up to that point there had to be some kind of corporate influence for a transaction to result in the ability to exert 'material competitive influence', whereas here there was no such link between the parties. Thus, for legal certainty it may be advisable to notify cooperation agreements like this to the BKartA in the future. Some commentators have also described this case as a way of using merger control to obtain an individual exemption for cooperation agreements.

## Thresholds, triggers and approvals

### 5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are two alternative sets of thresholds.

According to the first set of thresholds, a concentration must be notified prior to its completion if in the last financial year:

- the combined worldwide turnover of all participating enterprises exceeded €500 million;
- one participating undertaking had a turnover exceeding €25 million within Germany; and
- at least one further undertaking had a turnover in Germany exceeding €5 million.

The ninth reform of the GWB in 2017 added another set of thresholds, that catch concentrations that do not meet the thresholds in the first set, in an attempt to give the BKartA the power to review certain transactions, inter alia, in the fast-moving digital sector. According to this second set of thresholds, a concentration must be notified prior to its completion if, in the last financial year:

- the combined worldwide turnover of all participating enterprises exceeded €500 million;
- one participating undertaking had a turnover exceeding €25 million within Germany, but neither the target nor any other participating undertaking had a turnover in Germany exceeding €5 million;
- the value of consideration for the transaction exceeds €400 million; and

- the target is active in Germany to a significant extent (local nexus).

However, if the parties to a concentration fulfil the first set of thresholds, they will be exempted from the notification obligation if one party to the merger achieved less than €10 million worldwide turnover (in the case of the target including the seller and all its affiliates, provided that the seller controls the target and, in the case of the acquirer, including all its affiliates), or the concentration relates to the combination of public undertakings as a consequence of a 'reform of communal territory'. These exemptions do not apply if the parties to a concentration fulfil the second set of thresholds.

Turnover figures must be calculated by reference to an undertaking's last completed financial year, on a worldwide consolidated group basis excluding intra-group sales and VAT. In specific sectors, the calculation of turnover is a two-step process: for example, in the case of goods traded (ie, goods that are simply purchased and resold), only 75 per cent of the turnover achieved is to be taken into account. There are special rules for credit institutions and building societies, as well as insurance companies for the broadcasting sector and for producers and distributors of newspapers or magazines.

Merger control under the GWB is not applicable to any transaction that falls below the German turnover thresholds and the BKartA cannot investigate such cases. No such cases have been referred to the European Commission thus far. German merger control is also not applicable to any transaction that falls within the scope of the EUMR (with exceptions provided for in the EUMR, as set out in the European Union chapter).

Transactions that meet the above thresholds, but have no 'appreciable [domestic] effects' within the territory of Germany are exempt from the notification requirement (see question 7).

The question of whether the target is active in Germany to a significant extent (which is relevant for the application of the second set of thresholds) is different from the question of whether the transaction can have an 'appreciable effect' in Germany and should therefore be dealt separately. In July 2018, as explained in further detail in the 'Update and trends' section of this chapter in the 2019 edition of this publication, the BKartA, together with the Austrian competition authority, published a joint guidance paper. However, in case of doubts – given that the threshold is still relatively new, with little practical experience – it is advisable for the parties to seek informal guidance from the BKartA. Recent experience shows that the BKartA is open to such informal discussions and provides guidance quickly.

The ninth reform in 2017 of the law has excluded the application of merger control to transactions in which all undertakings concerned: are members of a banking industry association according to the German Corporation Tax Law; are principally active in the provision of back-office services for companies of the banking industry association of which they are a member; and do not have any own end-customer relationships in the services mentioned above.

### 6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory if the jurisdictional thresholds described above are met and if the requirements of the appreciable (domestic) effects clause are met (see question 7).

### 7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are subject to German merger control only if they have an 'appreciable effect' within the territory of Germany. The BKartA has always applied the concept of 'appreciable effect' broadly.

In practice, it is likely that almost all foreign-to-foreign concentrations caught by the first set of thresholds will have an 'appreciable effect' within the territory of Germany, even if the parties have no subsidiaries or other assets within Germany.

The only exception where the local effects test still plays a role relates to foreign joint ventures, as the turnover thresholds may, in these cases, be met by the parent companies alone and through activities that are not (directly) related to the joint venture. To ensure greater clarity, the BKartA updated its guidance in 2014 'to relieve concentrations that do not affect Germany of unnecessary bureaucracy'. The new guidance provides concrete examples as well as a flowchart to illustrate how to apply the concept of 'appreciable effects'.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, there are two different tests under which the Ministry for Economic Affairs and Energy (Ministry) assesses foreign investments: the 'cross-sectoral examination' and the 'sector-specific examination'. Both regimes have been amended in recent years, leading to a tighter control over acquisitions of domestic companies.

The cross-sectoral examination is applicable in cases where investors from outside the EU or EFTA who – directly or indirectly – wish to acquire 25 per cent or more (and in certain cases 10 per cent) of the voting rights in a German enterprise, if the acquisition could pose a threat to Germany's public order or security. Under certain conditions, the Ministry may also examine acquisitions by investors from within the EU or EFTA if one of their shareholders comes from a non-EU or non-EFTA member state and holds 25 (or 10) per cent or more of the shares. This right of scrutiny applies to all sectors and enterprises and allows the Ministry to initiate a review of the investment. The regulation lists a number of strategic industry sectors where transactions will be scrutinised more carefully. In particular, this applies to 'critical infrastructure': energy, information technology and telecommunications, transport and traffic, health, water supply, food, finance and insurance. Other strategic sectors include software for critical infrastructure, cloud-computing services and the media. If the Ministry concludes that the acquisition poses a threat to Germany's public order or security, it may either restrict the acquisition or prohibit it altogether, rendering the purchase contract invalid. Filings are mandatory for acquisitions in the sectors listed above (if certain materiality thresholds are met). For all other acquisitions, filings are voluntary, but may be advisable as they lead to shorter review periods for the Ministry. If no filing is made, the Ministry has up to five years from signing to open an investigation (and ultimately unwind the transaction). This period is reduced to two months (in case of a full filing) or three months (in case of a short notice), starting from the day of the submission of the complete filing or the short notice, respectively. If an investigation is opened and the parties have complied with all requests for information (which can in some cases take a few months), the Ministry has four months to clear the case (unconditionally or with orders) or to prohibit the transaction.

The sector-specific test is somewhat stricter and also applies to purchasers from within the EU or EFTA. The test focuses on acquisitions falling within certain strategic sectors: acquisitions of 10 per cent or more of the voting rights in corporations that produce or develop goods listed in the War Weapons Control Act, specific items mentioned in export control lists, certain cryptographic systems or specially designed motors or gears or transmissions to drive battle tanks or other armoured military tracked vehicles must be notified to the Ministry, which may prohibit or restrict the acquisition to safeguard Germany's essential security interests. The transaction may not be closed without the approval of the Ministry, which is obliged to issue a written statement of clearance if there are no objections to the notified investment.

The statement of clearance is deemed to be issued if the Ministry does not initiate a formal examination of the acquisition within two months of its notification.

Violations of enforceable orders by the Ministry prohibiting or restricting an acquisition may give rise to fines of up to €500,000 per infringement.

Other specific procedures and restrictions apply to investments by or in banks, air carriers and satellite technology operators and insurance companies.

The German government and various political parties have recently said that they are considering a further review of the current foreign investment regime.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no legal deadlines for a notification of a concentration, but notifiable concentrations must not be completed before clearance. It is possible to file a pre-merger notification even prior to the signing of the transactional documents. Parties should also not forget to submit a mandatory post-completion notice to the BKartA, which needs to be filed without 'undue delay' following completion of the transaction. This is, however, a mere formality.

Fines can be imposed for closing before clearance as well as for submission of incorrect or incomplete filing. Those sanctions are regularly applied in practice (see question 12 below).

#### 10 | Which parties are responsible for filing and are filing fees required?

In principle, all parties involved in a merger (ie, typically the purchaser and the target company) are responsible for filing. In the case of an acquisition of shares or assets, the vendor must also notify. In practice, the filing is often done by the acquiring firm on behalf of all parties involved.

Filing fees payable to the BKartA can amount to up to €50,000 (in cases of minor importance or with insignificant effect on the German market, the filing fees normally range between €3,000 and €15,000). In exceptional cases, a fee of up to €100,000 is possible. The BKartA determines the fees by taking into consideration both its administrative (ie, personnel and material) expenses and the economic significance of the transaction notified. In addition to the fees, the BKartA can recover costs for external consultants (eg, economists) from the merging parties.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Mergers that are subject to merger control may not be completed before either the BKartA has cleared the transaction or the relevant waiting periods of one month (first phase) or four months (first and second phases together) after submission of a complete notification have expired without the BKartA having prohibited the transaction.

2008 case law clarified that the suspension obligation also applies to transactions that are notified to the BKartA even where there is no formal notification obligation. Therefore, the decision to submit a 'precautionary notification' of a transaction where the question of the notification requirement is not entirely clear (eg, in possible cases involving the acquisition of material competitive influence (see question 4)) must be carefully made, as the notification, once submitted, triggers the waiting periods until a final decision of the BKartA is rendered. The

BKartA can, upon the submission of an application, grant an exemption from the suspension obligation if there are compelling reasons to do so. This is the case, in particular, if the parties involved can establish that an exemption would prevent severe damage to one of the undertakings involved or to a third party. However, both the BKartA and the courts interpret this exemption restrictively. Stock market, staff loss or competitiveness risks usually would not suffice – exemption tends to be limited to situations of imminent insolvency.

The parties have the right to withdraw their notification at any time, unless the BKartA itself has delivered a decision ending the procedure (such as an explicit or implicit clearance decision or a prohibition decision). Such withdrawal automatically ends the merger control procedure.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The completion of a notifiable merger prior to clearance can lead to severe penalties: fines of up to €1 million or, in the case of undertakings, of up to 10 per cent of their total worldwide group turnover in the preceding business year, can be imposed. The BKartA regularly imposes fines for closing notifiable transactions prior to clearance. Since the end of 2007, the BKartA has imposed five fines (up to €4.5 million) for closing before clearance.

In a recent judgment in the case *Edeka/Kaiser's Tengelmann*, the Higher Regional Court of Düsseldorf decided that a partial implementation of a concentration before clearance also violated the suspension requirement. In that case, the merging parties had already started implementing some aspects of the merger agreement (one party agreeing to close outlets in an interim period before clearance and joint purchasing cooperation). This decision has been confirmed by the German Federal Court of Justice (*Bundesgerichtshof*) in November 2017 that decided that measures or behaviour, which themselves cannot constitute a concentration per se, but which are made in the context of the intended concentration and can (at least) partly create the effects of that intended concentration, constitute gun jumping. In another judgment relating to the same case, rendered in 17 July 2018 (*Edeka/Kaiser's Tengelmann II*), the German Federal Court of Justice also confirmed the possibility for the BKartA to formally issue interim measures against existing or merely imminent gun-jumping acts of the parties (and according to the BKartA this approach also holds in the context of the Court of Justice of the European Union's *Ernst & Young* judgment).

In cases of negligent disregard of the notification obligation, the BKartA normally informs the parties to the transaction of their obligations and insists on the submission of a post-completion notice containing all the details that are normally required in a pre-merger notification. If the parties comply with this request, they may in many cases escape a fine, if it was their first violation of the obligation to notify. However, if the concentration involves parties with significant business activities in Germany who have already submitted a number of notifications in prior transactions, fines are more likely. In cases of deliberate disregard of the notification obligation, the BKartA normally will impose a fine. Fines are much more likely if there is already a negative track record.

The BKartA does not treat notifications of transactions that occur after their (complete or partial) completion as 'proper' notifications but will rather consider them as post-completion notices. The BKartA assesses the competition issues triggered by the proposed transaction directly as part of a 'merger dissolution procedure'. As a consequence, the one-month period for first-phase cases does not apply. Should the BKartA reach the conclusion that the transaction raises substantial

issues, it may directly order the dissolution of the transaction. As a consequence, it is easier for the BKartA to undo a consummated merger that fulfils the prohibition conditions in the GWB quickly, as there is no longer a need to issue a formal decision prohibiting the merger before opening a merger dissolution procedure.

Further, any transaction implementing a merger in violation of the clearance requirement is regarded as invalid under civil law (at least in German law) until final clearance is given.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions for closing before clearance are applied to any notifiable concentration. Whether the concentration involves national undertakings or foreign undertakings is irrelevant. The largest fine ever imposed by the BKartA for closing before clearance related to a foreign-to-foreign merger (fine imposed on Mars in 2008 for having closed the non-German parts of the acquisition of Nutro Products, see question 14).

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Hold-separate arrangements that are entered into between the parties for the purpose of closing a foreign-to-foreign transaction prior to clearance without breaching the suspension obligation may be possible if they ensure that the closing will not have an impact on the market in Germany. However, because they are unusual under German merger control rules, they require analysis in each individual case, and in practice, it is difficult to design hold-separate arrangements in a way that clearly excludes effects on the German market. This was made particularly clear after the BKartA's fining of Mars for having closed its acquisition of Nutro before clearance (one of the five gun-jumping fining decisions mentioned in question 12). Mars had notified its intention to acquire all shares in Nutro. Nutro had no assets in Germany and all sales of Nutro products into Germany were made through an independent third-party distributor located outside Germany. Following clearance by the FTC in the United States, Mars acquired the majority of the shares in Nutro prior to the BKartA's clearance. Prior to the transfer of the Nutro shares, the seller and Mars agreed to transfer and carve out the German activities that remained with the seller. The BKartA found that this was not sufficient as, in the BKartA's view, the German business could not be separated from the remaining Nutro business. It therefore concluded that the acquisition of the foreign Nutro assets had an impact on the German market and that the transfer of the shares therefore constituted an infringement of the German standstill obligation.

It is generally advisable to discuss all kinds of carveout or hold-separate solutions with the BKartA beforehand to avoid fines. In cases that do not raise competitive issues, asking the BKartA for a quick clearance may be the preferable option.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

German merger control rules are aligned with article 7(2) EUMR, allowing the notifying parties under certain conditions to consummate the public takeovers prior to clearance. The GWB does not prevent the implementation of a public bid that has been notified to the BKartA, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the BKartA.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Germany is one of the few jurisdictions worldwide that requires only a limited amount of information in a notification. The GWB requires, as a minimum, a description of the transaction and, in respect of all participating enterprises: name, place of incorporation, type of business, turnover of the parties involved (worldwide, in the European Union and in Germany), market shares of the parties in Germany and the basis of its own calculation if the combined market shares amount to 20 per cent or more, and in the case of an acquisition of shares in another company, information about the shares already held in the target company and the shares to be acquired. In the case a transaction is notified because the second set of thresholds is met, the value of consideration for the transaction as well as the principles dictating its computation are also required pieces of information. It is advisable, and may accelerate the proceedings, to provide at least some basic information on the markets concerned by the transaction. The level of information and analysis will depend on the extent to which the merger raises substantive competition law issues. The usual form of notification is a simple letter setting out the necessary information.

The notification must be submitted in German. The relevant waiting period begins after a complete notification has been received by the BKartA.

Foreign parties must appoint an authorised representative in Germany, on whom documents in the merger proceedings can be formally served. In contrast to EU merger control law, there is no obligation to submit the acquisition or merger agreement or any additional documents such as internal reports or annual reports and accounts to the BKartA. However, the BKartA sometimes requests such documents. Similarly, the BKartA does not usually require the submission of powers of attorney.

If a filing is made with incorrect or incomplete information, a fine of up to €100,000 can be imposed (this is an administrative offence). A fine of €90,000 was imposed in a case in which one notifying party did not disclose a majority participation in a company, although this participation was relevant for the substantive assessment of the notified concentration with another company (*Clement Tönnies/Tummel*, January 2013). The same penalties can apply for a failure to submit a post-merger completion notice or in cases of incomplete, incorrect or late notice. A fine of up to €1 million or, in the case of an undertaking, up to 10 per cent of its total worldwide group turnover in the preceding business year, can be imposed if the notifying parties intentionally include or make use of incorrect or incomplete information in the notification with a view to causing the BKartA to refrain from issuing a prohibition decision or from opening a second-phase investigation. External lawyers advising the notifying parties can also be fined if they intentionally submit incorrect information. Several external lawyers have already been or are subject to such an infringement procedure. Fines for incomplete filings have, so far, been rare in practice. Early in 2016, the BKartA imposed a fine of €90,000 on Bongrain Europe SAS for submitting incorrect (under-evaluated) market shares in a merger control filing. Where the parties intentionally submit incorrect information, the BKartA is likely to impose significant fines (eg, a fine of €250,000 has previously been imposed on a US company that provided incorrect information on its market share).

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

If the BKartA has sufficient data on the relevant markets, a decision is likely to be issued after internal discussions within the BKartA's division responsible for the case. If it requires more information (which is often the case) or needs to verify the information provided by the parties, it often contacts other market participants (such as competitors, customers or suppliers) to seek their views and information on their activities and the relevant markets, as well as often requiring the notifying parties to provide further information.

In the vast majority of cases, the BKartA is able to ascertain during the first-phase investigation that the case does not raise substantive competition problems in Germany. In these cases, the BKartA will issue an informal clearance letter within the first phase. The clearance letter is not reasoned and not subject to appeal by third parties.

If competition concerns are identified during the first-phase investigation, the BKartA must inform the parties (usually, but not necessarily, in writing) within one month that a second-phase investigation will be initiated. If the initial concerns are not confirmed during the second phase, the BKartA will either clear the concentration directly or, if there are intervening third parties, issue a draft clearance decision. If the second-phase investigation confirms the competition concerns, the BKartA will set out the identified issues in a written statement of objections. Both the statement of objections and the draft clearance decision provide an opportunity to submit comments. In addition, upon request of the notifying or the intervening third parties, the BKartA will also allow them to present their comments in a meeting with the case team.

Merging parties can submit proposals for commitments at any time of the procedure, provided that the BKartA still has sufficient time to review and market test the proposal. At the end of a second phase, the BKartA will either issue a clearance decision, a clearance decision with commitments or a prohibition decision. All three types of decisions are formal administrative decisions, which means that they must be reasoned and are subject to full judicial review.

The BKartA is open to pre-filing consultations in cases that are high-profile, are likely to raise competition concerns or present an unusual degree of complexity. Such discussions will usually help with the efficient preparation of the notification, as they will identify the areas in which the BKartA would like to receive more information etc. In fact, the President of the BKartA, Andreas Mundt, welcomed this explicitly by stating the following in its annual end-of-year press release: 'Companies often approach us first, in particular in cases which might be critical. Some of these projects will then not even be notified. After taking preliminary soundings in the extensive *Karstadt/Kaufhof* case we were able to send out formal requests for information to around 100 companies on the actual day of notification. This ultimately meant that the merger could be examined very quickly and at the same time very thoroughly.' By contrast, in simple cases, pre-filing consultations with the authority appear unnecessary.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The BKartA must decide within one month of complete notification whether to clear the merger or, if the transaction raises competition concerns, whether to commence an in-depth second phase investigation. Decisions in second phase proceedings must be issued within four months of the notification date. The four-month period may be further extended, provided that the notifying parties consent. This is applied in many cases after commitments have been proposed by the parties to allow the BKartA to properly market test the commitments, and there

is an automatic one-month extension of the second phase if the parties submit commitments. In addition, there is a stop-the-clock mechanism in second phase proceedings should the notifying parties not fully respond to an information request of the BKartA.

In practice, decisions are usually issued within the initial investigation (first phase) period of one month (more than 95 per cent of all notifications).

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A merger must be prohibited by the BKartA if it 'would significantly impede effective competition', in particular if it leads to the creation or strengthening of a dominant market position.

In 2013 the dominance test was replaced by the EU significant impediment to effective competition (SIEC) test. However, the dominance test remains the key standard example of SIEC. In the context of dominance (as an example of an SIEC), the principles set out in the 2012 Guidance document on the dominance test continue to be relevant. The BKartA applies the analytical framework of the SIEC test in a similar way to the European Commission.

According to the definition of dominance under the GWB, a dominant position exists if one or more enterprises have no competitors at all, are not subject to material competition, or are in a superior market position that enables them to act independently of competitors, customers and other market participants. The GWB contains a number of rebuttable presumptions as to the existence of dominant market positions. There is a presumption of single dominance where a single company has a share of at least 40 per cent of the market. Collective dominance is presumed if three or fewer enterprises have a combined market share of at least 50 per cent, or if five or fewer enterprises have a combined market share of at least two-thirds. Collective dominance is an issue that was at the heart of a number of recent high-profile mergers reviewed by the BKartA and the German courts. In contrast to the presumption of single firm dominance, the parties themselves must rebut the presumption of collective dominance (by showing, *inter alia*, that there would be no implicit collusion between the presumed jointly dominant companies). Because the BKartA is under a statutory obligation to fully investigate all relevant factors, these presumptions function more like soft safe harbours. Before the courts, they continue to play a slightly more important role.

The BKartA often considers complex economic arguments. Besides market share levels, the factors it takes into account include the competitive structure of the market, barriers to entry, potential competition, closeness of competition (a factor whose weight appears to have gained importance in recent years), switching costs, access to customers (eg, importance of distribution networks and brands), access to suppliers, vertical integration, structural links to competitors, suppliers and customers, and also, if relevant, the parties' financial resources. This trend has been further evidenced by the Guidance on Substantive Merger Control. One of the two prohibition decisions of 2019 concerned a horizontal overlap case in the area of plain bearings that are used in large bore engines. The BKartA concluded that the two parties were the major competitors in a market which was already highly concentrated and where it is already complex and costly for customers to switch to one of the few alternative suppliers. The BKartA also noted that no new companies were likely to enter the market for the production of the special bearings because this would require extensive knowledge of technological development and manufacturing processes and a high level of investment.

There are three exceptions to this rule. A concentration cannot be prohibited by the BKartA even if it would significantly impede effective competition in three situations.

The first is where the parties can show that the merger will result in an improvement of market conditions on another market, which outweighs the detrimental effects on competition. The most recent application of this clause can be found in the clearance by the BKartA of the takeover of Mediengruppe Frankfurt by the Ippen Group, with both companies publishing newspapers in the Hesse region in Germany (possible negative effects existed on some regional reader markets; however, improvements on the reader market in another region were viewed, on balance, as being significantly more important).

The second applies if the relevant market has been in existence for at least five years and had a total annual value of less than €15 million in the last calendar year (*de minimis* market clause). It is worth noting that this rule does not apply where a concentration is notifiable pursuant to the second set of thresholds. This *de minimis* rule does also not apply in relation to markets in which the service is provided free of charge to users. For the purposes of assessing the €15 million threshold, only the value of the German market has to be taken into account, even if the geographical market is wider than the national market. If the relevant geographical market is narrower than the national market, the relevant geographical market must be taken as the reference point for the calculation.

However, the clause should be assessed carefully, as, in a limited number of cases and under clearly defined conditions, the BKartA is allowed to bundle closely related geographic and product markets and to aggregate their volumes of sales when calculating the total size of the German market for the purposes of the *de minimis* market clause. This can be the case in particular where:

- a product market has been artificially separated into different *de minimis* markets within Germany;
- the transaction affects several homogeneous geographically neighbouring *de minimis* markets;
- the transaction affects several neighbouring product markets that have comparable competitive market structures; or
- the parties operate on a local *de minimis* market but also on non-*de minimis* upstream and downstream markets where the conditions of competition on the *de minimis* market directly determine which competitors are able to operate on the upstream or downstream markets.

Although the above principles were developed at a time where the legal framework was different (the question of *de minimis* markets played a role in determining whether there was a notification obligation in the first place), it is likely that the jurisprudence of the courts continues to be applied.

The third exception is a specific rule for the failing firm defence in the press sector. Dominant publishers will be allowed to acquire a small or medium-sized competitor even if this leads to the strengthening of a dominant market position, provided that the acquired publisher meets specific financial underperformance criteria (which are clearly defined by the law and differ from the failing firm defence criteria) and that no other acquirer could be found.

#### 20 | Is there a special substantive test for joint ventures?

Under the GWB, all joint ventures have to pass the SIEC test under the merger control rules.

In addition to the SIEC test under merger control, all cooperative aspects of the joint venture are reviewed under the restrictive practices provisions of the GWB (this is in contrast to the EUMR, where potential coordination effects between the parent companies are assessed as part of the merger control process). This review is not automatically integrated into the merger procedure but may be performed either in parallel or after the merger procedure (eg, after a merger control

clearance). A joint venture will raise competition issues if it leads to coordination between the parent companies. Coordination will be more likely in cases where the parent companies continue to be active on the same market as the joint venture. Spill-over effects on neighbouring or other markets are less likely, but can also occur (eg, if the joint venture carries substantial weight compared to the parent companies' other activities). However, a joint venture is unlikely to violate the restrictive practices provision if the following conditions are met:

- it is a full-function joint venture that acts as an independent market participant;
- the parent companies are not active in the joint venture's relevant product markets; and
- the joint venture is not exclusively or predominantly active in markets upstream or downstream of its parent companies' activities.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The BKartA examines all aspects of competition in the relevant markets. This covers unilateral and coordinated effects in horizontal, vertical and conglomerate mergers. A detailed summary of how the BKartA will typically approach the analysis can be found in its revised Guidance on Substantive Assessment (see question 19). In April 2019, the BKartA announced its intention to prohibit a concentration in the used packaging waste disposal and recycling sector (*Remondis/DSD*), for reasons of both vertical foreclosure risks (customer and input foreclosure) on the one hand, and horizontal overlaps leading to dominance on the other.

With regard to unilateral effects, key aspects of the BKartA's analysis relate to market shares, concentration ratio, capacity and capacity restrictions, customer preferences and switching costs, IP and know-how factors, market phase, access to procurement or sales markets, links with other companies, financial resources, potential competition and market entry, neighbouring substitution and countervailing buying power. In vertical mergers, the BKartA focuses its assessment on input and customer foreclosure effects.

With regard to coordinated effects, the BKartA's assessment focuses on the question of whether coordination becomes more stable, for example, because a significant outside competitor is acquired (eg, *Magna/Karmann* of 21 May 2010), or the companies participating in coordination become more symmetric (eg, *Axel Springer/ProSiebenSat.1* decision of 19 January 2006, confirmed by the Federal Court of Justice on 8 June 2010).

The identification of competition issues in conglomerate mergers is rather rare. The only example of this goes back over 10 years. It is the *Axel Springer/ProSiebenSat.1* case (2006), where one of the issues was cross-media effects and foreclosure. In the *Tokyo Electron/Applied Materials* case (2014) a significant conglomerate merger was cleared because the investigation did not confirm allegations by complainants that the merging parties would have the ability and incentive to foreclose rivals.

The protection of companies' incentives and ability to compete play an increased role in the BKartA's substantive assessment, and the degree of innovation capabilities is a factor that is taken into account by the BKartA in its substantive assessment. While the BKartA has had no prominent recent case, there is no reason to believe that the approach of the BKartA would be any different to the recent approach of the European Commission in innovation (please refer to question 21 in the European Union chapter).

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant and may not be taken into account by the BKartA. The BKartA regularly reiterates that its prerogative is the control of concentrations from a pure competition perspective. For example, when it cleared the acquisition of the newspaper *General-Anzeiger* by *Rheinische Post* in 2018, it noted that, while it is part of merger control to examine whether readers still have alternative sources to choose from, the BKartA cannot use diversity of opinion per se as an assessment criterion in its examination. It has also constantly taken the view that public interest and foreign investment grounds should be dealt with in a separate process by another authority.

However, the BKartA's decision to prohibit a merger can be overruled by the Federal Minister for Economic Affairs and Energy if the negative effects of the merger on competition are outweighed by benefits to the economy as a whole or if the merger is justified by an overriding public interest. The decision may also include conditions imposed on the parties. The Minister enjoys a wide margin of appreciation with regard to the criteria for granting an authorisation, but the decision is subject to judicial review on questions of substance as well as on procedural questions. In addition, before an authorisation can be granted by the Minister, an elaborate procedure has to be followed. In particular, the Monopolies Commission, an independent but government-sponsored competition policy think tank has to issue a public opinion on the public interest issue. Afterwards, a public hearing has to be held.

Cases of ministerial authorisation being granted are rare. Since the introduction of merger control in 1973, a ministerial authorisation has only been granted without conditions in three cases and with conditions in six cases (recently in the *Edeka/Kaiser's Tengelmann* case). In total, there have been only about 20 applications.

The ninth reform of the GWB in 2017 introduced new provisions on certain procedural aspects of a ministerial authorisation, in particular speeding up the procedure and allowing the Ministry of Economic Affairs and Energy to issue guidelines about details of the procedure. The minister is supposed to authorise a merger within four months from receiving the application; if a decision is not reached after six months, the application will be deemed to be denied.

In addition, the reforms limit the scope of third parties' ability to appeal against a ministerial decision: in contrast to the legal situation before the amendment, where an economic impact would suffice, now only persons or companies that can show an infringement of their own rights will have sufficient legal standing. Because the requirements for such an own right are quite high, it remains to be seen if the option of an appeal against the ministerial decision will retain any practical relevance in the future.

These changes to the law follow the recent case of *Edeka/Tengelmann* where a merger was initially authorised by the minister, but then later blocked by the Higher Regional Court of Düsseldorf following appeals of competitors.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Efficiency arguments have so far not played a major role in the BKartA's practice. It is unlikely to accept efficiency arguments where the transaction would lead to the creation or strengthening of a dominant market position. However, in such cases, a clearance can still be granted if the parties can demonstrate that the merger will also result in an improvement of market conditions that outweighs the disadvantages of the market dominance. Efficiencies could only be considered as such

an improvement of market conditions if the efficiency gains would be passed on to the consumer (balancing clause). In this respect the BKartA will require a high level of proof that the parties will pass on the efficiencies. As the BKartA works on the understanding that a dominant company will often have little or no incentive to pass efficiency gains on, it is difficult to succeed with efficiency arguments in cases involving the creation or strengthening of a dominant position. Whether efficiencies will be accepted as a defence in SIEC cases that do not create or strengthen a dominant position is an open question. Efficiency arguments can play a certain role in proceedings regarding a ministerial authorisation (see question 22).

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the statutory conditions for prohibition are fulfilled, the BKartA will prohibit the merger. The BKartA also has the power to order the divestment or the disposal of certain assets where a merger has already been completed (see question 12).

The BKartA has used the power to order the dissolution of a concentration and ordered two Swiss-based companies to undo their merger (*Sulzer/Kelmix*). This was the first ever divestment order from the BKartA in relation to a foreign-to-foreign merger (however, the decision was successfully appealed by the parties on other grounds). According to the Higher Regional Court of Düsseldorf, public international law is not in conflict with a prohibition of a foreign-to-foreign merger if the merger produces effects on the German territory. However, in the case of an already completed foreign-to-foreign merger, it remains unclear how the BKartA would in practice be able to enforce such a prohibition order if the parties refused to undo their merger.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The relevant provisions expressly provide for imposing conditions and obligations and accepting structural undertakings in second phase clearance decisions. In addition, remedies (such as a restructuring of the transaction or divestment undertakings) are also possible prior to the clearance decision. Behavioural undertakings that do not affect the structure of the market are rarely accepted as sufficient to address competition concerns, unless they have similar effects (divestment of slots, access to infrastructure, etc).

Undertakings subjecting the parties to the transaction to permanent behavioural control by the BKartA are explicitly prohibited by the GWB. However, albeit rare in practice (but see question 26 for an example) behavioural remedies are possible under German law, if they are effective and do not lead to a permanent control of the undertaking's behaviour by the BKartA.

The BKartA recently published a guidance on acceptable remedies explaining which conditions they must meet to enable the BKartA to clear the transaction with conditions and obligations.

The BKartA has also published model texts for the different types of remedies and a trustee mandate on its website. These templates are similar to the models used by the European Commission, but considerably shorter.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The BKartA can accept remedies if they effectively solve the competition problem and provided they do not involve a permanent monitoring of the parties' behaviour by the BKartA. Consequently, a broad range of undertakings is possible as long as the undertaking effectively remedies the competition concerns raised.

In general, all kinds of structural undertakings are accepted by the BKartA, although in practice most are divestment undertakings.

Non-structural remedies have also been accepted in some cases (see, for example, the acquisition of the cable network operator Kabel Baden-Württemberg by Liberty Global Europe Holding, where remedies included the granting of early termination rights to large customers and the waiving of certain exclusivity clauses).

Divestitures can only be made to a suitable purchaser approved by the BKartA. The BKartA will nowadays normally ask for an 'upfront buyer', meaning that the parties agree not to implement the transaction until the buyer has been approved (suspensive condition). An upfront buyer will be required in circumstances where there is risk as to the viability of the business to be divested, finding a suitable purchaser, or where the remedy concerns a substantial part of the concentration. The sale must be completed within a specified time limit, six months being the usual term, extendible by an additional six months if a divestiture trustee is required to sell the business. 'Fix-it-first' solutions (ie, sale of the divestiture business before the clearance decision is issued) remain relatively rare. In exceptional circumstances, the BKartA can also agree to a resolutive condition (ie, implementation of merger before suitable buyer is accepted and divestment business is sold, but clearance lapses if no suitable buyer is found).

Any divestment remedy must be accompanied by a proposal to safeguard the business in the interim. Normally, the parties need to appoint a monitoring trustee to oversee compliance with the preservation measures. A 'divestiture trustee' will be required to handle the disposal of the business in the event that the parent companies do not find an acceptable purchaser within the disposal deadline.

Unlike the EUMR, the GWB does not provide for the possibility of commitments in first phase and nor is there a deadline in second phase for the submission of commitments. However, it is advisable to discuss commitments with the BKartA as soon as the BKartA's competition concerns become clear.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As for all mergers that it reviews, the BKartA may require remedies in relation to foreign-to-foreign mergers before issuing a clearance decision. As in domestic transactions, parties to a foreign-to-foreign merger have been required to divest parts of their business around the world. Other remedies have also been imposed on parties to a foreign-to-foreign merger.

The BKartA liaises closely with other competition authorities investigating a merger, in particular with regard to remedies, provided the parties supply a waiver allowing the BKartA to exchange the necessary confidential information with the other competition authorities.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision of the BKartA does not automatically cover arrangements that are related and necessary to the implementation of the concentration insofar as these arrangements may restrict competition

between the parties. They may, however, be reviewed outside the merger control process under the restrictive practices provisions of the GWB or article 101 TFEU. This does not mean that such arrangements are automatically unlawful and void. As a basic rule, ancillary arrangements are exempted from the restrictive practices provisions if they are necessary and indispensable to the successful implementation of the concentration and EU law and practice are taken into account. In particular, ancillary restrictions in the context of newly formed joint ventures and moderate non-compete obligations on the seller may be accepted.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

During the initial investigation period of one month, but even more so during the second phase in-depth investigation, the BKartA often contacts customers, competitors or other market participants for market information, and their reactions have a substantial influence. However, the BKartA will dismiss information or arguments brought by third parties if it is not competition-related or if it does not bring any new elements.

A third party may also, upon application, formally participate in merger control proceedings before the BKartA as an intervening party if its interests are materially affected by the notified transaction. Therefore, competitors, customers and suppliers usually qualify as intervening parties and have been admitted in many second-phase proceedings as interveners. No private action may be brought parallel to the merger control proceedings of the BKartA, as merger control in Germany is a purely administrative matter.

Third parties admitted as intervening parties have the right to access the file, the right to be heard and the right to challenge second-phase decisions to the extent they are affected by the decision. First-phase clearance decisions are not subject to appeal.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The BKartA publishes a list of notified transactions with very limited case information on its website. If the parties would like to keep the transaction confidential during an initial period, they normally have to limit themselves to informal pre-notification discussions with the BKartA and the submission of a draft notification. The fact that a formal merger notification has been made in a particular case can only be kept confidential by the BKartA in very exceptional cases upon request. If such a request is made and the BKartA needs to undertake further investigations, it usually does not accept the notification as triggering the waiting periods. However, the BKartA will only postpone publication in extremely rare cases.

In addition, the BKartA now also publishes a list of all ongoing second-phase investigations.

Information on important merger decisions is published in the form of press releases on the internet and in the biennial competition report of the BKartA. A non-confidential version of all second-phase decisions is also available on the BKartA's website, along with summary reports of selected cases (some of which are also available in English).

The BKartA is under a statutory obligation to guarantee confidentiality and the disclosure of any business secrets by staff of the BKartA would constitute a criminal offence. Consequently, business secrets contained in a merger notification or in a response to an information

request issued by the BKartA will be kept confidential by the BKartA if they are identified as such by the notifying party, and indeed amount to business secrets.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The BKartA cooperates closely with other competition authorities within and outside the European Union, both on a formal and informal basis, where appropriate. However, the transmission of business secrets provided by the merging parties or by third parties is only permitted if the parties that have submitted the information give their consent, if the information is used for the same subject matter for which it was collected and if the receiving authority protects the confidentiality of the information. Regular cooperation exists in particular with the European Commission on jurisdictional issues, with other national competition authorities (for a recent example please see the press release regarding the concentration between Horizon Global Corporation/Westfalia and Brink International, in which the BKartA mentions close cooperation with the United Kingdom's CMA, which was also reviewing the transaction and expressed similar competition concerns), in particular with the US FTC and DOJ, and on policy matters, within the International Competition Network and the OECD. There is also a merger working group within the European Union with members from all EU national competition authorities and observers from the EFTA countries. Further details on cooperation between national competition authorities in the European Union can be found in the Merger Working Group's Best Practices (2011).

The European Commission and the national competition authorities of the member states exchange basic case information about notified transactions. Notification of a transaction in one EU member state can therefore trigger questions from other national competition authorities.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

All second-phase decisions of the BKartA are subject to full judicial review by the Higher Regional Court of Düsseldorf, and its judgments are subject to review by the Federal Court of Justice only on a point of law.

In its decision of 25 September 2007 regarding the *Springer/ProSiebenSat.1* case, the Federal Court of Justice acknowledged the right to a declaratory judgment on the BKartA's merger prohibition decisions, even in cases where the parties have abandoned the merger. Judicial review must be granted when the parties have 'a particular interest' in such review, either to clarify the factual basis of the BKartA's decision or to obtain legal certainty on a point of law (eg, if a similar acquisition may be attempted in the future).

Judicial review of second-phase clearance decisions is also available to third parties admitted, at the BKartA's discretion, as intervening parties (as well as, in some circumstances, third parties who applied for this status but were refused on the grounds of procedural efficiency) to the extent that they can show that their competitive interests are directly and individually affected by the decision.

However, third parties admitted as intervening parties in the initial merger control procedure do not automatically have the right to appeal the BKartA's decisions. As stated above, they still have to demonstrate how the decision directly and individually affects their competitive interests.

In proceedings brought by third parties against a clearance decision, the Higher Regional Court of Düsseldorf may order interim

measures preventing the parties from consummating the transaction. The court will do so if, based on a preliminary assessment, it has 'serious doubts as to the legality of the appealed clearance decision'. In contrast to the normal court proceedings, the appellant further has to show that its rights are infringed by the clearance decision. Thus, the requirements for getting an interim order are more demanding than for lodging an appeal (see question 29).

Ministerial authorisation decisions overruling a prohibition order of the BKartA are also subject to full judicial review by the Higher Regional Court of Düsseldorf.

For the first time in the BKartA's existence, one regional court (LG Köln) had to decide on the German state's liability in connection with a merger that was declared by higher courts to have been unlawfully blocked by the BKartA. The court recognised the responsibility of the state but decided that no damages should be paid by the state, as the conditions for fault were not fulfilled. The judgment was upheld by the Higher Regional Court of Düsseldorf in 2014.

## Time frame

### 33 | What is the usual time frame for appeal or judicial review?

An appeal against a decision of the BKartA has to be filed with the BKartA within one month of service of the decision. In cases of an application for ministerial authorisation, the period for a subsequent appeal begins upon issue of the order by the Federal Minister for Economic Affairs and Energy.

Proceedings before the Higher Regional Court of Düsseldorf will typically last 12 to 36 months until judgment. The judgment of the Higher Regional Court can then be appealed within one month. Following this, a review process before the Federal Court of Justice will normally take another one to three years.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The BKartA has continued to be very active in merger control over the past year. Of 1,383 notifications made to the BKartA in 2018 (up 6 per cent compared to 2017), 12 led to in-depth second-phase investigations. In 2018, no transaction was prohibited by the BKartA (one transaction was prohibited, however, in 2017). One case was cleared subject to conditions and four notifications were withdrawn after the BKartA either expressed competition concerns or indicated that it intended to prohibit the proposed merger. In 2019, up to the beginning of May, however, the BKartA prohibited two concentrations and an unusually high number of other notifications were withdrawn after the BKartA expressed competition concerns. The BKartA also announced its intention to prohibit a concentration in the used packaging waste disposal and recycling (aka dual systems) sector (*Remondis/DSD*).

Between 2005 and 2009, merger control enforcement by the BKartA featured a number of cases concerning hospital mergers and electricity and gas mergers. Between 2009 and 2012, petrol stations, food retail and media proved to be sectors that kept the BKartA very busy. In 2013 to 2016, we observed that those sectors remained a focus, with hospital, media and food retail deals the object of intense scrutiny. Over the period of 2018 to mid-2019, either merging parties withdrew their notifications or the BKartA announced that it viewed individual merger projects very critically in cases concerning petrol stations, hospitals and used packaging waste disposal and recycling, three sectors well-known to the BKartA and often characterised by a high level of concentration at local and regional level (and, in relation to petrol stations, a situation

of collective dominance). Other industries that the BKartA has already identified as being highly concentrated (and hence candidates for in-depth merger control scrutiny) include the airline industry and the telecommunications and mobile communications industry.

One of the most noteworthy deals of recent years is probably the BKartA's decision in 2018 to block the proposed acquisition, by CTS Eventim, of Four Artists, a decision in which the BKartA applies, in a great deal of detail, various concepts relating to platform markets, which have been a clear focus of enforcement and conceptual analysis (also in consultation and guidance papers) by the BKartA. Indeed, there has been a proven focus on cases relating to two-sided markets, including online markets. The BKartA has established a 'think tank' on how to deal with these cases and recently published working papers on 'Market Power of Platforms and Networks' and 'Data and its Implications for Competition Law'. Most of the merger control related amendments brought about by the ninth reform of the GWB in 2017 are also linked to the objective to render merger control more effective in the digital sector. It is noteworthy that the BKartA already started applying concepts applicable to the market power of platforms or relevant for the assessment of two-sided markets before the entry into force of the amendments. The only prohibition of 2017 (acquisition by CTS Eventim of Four Artists) assessed in detail the various sides of the markets concerned and the interplay between them. In that particular case, the BKartA analysed ticketing systems as being platforms. On the one side, such systems enable event organisers to sell tickets via different advance booking offices and online shops. On the other side, they enable advance booking offices to book tickets for different events. The BKartA examined factors establishing that CTS Eventim had a dominant position, in particular indirect network effects between the event organisers represented on the platform on the one hand and, on the other hand, advance booking offices and end customers using the platform. CTS Eventim's lead over its competitors in its access to data was also considered relevant for the analysis.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The ninth reform of the GWB entered into force in 2017. However, the next reform of the GWB is already in the works and may enter into force in the course of 2020 (for more details, see question 36).

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

### New law reform in the works

Although the last reform of the GWB is very recent (it entered into force mid-2017), the German legislator is already preparing the next reform of the law.

The last reform aimed particularly at improving competition law enforcement (including merger control) and responding to the challenges of the fast-moving digitisation of numerous industries. The next reform will continue on this path, although a recognisable focus is clearly on abuse of dominance in the digitised industries, the relevance of data to competition law, etc.

The following changes are currently under discussion:

- The second local turnover threshold might be increased, possibly from €5 million to €10 million. This could lead to a reduction of the number of notifiable concentrations by around 20 per cent. This proposal responds to the BKartA's plea to free up resources to concentrate on cases that are more likely to have problematic

competition effects in Germany. The president of the BKartA, Andreas Mundt, has repeatedly said that reviewing 1,200 to 1,300 merger control notifications a year was very burdensome.

- In order for the BKartA not to lose jurisdiction over all the cases that would not meet the amended thresholds (as some of them could be potentially problematic), some mechanisms are being considered. For example, an information obligation (but not an obligation to proceed to a fully-fledged notification) may be imposed for cases between the two thresholds, triggering a deadline for the BKartA to ask for further information or not.
- The de minimis market threshold may also be increased from €15 million to €20 million or €25 million (as set out in question 19, if the relevant market has been in existence for at least five years and had a total annual value of less than this threshold in the last calendar year, the BKartA would not be able to prohibit a transaction impeding competition on that de minimis market).
- An increase of the review deadline in the second phase is also considered.

Some other initial thoughts for the next reform were provided by a study by the competition institute DICE Consult on the 'Modernisation of Abuse Control for Dominant Companies' that was commissioned and received on 4 September 2018 by the Federal Minister for Economic Affairs and Energy. With regard to merger control, the authors proposed the extension of merger control by introducing a new rule that would prevent rapidly growing companies from systematically buying up start-up competitors with a view to foreclose the market. The GWB would include a new provision that would make it possible to prohibit a concentration that is part of an overall strategy, by a market-dominant undertaking, to systematically purchase high-growth but early-phase companies, where that strategy can significantly impede competition. For this, the target would need to have a recognisable and significant potential to become, in the medium-term, a competitor. That proposal, however, is not new and is quite controversial and may lead to numerous uncertainties in practice. Andreas Mundt already voiced practicability concerns over such a change. Currently, it does not appear that it will be retained in the draft bill.

We are currently not aware of any planned legislative changes relating to minority shareholdings and common ownership by large institutional investors, although this is a topic that is increasingly and regularly discussed.

The current debate involves numerous stakeholders (ministerial level, enforcers, scholars and practitioners) so it is currently unclear when the draft bill will be finalised and what it will look like. However, it is possible that the changes may be voted on as early as summer 2019 and could enter into force in the later months of 2019.



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# Greece

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation is Law No. 3959/2011 on the Protection of Free Competition (the Competition Law).

The Competition Law is enforced by an eight-member Competition Commission (the Commission), an independent authority with administrative and economic autonomy supervised by the Minister of Development and Investments, with a five-year term of office.

The Directorate General of Competition (DG) is headed by a general director appointed by the Commission for a four-year term of office and consists of approximately 100 members.

The National Telecommunications and Post Committee enforces the law regarding concentrations and antitrust cases in the electronic communications sector, according to Law No. 4070/2012.

Concentrations and antitrust cases in the media sector (TV, radio, newspapers and periodicals) are governed in principle by Law No. 3592/2007 (the Media Law) and by the Competition Law. These laws are enforced by the Commission.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Competition Law applies to concentrations in general. The term 'concentration' includes any kind of merger or acquisition between two or more previously independent undertakings (article 5.2 of the Law). A concentration is also deemed to arise where one or more persons already controlling at least one undertaking, or one or more undertakings, acquire direct or indirect control over the whole or parts of one or more undertakings.

#### 3 | What types of joint ventures are caught?

All full-function joint ventures shall constitute a concentration and shall be examined under merger control rules. However, the cooperative aspects of the joint venture shall be examined under article 1(1) and (3) of the Competition Law. In making this appraisal, the Commission shall take into account: whether the parent undertakings retain a significant portion of activities in the same market as the joint venture or in an upstream, downstream or closely related market; and whether it is likely that the joint venture eliminates competition in a substantial part of the relevant market.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

According to the Competition Law, control shall be constituted by rights, contracts or other means that either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the activities of an undertaking, in particular by ownership or usufruct over all or part of the assets of an undertaking, and rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking. Control is acquired by the person or persons who (or undertakings that) are holders of the rights or entitled to rights under the contracts concerned, or while not being holders of such rights or entitled to such rights under such contracts, have the power to exercise the rights deriving therefrom.

The acquisition of control may be in the form of sole or joint control. Sole control can be acquired on a de jure or a de facto basis. In the former case, sole control is normally acquired where an undertaking acquires a majority of the voting rights of a company. In the case of a minority shareholding, sole control may occur in situations where specific rights are attached to this shareholding. Sole control on a de facto basis may exist, among others, when a minority shareholder is likely to achieve a majority in the shareholders' meeting, given that the remaining shares are widely dispersed to a large number of shareholders and this shareholder has a stable majority of votes in the meetings, as the other shareholders are not present or represented. The Commission will assess whether, following the concentration, the party acquiring control will be able to determine the strategic commercial decisions of the target undertaking.

Joint control exists when the shareholders must reach agreement on major strategic decisions concerning the controlled undertaking. The Commission has consistently held that joint control exists in the case of equality in voting rights or in the appointment of decision-making bodies. Furthermore, it has held that the acquisition of minority interests may be caught by the Competition Law if, in combination with other factors, it may confer joint control to the holding party; that is, when this minority shareholder can block actions that determine the strategic commercial behaviour of the undertaking. As such, the Commission considers decisions on investments, business plans, determination of budget, or the appointment of management. Such veto rights may be included in a shareholders' agreement or in the company's statutes. Finally, joint control exists, according to the Commission, when the minority shareholdings together provide the means for controlling the target undertaking. This can be the result of either an agreement by which they undertake to act in the same way or can occur on a de facto basis, when, for example, strong interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

In a 2016 decision, the Commission dealt with the acquisition of exclusive control over 14 regional airports in Greece. This was achieved through the conclusion of concession agreements between Fraport AG and the Hellenic Republic Asset Development Fund whereby Fraport was assigned with the financing, upgrade, maintenance, management and operation of the airports for a period of 40 years. This period was considered sufficiently long to lead to a lasting change in control of the undertaking concerned.

Regarding the acquisition of control of a part of an undertaking, the Commission looks separately at each of the category of assets acquired and examines whether, despite the fact that they may have been acquired by different legal acts, they constitute a single unitary transaction. Furthermore, it considers the acquisition of control over assets as a concentration if those assets constitute a business to which a turnover can be attributed. It has found that this occurs in cases where the assets include, for example, installations, stock, goodwill, operation licence, intangible assets and are combined with a transfer of personnel. In the same context, in a 2013 decision, it has considered as part of an acquired business, apart from the tangible (eg, inventory) and intangible (eg, goodwill) assets transferred, the right of the acquiring undertaking to use the premises where the target business was carried out by virtue of a lease agreement of a 12-year duration concluded with the owner of the premises.

In a 2018 case in the media sector, the Commission has found that the acquisition by an undertaking in a public auction of five trademarks under which a corresponding number of newspapers had been previously published and that had been given as security to the lending banks by the owning company constituted a concentration, as these newspapers, when in circulation, generated a turnover. The acquiring undertaking, which re-launched the circulation of the newspapers under the acquired brands, received (small) fines for late notification and early implementation of the transaction on the grounds that it should have been aware that such acquisition was a concentration and should have suspended implementation until the Commission had issued its decision.

### Thresholds, triggers and approvals

**5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?**

A concentration is subject to a pre-merger notification if the parties have a combined aggregate worldwide turnover of at least €150 million and each of at least two participating undertakings has an aggregate turnover exceeding €15 million in Greece. In concentrations in the media sector, the thresholds are €50 million and €5 million, respectively.

In the case of an acquisition of parts of one or more undertakings, irrespective of whether these parts have a legal personality or not, only the turnover related to the target assets shall be taken into account with regard to the seller.

Regarding credit institutions and other financial institutions and insurance undertakings, article 10(3) of the Competition Law includes specific provisions regarding calculations of turnover.

**6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?**

The filing is mandatory without exception.

**7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?**

Yes, if the thresholds are met, according to article 6. Several foreign-to-foreign mergers have been notified where the parties had sales in the Greek market, even in the absence of a local company or assets. The basis for the application of the Competition Law to such mergers is article 46 thereof, under which the Law is also applicable to concentrations taking place outside Greece, even if participating undertakings are not established in Greece, where they have actual or potential effects on competition in the Greek market.

**8 | Are there also rules on foreign investment, special sectors or other relevant approvals?**

Regarding competition matters relating to special sectors of the economy under the umbrella of a regulatory authority, such as the telecommunications sector, which is supervised by the National Telecommunications and Post Committee (NTPC), the Commission will deal with markets falling within its competence, while referring others to the NTPC. This was demonstrated in a 2018 decision of the Commission, which approved the acquisition of sole control by Vodafone Hellas over Cyta Hellas regarding the markets of acquisition of TV content, including the right to retransmit other TV channels and to offer pay TV services. In contrast, the examination of the offering of combined or bundled landline telephony, broadband access to internet, pay TV and mobile telephony were referred to the NTPC.

Legislation relating to special sectors, such as banking, insurance, investment services, telecommunications, media, energy, etc, provide for special notifications or approvals, not related to antitrust issues, in cases of acquisitions of major holdings. In addition, there exist special reporting requirements when a major holding in a company listed in the Athens Stock Exchange is acquired or disposed of. These should be examined on a case-by-case basis.

Legislation aiming to attract investments includes the Greek Development Law 4399/2016 and the Law on Strategic and Private Investments 4146/2013. Tax incentives on transformation of companies are provided by a number of laws, such as Law 4172/2013, Law 2166/1993 and Law 1297/1972.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

**9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?**

A pre-merger filing should be submitted within 30 calendar days of the conclusion of a binding agreement, the announcement of a public bid or the acquisition of a controlling interest. Filing before any of the above events, in principle, shall not trigger the timetable for clearance.

In the case of wilful failure to notify a concentration as above, the Commission imposes a fine of at least €30,000 up to 10 per cent of the aggregate turnover of the undertaking under obligation to notify. In the majority of cases, the fines for late notification do not exceed double the minimum fine amount, although there have been some exceptions.

Failure to notify constitutes a criminal offence for the undertaking's lawful representative, punishable with a penalty from €15,000 to €150,000.

## 10 | Which parties are responsible for filing and are filing fees required?

In the case of a merger agreement, the concentration must be notified by all parties involved, whereas in cases of acquisition of sole control by the party acquiring control and in cases of acquisition of joint control, notification must be made by all the undertakings participating in the agreement.

The filing fee for a pre-merger filing amounts to €1,100.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In cases of concentrations subject to pre-merger control, the implementation of the transaction is prohibited until the Commission issues a decision:

- approving the transaction under article 8(3) (Phase I decision);
- approving the transaction after an in-depth investigation (with or without conditions) within 90 days from the initiation of Phase II proceedings, according to article 8(4), (5), (6) and (8) (Phase II decision);
- approving the transaction before a 90-day term following initiation of Phase II proceedings has expired without the issuance of a prohibitive decision (deemed clearance); and
- prohibiting the transaction according to article 8(6) (see question 18).

In a 2014 case, the Commission dealt with an acquisition of joint control, approved back in 2012, in the form of veto rights awarded to the 49 per cent shareholder by virtue of a shareholders' agreement and examined whether the concentration had been implemented before the issuance of its approving decision while it should have been suspended. According to the facts, on the same day that the shareholders' agreement was signed and even before the submission of the notification to the Commission, the shareholders' meeting of the target company had in fact elected a new board of directors consisting of directors appointed by both parties in conformity with the shareholders' agreement. From the evidence submitted to it, the Commission found that although the board had been elected by the shareholders' meeting and had convened at a meeting to constitute itself into a corporate body before the issuance of the Commission's approving decision, it had not thereafter exercised any of its powers. In fact, a month after its election, the shareholders' meeting of the target company revoked its decision electing such board with retroactive effect since its election. The Commission thus concluded that the joint control had not been actually implemented and refrained from the imposition of fines for early implementation of the concentration to the shareholders of the target company.

The issue of suspension of the implementation of a transaction came up in a 2018 decision dealing with the acquisition of sole control. In that case, the parties had notified to the Commission their non-binding memorandum of understanding providing for the sale of 100 per cent of the shares of the target company by the seller to the acquiring undertaking. A few days later, they signed and submitted to the Commission the sale and purchase agreement according to which the seller sold and delivered the shares to the acquiring undertaking, the latter paid to the seller a big portion of the purchase price and the board members of the target company had handed their written resignations to the acquiring company. That agreement did not contain a provision that the sale would be conditional on the approval of the transaction by the Commission; however, a similar clause was contained in the notified memorandum of understanding. The Commission cleared the transaction with commitments. Until the issuance of that decision, the acquiring undertaking had not exercised its rights as the new shareholder of the

target company and the resignation of the board members had not been become effective. So, until that day, the target was still being managed by the previous shareholder (ie, the seller). On the basis of these facts, the Commission found that there has not been an early implementation of the transaction, especially because there was no evidence that the parties had intended to conceal the change of control and avoid the substantive examination of the transaction. However, there was a dissenting minority, including the President of the Commission.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing before clearance attracts a fine of at least €30,000 and up to 10 per cent of the aggregate turnover of the undertaking under obligation to notify. In the majority of cases, the fines for early closing do not exceed double the minimum fine amount, although there have been exceptions.

Closing before the Commission's decision constitutes a criminal offence for the undertaking's lawful representative, punishable with a fine from €15,000 to €150,000.

The Commission may adopt appropriate provisional measures to restore or maintain conditions of effective competition if the concentration has closed before a clearance decision or in breach of the remedies imposed by the Commission's clearance decision.

Early implementation may only be allowed following a special derogation by the Commission. Derogations may be granted to prevent serious damage to one or more of the undertakings concerned or to a third party. A derogation may be requested or granted at any time (before notification or after the transaction) and revoked by the Commission in the circumstances provided in the law, for example if it was based on inaccurate or misleading information. The Commission may, in granting a derogation, impose conditions and obligations on the parties to ensure effective competition and prevent situations that could obstruct the enforcement of an eventual blocking decision. The Commission regards derogations as an exceptional measure and grants them with great caution, in particular where the participating undertakings face serious financial problems. The Commission has granted a derogation to a major Greek bank that intended to take over from a bank under liquidation all its current account contracts with its customers. The Commission held that the immediate implementation of the succession was crucial not only for the customers of the failed bank, so that they could have immediate access to their bank accounts, but also to safeguard the reputation of the Greek banking system.

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The Commission would impose sanctions in cases involving closing before clearance in foreign-to-foreign mergers.

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

'Hold-separate' arrangements have, to date, not been accepted by the Commission as it considers that a concentration at the level of the parent undertakings outside Greece gives the possibility to the acquiring undertaking to implement its business and pricing policy to the seller's customers in Greece, thus acquiring control of the target's local market share.

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

In the case of public bids or acquisitions of controlling interest on the stock exchange, implementation is allowed provided the transaction has been duly notified to the Commission and the acquirer does not exercise the voting rights of the acquired securities, or does so only to secure the full value of the investment and on the basis of a derogation decision issued by the Commission. In a derogation issued in this context, the Commission allowed the exercise of the voting rights of the acquired shares to elect a new board of directors, provided this board would not proceed to management acts that would substantially modify the assets or liabilities of the company until the issuance of the clearance decision by the Commission.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Pre-merger filing is onerous. A specific form exists similar to the Form CO, as well as a short form filed when the notifying party considers that the concentration does not raise serious doubts. As a general rule, the short form may be used for the purpose of notifying concentrations, where one of the following conditions is met:

- none of the parties to the concentration are engaged in business activities in the same relevant product and geographical market (no horizontal overlap), or in a market that is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);
- two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographical market (horizontal relationships), provided that their combined market share is less than 15 per cent; or one or more of the parties to the concentration are engaged in business activities in a product market that is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), and provided that none of their individual or combined market shares at either level is 25 per cent or more; or
- a party is to acquire sole control of an undertaking over which it already has joint control.

The Commission may require a full-form notification where it appears either that the conditions for using the short form are not met, or, exceptionally, where they are met, the Commission determines, nonetheless, that a full-form notification is necessary for an adequate investigation of possible competition concerns.

Notifications should be submitted in four copies in the Greek language, with supporting documents as well as by email. In practice, if these are in English, no Greek translation will be required, except for the concentration agreement itself. This document, or at least its principal provisions, should be translated into Greek. The submitting attorney should produce a power of attorney granting him or her all necessary powers to act before the Commission and also to act as attorney for service.

In a case where wrong or missing information is provided, the law provides for a fine of €15,000 with a maximum level of 1 per cent of the turnover.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

Upon receipt of notification, a rapporteur is appointed from the members of the Commission who shall be assisted by a team of employees of the DG. An investigation shall commence involving contacting third parties, such as competitors or customers, with the purpose of defining the relevant and the affected markets and the competitive conditions therein. Letters may also be addressed to notifying parties with additional requests for information, which should be replied to within at least five days of receipt. The rapporteur should issue its recommendation to the Commission, also made available to the notifying parties, whether to clear the transaction or not. The parties, following the issuance of the recommendation, have access to the non-confidential information of the Commission's file on the case. Third parties do not have access to the file.

A summons is addressed by the Secretariat to the parties for a hearing before the Commission. At the hearing, the parties may present their arguments and examine witnesses. Thereafter, they may also submit written pleadings.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

There is a two-stage procedure for pre-merger filings.

If the concentration does not raise serious doubts concerning potential restrictive effects on competition, the Commission should issue a clearance decision within one month of notification.

If the concentration raises serious doubts, the president of the Commission must issue a decision within one month of notification initiating a full investigation of the notified transaction. The participating undertakings should be immediately informed about this decision. The case is introduced before the Commission within 45 days. From that date, the undertakings may within 20 days at the latest propose commitments. In exceptional cases, the Commission may accept commitments even after the expiry of the 20-day term, in which case the term for the issuance of a decision under article 8(6) is extended from 90 to 105 days. Where the Commission finds that the concentration substantially restricts competition in the relevant market, or that, in the case of a joint venture, the criteria laid down by article 1(3) are not fulfilled, it shall issue a decision prohibiting the concentration. Such decision must be issued within 90 days of the initiation of Phase II. If the Commission finds that the concentration does not substantially restrict competition or if it approves the same with conditions, it shall issue an approving decision. If the 90-day term expires without the issuance of a prohibitive decision, the concentration is deemed as approved, with the Commission thereafter issuing a merely confirmatory decision.

This timetable cannot be speeded up. They can be extended when the notifying undertakings consent.

If the participating undertakings do not furnish any required information within the set deadline, the term for the issuance of the decision is suspended and recommences as soon as such information is furnished. In its decisions, the Commission mentions the date of the notification, the date of its request for information and the date of submission thereof by the notifying party.

In general, the Commission issues its decisions within the above terms.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The test for clearance is that a concentration must not significantly restrict competition in the Greek market, in particular by way of creating or reinforcing a dominant position. Criteria taken into account include: actual and potential competition, barriers to entry, the economic strength of participating undertakings, the supply and demand trends relating to the products or services involved, the structure of the market and the bargaining power of suppliers or customers.

In a 2017 decision, the Commission dealt with a conglomerate merger where an undertaking active in cold meat and cheese products was acquired by an undertaking producing sweet and salted snacks and chocolate products. The Commission cleared the merger on the grounds that it was unlikely that the acquiring company, although it had significant share in its market, would proceed to combined sales because:

- these were not complementary products;
- supermarkets had alternative sources of supply of cold meat and cheese products given the existence of strong competitors of the acquired company in that market;
- competitors in the crude meat market could deploy effective counter strategies to react to any attempt of foreclosure; and
- private label products played an important role in that market.

In the Media Law, dominance is defined by way of reference to a scale of market shares that will be acquired as a result of the concentration. These market shares vary depending on whether the party acquiring control is active in one or more media of the same type or of different types. The wider the spread in the various media, the lower is the market share conferring dominance. These shares vary from 25 per cent to 35 per cent.

#### 20 | Is there a special substantive test for joint ventures?

In addition to examining whether the joint venture will significantly restrict competition, the Commission will assess possible 'cooperative' effects (see question 3).

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

Single or joint market dominance is the basic concern of the authorities during their investigation of a concentration. They have also examined unilateral, coordinated, vertical and conglomerate effects.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

In recent years, the Commission has shown that it also takes into account the effects on the national economy when examining a merger. For example, in relation to the banking sector, the Commission has repeatedly stressed the need to support concentrations therein, as these sectors account for a considerable percentage of gross national income and concentrations would lead to the formation of more competitive and modernised groups with increased economic and productive strength, which would offer employment to a wide range of professions.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are taken into account by the Commission to the extent that they enhance the degree of competition in the market in favour of consumers.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the authorities find that a concentration significantly restricts competition, then a prohibitive decision shall be issued (see questions 11 and 18).

If a concentration has been implemented in breach of the Competition Law or in breach of a prohibitive decision, the Commission may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or disposal of all the shares or assets acquired, so as to restore the situation prevailing before the implementation of the concentration. Divestment has to date been ordered only once, in a transaction between Greek companies. The Commission may also order any other appropriate measure for the dissolution of the merger.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Commission may clear the transaction subject to conditions so as to render the concentration compatible with the substantive test for clearance or to ensure compliance by the parties with the amendments to the terms to the concentration agreed by them. A fine for non-compliance may be threatened by the Commission, which may not exceed 10 per cent of the aggregate turnover of the undertakings. By virtue of a subsequent decision verifying that the conditions have been breached, the Commission may declare that the fine has been forfeited.

In a 2011 decision involving the ice-cream sector, the Commission analysed in great depth the non-coordinated and coordinated effects of the transaction and cleared it following an undertaking by the acquiring undertaking that the exclusivity clause, obliging the point of sales to use freezers only for the ice cream of the suppliers providing them, would be deleted from the respective agreements. In another 2011 case in the milk sector, the Commission cleared the transaction after a commitment by the acquiring company to divest a business of the target and to appoint a trustee to implement such divestiture.

In a 2017 decision, the Commission, following Phase II proceedings, cleared the acquisition by the second-largest supermarket chain in Greece of another supermarket chain, in a stage of pre-bankruptcy proceedings, with an equal share, which would make the acquiring undertaking the largest chain in Greece, leaving the previous number one chain in second place with a difference of approximately 5 to 10 per cent in terms of market share. The acquiring undertaking had proposed the following commitments, which were accepted by the Commission:

- It would continue its cooperation with the suppliers used both by itself and the acquired chain whose sales to the new entity emerging from the merger would represent at least 22 per cent of their total sales, for a period of three years; the same commitment was taken regarding local suppliers of the acquired entity. This commitment would cease to apply in certain defined cases, including when the product supplied became obsolete, when there were issues of

safety and consumer protection imposing the interruption of the cooperation, when the quality of the product deteriorated or when there was an unreasonable increase in its price.

- The acquiring company and the new entity undertook to sell 22 shops in defined locations so as to address the concerns that high shares would emerge for the new entity post-merger in these geographic areas. Such sale should be effected within a term of nine months.

On that same transaction, the Commission issued a new decision in 2018 accepting a request by the acquiring party to modify the commitments on the grounds that the circumstances had changed. More specifically, out of the 22 stores, only eight had been sold and despite continuous efforts, there was no interest from potential buyers for the remaining 14. The Commission re-evaluated the market shares in the local markets concerned and found that although before its initial decision in 2017 the share of the acquiring undertaking would exceed 50 per cent, this was no longer the case as in the meantime new undertakings had entered the market and competition had increased. The Commission thus decided to lift the commitment of sale regarding the 12 stores and imposed a commitment on the undertaking to not operate the other two stores as supermarkets for a term of three years.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

To date, only one decision imposing divestment as a condition for clearance has been issued (see question 24). In that case, to entirely remove the horizontal overlap between the parties to the concentration and enable access of competitors in the chocolate milk market and given that it was not possible to separate the business activity of the chocolate milk from that of white milk, the Commission concluded that the acquiring party should sell a leading trademark of chocolate milk of the acquired party to an appropriate buyer. To ensure the viability and competitiveness of the divested asset, the acquiring party further committed, subject to the buyer's approval, to provide to the buyer access to its distribution network for chocolate milk and to have the new entity enter into a toll manufacturing agreement to produce chocolate milk for the buyer at market prices, for a transitional period of two years following completion of the divestiture.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Commission has, to date, never imposed remedies in a foreign-to-foreign merger.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision covers restrictions directly related and necessary for the implementation of the concentration. The Commission usually examines these restrictions separately and clears them on the basis of principles similar to those of the European Commission's Notice on ancillary restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties are given the opportunity under the Competition Law to play an important role in the application of Greek merger control rules. The DG may address questions to third parties, such as competitors or customers. These should be replied to within five days and the Competition Law provides for fines for those who do not comply. The Commission may invite any third party to the hearing before it, if it decides that its participation will contribute to the examination of the case. In addition, any third party, natural or legal person may intervene in the proceedings by submitting written pleadings at least five days before the hearing.

Although the Competition Law does not explicitly give third parties the right to complain in cases of infringement of merger control rules, there is no obstacle to the investigation of a non-notified transaction given the Commission's wide powers to commence on its own initiative investigations with the purpose of establishing whether merger control rules have been infringed.

Third parties demonstrating a legitimate interest may file an appeal against the decisions of the Commission before the Administrative Appeal Court of Athens.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Commission has fixed the form and content of the public announcement of the concentrations subject to pre-merger control by the notifying party in the daily press. This announcement should take place immediately after notification. This announcement is also uploaded to the Commission's website so that any interested party may submit observations or information on the notified concentration.

The decisions of the Commission are published in the Government Gazette. Commercial information, including business secrets, are protected from disclosure under article 28 of the Regulation of Operation and Administration of the Competition Commission.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Under the Competition Law, the Commission assists the European Commission in investigations carried out on the basis of EU provisions. Decisions of antitrust authorities of other member states play a crucial role in the Commission's assessment of the concentration. The Commission keeps records of concentrations subject to multiple filings in the context of the Network of European Competition Authorities (ECAs) and cooperates with ECAs regarding merger control.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

Decisions of the Commission are subject to appeal before the Administrative Appeal Court of Athens. This appeal does not automatically suspend the enforcement of the contested decision, but a petition to this effect may be submitted to the Appeal Court, which may grant

a suspension of the whole or part of the appealed decision, provided serious reasons exist. If the appealed decision imposes a fine, the Appeal Court may suspend only up to 80 per cent of the fine.

A recourse for judicial review of the Appeal Court's decision may be filed before the supreme administrative court, the Council of State, on points of law and procedure.

The Commission seems to recognise the possibility for third parties to request by way of a petition to the Commission the revocation of a decision it has issued approving a concentration, if this decision has been based on inaccurate or misleading information. In such case, the Commission may issue a new decision. However, this possibility is only available if the applicant can invoke a specific damage that it will suffer as a result of the approved concentration and a causal link between such damage and the issued decision.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

The time frame for an appeal before the Appeal Court is 60 days from the decision being served to the parties concerned. The term for recourse before the Council of State is 60 days from the Appeal Court's decision being served. It may take more than a year for the Appeal Court to deliver its decision and even longer for the Council of State.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Commission has, to date, never prohibited a foreign-to-foreign merger, but has imposed fines for failure to notify and for early closing.

Given the increased concentration occurring in the supermarket sector, the Commission had the opportunity in 2014–2015 to deal with a number of transactions in this sector that were approved at Phase I.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

There have been no developments in merger control legislation the past year.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The President of the Commission has changed in 2019, following the expiry of the term of office of Mr Dimitris Kiritsakis. Since January 2019, the President is Mrs Vasiliki Thanou, previously President of the Supreme Court. Also, two new rapporteurs have been appointed, Mr Ioannis Pavlovits and Mr Ioannis Stefatos, while the other two are Mr Nicolaos Zevgolits and Mr Panagiotis Fotis. The Vice President is Mrs Anna Nakou.

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# Greenland

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Although Greenland is part of the Kingdom of Denmark, Greenland has its own competition regulation. The main legislation on Greenlandic merger control is contained in the Greenlandic Competition Act (Act of the Home Rule Parliament No. 1 of 15 May 2014), which is modelled on Danish competition law (and thereby EU competition law) and entered into force on 1 July 2014. The Act brought about a reform of merger control in Greenland, and replaced the previous regime, which provided for a mere post-notification obligation. The main difference from the Danish Competition Act is the notification thresholds, which are significantly lower. This chapter reflects the provisions of the Competition Act and the law preparatory documents accompanying the bill, but at the time of writing, the situation remains that no decisions have been adopted and there is accordingly no administrative practice.

For merger control, the provisions of the Greenland Competition Act are accompanied by executive order No. 3 of 10 March 2016 on the Notification of Mergers, and executive order No. 13 of 23 July 2015 on the Calculation of Turnover.

The legislation can be accessed in Danish or Greenlandic on [www.lovgivning.gl](http://www.lovgivning.gl).

The Competition Tribunal is the principal enforcer of competition law in Greenland. It consists of a chairman and six members appointed by the Home Rule Parliament. The chairman and three of the members must be independent of commercial and consumer interests while, of the remaining three members, one is nominated by a commercial interest organisation, one by a consumer organisation, and one is nominated by the organisation Kanukoka, which represents the interests of municipalities in Greenland.

The day-to-day administration of the Competition Act is handled by the Consumer and Competition Authority, which serves as the secretariat of the Competition Tribunal.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The provisions of merger control apply to 'concentrations'. In accordance with the EU Merger Regulation, a concentration will be deemed to arise where either:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

#### 3 | What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a concentration.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Greenlandic regulation follows Danish legislation (which is consistent with EU law), entailing the following definition of control: control shall be constituted by rights, contracts or any other means that, either separately or jointly, confer the possibility of exercising decisive influence over an undertaking.

In cases where outright legal control is not acquired, rights attached to shares or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues may be considered. In the case of the acquisition of minority shareholdings, it is most likely that the Consumer and Competition Authority will assess the situation by looking at the strength of voting rights and other factors. Such considerations may lead to the conclusion that the possibility of exercising control as defined exists. It will most likely not matter whether control has actually been exercised. The European Commission's practice may be expected to serve as guidance.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions apply to concentrations where the combined aggregate turnover in Greenland of all the undertakings concerned is more than 100 million kroner and the aggregate turnover in Greenland of each of at least two of the undertakings concerned is more than 50 million kroner.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of merger notifications in Greenland is mandatory if the turnover thresholds are met.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers satisfying the turnover thresholds are subject to Greenlandic merger control even where no actual effects in the Greenland market can be shown. However, the thresholds have been defined so as to require actual turnover in Greenland.

- 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

No.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

- 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations falling within the thresholds must be notified to the Consumer and Competition Authority after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest; and in any event before implementation. A specific deadline can be expected in the future executive orders.

Fines may be imposed for failure to notify (and unlawful implementation).

- 10 | Which parties are responsible for filing and are filing fees required?

In principle, all the parties involved in a concentration are responsible for filing. In practice, however, the filing of acquisitions can be expected to be made by the acquiring party. The fee amounts to 50,000 kroner for simplified notifications and 0.015 per cent of the parties' turnover for non-simplified notifications. However, the filing fee is capped at a maximum of 1.5 million kroner. Fees have to be paid at the same time as the filing of the notification.

- 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A concentration that is notifiable to the Consumer and Competition Authority must not be put into effect before it has been approved by the Competition Tribunal or the Council's time limits have expired.

This creates waiting periods of 40 working days (Phase I) or additionally 90 working days (Phase II) after the expiry of the first waiting period.

### Pre-clearance closing

- 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Fines may be imposed for (failure to notify and) unlawful implementation. Moreover, where clearance is subsequently denied or made conditional, the transaction will have to be annulled or otherwise reopened and modified. The Competition Tribunal has not yet issued decisions in this relation.

- 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In principle, the same sanctions are applicable to foreign-to-foreign mergers as to other mergers.

- 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are still no decisions or administrative practice from the Competition Tribunal in these cases.

### Public takeovers

- 15 | Are there any special merger control rules applicable to public takeover bids?

No.

### Documentation

- 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filing under the Competition Act requires the use of a specific form known as Annex 1. The form requires the provision of information about the parties, the markets, customers, suppliers and competitors, and is only a little less detailed than the Form CO used under the EU Merger Regulation. For straightforward cases that are unlikely to raise competition concerns, a simplified 'short-form' filing using a form known as Annex 2 is also possible. This form is similar in structure to Annex 1 but requires less information to be submitted. Both forms require the lodging of a non-confidential version, which is intended to be used for market testing. The forms are similar to the applicable Danish forms.

### Investigation phases and timetable

- 17 | What are the typical steps and different phases of the investigation?

Pre-notification consultations with the Consumer and Competition Authority may and should take place.

The Competition Tribunal may approve a concentration before the expiry of the initial investigation (Phase I). The Competition Tribunal cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if there are serious doubts regarding the concentration's compatibility with the Competition Act.

- 18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance is the same whether the merger is filed under the simplified procedure or the full notification procedure.

The Competition Tribunal must make its decision on the substance within 40 working days (Phase I) from the receipt of a complete notification. It will decide to either approve the concentration or initiate further proceedings. In the latter case, the Competition Tribunal must make a final decision within 90 working days (Phase II) after the expiry of the original 40 working days. These time limits may be extended with up to 20 days if the undertakings propose new or revised commitments at a late stage (ie, fewer than 20 days remaining of the original deadline). The deadline is only extended with as many days required to provide 20 days for the assessment of the new or revised commitments. The deadline can also be extended with up to 20 days on request by the parties or with the parties' consent.

## SUBSTANTIVE ASSESSMENT

### Substantive test

- 19 | What is the substantive test for clearance?

The substantive test to be applied by the Competition Tribunal is whether the concentration significantly impedes effective competition (SIEC), in particular as a result of the creation or strengthening of a dominant position. Unless this is the case, the concentration must be approved.

In the case of full-function joint ventures, which may also have the object or effect of coordinating the competitive behaviour of undertakings

that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions of the Competition Act applying to anticompetitive agreements (similar to article 101(1) of the Treaty on the Functioning of the European Union (TFEU)).

## 20 | Is there a special substantive test for joint ventures?

The substantive test for clearance of concentrations that have as their object or effect the coordination of the competitive behaviour of undertakings is similar to that set out in the EU Merger Regulation. Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of the Competition Act, which are the domestic equivalents of article 101(1) and (3) TFEU. This test applies in addition to the SIEC test.

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

There are still no decisions or administrative practice from the Competition Tribunal. However, as in Denmark, the Competition Tribunal is expected to follow the European Commission's practice with regard to the applicable 'theories of harm'.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

The Competition Act entered into force on 1 July 2014. There have been no decisions or administrative practice from the Competition Tribunal that can constitute the foundation for such an assessment. However, the Competition Tribunal is expected to apply the above substantive test without taking account of non-competition issues.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment. However, section 1 of the Competition Act states that the purpose of the Competition Act is to promote 'efficient resource allocation' and, consequently, it can be argued that efficiency should be considered. In practical terms, an efficiency argument can be raised if available, and will be considered in the assessment of the case. However, in raising the efficiency defence the undertakings concerned might risk the competition authorities interpreting the argument as an indication of increased dominance, as the efficiency gained will make competition even more difficult for competitors that do not benefit from similar efficiencies. Therefore, the efficiency defence should be applied with due caution.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The transaction may be approved, approved with conditions, or prohibited. Commitments may be offered to eliminate competition concerns. The Competition Tribunal has the power and duty to impose conditions; therefore, it may not, according to the principle of proportionality, prohibit the transaction if it can design suitable remedies. The parties to the merger might therefore be in the position of deciding whether to

proceed with the transaction on the basis of remedies accepted by the Competition Tribunal.

### Remedies and conditions

## 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the competition authorities assess that the concentration cannot be approved without conditions, the undertakings concerned will enter into a dialogue or negotiation with the competition authorities to agree on suitable commitments. The commitments agreed with the competition authorities will be formulated as conditions in the approval of the concentration. Such conditions can be appealed separately after approval of the concentration, even though they are agreed during the negotiations with the competition authorities. The Competition Tribunal may attach conditions including divestment orders or behavioural remedies for clearance of a concentration and may also issue orders to ensure that the parties fulfil these.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The notifying parties are not required to identify ancillary restrictions. It is therefore up to the parties to assess whether there are ancillary restrictions that need to be evaluated by the Consumer and Competition Authority.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Consumer and Competition Authority can be expected to conduct market tests.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Act on public access to documents in public files does not apply to merger cases, and information will generally be treated as confidential information. Section 24 of the Competition Act provides which information is considered to be confidential.

## Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Consumer and Competition Authority cooperates with the other Nordic countries, (ie, Denmark, the Faroe Islands, Iceland, Sweden and Norway).

## JUDICIAL REVIEW

### Available avenues

32 | What are the opportunities for appeal or judicial review?

The decisions of the Competition Tribunal are not subject to administrative appeal. The decisions of the Competition Tribunal can be brought before the court in Greenland.

### Time frame

33 | What is the usual time frame for appeal or judicial review?

The time frame for an appeal before the court in Greenland can be expected to be around six to nine months.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

There have been no decisions or administrative practice from the Competition Tribunal to shed light on this question.

### Reform proposals

35 | Are there current proposals to change the legislation?

With the entering into force of the Competition Act of 15 May 2014 as recently as 1 July 2014, no further changes are expected in the near future.

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# Hong Kong

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The Hong Kong Special Administrative Region (Hong Kong) is administratively and legally separate from China. As such, Hong Kong has its own system of law.

The Hong Kong Competition Ordinance (Cap 619) (the Competition Ordinance), which came into full force on 14 December 2015, is the first ever economy-wide, cross-sector competition law in Hong Kong. While the Competition Ordinance focuses on two key behavioural prohibitions on anticompetitive business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, it also incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule). The Merger Rule provides that an undertaking must not, directly or indirectly, carry out a 'merger' that has or is likely to have the effect of substantially lessening competition in Hong Kong.

The Competition Commission (the Commission) and the Communications Authority (the CA) have concurrent jurisdiction in enforcing the Merger Rule. The Commission and the CA have jointly issued a guideline setting out how they intend to interpret and give effect to the Merger Rule (the Guideline). A dedicated Competition Tribunal (the Tribunal) has jurisdiction to hear and determine applications made by the Commission or the CA to unwind a completed merger or to prohibit a proposed merger.

Unless specified otherwise, where a matter relates to conduct falling within the Commission's and the CA's concurrent jurisdiction, references are made to the 'competition authority', which shall be read as including both the Commission and the CA. In practice, and as stipulated under the terms of a memorandum of understanding between the Commission and the CA, the CA will typically take the lead in relation to matters relating to the Merger Rule, given that the merger control regime in Hong Kong only applies to the telecommunications sector (see question 2).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The merger control regime only applies to 'mergers' involving a carrier licence within the meaning of the Telecommunications Ordinance (Cap 106). Such a carrier licence essentially relates to network operators that establish and maintain wired or wireless transmission facilities that carry 'communications' between locations that are separated by public streets or unleased land. This includes the local and external fixed network operators and mobile network operators.

There are no financial thresholds to trigger the Merger Rule. Instead, the issue is whether a merger has taken or is to take place. A 'merger' takes place if:

- two or more previously independent undertakings cease to be independent of each other;
- one or more persons or undertakings acquire direct or indirect control of the whole or part of one or more other undertakings. In this regard, the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger; or
- an acquisition by one undertaking of the whole or a part of the assets of another undertaking such that the acquirer is in a position to replace or substantially replace the acquired undertaking in the business or part of the business concerned in which the acquired undertaking was engaged immediately before the acquisition.

In each case above, the Merger Rule applies either where the acquirer or target holds a telecommunications carrier licence, or where the acquirer or target directly or indirectly controls an undertaking that holds a telecommunications carrier licence.

#### 3 | What types of joint ventures are caught?

The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity constitutes a merger within the meaning of the Merger Rule. In accordance with the Guideline, performing all the functions of an autonomous economic entity means that a joint venture must operate on a market and perform the functions normally carried out by an undertaking operating on that market; this is not the case if it only takes over one specific function within the parent companies' business activities without access to or presence on the market.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

A merger takes place if one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings. 'Control' is acquired by any person if that person becomes a holder of the rights or contracts or is capable of exercising decisive influence with regard to the composition, voting or decisions of any governing body of an undertaking or the activities of the undertaking by ownership of the assets of the undertaking. 'Decisive influence' refers to the power to determine or veto decisions relating to the strategic commercial behaviour of an undertaking. 'Control' may therefore be established on a legal or de facto basis such that minority and other interests that amount to less than legal control may be caught. However, no specific percentage threshold for 'control' is stated in either the Competition Ordinance or the Guideline.

## Thresholds, triggers and approvals

- 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are no financial thresholds under the Competition Ordinance; instead the question is whether a merger has taken or is to take place (see question 2).

The competition authority has nevertheless identified two indicative 'safe harbours' according to which mergers are unlikely to substantially lessen competition:

- four-firm concentration ratio: where the post-merger combined market share of the four (or fewer) largest firms (CR4) in the relevant market is less than 75 per cent, and the merged firm has a market share of less than 40 per cent; or where the CR4 is 75 per cent or more, and the combined market share of the merged entity is less than 15 per cent of the relevant market; and
- Herfindahl-Hirschman Index (HHI): where the post-merger HHI is less than 1,000 in the relevant market; or where the post-merger HHI is between 1,000 and 1,800, and the merger produces an increase in the HHI of less than 100 in the relevant market; or where the post-merger HHI is more than 1,800, and the merger produces an increase in the HHI of less than 50.

However, the competition authority has expressly stated that meeting one or both of the safe harbour thresholds does not necessarily mean that the merger does not give rise to competition concerns and that it may still commence an investigation in 'appropriate circumstances'.

- 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is voluntary in general, but parties are encouraged to contact the competition authority at an early stage to discuss a proposed merger that involves a telecommunications carrier licence.

However, where a party is required to make a mandatory general offer (MGO) under the Hong Kong Code on Takeovers and Mergers and Share Repurchases (the Takeovers Code) that would result in a 'change' in relation to a carrier licensee, the Takeovers Code requires that the MGO offeror obtains prior formal consent from the CA in relation to the 'change' to the carrier licensee before it triggers an obligation to make an MGO.

- 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Merger Rule applies to foreign mergers if the transaction (indirectly) involves a telecommunications carrier licence under the Telecommunications Ordinance.

- 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Generally speaking, there are no economy-wide restrictions relating to foreign investment in Hong Kong. Sector-specific limits on foreign investment apply in the television and sound broadcasting sectors.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

- 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing, as the merger control regime is generally voluntary. As a result, there are no specified sanctions for not filing but please refer to question 12 for the risks associated with closing before obtaining consent from the competition authority.

- 10 | Which parties are responsible for filing and are filing fees required?

'Merging parties' can submit a voluntary notification to the competition authority seeking 'informal advice' on a confidential basis (the Informal Advice Route). The informal advice is not binding on the competition authority, but it provides a preliminary view as to whether the proposed merger is likely to raise competition concerns.

Parties to a merger may also apply to the competition authority for a formal decision as to whether the merger is excluded from the application of the Merger Rule on the basis that the economic efficiencies of the merger outweigh the adverse effects caused by any lessening of competition, or the statutory exemptions apply (the Decision Route) (statutory exemptions cover statutory bodies to which the Merger Rule does not apply pursuant to section 3 of the Competition Ordinance or specified persons; and persons engaged in specified activities to which the Merger Rule does not apply as determined by the Chief Executive in Council by means of a regulation made pursuant to section 5 of the Competition Ordinance).

A fee of HK\$500,000 will be charged for an application to the competition authority for a decision; in the case of the CA, the amount of the fee will be equal to the costs and expenses incurred by the CA (but capped at HK\$500,000).

- 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is no suspensory obligation.

In terms of timetable for clearance, no indicative timetable is provided by the competition authority in relation to the Informal Advice Route or the Decision Route. The competition authority has stated that it will endeavour to process applications in an efficient and timely manner, but that timing will depend on the complexities of the case and the resources available to the competition authority. In practice, from submission of all required information, 'no issues' cases have been approved within one month and complex cases have taken up to six months to be approved.

In addition, the competition authority may commence an investigation of a merger within 30 days of the day on which the competition authority first became aware, or ought to have become aware, that a merger has taken place. If the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Tribunal for an order within six months (this can be extended if the Tribunal considers it reasonable) of the day on which the merger was completed or the competition authority became aware of the merger (whichever is the later).

## Pre-clearance closing

- 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As noted above, there is generally no requirement to seek approval before closing such that there are no specified sanctions for closing before clearance.

However, where the implementation of a proposed transaction would result in a requirement that the offeror make an MGO pursuant to the Takeovers Code, it is a requirement that the offeror obtain prior formal consent from the CA for a 'change' to the carrier licensee. Failure to do so may result in disciplinary action under the Takeovers Code. Sanctions include issuance of a public apology, public censure, and requirements on the company involved, licensed representatives and registered institutions not to act or implement the merger or acquisition.

In addition, the competition authority may commence an investigation of an anticipated or completed merger and can seek various orders from the Tribunal including orders to unwind the transaction or orders to divest certain assets. In certain circumstances, the competition authority can also apply to the Tribunal for interim measures for the purpose of 'preventing pre-emptive action', which may prejudice the hearing of the application by the Tribunal. Interim measures would include measures akin to hold-separate orders or stand-still obligations.

- 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There is generally no requirement to seek approval before closing and there are no specified sanctions for not filing (but please refer to question 12).

- 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Not applicable. The Hong Kong merger control regime is voluntary and non-suspensory (see question 13).

## Public takeovers

- 15 | Are there any special merger control rules applicable to public takeover bids?

Yes. See question 6 and 12.

## Documentation

- 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

A prescribed form (Form M) sets out the information required for an application for a decision to exclude a merger or proposed merger from the application of the Merger Rule. Information to be provided includes the parties' general corporate information and business activities, description of the transaction, proposed market definition, market shares, detailed competition analysis and grounds for exclusion. The application should also include supporting documents such as a declaration of completeness and accuracy, copies of transaction documents and internal documents.

There is no prescribed form for a voluntary notification for informal advice, but the Guideline indicates that applicants should provide some evidence that either the heads of agreement, term sheet or sale and purchase agreement are in place and that, when submitting the voluntary notification, reference may be made to the type of information listed in Form M.

## Investigation phases and timetable

- 17 | What are the typical steps and different phases of the investigation?

The competition authority may conduct an investigation into any conduct that, upon reasonable suspicion, may constitute a contravention of the Merger Rule. See question 11 for the time frame of commencing an investigation and application for an order.

Generally, the competition authority will have the power to obtain relevant documents and information and to require any person by written notice to attend an interview before the competition authority during an investigation. The competition authority may also conduct market inquiries that could include consulting with interested third parties. If, following its investigation, the competition authority considers that there is no reasonable cause to believe that the merger or anticipated merger contravenes the Merger Rule, the competition authority will take no further action. In the alternative, the competition authority can apply to the Tribunal for an order. See question 11 for the timelines.

- 18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 11.

## SUBSTANTIVE ASSESSMENT

### Substantive test

- 19 | What is the substantive test for clearance?

The substantive test to be applied for the Merger Rule is whether the merger has, or is likely to have, the effect of substantially lessening competition in Hong Kong. The Guideline explains that the competition authority will generally interpret a substantial lessening of competition by reference to whether the merger is likely to encourage one or more firms to raise prices, reduce output, limit innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives. The lessening of competition must be 'substantial'. Limited effects on the competitive process such as day-to-day injury to individual competitors will not be considered 'substantial' if the competitive process within the relevant market remains strong.

- 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

### Theories of harm

- 21 | What are the 'theories of harm' that the authorities will investigate?

The 'theories of harm' that the competition authority will likely investigate are set out in the Guideline and include both non-coordinated effects and coordinated effects. The factors that may be taken into consideration by the competition authority include:

- the extent of competition from competitors outside Hong Kong;
- whether the acquired undertaking has failed or is likely to fail in the near future;
- the extent to which substitutes are available or likely to be available in the market;
- the existence and height of any barriers to entry into the market;
- whether the merger would result in the removal of an effective and vigorous competitor;
- the degree of countervailing power in the market; and
- the nature and extent of change and innovation in the market.

The Guideline further sets out additional factors that the competition authority may consider when assessing a vertical merger. These include whether:

- there is market power at one or more of the functional levels involved in the merger;
- there are incentives to leverage that market power into the upstream or downstream market with the purpose of lessening or foreclosing competition in that market (ie, where the merged firm operates in a competitive upstream or downstream market);
- the market power is likely to be leveraged (eg, where raising rivals' costs in downstream markets through discriminatory access pricing would be profitable and would lessen competition); and
- the effect is likely to substantially lessen competition in the market.

The competition authority will usually employ a 'with-and-without' test when assessing the transaction, which involves assessing the level of competition that is likely to exist in a market both with and without the merger.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The Chief Executive in Council may, by order published in the Gazette, exempt a specified merger or proposed merger from the application of the Merger Rule if he or she is satisfied that there are exceptional and compelling reasons of public policy to do so. There is little guidance in the Guideline on what constitutes exceptional and compelling reasons of public policy.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Merger Rule does not apply to a merger if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong. The undertaking claiming the benefit of such exclusion will bear the burden of proof. The undertaking must show that the outweighing economic efficiency gains occur as a direct result of the merger.

The Guideline sets out three general types of efficiencies:

- productive efficiencies, which are achieved where a firm produces the goods and services that it offers to consumers at the lowest cost;
- allocative efficiencies, which are achieved where resources in the economy are allocated to their highest-valued uses (ie, those that provide the greatest benefit relative to costs); and
- dynamic efficiencies, which are achieved through an ongoing process of introducing new technologies and products in response to changes in consumer preferences and production techniques.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

### Voluntary application to the competition authority for decision

Where parties have submitted an application under the Decision Route, the competition authority, after considering the representations made by those who are likely to be affected by the decision, may make a decision as to whether or not the merger or proposed merger is excluded from the application of the Merger Rule, or make a decision that includes conditions or limitations subject to which the merger or proposed

merger is to have effect including, in the case of a proposed merger, specifying a date by which the proposed merger must be completed.

### Review of anticipated mergers by the competition authority

Where the competition authority, after conducting an investigation, has concluded that the merger will not contravene the Merger Rule, then the investigation will be closed and the competition authority will take no further action. If, however, the competition authority has reasonable cause to believe that anticipated mergers will likely contravene the Merger Rule if carried into effect, it may initiate proceedings at the Tribunal. If the Tribunal considers that the merger is likely to contravene the Merger Rule, it may make an order to ensure that there will be no such contravention, including ordering the person against whom the order is directed not to proceed with the merger or a part of the merger, or prohibiting the person against whom the order is directed from doing anything that will result in a merger. If the Tribunal is not satisfied that a merger would likely contravene the Merger Rule, it may make a declaration to that effect. If the application is made to the Tribunal but it has not yet been finally determined, the Tribunal may make interim orders for the purpose of 'preventing pre-emptive action' (see question 12).

### Review of completed mergers by the competition authority

Similar to anticipated mergers, the competition authority may apply to the Tribunal for an order if it has reasonable cause to believe that a merger will likely contravene the Merger Rule. Insofar as the Tribunal is satisfied that a merger contravenes the Merger Rule, it may make any order it considers appropriate for the purpose of bringing the contravention to an end, which may include an order providing for divestiture of any business or any undertaking or association of undertakings, or an order prohibiting or restricting the acquisition by any person of the whole or part of another person's business or the doing of anything that will or may result in a merger.

In each of the above scenarios, it is possible for the parties to propose suitable remedies to close down any competition authority investigation or Tribunal proceedings.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible for the parties to the merger to propose suitable remedies to meet the concerns of the competition authority in return for the competition authority's agreement not to commence an investigation, not bring proceedings in the Tribunal, or to terminate any investigation or proceedings that have commenced. As a general rule, the competition authority prefers structural remedies, as such remedies do not generally require ongoing monitoring activity.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The procedural requirements for the acceptance, withdrawal of acceptance, variation and release of commitments are provided in Schedule 2 of the Competition Ordinance. Before accepting a commitment, the competition authority must give at least 15 days' notice of the proposed commitment to those that are considered likely to be affected by the merger and the proposed commitment and consider any representations that are made to the competition authority. Any commitment accepted by the competition authority will be made public in the register of commitments.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The competition authority does not distinguish between domestic mergers and foreign-to-foreign mergers.

Under the old regime (repealed) under the Telecommunications Ordinance, the CA approved in 2014 HKT Limited's acquisition of CSL New World Mobility Limited subject to remedies. The remedies to address the concern in the downstream retail mobile telecommunications service market were: HKT and CSL to dispose of a specified amount of 3G spectrum, not to participate in any 3G auction in Hong Kong for a period of five years, and make known any plan of closure of any base station sites for a period of five years. The remedies to address the concern in the upstream wholesale access service market were: HKT and CSL to continue providing wholesale network access to mobile virtual network operators based on existing agreements for a period of three years, and HKT to continue giving effect to its network capacity sharing agreement with a mobile network operator that was relying on such network capacity to provide its own retail mobile telecommunications services.

Although *HKT/CSL* was a domestic transaction, the agreed remedies illustrate the types of remedies the competition authority could also seek in foreign-to-foreign mergers.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A merger transaction can involve the acceptance of restrictions that go beyond the merger agreement itself; for example, non-compete covenants, licences for intellectual property or purchase and supply agreements.

Where the restrictions are directly related and necessary to the implementation of the merger agreement, they will be treated as ancillary restrictions and will be assessed as part of the merger transaction under the Merger Rule. However, where the restrictions are not directly related and necessary, they will be assessed under the behavioural provisions under the Competition Ordinance relating to the prohibition against entering into anticompetitive agreements and the prohibition against abuse of a substantial degree of market power.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Under the Decision Route, the competition authority must publish a notice and allow for a period of 30 days for representations to be submitted and considered.

The competition authority may also, as part of an investigation into a proposed merger or completed merger, seek input from relevant third parties, conduct market inquiries that could include consulting competitors of the merging parties, suppliers, customers, industry associations and consumer groups and consider their views insofar as they are relevant, and carry out independent research, for example, to help assess the degree of competition in the relevant market.

For commitments, please see questions 25 and 26.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The competition authority is under a duty to establish and maintain adequate procedural safeguards to prevent the unauthorised disclosure of confidential information (which is a broadly defined term in the Competition Ordinance and encompasses commercial information and business secrets). It is an offence when a specified person (which is a defined term in the Competition Ordinance and includes the competition authority and their members, employees or agents) is in breach of his or her duty to preserve the confidentiality of any confidential information. Disclosure is only allowed with lawful authority; for instance, when the required consent is sought or if the information has already been lawfully disclosed to the public on an earlier occasion. In the case of disclosure with lawful authority, a specified person must, before disclosing any such information, give notice to the person who provided the information and to any person who is likely to be affected by the disclosure and consider any representations that are made about the proposed disclosure. The Competition Ordinance also imposes an obligation on a third party (not being a specified person) not to disclose confidential information.

Where a person or applicant provides information to the competition authority and is seeking confidential treatment, the information must be specifically identified and the reason for confidentiality must be provided. Parties are also asked to submit both confidential and non-confidential versions of documents when appropriate.

Specifically in relation to complaints, the competition authority will generally investigate in private to protect the interests of those involved and will not make disclosures except where appropriate (eg, to carry out the investigation).

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

There is no express provision in the Competition Ordinance providing for cooperation with antitrust authorities in other jurisdictions. The Commission did, however, become a member of the International Competition Network (ICN) in December 2013. It has since been an active member of the ICN and is engaged in the work of various ICN Working Groups. In addition, the Commission has signed a memorandum of understanding with the Canadian Competition Commission in December 2016 with the purpose of enhancing cooperation, coordination and information sharing between the two agencies.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

An application may be made by any person or undertaking concerned to the Tribunal for a review of the competition authority's decision. Such application can only be made with the leave of the Tribunal. Leave can only be granted if the Tribunal is satisfied that either the review has a reasonable prospect of success, or it is in the interests of justice to hear the review. Before or after the determination of an application for review, the Tribunal may, either of its own motion or on application, refer any question of law arising in the review to the Court of Appeal for determination by way of case stated.

An appeal lies as of right to the Court of Appeal against any decision, determination or order of the Tribunal made under the Competition

Ordinance with a few exceptions. The Court of Appeal has jurisdiction to hear and determine an appeal and may:

- confirm, set aside or vary the decision, determination or order of the Tribunal;
- where the decision, determination or order is set aside, substitute any other decision, determination or order it considers appropriate; or
- remit the matter in question to the Tribunal for reconsideration in the light of the decision of the Court.

An appeal does not lie to the Court of Appeal against any interlocutory decision, determination or order of the Tribunal unless leave to appeal has been granted by the Court of Appeal or the Tribunal.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

An application for the review of a decision of the competition authority must be made within 30 days of the day on which the determination was made. The Tribunal may extend the time if it is satisfied that there is a good reason for doing so and no injustice would be caused as a result of the extension.

An application for a judicial review must be made within three months of the day on which the determination was made.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since the entry into force of the Competition Ordinance on 14 December 2015, the CA has reviewed several merger cases relating to the telecommunications sector: the indirect acquisition of New World Telecommunications by Hong Kong Broadband Network, the indirect acquisition of Wharf T&T (now WTT) by private investment firms MBK Partners and TPG, and the indirect acquisition of Hutchison Global Communications by I Squared Capital. The CA decided not to commence formal investigations into any of these acquisitions. More recently, the CA reviewed Hong Kong Broadband Network's proposed acquisition of WTT. Following a public consultation on the original commitments offered by the parties, the CA conditionally cleared the transaction on 17 April 2019 subject to revised commitments. The transaction will reduce the major operators in the relevant market from four to three. The CA expressed concerns about the difficulties of competing fixed network operators in accessing the telecommunications network within certain buildings already served by the merging parties. The revised commitments facilitate access to the telecommunications system and enable competing operators to provide fixed telecommunications services in those buildings. The CA was also concerned about the risk that downstream rivals who have entered into wholesale agreements with the merging parties might become captive customers of the merged entity during a transitional period and therefore be less able to compete with the merged entity. To allow sufficient time for downstream rivals to switch service providers if necessary, the revised commitments extended the period during which the merged entity must continue to provide fixed telecommunication services on existing or no less favourable terms to wholesale customers from two years to three years. The parties have agreed to submit written reports on compliance with these revised commitments to the CA every six months.



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### Reform proposals

#### 35 | Are there current proposals to change the legislation?

It is clearly unusual for a merger control regime to apply to one sector only and there have been calls from some quarters for the scope of the regime to be extended to cover the rest of the economy in Hong Kong. The government has undertaken to review the Competition Ordinance a few years after it came into effect. In this context, the Commission has indicated that it would advocate for certain aspects of the Competition Ordinance to be revised, including the introduction of a cross-sector merger control regime. The recent proposed acquisition of Hong Kong Express by Cathay Pacific, which is not reviewable under the Merger Rule, has triggered a fresh wave of concerns over the lack of a cross-sector merger control regime. However, it remains to be seen whether the Merger Rule will be broadened in the future and in what time frame.

# Hungary

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The most important legislative act is Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act). The other major source of law is Act CL of 2016 on the General Public Administration Procedures, which (together with the special rules in the Competition Act) sets out the basic procedural rules for administrative proceedings (including merger review). The rules of the judicial review of merger control decisions are defined by Act I of 2017 on the Code of Administrative Litigation.

Hungarian merger control rules are enforced by the Hungarian Competition Authority (GVH), an autonomous public administrative authority that reports directly and only to Parliament. The Competition Council is the independent decision-making unit of the GVH.

Notices and communications by the GVH are also significant sources of merger control rules. GVH updated the notices applicable to merger review in 2018, including the notice clarifying the rules related to the initiation of merger control proceedings and the notice on imposing conditions and obligations for clearance.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The following transactions are caught by the Hungarian merger rules:

- acquisition of sole or joint control over the whole or a part of previously independent undertakings;
- merger of two or more previously independent undertakings; and
- creation of a full-function joint venture.

#### 3 | What types of joint ventures are caught?

Similar to the European Union, full-function joint ventures are subject to merger control review.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is defined as:

- acquisition of over 50 per cent of voting rights in the target;
- the power to appoint, elect or dismiss the majority of the executive officers of the target; and
- the ability to exert decisive influence over the decisions of the target (either by the virtue of contractual arrangements or de facto).

Minority and other interests less than control do not trigger the obligation to report the merger to the GVH.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The parties are obliged to report the merger to the GVH if:

- the combined Hungarian net turnover of all parties (ie, the acquirer or acquirers and the target) exceeds 15 billion forints; and
- the individual Hungarian net turnover of each of at least two parties exceeds 1 billion forints.

Turnover of subsidiaries jointly controlled by one of the parties and a third party must be allocated on a per capita basis according to the number of entities exercising joint control. For the purposes of the second limb of the test (ie, the 1 billion forints threshold), consecutive transactions by the same parties within two years preceding the date of the transaction must be taken into account, provided that such transactions were not subject to prior merger control notification. Intra-group revenues and the turnover of the seller's group must be excluded.

Specific rules apply to the calculation of thresholds for mergers including insurance companies, credit institutions, financial enterprises or investment companies, which are largely in line with those set out in the EU's Jurisdictional Notice.

The GVH may also decide to investigate mergers that fall below filing thresholds (within six months following their implementation), if: (i) it is not obvious that the concentration does not significantly reduce competition in the relevant market; and (ii) the combined net group turnover of all parties exceeded 5 billion forints in the previous financial year.

Mergers that meet the EU merger control filing thresholds will be assessed by the Commission in line with the 'one-stop-shop' principle.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory in the case of mergers that reach the jurisdictional thresholds.

A special 'public interest exemption' exists under the Hungarian competition regime, which permits the government to qualify a merger as 'strategic' and exempt it from the merger control filing requirement. The government can do so if the merger carries national strategic interests, such as it is needed to protect workplaces or to assure security of supply.

Another exception is temporary (less than one year) acquisition of control by an insurance, investment or financial institution, if such acquisition is made with a view to resell, and the exercise of control during the interim period does not exceed what is absolutely necessary. The one-year period may be extended once, by an additional year, at the request of the acquirer.

Filing is voluntary in the case of mergers that do not reach the jurisdictional thresholds, but may be subject to the GVH's investigation (see question 5 for such mergers). However, in that case, sanctions cannot be applied for closing before clearance.

**7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?**

Yes, foreign-to-foreign mergers are subject to Hungarian merger control review if they meet the local merger control filing thresholds.

**8 | Are there also rules on foreign investment, special sectors or other relevant approvals?**

There are no special rules regarding foreign investments; however, there are special sectors where the approval of other authorities is necessary in addition to merger review by the GVH. For instance, approval is needed from the National Bank for the merger of financial institutions. Also, the approval of the Hungarian Energy and Public Utility Regulatory Authority is required for the merger of electricity and natural gas utility companies operating under licences issued by the same authority. The approval of the Media Council is required for certain transactions involving media companies: if such approval is not obtained prior to the merger notification, the GVH suspends its merger review proceeding until the position statement of the Media Council is obtained. These approvals, however, with the exception of that of the Media Council, have no direct effect on the proceedings of the GVH and the GVH may conclude the merger review proceeding independently from the results of the investigations of these authorities.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

**9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?**

There is no deadline for filing, but the merger cannot be implemented prior to clearance by the GVH (see questions 11 and 18).

There are no specific sanctions for not filing per se, but sanctions apply for closing before clearance (see question 12).

**10 | Which parties are responsible for filing and are filing fees required?**

Typically, the acquirer, but in the case of a merger or joint venture, each of the parties are responsible for filing.

Fast-track review fees amount to 1 million forints. If further investigation is required and a Phase I review is opened, an additional 3 million forints must be paid, and in the case of a Phase II review being also opened, an additional 12 million forints must be paid.

**11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?**

Non-problematic concentrations can be cleared in a fast-track proceeding. The waiting period of the fast-track review is eight days and there have been cases where clearance was granted overnight. Fast-track review is available for non-problematic mergers and it is recommended that the parties engage in pre-notification discussions and submit a final and complete filing form in the course of such discussions for review and comments by the GVH.

If the investigation enters into Phase I, the waiting period is 30 days, while Phase II lasts an additional three months. The GVH may

extend its review by a maximum of 20 days in Phase I, and two months in Phase II. The GVH may also stop the clock until information requests are complied with. If the GVH fails to issue its decision within the applicable waiting period, its approval is deemed to be granted.

The implementation of the transaction has to be suspended prior to acknowledgement or clearance (see question 12).

### Pre-clearance closing

**12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?**

The GVH may impose daily fines for closing before clearance. Fines can range between 50,000 and 200,000 forints per day for each day starting from the date of signing (or other triggering event, as specified) until the initiation of the GVH's merger review process. This sanction was relatively recently introduced to the Competition Act, but there have already been cases in which the GVH imposed fines for closing before clearance.

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

Yes, sanctions described in question 12 also apply to foreign-to-foreign mergers.

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

The acquirer may apply for a GVH permission to exercise control prior to clearance. Such a request must be made in a reasoned submission and can be granted in exceptional cases only, in particular if control is required to maintain the value of the target's business.

### Public takeovers

**15 | Are there any special merger control rules applicable to public takeover bids?**

No.

### Documentation

**16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?**

Since the introduction of fast-track proceedings into the Hungarian merger regime (see question 18) the merger filing became considerably shorter. Currently, it consists of five main chapters and is 20 pages long and only requires information on the transaction, the parties and the relevant markets. If the merger cannot be cleared in a fast-track proceeding and further investigation is required, the GVH will issue targeted requests for information regarding the relevant markets and the competitive effects of the transaction.

The transaction agreement (SPA) and the annual financial reports of the parties shall be annexed to the filing form, together with proof of payment of the filing fee.

The filing form may be downloaded from the GVH website ([www.gvh.hu](http://www.gvh.hu)) and is available in both Hungarian and English, but must be submitted in Hungarian. Supporting documents drawn up in English may be submitted in the original language, but the GVH may require the submission of a Hungarian summary or a Hungarian translation. If the documents are drawn up in languages other than English, the Hungarian translation of the parts of the documents relevant to support the data and information provided in the notification form must also be attached.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

#### Pre-notification

The first (informal) step in the notification process is the confidential pre-notification discussions with the GVH (see question 18).

#### Notification stage

In straightforward, non-problematic cases the GVH closes the procedure and acknowledges the transaction within eight days of receipt of the notification by the issuance of an administrative certificate (fast-track procedure). If this is not the case, the GVH opens the investigation phase.

#### Investigation stage

In the case of transactions that require more thorough investigation, the procedure of the GVH is divided into two stages: an investigation stage by the case handlers and the decision-making stage by the Competition Council. The investigation stage is completed when the case handlers submit their investigation report to the Competition Council summarising their main findings in the case.

#### Decision-making stage

Formal decision-making is made by the Competition Council based on the investigation report and their own review and assessment.

#### Phase I and Phase II

After obtaining the agreement of the Competition Council, the case handlers will open a Phase II investigation in complex cases. In Phase II, extra time is added to the notification timetable both to the investigation (case handlers) and the decision-making (Competition Council) stage (see question 18 for length of Phase I and Phase II).

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

It is advisable to engage in pre-notification discussions with the GVH as these discussions can help to accelerate the GVH's decision-making (by reducing the risk and scope of information requests) and can result in obtaining clearance in a fast-track procedure (see question 11). Pre-notification discussions are confidential and typically last approximately two weeks. The GVH recommends that parties request the initiation of pre-notification discussions at least two weeks before they intend to report the merger.

In straightforward cases where the absence of competition concerns is clear, the GVH acknowledges the transaction by the issuance of an administrative certificate within eight days of the date the merger was reported. The administrative certificate is normally less than a page long and only contains a brief description of the transaction. The Phase I waiting period is 30 days, while Phase II lasts an additional three months. The GVH may extend its review by a maximum of 20 days in Phase I, and two months in Phase II. The GVH may also stop the clock until information requests are complied with. If the GVH fails to issue its decision within the applicable waiting period, its approval is deemed to be granted.

In 2018, the majority, namely 86 per cent of the GVH's merger decisions were simplified decisions and in 10 cases the decisions were made within one day following the receipt of the notification.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The GVH uses the significant impediment to effective competition (SIEC) test for its assessment of mergers and will clear transactions that do not result in a SIEC, particularly by creating or intensifying a dominant position on the relevant market.

#### 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The GVH assesses unilateral and coordinated effects in horizontal, vertical and conglomerate mergers including portfolio effects, by weighing pro and anticompetitive aspects, in particular:

- structure and characteristics of the relevant markets;
- actual and potential competitive pressure;
- presumed competitive effects;
- sourcing and sale opportunities;
- costs, risks and conditions of market entry and exit;
- market position and business strategy of the parties; and
- effects on suppliers and other partners.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The GVH's assessment centres around competitive aspects and it is not expected that the GVH would consider non-competition issues in its review. The only exception is mergers involving media companies, where the GVH must take into account the view of the Media Council that focuses its review on maintaining media pluralism.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The GVH takes into account economic efficiencies. In practice, efficiencies are expected to be specific to the transaction and to bring along quantifiable consumer benefit (the sooner the benefits are predicted to arise, the larger weight they carry in the assessment).

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The GVH may prohibit transactions or impose structural or behavioural remedies.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. If a transaction's projected anticompetitive effects can be prevented by imposing structural or behavioural remedies, the GVH can clear the

merger subject to appropriate remedies. Usually, the GVH prefers structural remedies because of their ease of monitoring.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Timing and conditions are imposed on a case-by-case basis. However, all remedies have to comply with some basic requirements: they must be capable of removing competition concerns, must be proposed by the parties, and be exact, consistent and verifiable. Commitments are normally subject to market testing and the GVH also holds hearings to discuss proposed remedies.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of any truly foreign-to-foreign mergers (where the parties have no Hungarian subsidiaries, manufacturing facilities or other presence) where the GVH imposed remedies on the parties.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

By virtue of law, all ancillary restraints necessary for the implementation of a concentration are covered by the GVH's clearance decision. However, this does not mean that all restrictions labelled in an SPA as 'ancillary' would be automatically approved by the GVH when issuing its merger clearance decision. Instead, the GVH's practice is not to assess the conformity of ancillary restraints with the relevant requirements during its merger review and its clearance decisions are silent on the issue. It is, therefore, the parties' responsibility to self-assess such restraints (prior to filing) and the GVH retains the right to open an independent investigation to assess any ancillary restraint even after the merger is cleared and closed.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Yes, customers and competitors can have their voice heard in the merger review process. The GVH can send information requests to any group of third parties whose views are relevant to the assessment of the merger. In complex cases, the GVH conducts an in-depth market testing exercise involving competitors, consumers and other parties affected by the transaction. In addition, third parties can also (at their own initiative) submit comments on an ongoing procedure (see question 30 on how third parties can learn of an ongoing merger review).

Anyone can submit a complaint to the GVH when suspecting the breach of competition rules, including merger-related infringements, such as closing without clearance or gun jumping. Complainants' status slightly defers on the basis of whether they used the GVH's complaint form when submitting their complaint, as complainants using the official form have more procedural rights than those submitting an 'informal' complaint (see some details below). The GVH must decide within two months from receipt of a formal complaint (which deadline may be extended with two additional months) whether to open an investigation on the basis of information revealed during its review of the complaint. After the complaint review process is closed, complainants can access and review the GVH file. In case of an informal complaint, the GVH has more flexibility, as it has no obligation to

formally decide on whether or not to open an investigation based on an informal complaint.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

First, after submission of the merger control filing form, the GVH publishes on its website a brief overview of the transaction containing basic information on the contemplated transaction, except if the concentration is accepted for confidential treatment, in which case no publication is made until the concentration is implemented. This summary is copied from a section of the filing form, so the parties can influence the level of detail that goes into it. Second, third parties can request access to merger files, but as a general rule are granted access only after the final and non-appealable conclusion of the merger case. Prior to that, access to merger files is only possible if the third party can demonstrate that such access is necessary to enforce a statutory right or to meet an obligation arising from law or from an administrative decision. In any event, third parties may only have access to non-confidential versions of the relevant documents. Third, the GVH may hold hearings in any competition case (including mergers). The default rule is that such hearings are public, unless the GVH decides to hold a closed hearing because of the need to discuss sensitive information. Finally, the GVH's final decision is published on the GVH's website. All sensitive and confidential information is removed from the public version of the GVH decision prior to publication on its website.

The GVH is very attentive to protecting commercially sensitive or private data throughout the process.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The GVH is a member of the European Competition Network that consists of the national competition authorities of EU member states and the European Commission. It is also a member of the European Association of Competition Authorities, which consists of national competition authorities of the member states of the EU and the EFTA (except for Switzerland), as well as the European Commission and the EFTA Surveillance Authority. The GVH is also member of the International Competition Network.

There is a lively cooperation between the GVH and the OECD, which (among others) manifests in the OECD-GVH Regional Centre for Competition in Budapest (since 2005). The Centre promotes the development of competition policy in the south-east, east and central European regions.

Finally, the GVH has bilateral cooperation agreements with a number of non-EU competition authorities, including the Chinese, Ukrainian, Moldovan, Albanian, Serbian, Russian and Taiwanese authorities.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

The decision of the GVH is subject to judicial review, which may be launched within 30 days of receipt of the GVH's decision. The first instance court decision may be subject to appeal to a higher court.

The GVH's decision is rarely challenged successfully. The most recent merger case that was remanded and referred back for reconsideration dates back to 2012.

**Time frame****33 | What is the usual time frame for appeal or judicial review?**

Court review takes approximately two years (including both first and second instance review) on average, but it is not uncommon for the review process to last even longer.

**ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS****Enforcement record****34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

The GVH closed 62 merger control proceedings in 2018, from which 53 were simplified procedures, six procedures have been closed in Phase I and three in Phase II. Further, in 2018, the GVH closed three merger related follow-up procedures, two procedures for violation of the standstill obligation and one where the GVH revoked its earlier approval because of false information provided in the notification (see question 36). In 2018, the GVH continued to impose penalties for closing before clearance.

**Reform proposals****35 | Are there current proposals to change the legislation?**

The background legislation changed recently, as the Act CL of 2016 on the Common Rules of Administrative Procedures and Act I of 2017 on the Code of Administrative Litigation Procedures entered into force on 1 January 2018. The Competition Act has been amended with the same effect, to accommodate the change to the background legislation; therefore, comprehensive legislation change is not expected in the coming period.

**UPDATE AND TRENDS****Key developments of the past year****36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

The GVH remains sensitive and vigilant to any false information provided in the merger control procedure. In case Vj/31/2018 *DIGI-Invitel*, the GVH revoked its decision approving the transaction and imposed a fine of 90 million forints for submitting false information in the notification. In the same case, the GVH used a dawn raid as a tool of investigation for the first time in a national merger control case.

Another trend is for the GVH to investigate mergers not satisfying the mandatory filing thresholds, but meeting the 5 billion forints combined turnover threshold. In the first such case (case VJ/49/2017 *DIGI-Greencom*), however, the GVH terminated the procedure for lack of sufficient information to determine whether the concentration could significantly decrease competition, which is the other limb of the alternative merger control test.

The GVH continues to actively monitor gun jumping and is ready to impose fines for violating the standstill obligation (see, for example, case Vj/44/2017 *BTL Group*).

In 2018, the Hungarian government continued to rely on the exemption from under the merger control scrutiny by the GVH, as could be witnessed, for example, in case B/961-11/2018 *KESMA*, where the Decree of the Hungarian government qualified the acquisition of a number of media companies by Közép-Európai és Média Alapítvány (Central European Press and Media Foundation, KESMA).

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# Iceland

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LEX

## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The Icelandic rules on merger control are set out in the Competition Act No. 44/2005 (the Act) and the Rules on the Notification of Mergers No. 684/2008 (the Rules).

Merger control is enforced exclusively by an independent administrative authority, the Competition Authority (CA). Decisions of the CA may be appealed to an independent administrative committee, the Competition Appeals Committee (the Appeals Committee).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The definition of a merger under the Act is similar to the EU definition set out in the EU Merger Regulation 139/2004 (EUMR). It follows that a merger within the Act occurs where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings;
- the takeover by one undertaking of another independent undertaking;
- the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings; or
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

#### 3 | What types of joint ventures are caught?

Joint ventures are handled in the same manner under the Act as under the EUMR. Accordingly, the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitutes a merger within the meaning of the Act.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Yes, the concept of control is defined in the Act in a similar manner as in the EUMR. Accordingly, control under the Act stems from rights, contracts or any other means that, either separately or in combination and having regard to the consideration of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- ownership or the right to use all or part of the assets of an undertaking; or

- rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Control is acquired by persons who are holders of rights or entitled to rights under the contracts concerned or while not being holders of such rights or entitled to rights under such contracts, have the option to exercise such rights. Customary minority rights do not constitute control and other interests that do not reach the standard of control are not subject to merger review.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger falls within the merger control regime if: (i) the combined aggregated annual turnover of the relevant undertakings is 2 billion kronur or more in Iceland and (ii) the annual turnover of at least two of the undertakings party to the merger is at least 200 million kronur in Iceland.

The turnover of a parent, subsidiary and other undertakings within the same group as the undertakings party to the merger shall be taken into account as well as the turnover of undertakings over which they have direct or indirect control.

These thresholds are cumulative and must accordingly both be met for a merger to be caught. If the CA believes a merger falling below these thresholds will substantially impede effective competition, it can bring the merger under the regime if the combined aggregated annual turnover of the relevant undertakings is over 1 billion kronur. This is executed by ordering the parties to the merger to notify it to the CA.

Under the Media Act No. 38/2011, all mergers involving at least one media service provider with an annual turnover of at least 100 million kronur in Iceland must be notified to the CA, notwithstanding the combined aggregated annual turnover of the relevant undertakings. The Media Act also provides that if the Media Commission believes that a merger that does not meet the relevant turnover threshold can substantially impede pluralism or diversity in the media, it may request that the CA demands a notification from the merging parties.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a merger meets the relevant turnover thresholds, it must be notified to the CA before the merger is executed. As explained above, the CA can bring a merger under the regime if the combined aggregated turnover of the relevant undertakings is over 1 billion kronur. If parties to a merger that does not meet the turnover thresholds inform the CA about the merger, the CA has 15 working days to decide whether it brings the merger under the regime in accordance with the above.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

If the relevant thresholds for turnover in Iceland are met, mergers (including foreign-to-foreign mergers) fall within the scope of the merger regime and must be notified. Hence, a local effects test is not applied.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Under Act No. 34/1991 on Foreign Investment in Undertakings, as amended by Act No. 57/2014, certain types of foreign investment in Icelandic undertakings must be notified to the Minister of Tourism, Industry and Innovation, as further described in the Act. This obligation to notify investments is limited to sectors where there are restrictions on foreign investment: the fisheries industry, the energy sector and the airline sector. However, the obligation to notify does not apply in the latter two industries where the investor is an individual or a legal entity resident or established in a member state in the European Economic Area under the EEA Agreement, member state of the European Free Trade Association or in the Faroe Islands.

According to the Electronic Communications Act No. 81/2003, mergers involving an electronic communications undertaking holding rights to use frequencies must be notified to the Post and Telecom Administration.

Furthermore, Icelandic law contains restrictions to ownership of and the right to use real property, as well as ownership of companies that own real property, pursuant to Act No. 19/1966 on the Right of Ownership and Use of Real Property. The Act limits foreign persons', resident outside the EEA area and the Faroe Islands, ownership of real property and real property companies in Iceland.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The CA shall be notified of a merger before it takes effect but after the conclusion of an agreement on the proposed merger, the public announcement of a takeover bid or the acquisition of a controlling interest in an undertaking. A merger falling within the regime shall not take effect while it is being examined by the CA. Any violation of these instructions and conditions can be subject to fines of up to 10 per cent of the total turnover of the preceding business year of any undertaking or association of undertakings involved in the violation. Fines for not notifying the CA of a merger are applied in practice. The CA is authorised, however, with the consent of the parties involved, to conclude the matter by a settlement.

In addition, the CA may, on request, grant an exemption from the obligation that a merger should not take effect while it is being examined by the CA, provided that it is established that delaying the implementation of the merger could harm the undertakings concerned or its business partners and threaten competition. Such a request shall be in writing and reasoned. An exemption may be made subject to conditions to ensure effective competition.

## 10 | Which parties are responsible for filing and are filing fees required?

The parties to the merger, or the parties obtaining control, as applicable, shall jointly prepare the notification of the merger. If an undertaking acquires a controlling share in another undertaking, the undertaking

initiating the takeover shall prepare the notification of the merger. In the event of a takeover bid for an undertaking, the bidder shall prepare the notification. The filing fee is 250,000 kronur.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The CA shall, within 25 working days, notify a party that has submitted a notification of a merger if it sees reason for further investigation of the competitive impact of the merger. This time limit begins on the first working day following the receipt by the CA of a notification meeting the conditions set out in the Act and the Rules. If the merger notification is not sufficient in that respect, the relevant time limits do not commence. If no such communication is received from the CA within the established period, the CA cannot annul or otherwise intervene in the merger. A decision on the annulment of a merger shall be made no later than 70 working days from the time that a notification pursuant to the first sentence has been sent to the party or parties notifying the merger. If it is necessary to obtain further information to properly review the merger, the CA may extend this time limit by up to 20 working days.

If the CA fails to make a decision on whether to annul or establish conditions for a merger within the aforementioned time limits, the CA can neither annul the merger nor make it subject to conditions.

The merger may not be implemented before the CA has reached a positive decision to that extent. As described in question 9 the CA may, however, on request, grant an exemption from the obligation that a merger should not take effect while it is being examined, provided that it is established that delaying the implementation of the merger could harm the undertakings concerned or its business partners and threaten competition. Such a request shall be in writing and reasoned. An exemption may be made subject to conditions to ensure effective competition.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing before clearance is considered equivalent to an absence of filing and is accordingly subject to the same sanctions as set out in question 9. The same applies to integration of activities of the merging entities before clearance.

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As stipulated in question 7, foreign-to-foreign mergers that meet the relevant thresholds for turnover in Iceland fall within the scope of the merger regime and must be notified. Sanctions, as described above, are applicable in such cases.

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No specific solutions permitting closing before clearance are provided for under the Act in foreign-to-foreign transactions, other than the CA's granting of an exemption from the obligation that a merger should not take effect as described in question 11.

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

No, there are no special merger control rules applicable to public takeover bids. However, the notification of a merger in connection with a public takeover bid must be notified to the CA after the bid has been made public.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

A merger notification shall include information on the merger, the undertakings concerned, the relevant markets and other details necessary for assessing the competitive effects of the merger. In brief, the standard notification shall, for example, contain:

- a short description of the merger;
- basic information of the parties to the merger, such as the names of the parties and the nature of their operations;
- detailed information on the background of the merger, its objectives and nature;
- information of ownership and control of all the parties to the merger;
- personal and financial relationship between the parties;
- all documents relating to the merger;
- detailed information on the market definition;
- a description of the effect on consumers and intermediaries; and
- a declaration certifying that the data provided by the parties is complete and accurate.

A short form may be used for the purpose of notifying a merger where one of the following conditions is met:

- the markets affected by the merger are not related;
- two or more of the parties to the merger are engaged in business activities in the same product and geographic market (horizontal merger), provided that their combined market share is less than 20 per cent;
- two or more of the parties to the merger are operating in product markets that are upstream or downstream of a product market in which either party to the merger is operating (vertical merger), provided that their individual or combined market share is less than 30 per cent;
- the merger in question is a joint venture that has a limited effect in Iceland; or
- a party acquires sole control of an undertaking over which it already had joint control.

The following information shall accompany a notification submitted in short form:

- an overview of the undertakings directly or indirectly controlled by the parties to the merger;
- a description of the product, service and geographic markets that are affected by the merger and a reasoned assessment of the market share of the undertakings in question in such markets;
- a reasoned assessment of the competitive impact of the merger;
- copies of all contracts and other instruments upon which the merger is based, together with copies of the annual financial reports of the undertakings that are parties to the merger; and
- a declaration certifying that the data provided by the parties is complete and accurate.

Submission of wrong, misleading or insufficient information to the CA is subject to fines or up to two years imprisonment. Fines can be imposed on both individual and legal persons.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

During the first phase of investigation, described in question 18, the CA will first review the merger notification and see if it is complete or if any information is missing. The CA may request information not only from the parties, but also from other market players, including the parties' suppliers, customers and competitors. When the CA has all the information required, it will decide whether there are grounds to move on to the second phase of investigation. If the CA is of the opinion that the merger notification is not complete, it will call for additional information to be provided. The 25-working-day preliminary investigation will start when the notification is deemed complete.

The second phase of investigation is for mergers that the CA considers likely to be harmful to competition. During the second phase, the CA will perform a thorough definition of the relevant markets and evaluate the market power of the parties to the merger. To do so, the CA may request further information not only from the parties, but also from other third parties as described above. In cases raising competition concerns, the CA will issue a statement of objection and, if relevant, give the parties a chance to propose remedies. The parties then have the opportunity to respond to the CA's statement of objection and present their arguments and views on the case, before the CA issues a final decision.

If the CA is of the opinion that a merger will obstruct effective competition by giving one or more undertakings a dominant position or by strengthening such a position, or will result in a significant distortion of competition in the market in other respects, the CA may annul the merger. The CA may also establish conditions for such a merger that must be met within a given time.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The procedure of the CA is explained in question 11. The timetable for clearance is as follows.

#### First phase (maximum 25 working days)

- This phase is common to all mergers. The CA shall, within 25 working days, notify a party that has submitted a notification of a merger if it sees reason for further investigation of the competitive impact of the merger.
- This time limit begins on the first working day following the receipt by the CA of a notification meeting the conditions of a sufficient merger notification.

#### Second phase (maximum 90 working days)

- A decision on the annulment of a merger shall in general be made no later than 70 working days from the time that a notification has been sent to the party notifying the merger.
- If it is necessary to obtain further information to properly review the merger, the CA may extend this time limit by up to 20 working days.

There is no special mechanism that can be used to speed up proceedings in merger cases in Iceland. However, if the merging parties feel it is necessary to execute the merger prior to the CA having reviewed it substantially, it is possible to seek a special exemption for that purpose. The time in which the CA typically reaches its decision, within the

statutory timetable, varies and is dependent upon whether the merger demands further investigation by the CA (see question 17), hence being moved to the second phase. The clearance process cannot exceed the time limits mentioned, and if it does, the CA cannot prevent, annul or impose conditions on a merger.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for clearance is whether the merger impedes effective competition by creating or strengthening an individual or collective dominant position or otherwise significantly impedes effective competition. The substantive analysis is therefore largely similar to the analysis under the EUMR.

The merging parties can raise a failing firm defence. The CA can clear an otherwise problematic merger if one of the merging parties is a failing firm.

#### 20 | Is there a special substantive test for joint ventures?

No, there is no special test for joint ventures. A full-function joint venture will be reviewed by the CA like any other type of merger. However, the possible coordination issues between the parents will be especially examined.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The CA largely applies the same analytical framework as the European Commission. Accordingly, it investigates all possible anticompetitive effects in respect of the type of merger in question, including non-coordinated and coordinated effects, vertical foreclosure, common ownership and conglomerate effects.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The CA is not obligated to consider non-competition issues in its analysis.

In assessing a merger according to the Media Act, the CA shall consider whether the merger may or may not adversely affect pluralism or diversity in the media on the market or markets in which the concerned media providers operate.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Under the Act the CA is, in its substantive analysis of a merger, obligated to consider whether a merger will result in technical or economic progress if such progress benefits consumers and does not impede competition. For statements of such progress to be taken into account, the parties must be able to demonstrate in what manner it will benefit consumers and to what extent and when it will materialise.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

As described in question 17, the CA may annul a merger if it has reached a conclusion that a merger will obstruct effective competition by creating a dominant position or by strengthening such a position, or it will significantly impede competition in the market in other respects. The CA may also establish conditions for such a merger that must be met within a given time.

In the event that the CA has found that a merger does not impede competition or has approved a merger subject to conditions, the CA may revoke such a decision where:

- the decision is based on incorrect information for which one of the merging parties is responsible or where it has been obtained by deceit; or
- the undertakings concerned violate the conditions attached to the merger.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Between filing and the final decision of the CA, the notifying parties may propose amendments to the transaction to remedy competition issues. The parties may propose various remedies (behavioural as well as structural), such as selling of assets to third parties (those third parties are subject to approval by the CA), to execute a contract (eg, a trademark or patent licence), to amend conditions of sale or to keep the CA informed of any change in the structure of the relevant market (such as an increase in the parties' market share), etc.

As explained above, the CA may establish conditions for a merger that must be met within a given time. These conditions vary in each case, such as obligations for merger parties to sell assets to third parties, to keep the CA informed of any change in the structure of the relevant market and to guarantee that the majority of the board of directors is independent from the controlling merger parties.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

When there are conditions on divestment or other remedies, the CA generally sets conditions that the assets have to be sold in a defined and transparent sales process within a specific time limit. These time limits are, however, eliminated from the published decisions for confidentiality reasons.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As explained in question 7, foreign-to-foreign mergers that fall within the scope of the merger regime must be notified and will be reviewed.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

As under the EUMR, it is recognised that certain contractual restrictions may be directly related to and necessary for the successful implementation of a merger. A decision that clears a merger is deemed also to clear such restrictions if they meet the criteria of direct relation and necessity.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Without obligation, the CA habitually seeks comments of third parties such as customers and competitors during its review of a merger. Moreover, it seeks comments from other third parties if it considers it to be useful to the review process.

Furthermore, in three relatively recent merger cases the CA considered the markets involved to be highly relevant to the public, which drove the CA to release the merger notifications, in which confidential information had been omitted, on their website and publicly request comments as to the possible effects of these mergers on competition in the relevant markets.

Third parties are not parties to the merger case and do not have the relevant procedural rights. It follows that third parties do not have automatic access to the case file and the CA is not obligated to hear them.

It should be noted, however, that a third party can appeal the decision of the CA in a merger case to the Appeals Committee if it can demonstrate sufficient individual interest in the outcome of the case. A recent example of this is a case where the CA cleared a conglomerate merger with certain conditions, but a third party, a competitor, appealed the decision to the Appeals Committee. In its ruling in case No. 6/2018 the Appeals Committee found that the third party had demonstrated sufficient interest in the outcome of the case. The third party was therefore granted access to the case and the claims of the merging undertakings to dismiss the case were rejected.

### Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The merger notification is not automatically publicly available, and the CA does not publish information in relation to the filing of notifications. Under the Information Act No. 140/2012, however, government authorities are obliged to grant the public access to materials concerning specific matters, if requested, with certain derogations. These derogations include, inter alia, restrictions on the right to information, owing to private interests such as important financial or commercial interests of businesses or other legal entities.

Decisions of the CA as well as rulings of the Appeals Committee are published on the CA's website. Parties to a merger case may, however, request that documents or parts of documents containing commercially sensitive information remain confidential. In the published versions of such decisions and rulings, reference to confidential information is accordingly omitted.

### Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CA participates in international cooperation in its field. First, the relevant authorities of Iceland, Norway, Denmark, Sweden, Finland, the Faroe Islands and Greenland are engaged in regular cooperation. Second, the CA participates in cooperation based on the EEA Agreement, including cooperation organised by the European Competition Network. Finally, the CA is party to the International Competition Network and takes part in cooperation in the field of competition within the OECD.

## JUDICIAL REVIEW

### Available avenues

32 | What are the opportunities for appeal or judicial review?

As stipulated in question 1, the decisions of the CA may be appealed to a separate and a superior committee, the Appeals Committee. A written appeal must be received within four weeks from the time the party in question was informed of the CA's decision. The ruling of the Appeals Committee shall be rendered within six weeks from the date of the appeal. In several instances, the Appeals Committee has not been able to uphold this time frame.

If a party, including the CA, is not willing to accept the ruling of the Appeals Committee it may instigate legal action for annulment before the courts of law. Such action shall be brought within six months after the party obtained knowledge of the Appeal Committee's ruling. Such action does not suspend the entry into force of the ruling, nor shall it preclude formal enforcement proceedings.

### Time frame

33 | What is the usual time frame for appeal or judicial review?

As described above, a written appeal to the Appeals Committee must be received within four weeks of the time the party in question was informed of the decision of the CA. If a party is not willing to accept the ruling of the Appeals Committee, it may instigate legal action for annulment before the courts of law within six months after the party obtained knowledge of the Appeals Committee's ruling.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The CA received 37 merger notifications in 2018. During this time, decisions were made in 33 merger cases. The CA cleared the majority of these mergers within the first phase. Conditions were imposed on six mergers and one merger was annulled. Three merger notifications were withdrawn in 2018, all of which were later resubmitted.

During the period 2012–2017, the CA received 156 merger notifications. Conditions were imposed on 32 mergers, three mergers were annulled and at least two merger notifications were withdrawn following the issue of statements of objection by the CA, concluding that the mergers should be annulled.

The current enforcement concerns of the authorities remain somewhat connected to the aftermath of the economic crisis in 2008. Most of the merger cases following the economic crisis that started in 2008 involved banks taking over commercial undertakings, to financially reconstruct them and sell them, their commercial business or assets on the open market. Even though most of the cases in question involved conglomerate mergers, the CA established detailed conditions for the banks' ownership of these companies to ensure that ownership does not lead to harmful disruptions to competition as a result of the unusual circumstances present in the Icelandic economy. However, the most current concern with regard to the aftermath of the financial crisis is now the increased ownership of pension funds and investment funds of commercial undertakings, which has increased substantially, raising concerns within the CA, which believes that this can possibly impede competition, especially if certain pension funds, investment funds or related parties have minority shareholdings in two or more competitors or undertakings on different levels of the same market.

The focus of the CA has also been on the retail market. The Icelandic retail market has been going through considerable changes in recent years with the entry of large-scale global retailers into the Icelandic market. The CA has published several merger decisions involving mergers of large retail companies as well as retail companies and fuel companies. Notable cases include decisions of the CA in cases No. 9/2019 and 8/2019. In its ruling in case No. 9/2019, the CA considered a merger between a large listed retail company that operates supermarkets, convenience stores, warehouses, distributors and clothing stores and a large fuel company would be likely to impede effective competition. Therefore, the CA imposed conditions to the merger, which were accepted by the merging parties and the matter was concluded with a settlement between the CA and the merging parties. A similar result may be found in case No. 8/2019, which involved a merger between a listed fuel company and a large retail company that operates supermarkets, convenience stores, a warehouse and electronics store.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

According to a list of legislative bills to be submitted to the parliament in 2018–2019, a bill is to be submitted that will entail updates to the Act and amendments in line with a Nordic cooperation in the field of competition law. Because the bill has not been submitted to the parliament yet, further information on its content is not available at this time. It is unclear when the bill will be submitted to the parliament.

The aforementioned list of legislative bills also includes a bill to a new legislation on state aid measures. The act is intended to lay down procedures to be followed by the competent authorities in the case of state aid measures or possible state aid measures. Furthermore, the bill contains legislative powers that relate to the supervision of state aid by the EFTA Surveillance Authority. Should the bill become law, it will entail changes to the Act in such a way that provisions of the Act on state aid would be removed from the Act.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

As mentioned in question 34, the CA has in recent years raised concerns over the increased ownership of pension funds and investment funds of commercial undertakings, especially investment funds that are managed by management companies that are related to the three large commercial banks in Iceland. The CA has set conditions for such investments that are intended to ensure commercial independence of commercial undertakings from the three large commercial banks. The CA has considered these conditions necessary to maintain effective competition in the financial market. The CA has also considered the conditions to be necessary to ensure that dealings between the commercial undertakings and other companies owned by the three large commercial banks are based commercial grounds, and to prevent tying of different types of services.

In 2018, the CA made several decisions in cases involving mergers of investment funds and commercial undertakings. Notable cases include the decisions of the CA in cases No. 10/2018 and 21/2018. In both cases, the CA imposed conditions to a merger in the form of an investment of an investment fund in a commercial undertaking. The investment funds were managed by management companies that were related to the three large commercial banks in Iceland. The objective of the conditions was to ensure the commercial independence of the commercial undertakings from the large commercial banks. To achieve



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this objective, the board of directors of the commercial undertakings shall be independent from the relevant commercial bank and related parties. The board of directors of the commercial undertakings shall also be independent of their competitors. Furthermore, the conditions include instructions in relation to disclosure of information from the board of directors of the management companies to their shareholders.

# India

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Competition law in India is governed by the Competition Act 2002 (the Competition Act) and regulations and guidance notes issued thereunder. Sections 5 and 6 of the Competition Act require the mandatory pre-notification of all acquisitions, mergers and amalgamations that cross specified asset or turnover thresholds (collectively described as 'combinations') to the Competition Commission of India (CCI), which is the enforcement agency.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Section 5 of the Competition Act covers three broad categories of combinations:

- First, the acquisition by one or more persons of control, shares, voting rights or assets of one or more enterprises, where the parties, or the group to which the target will belong post-acquisition, meet specified assets or turnover thresholds (see below). Acquisitions not involving a change of control are also caught in this category.
- Second, the acquisition by a person of control over an enterprise where the person acquiring control already has direct or indirect control over another enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods, or in the provision of a similar or identical or substitutable service, where the parties, or the group to which the target will belong post-acquisition, meet specified assets or turnover thresholds (see below).
- Third, mergers or amalgamations, where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger or amalgamation, meets specified assets or turnover thresholds (see below).

To prevent the merger control regime from becoming unduly onerous, the CCI introduced, in Schedule I of the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations 2011 (the Regulations), categories of transactions that are 'ordinarily' not likely to cause an appreciable adverse effect on competition (AAEC) in the relevant market in India and, therefore, are not 'normally' required to be notified to the CCI. These transactions are:

- direct or indirect acquisitions of shares or voting rights entitling the acquirer to hold less than 25 per cent of the shares or voting rights of a target company (including through a shareholders' agreement or articles of association), solely for investment purposes or in the ordinary course of business, provided that this does not lead to the acquisition of control. The acquisition of less than 10 per

cent of total shares or voting rights will be treated solely as an investment if:

- the acquirer is able to exercise only the rights of ordinary shareholders exercisable to the extent of their respective shareholding;
- the acquirer does not have, or have a right to have, or intend to have a seat on the board of the target enterprise; and
- the acquirer does not intend to participate in the management or affairs of the target enterprise;
- an acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to the acquisition, already holds 25 per cent or more shares or voting rights of the enterprise, but does not hold 50 per cent or more of the shares or voting rights of the enterprise, either prior to or after such acquisition. This exemption is not available if the acquisition results in the acquisition of sole or joint control of such enterprise by the acquirer or the group;
- acquisition of shares or voting rights where the acquirer already holds 50 per cent or more of the shares or voting rights in the target enterprise, except in the cases where the transaction results in a transfer from joint control to sole control;
- acquisition of assets not directly related to the business of the acquirer or made solely as an investment or in the ordinary course of business, not leading to control of the target enterprise, except where the assets represent substantial business operations of the target enterprise in a particular location or for a particular product or service, irrespective of whether such assets are organised as a separate legal entity or not;
- intra-group reorganisations. These include:
  - an acquisition of shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group; and
  - a merger or amalgamation of two enterprises where one of the enterprises has more than 50 per cent shares or voting rights of the other enterprise, or a merger or amalgamation of enterprises in which more than 50 per cent shares or voting rights in each of such enterprises are held by enterprises within the same group. This exemption is not available if the transaction results in transfer from joint control to sole control;
- acquisitions of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business;
- acquisition of shares or voting rights pursuant to a buyback or a bonus issue or a stock split or consolidation of face value of shares or subscription to rights issue, not leading to an acquisition of control. Care will need to be taken in case of an acquisition of control through a renunciation of rights;

- amended or renewed tender offer where a notice has been filed by the party making such an offer;
- acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI (for instance, in case of a divestiture); and
- acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stockbroking.

### 3 | What types of joint ventures are caught?

The formation of a joint venture is not specifically covered by section 5 of the Competition Act, as it only covers the acquisition of an 'enterprise' and mergers and amalgamations of 'enterprises'.

'Enterprise' as defined under the Competition Act effectively refers to a 'going concern' that is already conducting or has previously conducted business. A purely 'greenfield' joint venture is unlikely to be considered as an enterprise, and will therefore not fall within the scope of section 5. Moreover, even if it were to be considered as an enterprise, in a majority of cases, a truly greenfield joint venture is unlikely to meet the thresholds under the target exemption (see question 5).

By contrast, the establishment or acquisition of a 'brownfield' joint venture (where parents are contributing existing assets or businesses, customers, customer contracts, intellectual property, etc, or conferring control over them) would be notifiable where the jurisdictional thresholds are met, as it relates to the acquisition of an enterprise under section 5 of the Competition Act.

There is presently limited guidance from the CCI in relation to the treatment of joint ventures or the criteria it would apply in determining whether a transaction is greenfield or brownfield, or, for that matter, whether it would treat full-function joint ventures differently from non-full-function joint ventures.

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The acquisition of 'control' is one of the events that may trigger a notification. As a starting point, 'control' is defined under explanation (a) to section 5 of the Competition Act to include 'controlling the affairs or management by: (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise'.

Earlier, the CCI, in its substantial decisional practice, had interpreted control to mean the ability to exercise decisive influence over the management or affairs and strategic commercial decisions of a target enterprise, whether such decisive influence is capable of being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding) or contractual covenants. However, in the last year, the CCI has further expanded the scope of 'control' in two of its orders, (i) penalising *Telenor* (C-2012/10/87) for failing to notify its acquisitions of shareholdings in two companies, and (ii) penalising *UltraTech Cement* (C-2015/02/246) for failing to provide information on the shareholding or control of the promoter family over two companies. In *UltraTech Cement*, the CCI stated that in defining control, regard has to be given to different levels of control – in ascending order, material influence, de facto control and controlling interest (de jure control) – and not just special rights. In *Telenor*, the CCI held that Telenor could not have sole control of the two target companies as (i) in the first target, another shareholder held 51 per cent shareholding, conferring a controlling interest, and (ii) in the second target, even though Telenor held 67.25 per cent shareholding, other shareholders held more than 26 per cent, giving them the ability to block special resolutions (and is considered negative control even under Foreign Direct Investment

policy). In these cases, the CCI has moved from the concept of 'decisive influence' based on special or veto rights, towards a more expansive definition of control, to include 'material influence'.

Such interpretation, therefore, includes negative control by minority shareholders. In contrast to mere 'investor protection' rights, having the ability to veto (or cause a deadlock in respect of) strategic commercial decisions could be sufficient to confer at least joint control, the acquisition of which would require notification to the CCI. Such strategic commercial decisions have included annual business plans, budgets, recruitment and remuneration of senior management, and opening of new lines of business.

Because of the expansive interpretation accorded to the meaning of 'control', and the absence of clear guidance from the CCI on which specific rights will be considered as pure minority protection rights, the distinction between genuine minority protection rights and negative control has become blurred. As a result, many pure financial investments and private equity transactions are susceptible to review and have been reviewed by the CCI.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Set out below are the jurisdictional thresholds under the Competition Act.

#### Parties test

- The parties have combined assets in India of 20 billion rupees or combined turnover in India of 60 billion rupees; or
- the parties have combined worldwide assets of US\$1 billion including combined assets in India of 10 billion rupees or combined worldwide turnover of US\$3 billion including combined turnover in India of 30 billion rupees.

#### Group test

- The group has assets in India of 80 billion rupees or turnover in India of 240 billion rupees; or
- the group has worldwide assets of US\$4 billion including assets in India of 10 billion rupees or worldwide turnover of US\$12 billion including turnover in India of 30 billion rupees.

For the purposes of calculating the jurisdictional thresholds, the government of India has exempted, in the public interest, groups that exercise less than 50 per cent of the voting rights in the other enterprise.

The government of India, through a notification dated 27 March 2017, revised the de minimis target-based filing exemption to now apply to all forms of transactions (ie, acquisitions, mergers and amalgamations), for a period of five years until 28 March 2022, whereas earlier it only applied to acquisitions, and in the case of a division of the business being acquired, applied to the selling entity. Under the current exemption, transactions where the assets being acquired, taken control of, merged or amalgamated are not more than 3.5 billion rupees in India or where the turnover is not more than 10 billion rupees in India are exempted from the CCI notification requirement (Target Exemption).

The revised notification also effectively added an explanation in relation to assessing the jurisdictional thresholds.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the jurisdictional thresholds are met and no exemptions are available (as discussed above), the combination needs to mandatorily be notified to the CCI. Where a proposed combination consists of a number of

inter-connected steps or transactions, even where one or more of these steps or transactions would, on a stand-alone basis, have been exempt from filing, all such transactions must be filed as a composite whole and must not be completed pending the CCI's review.

In addition to the Schedule I exemptions (as listed above) and the Target Exemption, the government of India has also exempted banking companies from the merger notification requirement when a notification of moratorium has been issued in respect of such companies. A notification of moratorium is ordinarily issued to 'failing' banks that are financially and operationally weak and are on the brink of insolvency. In August 2017, the government of India through its notifications exempted Regional Rural Banks and nationalised banks from the application of the provisions of sections 5 and 6 of the Competition Act for a period of five years and 10 years, respectively. Through another notification in November 2017, the government of India exempted central public sector enterprises along with their subsidiaries operating in the oil and gas sectors from the application of the provisions of sections 5 and 6 of the Act for a period of five years.

Section 6(4) of the Competition Act provides that acquisitions, share subscription or financing facilities, entered into by public financial institutions, registered foreign institutional investors, banks or registered venture capital funds, pursuant to any covenant of a loan agreement or an investment agreement, do not need to be pre-notified to the CCI. However, in such cases, the body concerned will need to notify the CCI of the acquisition, within seven calendar days of completion of the transaction. So far, there have been only four decisions published by the CCI under this provision.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Until the end of March 2014, the Regulations provided an exemption for transactions between parties outside India provided there was insignificant local nexus and effects on markets in India. The CCI interpreted the exemption narrowly, rendering it virtually redundant. To remove uncertainty in this regard, the CCI withdrew the exemption, so that foreign-to-foreign transactions satisfying the standard assets and turnover thresholds under the Competition Act, and not covered by any of the other exemptions, will have to be notified even if there is no local nexus and effects on markets in India. However, the absence of a local nexus and effects will expedite the review and clearance process by the CCI.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There are currently no other special rules under the Competition Act governing merger control review for foreign investment or specific sectors such as telecoms, pharmaceuticals, the media, oil and natural gas.

In addition, there are non-competition regulatory approvals, which may be required, depending on the sector in which the investment is being made. Notably, following an amendment to the recently introduced Insolvency and Bankruptcy Code, 2016, it has been made clear that where a transaction covered by the corporate insolvency resolution process (CIRP) has to be notified to the CCI, approval by the CCI is required before a resolution plan is approved by the committee of creditors. The CIRP is limited to 180 days, which may be extended up to a further 90 days in certain cases. To meet this tight deadline, a bidder would be advised to notify a transaction to the CCI as early as possible.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

In a welcome move to ease doing business in India, the government has removed the requirement on parties to notify combinations to the CCI within 30 calendar days of the relevant trigger event. While notifiable transactions will still require approval from the CCI prior to closing and remain subject to penalties for gun jumping, the elimination of the filing deadline removes the artificial timing pressures on filing parties.

Previously, while the CCI actively penalised parties for belated filings, it also penalised parties for failing to notify transactions. In *SCM Soilfert* (C-2014/05/175), the CCI fined the acquirer 20 million rupees for consummating strategic open market purchases in the target enterprise, without prior approval from the CCI. In addition, the CCI imposed a penalty of 50 million rupees on *Piramal Enterprises* (C-2015/02/249) for failing to notify previously closed interconnected steps of a transaction. The COMPAT upheld both penalties and the Supreme Court of India upheld the penalty imposed in the *SCM Soilfert* case.

Given the trigger exemption, we anticipate that the CCI will now be more vigilant in pursuing defaulters and parties are likely to increase the use of the substantive pre-notification consultation process before formally submitting the filing.

#### 10 | Which parties are responsible for filing and are filing fees required?

In case of an acquisition, the acquirer and in case of a merger, both the parties jointly are responsible for filing. Generally, the notice is filed in the (short) Form I; however, where there is a horizontal overlap of more than 15 per cent or a vertical overlap of more than 25 per cent, the notice is filed in the (long) Form II.

The filing fee for Form I is 1.5 million rupees and for Form II it is 5 million rupees. The acquirer, in case of an acquisition, or the parties to a merger or amalgamation in case of a merger or an amalgamation, shall pay the filing fees. In case of a joint notification, the fees are payable jointly or severally.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The merger control regime in India is suspensory and transactions subject to merger control review by the CCI cannot be consummated until merger clearance has been obtained, or a review period of 210 calendar days has passed, whichever is earlier. The suspensory effect extends to both exempt steps of interconnected transactions as well as to the closing of global transactions (even if the Indian leg has not been consummated) pending the CCI's approval.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the parties fail to notify a notifiable combination prior to closing, the CCI has the power to impose a penalty of up to 1 per cent of the total turnover or value of assets, whichever is higher, of the proposed combination. The CCI has used these powers regularly in cases where late filings have been made, though given the trigger exemption, such proceedings are unlikely to continue. The quantum of penalty levied by the CCI has been as high as 50 million rupees. Recently, however, the

CCI has imposed more nominal penalties in cases of delayed, voluntary filings. In case of consummating part of the combination prior to approval by way of pre-payment of consideration, the CCI imposed a penalty of 500,000 rupees (*Hindustan Colas (C-2015/08/299)*), and more recently, a penalty of 1 million rupees (*Chhatwal Group Trust (C-2018/01/544)*), and by way of advancing a loan to the seller that could be adjusted against the consideration payable for the proposed acquisition before the CCI approval, a penalty of 1 million rupees was imposed (*Adani Transmission (C-2015/01/547)*).

A penalty of 500,000 rupees was imposed in *Cairnhill CIPF (C-2015/05/276)*, where the CCI held the filing to be late, because the wrong agreement or document was considered as the trigger by the parties. Interestingly, in *PSPIB and Grupo Isolux Corsan (C-2015/10/330)*, which involved a dissolution of a joint venture, the CCI decided not to impose any penalty for a belated filing, given the unique structure of the combination, and the lack of finality of key terms, which were to be determined by third parties. Recently, the CCI found that even a contractual clause in the acquisition agreement amounted to consummation of a part of the acquisition (*Bharti Airtel (C-2017/10/531)*). It is not clear what the offending clause covered, as material parts of the order are redacted. However, the CCI considered that the arrangement disincentivised the target from competing with the acquirer, that it affected the business activities in the ordinary course of the target and that it could not be considered as inherent and proportionate to the objective of preserving the business valuation.

The power to impose a penalty also extends to the consummation of any part of the proposed transaction prior to obtaining CCI clearance. In *Etihad Airways/Jet Airways (C-2013/05/122)*, the CCI penalised Etihad Airways 10 million rupees for completing one leg of the composite transaction notified for clearance. Parties therefore need to be conscious that they are not deliberately or inadvertently taking steps to give effect to parts of the transaction or aligning their commercial behaviour or completing any leg of a notified transaction until approval for the entire transaction has been received. In *LT Foods (C-2016/04/387)*, the CCI made it clear that any coordination between parties before approval – such as handing over inventories, making introductions to suppliers and restrictions on promotional selling – was prohibited, and accordingly imposed a 'nominal' penalty of 500,000 rupees.

In May 2018, the CCI penalised telecommunications companies for failing to notify acquisitions of telecommunication spectrum (*Bharti Airtel (C-2017/05/509)*; *Bharti Airtel and Bharti Hexagon (C-2017/06/516)*; and *Reliance Jio Infocomm (C-2017/06/516)*). Notably, the CCI held that (i) guidelines issued by the sectoral regulators setting caps on market shares and spectrum holdings did not replace the competition mandate of the CCI; (ii) spectrum constituted an asset, the acquisition of which amounted to a combination under the Competition Act; and (iii) the exemption for the acquisition of assets made solely as an investment or in the ordinary course of business did not apply. In line with the trend of imposing nominal penalty, the acquirer in each case was required to pay 500,000 rupees for gun-jumping.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, sanctions are applied in cases involving closing before clearance in foreign-to-foreign mergers. In *Titan International Inc/Titan Europe PLC (C-2013/02/109)*, the parties sought to justify a lengthy delay in filing on the grounds that the transaction was 'foreign-to-foreign', they were not aware of the filing requirement, the delay was unintentional and there was no bad faith. However, the CCI pointed to a 147-day delay and the fact that the combination had been completed by the time the filing had been made. The CCI could have imposed a maximum penalty of 1.45 billion rupees. However, since the transaction was a foreign-to-foreign

acquisition, the parties were based outside India and, notwithstanding the delay, they had voluntarily filed the notification, the CCI accepted these as mitigating factors and imposed a lower penalty of 10 million rupees. In *Etihad Airways/Jet Airways*, the CCI imposed a penalty of 10 million rupees on Etihad Airways for completing one limb of the notified transaction before receiving clearance. In *Baxter/Baxalta (C-2015/07/297)*, the CCI imposed a penalty of 10 million rupees on the parties for closing the global limb of the transaction before receiving clearance in India.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is currently no precedent in India in relation to this issue and the CCI has not given any guidance in this regard. However, the Competition Act is worded in a manner where it may be arguable that hold-separate arrangements might be legitimate in India. If the CCI initiates proceedings against the parties for failure to notify before closing a global transaction, the parties will have to satisfy the CCI that the assets that relate to India have been kept separate until such time as the clearance from the authority is received and there is no AAEC in India. This approach, however, is untested and the CCI might take a different approach.

What is clear, however, is that the actual combination must not be given effect to until CCI approval is received. In *Baxter/Baxalta* the parties gave effect to a global agreement; however, the transfer of the Indian operations was subject to local implementation agreements. The CCI held that the global transaction was the notification trigger and could not be given effect to (even if, in practice, the transfer of the local entities required separate agreements).

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules under the Competition Act applicable to public takeover bids.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Both Form I and Form II require extensive information – far more than that required by the equivalent notifications under the EU Merger Regulation or the US Hart-Scott-Rodino Act. The filing process is complex, and the parties need to prepare filings with the utmost care and well in advance, including detailed overlaps analysis and related information for the narrowest possible market definitions. The documentation to be filed include the trigger document, financial statements of the parties, market data (market share, market size to the extent possible and based on independent third-party data sources and sales) and competitive assessment of the relevant market. Lack of complete information has resulted in the CCI invalidating the notification forms, requiring the parties to file afresh and also resetting the review clock. Further, a penalty of not less than 500,000 rupees, which may extend to 10 million rupees, may be imposed for making a false statement or omitting a material particular in the notification form.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

The investigation into combinations by the CCI is in two phases.

#### Phase I

The CCI is required to form its prima facie opinion on whether the combination is likely to cause or has caused an AAEC within the relevant market in India within 30 working days of receipt of the notice. However, if the CCI reaches out to third parties or statutory authorities during Phase I, this time period may be extended by up to 15 working days. Further, where modifications are offered in Phase I itself, the time period is further extended by 15 working days. The clock will also stop if a formal request for information is made and restart only when the CCI has received a satisfactory response to all its queries. If the CCI is satisfied that the combination does not cause nor is likely to cause an AAEC or that its concerns can be addressed through remedies or modifications offered by the parties, it will clear the transaction at the end of Phase I.

#### Phase II

If the CCI forms a prima facie opinion that a combination is likely to cause, or has caused, an AAEC within the relevant market in India, it shall issue a show cause notice to the parties asking for an explanation as to why an investigation into the combination should not be conducted. The parties are given 30 calendar days to reply to this notice. After the reply has been filed by the parties, the CCI may either direct the Director General to conduct a detailed investigation or do so on its own, and this heralds the formal beginning of Phase II. The parties shall also be directed to publish details of the combination in four leading daily newspapers (including at least two business newspapers), the parties' websites and the CCI's website within 10 days of the CCI's decision to investigate further. Until the date of writing, the CCI has never directed the Director General to conduct a detailed investigation into a combination and all Phase II inquiries have been conducted by the combinations division of the CCI.

The objective of this publication is to invite comments from the public in relation to the proposed combination. Once the comments are received by the CCI, it may request further information or seek clarifications from the parties in relation to the comments received from the public or stakeholders. At this stage, the CCI may invite any person or member of the public, affected or likely to be affected by the combination, to file their written objections before the CCI within 15 working days from the date on which the details of the combination are published. Thereafter, within the 15 working days from the expiry of the period mentioned above, the CCI may call for additional information from the parties to the combination to be furnished by the parties within a further 15 days. Following the submission of the information and clarifications by the parties, the CCI will proceed to review the transaction and arrive at its final determination, including proposing remedies to the parties, where it is of the view that the transaction will cause or be likely to cause an AAEC.

After receipt of all the information, the CCI will pass orders either approving or prohibiting or suggesting modifications to the combination.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The CCI has up to 210 calendar days from the date of notification to approve or prohibit a notified combination. The 30-working-day periods for the parties to submit amendments to proposed modifications, and for them to accept the CCI's original modifications in case the modifications

are not accepted, are excluded from this 210-day time period. Further, the CCI follows a practice of excluding any time extensions sought by parties for responding to the CCI's additional requests for information, from the 210-day time period (although the Competition Act and the Regulations are silent on this aspect).

There are no provisions to speed up the review timetable and parties who wish to gain early clearance should comply with all information requests expeditiously. In practice, CCI clearance can take anywhere between 60 and 90 days even for no-issues transactions. Transactions with substantial overlaps can take significantly longer. For example, both in the case of *Agrium/PotashCorp* (C-2016/10/443) and *Holcim/Lafarge* (C-2014/07/190), the conditional clearance decisions were adopted nearly at the end of the entire 210-day review period. The CCI in *Dow/Dupont* (C-2016/05/400) and *Bayer/Monsanto* (C-2017/08/523) took over 500 days (including all time 'exclusions') to clear and approve the transaction subject to modifications.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for assessing a combination is whether the combination will cause or be likely to cause an AAEC within the relevant market in India.

To determine whether a combination will have or be likely to have an AAEC, the CCI may consider all or any of the following factors stated in section 20(4) of the Competition Act:

- actual and potential level of competition through imports in the market;
- extent of barriers to entry in the market;
- level of combination in the market;
- degree of countervailing power in the market;
- likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- extent of effective competition likely to sustain in a market;
- extent to which substitutes are available or are likely to be available in the market;
- market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- nature and extent of vertical integration in the market;
- possibility of a failing business;
- nature and extent of innovation;
- relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an AAEC; and
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

#### 20 | Is there a special substantive test for joint ventures?

No, there is no special substantive test for joint ventures and nothing has so far emerged from decided cases.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

There is no clear guidance from the CCI on the theories of harm that they will investigate. However, on the basis of the CCI's jurisprudence,

the CCI has considered both unilateral effects and coordinated effects (and a combination of both in one case) as appropriate theories of harm in a number of cases.

To date, the CCI has been focused on combined market shares and the presence of strong competitors post-transaction in approving transactions.

The CCI has considered the impact of a proposed combination on innovation and has required divestments that allow a new entrant to compete in the market. In addition, in *Agrium/PotashCorp*, the CCI arrived at a view that the combination might cause coordinated effects in the market for supply of potash in India and required a divestment of minority shareholdings in competing enterprises.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the review process. In *Walmart/Flipkart* (C-2018/05/571), a number of market players and pressure groups voiced criticisms of Flipkart's business practices. However, the CCI found that the majority of these concerns were unconnected to the transaction and many had nothing to do with competition law.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Section 20(4) of the Competition Act prescribes various factors that may be considered by the CCI while examining a transaction, including various efficiency-related factors. The efficiency-related factors include:

- nature and extent of innovation created as a result of the transaction;
- relative advantage, by way of contribution to the economic development by any transaction causing or being likely to cause an AAEC; and
- assessing whether the benefits outweigh the adverse impact of the transaction.

In its limited decisional practice to date, the CCI has not cleared any transaction that was likely to or caused an AAEC, solely on the grounds that efficiencies outweighed competition concerns. The CCI has taken the prima facie view that a transaction may cause an AAEC on approximately 10 occasions, which were cleared on account of modifications and divestments, and not on account of efficiencies. Some limited guidance can be drawn from the CCI's clearance decision adopted in *Ethad Airways/Jet Airways, Holcim/Lafarge* and *PVR/DT* (C-2015/07/288) transactions, where the CCI has indicated that the efficiencies (where claimed by the parties) should be merger specific, verifiable, quantifiable and outweigh competition concerns.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

In the event the CCI believes the transaction will cause or is likely to cause an AAEC in India, the transaction will be treated as void, and all actions taken in pursuit of the void transaction shall also be void. In such a case, the CCI has the power to unwind the transaction, though this has not happened to date. The CCI also has the power to reduce the scope of ancillary restrictions such as non-compete provisions and can

also order divestiture of assets. There is no express restriction on the types of remedies that the CCI can accept to address AAEC concerns.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues.

Initially, the remedies considered by the CCI were largely in the context of non-compete obligations in the pharmaceutical sector. Since then, the CCI considered far more significant remedies, both behavioural and structural, while clearing the transactions. For example, in a proposed transaction related to establishing a joint venture in relation to aviation fuel farm facility, the CCI accepted, among other matters, commitments in relation to third-party access rights as a remedy for clearing the transaction. Structural remedies have been imposed in *Holcim/Lafarge* and *Sun/Ranbaxy* (C-2014/05/170). In *PVR/DT*, the CCI relied on structural remedies, and required divestitures and expansion freezes as a precondition to clearing these transactions. The CCI did not accept behavioural remedies in the form of price caps, as it considered such remedies to be ineffective to address the identified AAEC concerns, and difficult to monitor. The CCI has required significant India-specific remedies in *Dow/DuPont, FMC/Dupont* (C-2017/06/519), *Bayer/Monsanto* and *ChemChina/Syngenta* (C-2016/08/424) to approve these transactions. The CCI has also gone as far as requiring divestment of minority shareholding in companies in India (*Bayer/Monsanto*) and outside India (*Agrium/PotashCorp*).

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

During Phase I, the CCI will carry out a review of the proposed combination within a 30-working-day period. However, if the CCI reaches out to third parties during Phase I, this time period is extended by up to 15 working days. In practice, the process may take more than 30 to 45 working days, as the clock can be stopped for various reasons, including the time taken to respond to information requests. At the end of this, the CCI may arrive at the opinion that the proposed combination is not likely to have an AAEC, in which case it will approve the combination. During this phase, the parties themselves may offer modifications that, if accepted by the CCI, will be treated as conditions in the clearance order. Where modifications are offered by the parties, the time period for the CCI to come to a prima facie view is extended by another 15 days.

Alternatively, the CCI may reach a prima facie opinion that the combination is likely to cause an AAEC. Unless the parties can, in response to a show cause notice, persuade the CCI otherwise, the Phase II investigation will start. Through an amendment to the Regulations, the CCI now allows the parties to offer modifications (remedies) in response to a show cause notice, before the start of a detailed Phase II investigation.

Once the Phase II investigation commences, as a formal matter, it is for the CCI to initiate the remedies process by proposing modifications to the transaction, although it will in practice allow the parties to set the ball rolling informally. The Competition Act provides in some detail the Phase II process for agreeing to modifications. Where the CCI proposes modifications to proposed combination, the parties to the combination may carry out modifications within the specified period, or submit amendments to the modifications to the CCI within 30 working days. If parties' proposed amendments are rejected, the parties have 30 working days to accept original modifications proposed by the CCI. If parties fail to accept the original modifications or to implement them, the combination will be prohibited. In the *Dow/Dupont* and *Bayer/Monsanto* transactions, the CCI took over 500 days (including all time exclusions) to conditionally approve the transactions, subject to modifications.

Therefore, the CCI's review period can end with a prohibition decision, an unconditional approval or an approval conditional on behavioural or structural remedies.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CCI is yet to require remedies in foreign-to-foreign transactions, and none have been offered to date.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The CCI requires parties to file all ancillary arrangements along with the notification form. Approval for the combination thus also covers the ancillary restrictions.

There is some guidance from the CCI in relation to the acceptable scope of non-compete arrangements (including in relation to duration, geographic and product scope). The CCI's guidance makes it clear that a restriction will be regarded as ancillary only where it is directly related to and necessary to the implementation of the transaction, taking account of the reasonableness of the restriction in terms of duration, subject matter and geographical scope. Where the covenants are for longer durations, the CCI will seek justifications from the parties.

If non-competes do not fall under the guidance, they remain subject to review under sections 3 and 4 of the Competition Act regarding anti-competitive agreements and abuse of dominant position, respectively. The CCI does not conduct such analysis in its merger review process. However, its orders state that the non-compete are not ancillary to the transaction. In the last year, in *SVF Doorbell* (C-2019/01/633), *CA Swift Investments* (C-2019/01/643) and *Atos/Syntel* (C-2018/08/592), the CCI approved the transactions, but noted that the duration and scope of non-compete provision were not ancillary to the transaction, and were thus, not covered by the approval order.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties do not have a right to voluntarily represent their interests during Phase I of the investigation; however, the CCI can reach out to third parties, and on such occasions, these specific third parties may make their representations to the CCI during Phase I. Further, if the CCI forms a prima facie opinion that the combination has, or is likely to have, an AAEC, it shall, after considering the response of the parties to the combination or receipt of the report from the Director General, whichever is later, direct the parties to the combination to publish details of the combination in daily newspapers.

Thereafter, the CCI may ask any person or member of the public affected or likely to be affected by the said combination to file his or her objections in writing within 15 working days of the date on which the details of the combination were published. The person filing his or her objection is required to substantiate his or her claim that he or she is adversely affected or is likely to be affected by the combination by producing supporting documents.

Third parties can only present their opinions in writing to the CCI and there is no provision for an oral hearing before the CCI.

The CCI remains free to contact customers, competitors and suppliers of the parties to the combination during the course of the investigation and has done so informally even during the Phase I

review period. In complex transactions with significant overlaps, the CCI is increasingly relying on these powers and has reached out to competitors and customers to gather information as well as verify the information and claims made by the notifying parties. The CCI has also increased its international cooperation, especially in its review of global, multi-jurisdictional transactions.

In August 2018, in *Walmart/Flipkart*, the CCI approved the acquisition of the majority stake in Flipkart by Walmart. Notably, a number of market players and pressure groups voiced criticisms of Flipkart's business practices. The CCI found that majority of these concerns were unconnected to the transaction and many had nothing to do with competition law. It did, however, take note of the concerns of deep discounting and preferential treatment to select retailers in online marketplaces, but held that these were not specific to the notified transaction as, if so, Flipkart was doing so prior to the proposed acquisition. Accordingly, as the purpose of merger review is to consider the effects of combinations, such conduct was not subject to the merger review process. Separately, Flipkart's conduct was investigated pursuant to a complaint filed by the All India Online Vendors Association (AIOVA) alleging abuse of dominant position (*AIOVA v Flipkart* (Case No. 20 of 2018)). The complaint was dismissed by the CCI, holding that no case of contravention of the provisions dealing with abuse of dominant position is made out against Flipkart. The matter is pending appeal before the National Company Law Appellate Tribunal (NCLAT).

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Parties are required to submit a 500-word summary of the transaction (not containing any confidential information), which is uploaded on the CCI website as soon as parties file their notification form with the CCI.

The CCI allows requests for confidentiality by parties, when these requests are specifically made in writing along with the notification form, or along with any other information submitted to the CCI. The CCI requires that the parties submit detailed reasons and justifications in support of their confidentiality claims. The CCI has required such reasons to be provided in an affidavit. Once accepted, the CCI will not publish information on which the parties have requested confidentiality without first obtaining the permission of the parties. As a general matter of practice, the CCI grants confidentiality for three years.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CCI has signed memorandums of understanding (MOUs) with various competition authorities, including with the Federal Antimonopoly Service of Russia, the US Federal Trade Commission and the Department of Justice, the Canadian Competition Bureau, the European Commission, and the Australian Competition and Consumer Commission to enhance cooperation between the authorities. The CCI is in the process of signing similar MOUs with other key jurisdictions.

The MOUs, which are very general, are intended to increase cooperation and communication between the competition authorities. The CCI has stated that it has reached out to other competition authorities during the review process and regularly seeks waivers from parties to share information with other authorities in large global transactions.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Any person aggrieved by an order of the CCI approving or prohibiting a transaction may appeal to the NCLAT within 60 days. Appeals previously lay before the COMPAT, which has been dissolved as of 26 May 2017. Orders of the COMPAT and NCLAT can be further appealed to the Supreme Court of India.

In 2013, a concerned citizen appealed the *Etihad Airways/Jet Airways* decision before the COMPAT in *Jitender Bhargava v Competition Commission of India & Ors* (Appeal No. 44 of 2013). The appeal was dismissed as the appellant did not have locus standi to appeal the CCI's decision as it was not a 'person aggrieved' as required by the Competition Act.

Similarly, in 2014, Thomas Cook appealed the CCI's decision in *Thomas Cook/Sterling Holidays* (Appeal No. 48 of 2014), and the COMPAT set aside the 10 million rupees penalty imposed by the CCI for a delayed filing. The CCI appealed this decision in the Supreme Court of India, which has restored the penalty on Thomas Cook in its recent order and upheld the CCI's decision. The penalty of 20 million rupees imposed on the acquirer in *SCM Soilfert* for consummating strategic open market purchases in the target enterprise, without prior approval from the CCI, was upheld in appeal both in the COMPAT and the Supreme Court.

In 2016, Dalmia Cements appealed the CCI's supplementary order passed in *Holcim/Lafarge* on the grounds that the CCI did not have the power to pass such an order under the Competition Act. The COMPAT granted interim relief to Dalmia Cements, staying the operation of the CCI's supplementary order; however, Dalmia Cements withdrew its appeal prior to the COMPAT deciding the case finally.

In *Agrium/PotashCorp*, upon rejection of the counter-proposal made by the parties to divest shareholding in two entities as opposed to three entities that were proposed by the CCI to remedy the resultant coordinated effects in the market, the parties filed an appeal before the NCLAT. In the first ever appeal against a CCI modification proposal, the NCLAT provided six weeks' time to the parties and the CCI to arrive at a consensus and resolve the matter. Subsequently, the parties submitted a new proposal, accepted by the CCI and that was approved by the NCLAT, which accordingly disposed of the appeal.

In August 2018, the Confederation of All India Traders, a trader's collective, filed an appeal before the NCLAT, challenging the approval order passed by the CCI in *Walmart/Flipkart* on the ground that the CCI failed to look into the anticompetitive effects arising out of the combination. The hearings in the matter have concluded and the judgment has been reserved.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

Section 53B(5) of the Competition Act provides that appeals before the NCLAT shall be dealt with expeditiously and the NCLAT shall endeavour to dispose of appeals within six months. Appeals of merger decisions have generally been completed within this period.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since the merger control provisions came into force in June 2011, the CCI has cleared almost all notifications in the Phase I review period. Public

orders have been published in *Sun/Ranbaxy*, *Holcim/Lafarge*, *PVR/DT*, *Dow/DuPont*, *Bayer/Monsanto*, *Agrium/PotashCorp*, *Linde/Praxair* (C-2018/01/545) and *Schneider/L&T* (C-2018/07/586), which were all approved subject to remedies after a Phase II review. Show cause notices were issued in *Mumbai International Airport* (C-2014/0/164), *Nippon Yusen Kabushiki* (C-2016/11/459) and *ChemChina/Syngenta*; however, these transactions were cleared before Phase II was initiated. To date, there have been no prohibition decisions.

In the last year, the CCI unconditionally approved *Walmart/Flipkart*, *Alstom/Siemens* (C-2018/07/588), *IndiaIdeas.com/Visa* (C-2018/12/620), *GlaxoSmithKline/HUL* (C-2018/12/625) and *Proctor and Gamble/Merck* (C-2018/06/579), whereas, it approved *Northern TK Venture/Fortis Healthcare* (C-2018/09/601) and *Reliance/Den/Hathaway* takeovers (C-2018/10/609 and C-2018/10/610) subject to voluntary remedies in Phase I.

The CCI appears to have paid particular attention to the technology and healthcare sectors in its merger review process. It has also reviewed the cement sector in greater detail given the recent consolidation in the sector and the history of cartelisation.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

There are no current proposals to change the legislation.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The CCI cleared a number of high-profile mergers in 2018. These included Walmart's acquisition of a majority stake in Flipkart; the CCI found that the relevant B2B market in which the parties were active was very competitive, given the presence of large players and the very low market shares of the parties. The CCI declined to consider a number of criticisms of Flipkart's business practice, finding that these were not specific to the notified transaction. The CCI also cleared Siemens' proposed acquisition of Alstom, wherein the parties overlapped in the mobility business (products and services for rail transport), but there was no likelihood of an AAEC given the low combined market shares, limited bidding overlaps and the presence of other credible and big competitors. However, the European Commission blocked the transaction on the basis of the concern specific to the European Union.

In *Bayer/Monsanto*, the CCI cleared the major agrochemicals merger on the basis of divestment of certain businesses and of behavioural commitments, including requirements to license on fair, reasonable and non-discriminatory (FRAND) terms and to give Government of India institutions free access to Indian agro-climatic data. In *Linde/Praxair*, a merger between the two industrial gas giants was cleared on the basis of commitments to divest certain plants and filling stations as well as Linde's shareholding in a joint venture. In *Northern TK Ventures/Fortis Hospitals*, a member of the acquirer's group had an interest in a joint venture (JV) operating a competing hospital. Concerns that the JV might be used as a platform for coordination by competing companies were addressed by a 'rule of information control' ensuring that the JV and the combined entity would operate as separate, independent and competitive businesses, which included the removal of interlocking directorates. The CCI also cleared two acquisitions by companies in the Reliance Industries Limited Group of majority stakes in and sole control of multi system operators Den Networks (Den) and Hathaway Cable and Datacom in the markets for broadcasting and distribution and broadband internet services, subject to

voluntary undertakings: (i) no technical alignment resulting in changes in equipment in customer premises; and (ii) in case of any change, the costs would be borne by the parties and the customers would be free to choose any type of services and bundles of services offered by the companies concerned. *Schneider/L&T* became the first ever transaction to be approved after a Phase II review purely on the basis of behavioural commitments offered by the parties along with a detailed implementation and monitoring mechanism.

Following an amendment to the Insolvency and Bankruptcy Code, 2016, it has been clarified that where a transaction covered by the CIRP is required to be notified to the CCI, approval by the CCI is required before a resolution plan is approved by the committee of creditors. The CIRP is limited to 180 days, which may be extended up to a further 90 days in certain cases. To meet this tight deadline, a bidder would be advised to notify a transaction to the CCI as early as possible after an expression of interest with a resolution professional. The CCI reviewed a number of transactions under the Insolvency and Bankruptcy Code. Most of these involved the steel and cement industries. In view of the tight timelines prescribed by the Code, all these proposed combinations, none of which raised AAEC concerns, were speedily reviewed and cleared.

The CCI has continued its hard-line stance in relation to failures to notify notifiable transactions and implementation before clearance, ie, gun jumping. The CCI penalised some telecommunications companies for failing to notify acquisitions of spectrum that constitute assets and the exemption for the acquisition of assets made solely as an investment or in the ordinary course of business did not apply. The CCI has moved from the concept of 'decisive influence' based on special or veto rights towards a more expansive definition of control, to include 'material influence'.

The CCI made a number of amendments to the Regulations, in particular allowing parties to 'pull and refile' a merger notification and enabling the parties to offer modifications (remedies) in response to a show cause notice, before the start of a detailed Phase II investigation.

In July 2018, the CCI introduced a Do It Yourself (DIY) Notifiability Check for Mergers and Acquisitions under the Competition Act, available at <https://www.efilingcci.gov.in/DIY/#/>. This is designed to help individuals (and their advisers) determine whether a transaction is notifiable to the CCI based on the assets and turnover thresholds and available exemptions.



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# Indonesia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The legal basis for merger control in Indonesia is Law No. 5 of 1999 on the Prohibition of Monopoly and Unfair Business Competition Practices (the Competition Law), in particular articles 28 and 29. Article 28 prohibits mergers, consolidations and acquisitions of shares (mergers) that may result in a monopoly or unfair business practices. On the other hand, article 29 provides that mergers that result in combined assets, sales or both, exceeding certain thresholds as set forth under government regulation, shall be notified to the Indonesian Competition Commission (KPPU), an independent agency established for the enforcement of the Competition Law.

In July 2010, the Indonesian government finally promulgated Government Regulation No. 57 of 2010 on Mergers, Consolidations and Acquisitions of Shares that May Result in Monopoly or Unfair Business Competition Practices (the Government Regulation), which provides more specific provisions regarding merger control in Indonesia. The Government Regulation provides criteria for the prohibited mergers and thresholds for notification as well as other issues concerning the enforcement of merger rules and reiterates the mandate given by the Competition Law to the KPPU to carry out and supervise the enforcement of merger control rules in Indonesia. Following the enactment of the Government Regulation, the KPPU has adopted four commission regulations related to merger control:

- Commission Regulation No. 10 of 2010 on the Form of Post-Merger Notification (Commission Regulation 10/2010);
- Commission Regulation No. 11 of 2010 on Pre-Merger Notification;
- Commission Regulation No. 02 of 2013 on the Third Amendment of Guidelines of Mergers, Consolidations and Acquisition (Commission Regulation 02/2013), which supersedes Commission Regulation No. 13 of 2010 on the Guidelines of Mergers, Consolidations and Acquisition; and
- Commission Regulation No. 04/2012 on Guidelines for the Imposition of Fines for Delay in Notifying Mergers, Consolidations and Acquisitions of Shares (Commission Regulation 04/2012).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Competition Law, along with its Government Regulation and Commission Regulation 02/2013, stipulates particular transactions that shall be notified to, and examined by, the KPPU. The consolidation or merger of two or more previously independent undertakings (non-affiliates), and the acquisition by one or more companies, directly or indirectly, of the shares of another company, and joint ventures by way of share transactions resulting in a change or transfer of control are the

transactions that fall within the jurisdiction of the KPPU. Therefore, the assets-based transaction shall not in any way be deemed as a notifiable one under the current merger control. According to the Government Regulation, consolidation refers to a legal action whereby two or more undertakings combined by establishing a new undertaking that by law receives the assets and liabilities from the consolidating undertakings and as a result of which the consolidating undertakings are dissolved. Further, merger refers to a legal action undertaken by one or more undertakings to merge with another existing undertaking, resulting in the assets and liabilities of the merging undertakings being transferred by law to the merged company and the other merging undertakings then being dissolved; and the acquisition of shares refers to a legal action taken by an undertaking to acquire shares of a company, which may result in a change of control of the acquired company. Although basically the KPPU calls only for share-based transactions to be notified, the most current trend, especially in foreign merger cases, indicates that the KPPU has moved forward to also apply the notification obligation to non-share-based transactions but those that have similarities with share-based transactions, such as in capital interest or membership interest transactions. Thus, the KPPU will examine transactions on a case-by-case basis and may use its power as stipulated in the relevant legislation.

#### 3 | What types of joint ventures are caught?

Commission Regulation 02/2013 defines joint ventures as business activities of two or more companies in establishing a new company whereby each of the initial companies has equal control in the newly established company. It then requires the founding companies to jointly bear the risk and capital investment as well as place representatives as directors in the new company. If the establishment of a joint venture results from a transfer of shares or an acquisition of actual control of related undertakings, then this joint venture may be caught by the merger control regulations. A recent example of creation of a notifiable joint venture is the shares acquisition of Global Mines Company Pte Ltd (GMC) by KOG Investments Pte Ltd (KOGI), which was notified to the KPPU on 4 October 2013. In its opinion, the KPPU was of the view that shares acquisition of GMC by KOGI had resulted in GMC being jointly controlled by KOGI and its previous owner, Clariant Participations Ltd.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

As set out in the Government Regulation, control would be presumed to exist when there is an ownership of more than 50 per cent of shares or voting rights of a particular company or where the ownership only involves 50 per cent or less but may still be able to influence and determine the management and policy of the company. However, there are no clear criteria on what kind of situation would be deemed as 'able to

influence or determine management policy', and therefore it would be determined on a case-by-case basis by the KPPU. An example of the application of this rule is the acquisition of shares of Asuransi Dharma Bangsa, an insurance company, by AXA SA, which was notified to the KPPU in November 2011. In this case, AXA SA only acquired a 40 per cent share of Asuransi Dharma Bangsa and the other 60 per cent share was acquired by Bank Mandiri, an Indonesian state-owned bank. Even though AXA SA is only a minority shareholder, it was considered by the KPPU as having control over Asuransi Dharma Bangsa because it has the power to nominate two out of three of the directors of Asuransi Dharma Bangsa. It is also likely to have more control over Asuransi Dharma Bangsa than Bank Mandiri owing to its core competence in the insurance industry compared to Bank Mandiri, which has core competence in the banking industry. Thus, regardless of the number of shares or equivalent, so long as they allow the holder to influence or determine the management or policies of the acquired company, the KPPU will generally consider it as having control over the target or acquired company.

Another interesting example of the application of this rule is the acquisition of shares of PT Mobile 8 Telecom, Tbk (Mobile 8), an Indonesian company engaging in telecommunication service, by PT Wahana Inti Nusantara (WIN) in 2011. In this transaction, WIN acquired 24.05 per cent of shares in Mobile 8. This transaction has resulted in 62 per cent of Mobile 8's shares being acquired by the Consortium, which consist of WIN (24.05 per cent), PT Global Nusa Data (GND) (20.84 per cent) and PT Bali Media Telekomunikasi (BMT) (18.70 per cent). Meanwhile, the remaining 38 per cent is owned by three other shareholders and the public. Because WIN is the leader of the Consortium, WIN has control over the other Mobile 8's shareholders, which are GND and BMT. Thus, the KPPU in its opinion concludes that WIN is considered to have control over Mobile 8 even though WIN is not the majority shareholder after the transaction.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Government Regulation applies two alternative jurisdictional thresholds in merger control, calculated on a nationwide basis. A merger can and shall be notified to the KPPU if it meets one or both of the following thresholds:

- the asset value of the merged entity exceeds 2.5 trillion rupiah; or
- the turnover of the merged entity exceeds 5 trillion rupiah.

However, if all the parties to the transaction (both acquiring and target companies) are banks, only the asset value shall apply, and the threshold shall be when the combined national asset value exceeds 20 trillion rupiah. If only one of the transacting parties is a bank, it shall adhere to the asset value threshold of 2.5 trillion rupiah.

The nationwide turnover or assets are determined based on the calculation of assets located in Indonesia or turnover from Indonesia (of the merged party).

There is no specific rule to calculate group assets or turnover as the calculation is simply based on the cumulative assets or turnover of the undertakings within the group. For a part-owned subsidiary, the calculation of thresholds covers all the assets or turnover of the subsidiary. This calculation shall be based generally on the latest financial year of audited financial reports of the relevant parties. If the calculation of assets or turnover of the latest year is significantly different (more than 30 per cent) from that of the preceding year, the combined turnover shall then be determined based on the average turnover of its audited financial statements for the previous three years. As only

national turnover is taken into account, revenue deriving from export activities (outbound Indonesia) should be excluded from the calculation.

A single party's assets or turnover could trigger notification as the asset value or turnover of the merged entity. This implies that the source of the assets or turnover is not an important issue.

Despite the assessment on the threshold, the KPPU may and can still open an investigation into the transaction, once it considers that the transaction may lead to anticompetitive effects within the Indonesian market.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The Competition Law requires all mergers that meet the thresholds and criteria (see question 2 for more detailed criteria) to be notified to the KPPU despite the fact that:

- the transaction value is insignificant;
- the resulting market share of combined entity is insignificant;
- there is no overlapping market arising from the transaction;
- there is no anticompetitive concern that might arise because of the transaction;
- the transaction shall not lessen competition in any way, in any potentially affected relevant market;
- there is no vertically related market arising from the transaction;
- the sales value is insignificant and negligible, yet the assets have met the statutory threshold; and
- the asset value is insignificant and negligible, yet the sales value has met the threshold.

The Government Regulation has adopted two systems for notification. The first is voluntary pre-merger notification, which is also known as consultation, in which a merger can be voluntarily notified to the KPPU before it is completed or legally effective. Although the pre-merger notification is voluntary in nature, the KPPU keenly urges undertakings to go through the pre-merger notification or consultation so as to, on the one hand, minimise the risk or losses if the KPPU concludes that the merger is likely to be in violation of the Competition Law, and on the other hand accelerate the process of the compulsory post-merger notification as the KPPU will not re-evaluate a completed merger if it has been notified under a pre-merger notification, provided that there are no substantial changes in data or the market following the completion of the merger. The second is known as mandatory post-merger notification, in which all mergers, having met the threshold and criteria, are required to be notified within 30 working days after the transaction is completed or legally effective. This post-merger notification is mandatory although the merging parties have already participated in the pre-merger notification.

The importance of participating in the pre-merger notification or consultation process is high, as the KPPU has advised that non-share-based transactions may still be required to be notified.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

In its guidelines, the KPPU has emphasised that it essentially has the jurisdiction to control any merger that affects competitive conditions in the Indonesian (domestic) market. The KPPU thus asserts that it has the authority to review a merger concluded between two or more foreign companies (foreign merger) where the target company is a foreign company (foreign merger), taking into account the effectiveness of such enforcement.

A foreign merger shall be notified post-closing to the KPPU where it satisfies all five criteria below:

- the merger is conducted outside Indonesian jurisdiction or the target company is a foreign company;
- the specified threshold is met;
- the merger is between or among non-affiliates;
- the merger has a direct impact to the Indonesian market (local effects test); and
- the merger is a share-based transaction (or other transaction that is similar to or has a similar impact to a share-based transaction) that results in change of control.

Particularly for 'direct impact on the Indonesian market' criterion, the KPPU provides alternative schemes that may indicate potential direct impact, as follows:

- all merging parties have business activities in Indonesia, either directly or indirectly (eg, through a subsidiary or subsidiaries);
- one of the merging parties has business activities in Indonesia but the other party (or parties) sells to Indonesia; or
- one of the merging parties has business activity in Indonesia while the other party (or parties) does not have activity, but has a sister company or companies having business activity in Indonesia.

## 8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Competition Law, including its implementing regulations, applies to all business activities in Indonesia, except for those specifically exempted in the Competition Law (ie, small businesses and cooperatives). On the other hand, there are specific rules on mergers in separate regulations applicable to foreign investment or certain sectors. For example, in the finance and banking sectors, some mergers must also be notified and subject to approval from the Ministry of Finance or the Indonesian Central Bank or the Indonesia Financial Services Authority. In the oil and gas upstream sector, approval from the Ministry of Oil and Gas is needed for mergers that involve Indonesian undertakings engaged in upstream activity in Indonesia. Those specific rules, however, are not enforced by the KPPU.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no provision concerning the deadline for filing a pre-merger notification, and accordingly, no sanction applies. A post-merger notification, on the other hand, has to be made within 30 working days of the date on which the merger becomes legally effective. For a merger involving an Indonesian limited liability company, the definition of 'legally effective' refers to the following alternative conditions:

- approval by the Minister of Justice and Human Rights upon the amendment of the articles of association, in case of a merger;
- receipt by the Minister on notification for particular amendments; or
- legalisation by the Minister upon the deed of establishment of the company, in case of a consolidation.

In general, notification shall be made within 30 working days of the closing date. In a merger between foreign companies, the merged entity needs to provide an official document indicating that the merger has been completed. Where there are no official documents released by the relevant authority, the KPPU may accept other documents such as a statement letter stamped and signed by an authorised representative of the merged party indicating the completed merger. This alternative option is subject to change and solely at the KPPU's discretion.

If the merged party fails to meet the deadline, according to the Commission Regulation 02/2013, the KPPU may impose fines in the amount of 1 billion rupiah per day commencing after 30 working days, with a maximum fine of 25 billion rupiah. To date, there have been fifteen decisions issued in relation to the failure to notify a merger. Under Commission Decision No. 08/KPPU-M/2012, the KPPU decided that the notification made by PT Bumi Kencana Eka Sejahtera was still in good time for notification, as the calculated cut-off date was the date of Acceptance Letter of the Change of Data of PT Andalan Satria Lestari. Meanwhile, the KPPU imposed a 4.6 billion rupiah fine on PT Mitra Pinasthika Mustika (MPM) as it notified the merger only after 62 days had elapsed since completion of the merger. MPM should have been fined the maximum amount, but in consideration of its good cooperation with the KPPU and the KPPU's intention to make this case an example to other businesses, the KPPU reduced the amount of the penalty imposed.

Although the KPPU has made the MPM case an example to undertakings failing to notify the merger, it still found four violations on the post-closing notification submission during 2013 and 2014 alone. The first is the case of PT Muarabungo Plantation's (MP) acquisition of PT Tandan Abadi Mandiri, where the notification was submitted 76 days after the closing. In that regard, MP was fined 1.249 billion rupiah. Secondly, the acquisition of PT Subafood Pangan Jaya by PT Balaraja Bisco Paloma (BBP) was notified 43 working days after the transaction completed, thus the KPPU imposed a 5 billion rupiah fine on BBP as the acquiring party. Third, a 1 billion rupiah fine was imposed on PT Dunia Pangan for its failure to notify its acquisition of PT Sukses Abadi Karya Inti within the 30-working-day requirement. And in the fourth, although PT Tiara Marga Trakindo (TMM) participated in the pre-merger notification (consultation), it was fined 1 billion rupiah for submitting the mandatory post-merger notification of its acquisition of PT HD Finance, Tbk (HF) 41 working days after closing. In the *TMM/HF* acquisition case, the KPPU also emphasised that participation in pre-merger notification does not exclude the obligation of the acquiring party to properly notify the transaction post-closing.

In 2016, the KPPU imposed fines on two more transactions because of failure to notify. In the acquisition of Woongjin Chemical Co (WCC) by Toray Advanced Material Korea Inc (TAMK), the KPPU imposed 2 billion rupiah fines on TAMK for submitting the notification four days past the deadline. This has been a landmark case as the *TAMK/WCC* case was the first precedent of KPPU imposing fines on a foreign company for failure to notify. Later on in 2016, the KPPU imposed an 8 billion rupiah fine, the highest so far, to LG International Corp (LG) for submitting the notification of its acquisition of PT Binsar Natorang Energi 20 working days past the deadline.

In March 2018, the KPPU fined the following two companies for their late notifications on the below transactions:

- PT Plaza Indonesia Realty, Tbk was fined 1 billion rupiah for its late notification on the acquisition of PT Citra Asri Property (*Plaza Indonesia/Citra Asri*). The combined assets and sales of the parties exceeded the statutory thresholds. However, the notification was only made to KPPU on 13 May 2016. Therefore, it was 345 days past due according to the KPPU press release. This sets the record for longest period of failure to notify to date; and
- PT Nirvana Property was fined 1 billion rupiah for its late notification on the acquisition of PT Mutiara Mitra Bersama (*Nirvana Property/Mutiara Mitra*). The transaction was legally effective on 29 December 2015, but was notified to KPPU on 7 October 2016. Therefore, according to the KPPU press release, the notification was 161 days late.

Afterwards, KPPU scrutinised five more companies until the end of 2018 and fined four of them, including PT Japfa Comfeed Indonesia Tbk

(Japfa) with 3.7 billion rupiah, for its late notification on the acquisition of PT Multi Makanan Permai. Despite the insignificant transaction value, which only amounted to 483 million rupiah, the combined assets and sales of the parties still exceeded the statutory thresholds. The transaction was legally effective on 27 April 2015 but was notified to KPPU on 19 September 2016. Therefore, it was 310 days past due according to the KPPU decision and represents the second longest period of failure to notify to date. At the end of 2018, Japfa filed an appeal to the district court against the KPPU decision and received a fine reduction of 1.7 billion rupiah from the district court.

The one company that was scrutinised by KPPU because of its alleged late notification but was not declared as violating the Competition Law and thus not fined by KPPU in 2018 was PT Erajaya Swasembada, Tbk (Erajaya) when it acquired 51 per cent shares of PT Axioo International Indonesia (Axioo). According to the KPPU decision, the notification was submitted 145 days after the initial deadline on 7 July 2015. However, Erajaya was acquitted of all charges and fines as KPPU was of the view that the acquisition was exempted from the notifiable transaction, as it was conducted based on a regulation that required certain importers to have certain business activities in Indonesia.

We believe the number of companies that are fined will continue to increase because we understand that the KPPU is in the process of investigating other late notification cases.

#### 10 | Which parties are responsible for filing and are filing fees required?

In pre-merger notification, the merging parties (under a consolidation or merger scheme) are responsible for notifying the KPPU, while in shares acquisitions, the responsibility lies with the acquiring party. The KPPU, however, has highlighted that each firm shall keep confidential information from each other or parties in a pre-merger notification owing to the possibility that the deal may be called off. In that regard, when performing a consultation on the proposed transaction, the KPPU provides the possibility for each party to submit the data and information separately, although the pre-merger notification form must be submitted together or at the same time by the notifying party or parties. As in post-merger notification, it is the remaining entity that is responsible for filing or the acquiring party in case of an acquisition. To date, and in accordance with the applicable regulations, there are no fees required for filing.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As the Competition Law adopts mandatory post-merger notification, it does not include provisions on waiting periods or the suspension of the completion of a transaction prior to the issuance of an opinion of the KPPU.

#### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As the Competition Law only requires notification on which the KPPU will issue an opinion, which does not constitute clearance or approval, and as notification prior to the closing of a transaction (pre-merger consultation) is essentially voluntary, no sanctions apply with regard to obligation to notify.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Because foreign merger control rules generally mirror the domestic rule, no sanctions for closing before clearance apply with regard to obligation to notify.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Not applicable.

#### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

The applicable regulations do not make special provisions for criteria of notifiable public takeovers. Thus, the general rules on merger control shall also apply to public takeovers. There is only one specific criterion relating to the closing date or legally effective date of a public takeover that is considered, which is since the public disclosure of the takeover of the listed company.

#### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There are two types of form for filing purposes: one is for the pre-merger notification and the other is for the post-merger. Each type is available for three different transactions: merger, consolidation and share acquisition. The pre-merger notification forms are: merger transaction (form M2), consolidation transaction (form K2) and share acquisition transaction (form A2); and the post-merger notification forms are: merger transaction (form M1), consolidation transaction (form K1) and share acquisition transaction (form A1). These forms are available online and can be downloaded from the KPPU's website ([www.kppu.go.id](http://www.kppu.go.id)).

Upon completion, these forms shall be submitted to the KPPU to meet administrative requirements. The information required is general in nature and consists of basic information on the related parties. Currently, information required for a filing includes, but is not limited to:

- the identity of the merging parties, which consists of information on the name, address, members of the board of commissioners, members of the board of directors, shareholders and their shares and voting rights percentages and the value of sales and assets for the last three years prior to the merger;
- the identity of the parent company and companies under the control of the parent company, which includes information on the name and value of sales and assets prior to the merger;
- general information on the merging parties' products, consisting of information on the brand names, product category, market share and product description;
- profile of competitors, consumers, and suppliers of the merging parties, including information on the names, addresses, brand names, market shares and product descriptions;
- a summary of the transaction, which covers the background, process and expected goals of the transaction;
- business plan for the next three years, explaining the commercial or business policies of the merging parties, the position of the merging parties as a group in the industry, along with the competition map of the industry in which the parties operate; and

- industry or market data containing the data and information of market share of the merging parties and the competitors in the industry or industries in which the parties are operating.

The submission of industry or market data is important, as failure to provide such information will mean that the notification requirement is not complete and the KPPU shall not proceed to the assessment process. In its guidelines, the KPPU has pointed out that it has the power to request further information from the merging parties or their affiliates as it deems necessary for the assessment of the transaction.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

Once a notification is filed, the KPPU generally will commence by examining the notification form as well as the supporting documents. The KPPU may require more information or additional documents as it may deem necessary.

In pre-merger notification or consultation, the process consists of two phases: Phase I and II. Phase I (preliminary assessment) shall begin only if KPPU declares that documents and data submitted by the parties are complete (documents completion declaration). In other words, KPPU must first make the documents completion declaration before proceeding with the preliminary assessment period. According to current merger control, there is no firm timeline regulating how long the KPPU may take in assessing the documents completion and issuing the documents completion declaration accordingly. The KPPU will define the relevant market or markets and measure market concentration in Phase I. If the post-merger concentration or position of the merging parties does not raise competition concerns, the KPPU will issue its opinion without entering into Phase II. This process will last for a maximum of 30 working days. On the other hand, the KPPU will continue to Phase II (comprehensive assessment) if there is overlap between the business of the relevant parties creating an ex-post Herfindahl-Hirschman Index (HHI) higher than 1,800 and a delta exceeding 150, or there is a vertical (business) link between relevant parties to the transaction holding a dominant position in the market. This comprehensive assessment will last for a maximum of 60 working days following the end of the preliminary assessment. During the Phase II process, the KPPU will generally examine entry barriers, possible anticompetitive effects, efficiencies put forward by the merging parties, and possible bankruptcy defences. The submission of remedies proposals by the merging undertakings shall also take place in this phase. Although the KPPU issues this documents completion declaration, the KPPU may still request further additional information or documents to the parties of transaction or any other stakeholders throughout the overall assessment process.

Under the post-merger notification scheme, the merged entity is obliged to notify the KPPU within 30 working days of completion of the merger. As it is with the pre-merger notification or consultation, the KPPU will only commence its assessment after it issues the documents completion declaration. The post-merger notification assessment consists of only one phase that will last for a maximum of 90 working days before an opinion on the merger is issued. The substantive test will be similar to that of the pre-merger notification. The KPPU may request additional request for information or documents throughout this post-merger notification assessment phase.

The participation in the voluntary pre-merger notification does not make the parties free from the post-merger notification obligation. However, if the merging parties undertook a pre-merger notification and an opinion of the KPPU for that process has been issued before the merger is completed, there will be no reassessment when the merger is

notified following the completion. Reassessment will only be conducted if there are material changes to data or market condition, such as:

- there is a reduction of the number of undertakings in a highly concentrated market (Spectrum II, see question 19) causing the HHI to change by more than 500;
- there are changes to the post-merger business plan; or
- the predicted post-HHI during a pre-merger notification is below 1,800, but after recalculation in the post-merger review it is above 1,800.

Other than the documents completion declaration, all the time frames mentioned above are maximum periods that cannot be extended in any case.

During the assessment process, either in pre-merger notification or post-merger notification, the KPPU may, and usually will, invite the merging parties to meet and clarify information and documents that have been submitted to them. For this clarification meeting, the KPPU will provide the parties with the list of questions to be discussed and clarified. In addition, the KPPU may require the parties to submit a summary of notification (SON). The SON's objective is to summarise all relevant facts (which have usually been provided to the KPPU in the notification bundle) needed by the KPPU to assess the transaction. Basically, it is not a compulsory document that shall be submitted but it would help the KPPU to expedite the assessment process, particularly in identifying relevant facts needed for their assessment. The KPPU does not set any specific deadline for submitting the SON.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

Commission Regulation 02/2013 only prescribes the maximum period for the KPPU to complete its assessment and therefore the assessment process may be completed earlier than the maximum statutory period (see question 17 for a more detailed time frame). However, as mentioned in question 17 above, the assessment process will only be started by the KPPU if all requested documents and information have been provided and the KPPU has issued a documents completion declaration. As there is no provision governing the timeline for the KPPU issuing the documents completion declaration, the periods to obtain the completeness status from the KPPU vary and depend on, among others, the nature or complexity of the transaction and the sufficiency of information provided by the parties, as well as the number of notified transactions being reviewed by the KPPU.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The Competition Law prohibits mergers that would create a monopoly or would likely result in conditions that facilitate unfair business practices, and as a result would cause harm to consumers. The review will involve, at the very least, an evaluation of market concentration, barriers to entry, potential anticompetitive effects, efficiencies and the possibility of the failing firm defence.

In general, the KPPU will begin its assessment by measuring the market concentration following the merger. The KPPU usually uses HHI to measure concentration. However, if the available data cannot be used to calculate HHI, the KPPU will use other concentration measures such as concentration ratios. Essentially, the KPPU divides post-merger HHI into two spectrums: Spectrum I (low concentration, with HHI below 1,800) and Spectrum II (high concentration, with HHI above 1,800). The KPPU will only identify horizontal competition concerns if

the post-merger HHI falls within Spectrum II and the delta is more than 150 points. With regard to vertical mergers, there will be no competition concerns if none of the merging parties has a dominant position. The KPPU will not continue with a comprehensive assessment if this condition is satisfied.

Aside from calculating the market concentration index, the KPPU will assess the barrier to entry from regulatory and non-regulatory ones, such as the technical or economics reasons. When the barrier to entry is low, the KPPU will consider a merger leading to a control of significant market shares by the merged entity as unlikely to cause any anticompetitive effect because there will be sufficient competitive pressure from undertakings entering the market following the merger. On the other hand, the KPPU will consider a merger as likely to cause an anticompetitive effect even if the merged entity only possesses moderate market shares if the barrier to entry is high. In determining whether entry will deter or counteract the anticompetitive effects resulting from a merger, the KPPU will not only take into account the likelihood of entry, but also its sufficiency and timelines. However, there is no further explanation by the KPPU of these elements. For example, the KPPU never explains what would be considered an appropriate time period or the scope and magnitude of entry that would be considered to be sufficient to decide that entry is easy.

The KPPU may find that a horizontal merger will result in a monopoly or unfair business competition if the merger causes coordinated or unilateral effects or a vertical merger results in a monopoly or unfair business practices if the merger leads to market foreclosure.

If the goal of a merger is the creation of or an increase in efficiency, the KPPU will then evaluate the expected efficiency and the benefit consumers will obtain from such efficiency. The KPPU will undertake an in-depth investigation over any claimed efficiency proposed by the merging parties. During its assessment, the KPPU will compare the efficiency with the anticompetitive effects of the merger. If the anticompetitive effects will likely outweigh the efficiency, the KPPU will generally choose promoting fair competition in preference to encouraging the improvement of efficiency. In the KPPU's view, a competitive market structure will directly or indirectly lead to the creation of an efficient undertaking in the market.

If an undertaking makes a decision to merge with another undertaking to prevent their business from ceasing to operate (ie, avoiding bankruptcy) the KPPU will generally assess whether consumers will be more harmed by the bankruptcy than the impact of the merger on competition. When consumer loss caused by the exit of the failing undertaking from the market is higher than the anticompetitive effects, the KPPU will decide not to challenge the merger. In performing the assessment, the KPPU will examine, among other things, whether the undertaking will not survive owing to its financial condition, whether there is the possibility of a successful reorganisation, and whether there is another alternative with fewer anticompetitive effects than the merger to protect the undertaking from bankruptcy.

## 20 | Is there a special substantive test for joint ventures?

The applicable regulations do not establish a substantive test specific to joint ventures.

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

In reviewing a horizontal merger, the KPPU will consider the unilateral and coordinated effects of the merger. In the event of a merger involving undertakings from a different level of production (value added) chain (vertical merger), the KPPU will examine the foreclosure

effects (input foreclosure or customer foreclosure) and the coordinated effect of a merger.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

There are two transactions in which the KPPU considers the sector-wise regulatory issues in reviewing mergers: the share acquisition of PT Caturmas Karsaudara (Caturmas) by PT Agung Podomoro Land Tbk (Agung Podomoro), and the share acquisition of PT Wahana Sentra Sejati (Wahana Sentra) by Agung Podomoro.

In both transactions, the KPPU concludes that there is an overlap in the trade centre market in Jakarta. Further, the KPPU also stated that the HHI's value and  $\Delta$  HHI of the share acquisition of *Caturmas/Agung Podomoro* and *Wahana Sentra/Agung Podomoro* are respectively below 1,800 and 150. However, the KPPU in its assessment was of the view that there will be a difficulty faced by any new entrants establishing a trade centre in Jakarta, owing to the issuance of the Jakarta Governor Instruction in 2014 regarding a moratorium on trade centres. This regulation has resulted in a temporary suspension of issuance permits to establish trade centres in Jakarta. Therefore, by considering this public interest issue, the KPPU subsequently issued opinions of no alleged monopoly or unfair business competition practices to both of transactions with remarks in which the KPPU monitors the trade centre market in DKI Jakarta and requires Agung Podomoro to submit outlet sales data in Harco Glodok Trade Centre along with its annual maintenance cost for five years.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Government Regulation has set out efficiencies as one factor that can be used by the KPPU to decide whether a merger may result in monopolistic or unfair competition practice. This provides an opportunity for undertakings to put forward the efficiencies that may arise from their merger when submitting a notification to the KPPU. The KPPU is likely to evaluate efficiencies that may arise from a merger in its comprehensive review even though competition concerns may be limited. There have been at least two opinions of which KPPU considered the quantitative approach to seek efficiency. The latest opinion describing such is as illustrated in the KPPU's opinion of the acquisition of Vinythai Public Company Ltd (Vinythai), which was released in March 2018 (Asahi-Vinythai Opinion). In the Asahi-Vinythai Opinion, the KPPU used quantitative analysis to calculate economic efficiencies gained from the transaction. In its calculation, the KPPU is of the view that after transaction, the potential efficiency from this transaction may not lead to a price decrease to one of the merging party. Following this assessment, KPPU issued a conditional non-objection opinion that required Asahi Glass Company Ltd to regularly report their production volume, sales volume, and price information of S-PVC in Indonesia, and required the export volume and price information of S-PVC from Vinythai to Indonesia quarterly for the next three years.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

As the current regime adopts the notification or non-clearance system, the KPPU has no power to block a merger. However, it can review and

issue an opinion on a merger plan following a voluntary notification. The opinion issued prior to the merger is binding on the KPPU, but it is only as long as the plan has not been substantially changed when the merger is completed.

When the KPPU finds that a merger is objectionable, it cannot reject or block the merger, but it may open a formal investigation and decide whether or not it will order the dissolution of the merger, in case of a completed merger, or impose sanctions, such as fines or damages.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Once the KPPU has evaluated the proposed or complete merger under the consultation or notification scheme, if the result indicates that there is a potential substantial lessening competition arising from the merger, the KPPU may provide conditions to be fulfilled by the merging parties to comply with the Competition Law. The merging parties are given an opportunity to submit the proposed remedies to the KPPU no later than 14 working days after receiving the report, and the KPPU shall evaluate whether or not such proposed remedies may mitigate the potential anticompetitive effects. If the KPPU approves the remedies it will issue an 'opinion of no alleged violation on condition'. On the contrary, if the KPPU declines the proposed remedies, then the opinion of the existence of the alleged monopoly practices and anticompetitive conducts arising from the merger is issued.

The proposed remedies may take the form of structural or non-structural (behavioural) remedies. There is no precedent to date on structural remedies. For this reason, it is very important for the merging parties to notify the KPPU first before proceeding with their transaction to seek the KPPU's opinion, especially when the market is highly concentrated or the relevant parties to the transaction have a dominant position or significant market share.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Under current regulations and precedent, there are no clear indications regarding the basic conditions and timing for a divestment or other structural remedies. Taking into account the approaches used by the KPPU in its recent decisions, we may, however, expect that the KPPU will consider and impose specific behavioural conditions as well as a timetable when it finds it necessary, depending on the complexity of the issues under review.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no precedent regarding remedies in foreign-to-foreign mergers. However, there is one example of a foreign-to-foreign merger where the KPPU monitored the affected markets for a certain period of time after the merger (see question 34).

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Government Regulation and its implementing regulations do not provide clear provisions on ancillary restraints. They may be relevant when considering potential unilateral effects or abuse of a dominant position.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Although there are no statutory rights given to customers or competitors to get involved during the review process, the KPPU is entitled to and will generally invite customers as well as competitors in its review process to provide relevant information with regard to market analysis and competition impact. Customers and competitors may also, at the KPPU's request, submit their opinions or recommendations on the merger.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Information about the submission or notification of proposed or completed mergers will be made available to the public through the KPPU's website ([www.kppu.go.id](http://www.kppu.go.id)). However, the KPPU will only publish the non-confidential version of the opinion. Sometimes the KPPU issues a press release informing the public about the overview of the notified transaction. When an opinion on a merger has been made, the KPPU will then issue a press release and upload the public version of the opinion or decision to its website. The opinion is only made available in the Indonesian language. As the KPPU is obliged to protect commercially confidential information acquired during its review, the KPPU will observe this obligation in its merger review process by keeping merging parties' trade, company or commercial secrets (that it has acquired during the review process) properly secure and unavailable to the public. The KPPU will usually also provide merging parties with a draft opinion before publishing it, so that they may review the draft and request further deletion of information in the draft opinion if the information is deemed confidential. Despite this, it is imperative for the merging parties to state to the KPPU any information they consider as confidential as this would prevent the KPPU from mistakenly making public any business secrets.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The KPPU has established several limited cooperation agreements with the Japan Fair Trade Commission, the Korea Fair Trade Commission and the US Federal Trade Commission to exchange information regarding the enforcement of competition law, including merger control. To the best of our knowledge, KPPU cooperation with other antitrust authorities is conducted sporadically, on an ad hoc basis.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

All KPPU decisions are subject to review by the district court and finally the Supreme Court. The result of mandatory post-merger and voluntary pre-merger notifications is a KPPU opinion, not a KPPU decision, thus there is no possible appeal by the undertakings directly upon the issuance of the KPPU opinion. However, if the KPPU prohibits a merger transaction by adopting a decision (in this case where the undertakings disregard the opinion (of alleged unfair practice), the KPPU will open a

formal investigation and issue a decision regarding alleged violation as a result of the completed merger), the merger entity may then file an appeal to the district court against the KPPU decision. Appeals against a KPPU decision can only be brought by the merging parties. The current regime provides no possibility for third parties, such as competitors or consumers, to challenge a KPPU decision. However, currently there is no precedent on this matter.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

An appeal has to be filed before the competent district court within 14 days of the parties receiving the KPPU decision. In accordance with the time frame as set out in the Competition Law, the district court shall issue its ruling within 30 days of the commencement of the proceedings. A further appeal can be made to the Supreme Court within 14 days of the district court's ruling being received by the merging parties. The time frame for this review is, by law, set at a maximum of 30 days. Unfortunately, the process in the Supreme Court, and sometimes in the district courts, is unpredictable. In many cases, it takes months before a Supreme Court, or district court decision is made. In rare cases, it can take years.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

As of end of April 2018, the KPPU has reviewed 85 foreign mergers for the last four years. The KPPU has declared 'no alleged unfair practice or violation' in all its opinions. However, in the *Nestlé SA/Wyeth (Hong Kong) Holding Company Ltd* infant formula milk acquisition, the KPPU declared it will monitor for three years the monthly sales price and volume submitted by the Indonesian subsidiary of *Nestlé/Wyeth* every June and December, although the KPPU does not object to the acquisition. Monitoring only applies for the infant formula milk (below six months) and the formula milk (above one year) markets owing to the potential collusive behaviour following the acquisition. Formula milk for seven to 12-month-old babies is excluded from the monitoring process despite the market being concentrated, as the change in post-transaction concentration is insignificant.

Despite the typical steps and assessment referred to at length in question 17, the KPPU, in its opinion on the acquisition of PT Wahana Sentra Sejati by PT Agung Podomoro Land that was released in August 2016 (*APL/Wahana*), stated that although the *APL/Wahana* transaction generated the HHI's value below 1800, the KPPU still assessed the entry barrier and potential anticompetitive conduct analysis. In the entry barrier analysis, the KPPU stated that the entry barrier to establish a trade centre in DKI Jakarta is high and the new entrants will face difficulty in entering the trade centre market. The KPPU also further stated that there are potential anticompetitive conducts owing to the transaction in the form of abuse of bargaining position to new outlet buyers with a non-competitive price, setting up high maintenance costs, and collusive agreement with other players in the trade centre market. Based on these analyses, the KPPU released an opinion of no alleged monopoly or unfair business competition practices with remarks in which the KPPU monitors the trade centre market in Jakarta and requires APL to submit outlet sales data in Harco Glodok Tradecenter along with its annual maintenance cost in five years.

In addition to the above, the KPPU is currently focusing its enforcement on and closely monitoring sectors where there are high-profile companies having market share above 50 per cent and a rigid or high

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price, or a shortage of supply, such as in the selling of oil and gas for retail markets, banking (owing to high lending interest rates), food and agricultural, infrastructure, as well as education and health (including pharmaceutical) sectors, sectors monopolised by state-owned companies or firms holding market share of more than 50 per cent, poor quality public services and highly regulated or concentrated markets.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

In April 2017, the Indonesian Parliament provided its approval of the draft amendment to the Competition Law and handed it to the Government of Indonesia (GoI) for further assessment or approval. The GoI will form a special working task force to assess the draft amendment to the Competition Law. Significant changes related to merger control include the change of the merger control regime to be that of mandatory pre-merger notification and that merger control shall include the assets-based transaction.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

One of the most important cases in the context of merger control is the acquisition of Axioo by Erajaya (see question 9). The Competition Law provides several actions, including merger, that may be exempted from the law. These exemptions include actions that are carried out based on the instruction of prevailing laws. In cartel and abuse of dominant

cases, or both, the KPPU tends to take the view that the instruction must be expressly stated under the laws, and views that any instructions given under any regulations lower than law (such as government regulation or minister regulation) do not exempt the undertakings from the Competition Law. Previously, we found no precedent of this exemption in the context of merger control.

Unlike in previous precedents, in cartel or abuse of dominance cases, where the KPPU only recognised exemption based on laws, in this case, KPPU decided that Erajaya was acquitted of all charges and fines as it viewed that the acquisition was conducted based on a minister regulation or regulation lower than law. This case might have revealed how the KPPU would interpret this exemption in failure-to-notify cases, or possibly in all competition cases going forward.

# Ireland

Helen Kelly and Ronan Scanlan

Matheson

## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Ireland's merger control regime has its legal basis in Part 3 of the Competition Acts 2002 to 2014 (the Act) as amended by the Competition and Consumer Protection Act 2014.

The Competition and Consumer Protection Commission (CCPC) is primarily responsible for the enforcement of the Irish merger control regime. The CCPC shares responsibility for the review of media mergers with the Minister for Communications, Climate Action and Environment. The Irish courts have jurisdiction to adjudicate on any allegation of breaches of the Act and on any appeal against a merger decision.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Irish merger control regime applies to 'any merger or acquisition', which is defined by section 16(1) of the Act as including transactions where:

- two or more undertakings, previously independent of one another, merge;
- one or more individuals who already control one or more undertakings, or one or more undertakings, acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the acquisition of part of an undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business to which a turnover can be attributed, and for the purposes of this paragraph, 'assets' includes goodwill.

The concept of 'undertakings involved in the merger or acquisition' is broadly equivalent to the concept of 'undertakings concerned' under Council Regulation (EC) No. 139/2004 (the EUMR).

Mergers and acquisitions (mergers) that meet the turnover thresholds set out in section 18(1) of the Act are subject to mandatory notification to the CCPC. Where these requirements are not met, mergers may still be notified to the CCPC on a voluntary basis under section 18(3) of the Act (see further the response to question 5 below for turnover thresholds and voluntary notification).

There are different thresholds that apply to media mergers under the Act (see further the response to question 8 below).

#### 3 | What types of joint ventures are caught?

Only full-function joint ventures (ie, those that perform, on a lasting basis, all the functions of an autonomous economic entity) constitute a merger for the purposes of the Irish merger control regime. The relevant definition is included in section 16(4) of the Act.

The CCPC adopts an approach mostly consistent with the European Commission in identifying whether joint ventures are subject to Irish merger control law. Where a joint venture does not qualify as full-function, the CCPC may assess it under section 4 of the Act, which is based on article 101 of the Treaty on the Functioning of the European Union. Typically, the CCPC will have regard to the European Commission's Guidelines on Horizontal Cooperation Agreements and the Guidelines on Vertical Restraints when undertaking such an assessment.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Irish merger control regime does not regulate the acquisition of interests other than those conferring 'control' over an undertaking or part of an undertaking.

The definition of control that applies under the Act is based on the concept of 'decisive influence', derived from the EUMR.

The following non-exhaustive list of the circumstances that can give rise to control is included in section 16(2) of the Act:

- ownership of, or the right to use all or part of, the assets of an undertaking; and
- rights or contracts that enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Irish merger control regime is mandatory where, for the most recent financial year:

- the aggregate turnover in the state of the undertakings involved is not less than €60 million; and
- the turnover in the state of each of two or more of the undertakings involved is not less than €10 million.

These revised thresholds came into effect on 1 January 2019. References to 'the state' are references to Ireland, excluding Northern Ireland.

There are different thresholds that apply to 'media mergers' under the Act (see further the response to question 8).

The CCPC can also investigate mergers falling below the turnover thresholds under sections 4 and 5 of the Act (ie, where it believes, respectively, either that the merger could have as its object or effect the prevention, restriction or distortion of competition, or involves the creation or strengthening of a dominant position). In practice, the CCPC will contact parties to a merger falling below the turnover thresholds, where that merger raises potential competition concerns, and request

that they notify the merger on a voluntary basis under section 18(3) of the Act. For example, through its market surveillance the CCPC became aware in February 2017 that Mediawatch Limited (trading as Kantar Media), a wholly owned subsidiary of WPP plc, was to acquire sole control of Newsaccess Limited. Notwithstanding the fact that the proposed merger fell below the turnover thresholds that trigger mandatory notification, the CCPC undertook a preliminary assessment, which found that the merger would result in Kantar Media removing its closest and most substantial competitor from the market. The CCPC therefore informed the parties that they should make a voluntary notification of the merger. The parties did so and the CCPC eventually cleared the merger with binding commitments.

The CCPC has stated in its published guidance that if, having been contacted by the CCPC, parties to a non-notifiable merger that raises competition concerns inform the CCPC that they do not intend to notify, the CCPC will carry out a preliminary inquiry to determine whether to open an investigation under section 4 or 5 of the Act. The CCPC may then seek an undertaking from the parties not to implement the merger or, where necessary, may seek an injunction to restrain implementation of the merger. Where a non-notifiable merger raising competition concerns is implemented, the CCPC will conduct an investigation and in appropriate cases invoke the Irish Court's equitable jurisdiction to restore the status quo, which may result in the merger being reversed. Such an eventuality has not occurred to date.

The CCPC has not issued detailed guidance on its approach to the calculation of turnover but tends to follow the principles set out in the Commission Consolidated Jurisdictional Notice under the EUMR on the Control of Concentrations between Undertakings, 2008 (the Commission Jurisdictional Notice).

One exception is the CCPC's approach to geographic allocation of turnover. A guidance note by the CCPC provides that 'turnover in the state' means sales made or services supplied to customers within the state. The CCPC follows this approach even in cases involving financial institutions where the Commission Jurisdictional Notice would suggest that turnover should instead be allocated on a 'branch basis'.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for mergers that meet the turnover thresholds. No exceptions exist.

Section 18(3) of the Act provides for voluntary notification of a merger that does not meet the jurisdictional thresholds (see further question 5).

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Any merger that involves undertakings meeting the turnover thresholds in the state as set out in the Act must be notified to the CCPC.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

No special rules apply to foreign investment.

Special rules apply where two or more undertakings carry on a media business in the state or one or more of the undertakings involved carry on a media business in the state and one or more undertakings carry on a media business elsewhere.

The definition of 'carrying on a media business in the state' requires undertakings involved to have either a physical presence in the state and make sales to customers located in the state, or to have made sales in the state of at least €2 million in the most recent financial year.

The term 'media business' is broad and includes newspaper publishing, radio and TV broadcasting and production of news and current affairs programming, including online news sources and broadcasting.

Where a merger qualifies as a media merger, the substantive test is 'whether the result of the media merger will not be contrary to the public interest in protecting the plurality of the media in the state' and this includes a review of 'diversity of ownership and diversity of content'.

Undertakings involved are required to make two notifications of a media merger. One notification is sent to the CCPC, which determines whether the merger is likely to give rise to a substantial lessening of competition (SLC). A separate notification is sent to the Minister for Communications, Climate Action and Environment. This is in a prescribed form, last updated in 2015. A fee is payable for each notification.

The Minister will commence a separate review of the media merger 10 days after the CCPC determination is made (ie, consecutively). If the media merger does not raise concerns, it will usually be cleared within 30 working days of the commencement of the Minister's review. However, if the Minister is concerned that the media merger may be contrary to the public interest in protecting plurality of the media, the Broadcasting Authority of Ireland (BAI) will carry out a 'Phase II' examination. The BAI has 80 working days to prepare a report to the Minister, which includes recommending whether the merger should be put into effect (with or without conditions). An advisory panel may be set up to assist the BAI in its review. The Minister will make the decision of whether to approve (with or without conditions) or prohibit the merger, taking into account the BAI report and, if applicable, the views of the advisory panel. The Minister must take this decision within 20 working days of receipt of the BAI report.

To date, there has been only one Phase II examination of a media merger, the acquisition of seven regional newspapers (part of Celtic Media Group) by Independent News & Media (INM). This examination was not completed, as the merger was terminated by mutual consent of the parties.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A filing must be submitted to the CCPC prior to the implementation of the merger, and may be made so long as the undertakings involved demonstrate a good faith intention to conclude an agreement. This approach is in line with the European Commission's practice under the EUMR.

Under sections 18(9) and 18(10) of the Act, failure to notify a merger that meets the turnover thresholds is a criminal offence punishable by fines of up to €250,000, plus €25,000 per day for a continued breach. The CCPC cannot impose administrative fines but must refer the matter to the Director for Public Prosecutions to initiate either summary prosecution or prosecution on indictment.

Liability attaches to the undertaking required to make the notification, or the person in control of that undertaking. Section 18(11) of the Act provides that the 'person in control' of an undertaking is:

- in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention;
- in the case of a partnership, each partner who knowingly and wilfully authorises or permits the contravention; or
- in the case of any other form of undertaking, any individual in control of that undertaking who knowingly and wilfully authorises or permits the contravention.

Following a CCPC investigation, on 8 April 2019, Armalou Holdings Limited (Armalou) pleaded guilty in the Dublin Metropolitan District

Court to a breach of section 18. Armalou pleaded guilty to six charges arising from its failure to notify the CCPC of its acquisition of Lillis-O'Donnell Motor Company Limited in December 2015. Subsequently, on 10 May 2019, Airfield Villas Limited (formerly known as Lillis-O'Donnell Holdings Limited), also pleaded guilty to six charges arising out of its failure to notify the CCPC of the same transaction. This was Ireland's first criminal prosecution involving 'gun-jumping'. In both cases, the District Court decided to apply the Probation Act 1907 on condition that each company made a charitable donation of €2,000 and pay a contribution of €2,070 towards the Director of Public Prosecutions legal costs and the CCPC's witness expenses.

See further the response to question 12 with regard to the consequences of completing a merger after notifying but prior to clearance being obtained.

## 10 | Which parties are responsible for filing and are filing fees required?

Each 'undertaking involved' in the merger must submit a merger filing. In practice, joint filings are submitted and the purchaser tends to lead on drafting the filing. A filing fee of €8,000 (for each filing) currently applies.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A Phase I clearance determination must be issued by the CCPC within 30 working days of the 'appropriate date', which means the date on which a full and complete filing by the merging parties is made, unless either the CCPC has used its power to 'stop and restart the clock' by issuing a formal requirement for information (RFI), which has the effect of resetting the clock and it only restarts when the RFI is complied with, or where the parties and the CCPC are negotiating remedies, in which case the Phase I period is extended to 45 working days. The CCPC also issues 'informal' requests for information that do not stop and restart the clock.

A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date. If the CCPC issues a formal RFI in the first 30 working days of the Phase II period, this has the effect of stopping and restarting the clock in the same way as at Phase I. If the parties and the CCPC are negotiating remedies, the Phase II period is extended to 135 working days.

Media mergers are subject to the waiting periods outlined in response to question 8.

A suspensory obligation is included in the Act. Section 19(1) of the Act imposes a prohibition on the merging parties putting a merger that has been notified (both mandatory and voluntary) into effect prior to the issue of a clearance determination.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Section 19(1) prohibits the putting into effect of a notifiable merger until the CCPC has reached a determination that it may be put into effect.

In *M/16/013 INM/Greer*, INM completed the acquisition of assets of Greer Publications prior to notification in breach of section 19(1) of the Act. The CCPC accepted the notification on the basis that INM would not, prior to receiving CCPC clearance, combine or change the structure of the target assets, integrate any retailing or advertising functions of the target assets into INM, cross-sell advertising space between INM and the target assets or share commercially sensitive information between INM and the target assets. The CCPC subsequently cleared the merger.

Section 19(2) of the Act provides that a notifiable merger that is notified to the CCPC, but put into effect prior to a clearance determination, is void. The Act does not state whether a merger that is completed prior to clearance is rendered void for all time, or merely until such time as the CCPC issues a clearance determination. The CCPC has previously expressed the view that a notifiable merger completed without notification remains void until the date of a clearance determination (*M/04/003 Radio 2000/Newstalk 106*).

Completing after notification but prior to clearance (ie, where clearance is ultimately given) is not a criminal offence.

While the CCPC has permitted the parties to submit a late notification of a completed merger, it has released statements that parties have breached the Act by closing before clearance. For example, in *M/10/043 Stena/DFDS*, the merging parties completed the merger prior to notification and the CCPC issued a press release stating that the parties had infringed section 19(1) of the Act, and therefore that the implementation of the acquisition was void under section 19(2).

See further the response to question 9 above with regard to criminal sanctions for failure to notify.

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same legal rules apply to all cases involving closing before clearance, regardless of whether or not the transaction is a foreign-to-foreign merger.

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No formal guidance has been published by the CCPC on whether structures such as 'hold-separate' undertakings might enable parties to avoid a legal breach of the suspensory obligation under section 19(1) of the Act. In general, we would expect the CCPC to follow the same approach as the Commission with regard to its approach to carve-outs or close-arounds.

Where such mechanisms have been used in Ireland, the CCPC has publicly criticised the merging parties for doing so. In *M/12/031 Top Snacks/KP Snacks*, the CCPC stated in its determination that the Act does not permit partial implementation of a merger or acquisition even where a 'framework agreement' or other kind of hold-separate arrangement is put in place with regard to certain parts of the business within the state. The CCPC might be less likely to initiate court proceedings for breach of section 19(1) or section 19(2) in cases where the Irish businesses of the merging parties were being held separate pending the grant of clearance by the CCPC. In *M/16/013 INM/Greer*, the CCPC accepted the notification of the merger after completion on assurances from INM that it would not, prior to receiving the CCPC's determination, integrate the relevant target assets into its business. Parties should seek legal advice on a case-by-case basis and consider engaging with the CCPC in pre-notification discussions.

### Public takeovers

## 15 | Are there any special merger control rules applicable to public takeover bids?

Section 18(1A) of the Act provides that, where the turnover thresholds are met, the making of a public bid may be notified by any of the undertakings involved to the CCPC once one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted.

## Documentation

### 16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There is a standard form for notifying the CCPC. All parts of the notification form must be completed, unless a conditional approval has been granted by the CCPC in pre-notification discussions. For example, where there is no overlap between the parties' activities, it is usual practice to request an exemption from completing some or all of section 4 of the form, which requires a description of the conditions of competition in relation to all markets where there is a horizontal or a vertical overlap.

No market share threshold applies for the identification of overlaps.

The form requests details of the proposed merger, the parties involved, the overlapping products or services, any ancillary restraints and copies of any non-privileged competition assessments of the merger. The Act requires 'full details' of the proposed merger to be notified to the CCPC.

In terms of media mergers, a notification form and guidelines have been issued by the Department of Communications, Climate Action and Environment. The content required in the merger notification form includes a description of the proposed merger, and significant details on the undertakings involved. Market share details (both pre and post-merger) are required for each media business of the undertakings involved, in terms of readership, listenership, viewership and page impression hits. The undertakings involved must submit detail on compliance with industry codes of practice, relevant regulatory bodies and applicable legislation. Detail is also required on grievance procedures for employees, and employment tribunal proceedings involving employees. The notification form states that an undertaking's record in respect of industrial relations and Labour Court rulings may be examined as part of the assessment.

The undertakings involved must provide information on the 'editorial ethos' of each media business, including data on editorial control, editorial structure and positions taken regarding political endorsements and issues of debate or controversy. A breakdown of content for each media business is also required as well as details of any future plans of the undertakings; for example, whether the undertakings to be acquired will continue as separate enterprises (eg, a newspaper and a radio station) and whether there will be changes to editorial and key content-producing staff.

## Investigation phases and timetable

### 17 What are the typical steps and different phases of the investigation?

#### Pre-notification

- Request conditional approval not to complete the entire notification form (where no overlaps); and
- meeting or conference call to discuss the proposed merger (for difficult cases, expedited cases or requests only).

#### Phase I

- Submit filing to the CCPC (one hard copy only is required plus an electronic copy of the merger notification form in Word format);
- publication of notice on the CCPC's website within seven days recording fact of filing and parties' names with a call for submissions or comments from third parties (generally a 10-day period);
- possibility of a formal requirement for information that stops and, when complied with to CCPC's satisfaction, restarts the Phase I timetable;
- possibility of an informal request for information that does not impact on the Phase I timetable;

- discussion of remedy proposals from the parties (if applicable), which extends the Phase I period to 45 working days;
- notice to parties of determination (clearance, conditional clearance or Phase II; with press release for noteworthy mergers);
- merging parties may request redactions from the public version of the determination; and
- publication of Phase I determination within 60 working days of date of adoption.

#### Phase II (if applicable)

- Communication from the CCPC setting out its decision to move to Phase II giving limited details;
- call for submissions or comments from third parties;
- possibility of a formal requirement or informal request for information;
- the CCPC may commission a market survey or economic analysis from consultants;
- meeting between the parties and the CCPC (optional);
- early determination approving the merger can be issued within 40 working days of the beginning of Phase II (rather than 120 working days from notification; this is the usual Phase II outcome) or if the investigation is to progress, the CCPC sends the parties an assessment setting out its concerns about the merger;
- oral hearing (if requested within five working days of receipt of the CCPC's assessment);
- access to the CCPC's file;
- discussion of remedy proposals from the parties (no later than 15 working days after receipt of the CCPC's assessment);
- market testing of remedy proposals of parties (depending on circumstances and at the discretion of the CCPC);
- notice to parties of determination (clearance, conditional clearance or blocking) and press release;
- merging parties may request redactions from the public version of the determination; and
- publication of Phase II determination within 60 working days of date of adoption.

### 18 What is the statutory timetable for clearance? Can it be speeded up?

A full description of the applicable waiting periods is included in response to question 11.

The CCPC has a period of 30 working days in which to decide whether to grant a Phase I clearance, and a period (from initial notification) of 120 working days in which to decide whether to grant a Phase II clearance.

The Act does not provide for an accelerated investigation and there is no guidance issued by the CCPC on this point. However, in practice, merging parties can request an accelerated investigation and the CCPC has issued expedited clearance decisions in cases not raising competition concerns. For example, *M/12/029 Endless/VION* was cleared in 11 days, and in cases that involved strict insolvency procedure timetables, such as *M/09/002 HMV Ireland/Zavvi*, the clearance determination was issued in nine days. More recently, in *M/16/053 Anchorage Capital/Eircom*, the CCPC cleared that 'no issues' merger in 11 days.

The CCPC can reduce the normal period of 10 days allowed for public comment after publication of notice of a merger notification on its website in individual cases, if circumstances so require. For example, in *M/12/048 Endless/Imtech Suir*, the notification period was reduced from 10 days to five days where Imtech Suir's parent company had been declared insolvent and consequently Imtech Suir was in financial jeopardy and unlikely to operate as a going concern. In that case, the CCPC issued a clearance determination in six days.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

Section 20(1)(c) of the Act provides that the substantive test for assessment of competition issues is 'whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the state' (the SLC test). The CCPC interprets the SLC test in terms of consumer welfare, which depends on a range of variables. In particular the CCPC will assess whether a merger would be likely to result in a reduction in choice or a price rise for consumers. This is a similar test to that applied by other jurisdictions, such as the UK's Competition and Markets Authority (CMA).

A merger that would otherwise give rise to an SLC may nonetheless be cleared by the CCPC where the failing firm or failing division test is met (as set out in Chapter 9 of the CCPC's Guidelines for Merger Analysis) and therefore the relevant counterfactual is not the prevailing conditions of competition. For example, in *M/15/026 Baxter Healthcare/Fannin Compounding*, the CCPC identified competition concerns related to the reduction in competition for the commercial supply of compounded chemotherapy medicines to hospitals in the state. However, the parties submitted that Fannin Compounding was a 'failing division' of Fannin Limited and that the assets involved would exit the market if the merger was prohibited. The CCPC investigated this argument and engaged Grant Thornton to independently examine financial information pertaining to Fannin Compounding. The CCPC ultimately cleared the merger. It found that the most likely outcome absent the merger would be that Fannin Compounding would close and its assets would exit the market. Thus, the competitive structure of the relevant market would deteriorate to at least the same extent in the absence of the proposed acquisition.

#### 20 | Is there a special substantive test for joint ventures?

No. Joint ventures that are notifiable under section 16(4) of the Act must satisfy the same SLC test.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The CCPC's October 2014 Guidelines on Merger Analysis states that the CCPC will examine unilateral, coordinated, conglomerate and vertical effects (including the loss of actual 'or potential' competition). Like the European Commission, the CCPC in practice tends to focus on the risk of horizontal unilateral effects, although coordinated effects and vertical mergers are occasionally examined.

For example, in *M/17/005 Vhi Investments/Vhi Swiftcare Clinics*, the CCPC investigated potential vertical concerns arising from the acquisition by VHI Healthcare (the state's largest health insurer) of the remaining 50 per cent interest in each of two 'Swiftcare' clinics offering primary care services in Dublin and one clinic in Cork. Specifically, the CCPC investigated an input foreclosure theory of harm whereby VHI could potentially exclude other competing insurers from offering their policyholders access to these clinics. However, the CCPC determined that the clinics formed a small part of the overall primary care market (which included GP clinics and hospitals in those areas) and therefore the merger would not lead to input foreclosure.

Separately, in *M/17/035 Dawn Meats/Dunbia* the CCPC investigated whether the merger could give rise to an increased risk of coordinated effects and undertook econometric analysis to test this point, though it ultimately did not identify any concerns.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

Aside from media mergers, non-competition issues are not relevant under the Act. However, the CCPC does sometimes consider wider welfare factors. For example, in *M/17/035 Dawn Meats/Dunbia*, the CCPC investigated whether the merger would give Dawn Meats the ability and incentive to lower the prices it pays to farmers for live cattle for slaughter in the state. The CCPC did not find evidence to support this potential concern.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The CCPC's October 2014 Guidelines on Merger Analysis state that it will consider efficiency arguments, but the burden of proof is on the parties to demonstrate that the claimed efficiency gains are as a direct result of the merger.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Upon the completion of a Phase II investigation, the CCPC may clear a merger subject to conditions or block a merger outright if the CCPC forms the opinion that the merger would lead to a substantial lessening of competition in markets for goods or services in the state.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Section 20(1)(b) of the Act provides that the CCPC may enter into discussions with the merging parties with a view to identifying measures that would ameliorate any negative competitive effects of the merger. These discussions can have as their outcome divestment undertakings or behavioural remedies. Section 20(3) of the Act provides that the negotiation of remedies or commitments may be commenced at any stage of a Phase I or Phase II investigation.

The CCPC has previously accepted both divestment undertakings and behavioural remedies as conditions to clearance determinations.

For example, in *M/16/008 PandaGreen/GreenStar*, CCPC clearance was obtained where PandaGreen made divestment undertakings in relation to Greenstar's domestic waste collection businesses in Fingal and Dun Laoghaire-Rathdown. In *M/14/026 Valeo/Wardell/Robert Roberts*, the acquirer undertook to divest the YR brand of brown sauce to address the CCPC's concern that the acquirer's large post-merger market share in the market for the supply of brown sauce to the retail sector would incentivise it to increase prices to retailers, with insufficient competitive constraint from competitors or countervailing buyer power. Divestment undertakings were also accepted in *M/15/020 Topaz/Esso*, where Phase II clearance was subject to divestment commitments relating to Esso's interest in a fuel terminal at Dublin Port and certain fuel retail sites. This interest was subsequently divested to Applegreen during the course of 2017, with a binding commitment that Applegreen would import and supply refined fuel products, including aviation fuel (Jet A1), through the JFT.

In *M/17/012 Kantar Media/Newsaccess*, Kantar agreed to divest fixed assets and release a number of contracted customers from their

fixed-term contracts. Finally, in M/17/027 *Dalata/Clarion Liffey Valley/Clayton Cardiff Lane*, the CCPC took the somewhat unusual step of requiring Dalata to commit to voluntarily notify the CCPC any time it begins operating a hotel in the state on behalf of a third party, where this would not otherwise be notifiable to the CCPC or EU Commission or give rise to potential competition concerns.

In M/18/36 *Enva/Rilta*, Enva agreed to divest property and fixed assets to ameliorate concerns identified by the CCPC in the waste-processing market as a result of its Phase II investigation. Enva also agreed to certain access proposals relating to the processing of waste lubricant oil and hazardous contaminated soil.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

As stated above, there is a 45-working-day statutory period for the issue of a conditional clearance at Phase I.

In practice, the Phase I deadlines tend not to allow merging parties sufficient time to design and obtain approval for any 'complex' remedies.

The Phase II timetable allows the merging parties more time to satisfy the CCPC that their remedies proposal effectively resolves any identified 'theories of harm' or competition law concern. As noted above, the CCPC may 'market test' a remedies proposal during both Phase I and Phase II investigations.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CCPC has not required remedies or commitments in foreign-to-foreign mergers, to date.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A merger clearance determination by the CCPC covers not only the notified merger but any arrangements constituting restrictions that are directly related and necessary to the implementation of the merger, and that have been described by the merging parties to the CCPC in the notification form.

In practice, the CCPC tends to follow the principles included in the European Commission's Notice on Ancillary Restraints in this regard.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Section 20(1)(a) of the Act provides that, within seven days of receipt of a merger notification, the CCPC must publish a request for comments from third parties (including customers and competitors). Generally, a 10-working-day period is allowed for the submission of third-party comments during Phase I, and a 15-working-day period is allowed for the submission of third-party comments during Phase II (as noted in question 18, this 10-working-day period may be reduced depending on the facts of the merger).

In practice, the CCPC will often proactively seek submissions from competitors and customers during both Phase I and Phase II investigations.

Section 20(1)(b) of the Act provides that the CCPC may enter into discussions with third parties (including customers and competitors), with a view to identifying remedies.

The CCPC will consider all third-party submissions and, at its discretion, may meet with interested competitors and customers during the review process.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As stated above, the CCPC publishes on its website notices of all mergers notified to it, written determinations and any press releases by the CCPC on particular cases.

Notifying parties can identify commercially sensitive information that they believe should remain confidential when submitting a notification. Notifying parties are also afforded the opportunity to submit comments on the deletion of confidential information from the public version of the CCPC's determination.

In the event that the CCPC seeks to include information provided by a third party in its determination, that third party will also be offered the opportunity to protect confidential information. Similar provisions apply in access to the file in Phase II.

The CCPC tends to accept all reasonable requests to maintain confidentiality in its written determinations.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Section 23 of the 2014 Act permits the CCPC to enter into arrangements with other competition authorities in other countries for the exchange of information and the mutual provision of assistance.

The CCPC maintains regular contact with competition authorities in other jurisdictions, including in particular the UK CMA and the European Commission regarding, respectively, cases that are subject to parallel reviews in the United Kingdom and Ireland and EU cases that may impact on Ireland. For example, in 2018, the CCPC closely followed the European Commission's investigations into a number of proposed mergers that it considered to be of significant interest to Ireland, including the following:

- M.8306 *Qualcomm/NXP Semiconductors*;
- M.8677 *Siemens/Alstom*;
- M.8736 *Toohil Telecom/Eircom*;
- M.8792 *T-Mobile NL/Tele2 NL*;
- M.8084 *Bayer/Monsanto*;
- M.8882 *Kennedy Wilson/AXA JV*; and
- M.8900 *Wieland Werke/Aurubis & Schwermetall*.

Finally, the CCPC is an active member of the European Competition Network, the International Competition Network and the OECD Competition Committee.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

Merging parties may appeal a determination of the CCPC prohibiting a merger or imposing conditions on a point of fact or law to the Irish High Court. There is a possibility for merging parties or the CCPC to make a subsequent appeal of a High Court decision, but only on a point of law. The Act provides no right of appeal in respect of a determination to clear a merger and third parties are not given a right of appeal.

## Time frame

### 33 | What is the usual time frame for appeal or judicial review?

An appeal to the High Court must be lodged within 40 working days of the CCPC's published determination, or, in the case of a media merger, within 40 working days of the Minister for Communications informing the relevant party of his or her determination. The High Court will issue a decision within two months, if this is practicable.

To date, the only successful appeal to the High Court from a determination of the CCPC blocking a merger was in September 2008, when Kerry Group successfully appealed the determination of the CCPC blocking its proposed acquisition of Breeo. The CCPC lodged an appeal to the Supreme Court in respect of the High Court judgment but decided in April 2016 not to proceed with the appeal.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2017, there were 72 notifications to the CCPC, of which two were voluntarily notified (M/17/036 *Sean Loughnane/Crinkle Foods* and M/17/012 *Kantar Media/Newsaccess*) and one was withdrawn at the request of the parties (M/17/055 *Siris/Synchronoss*). Of the nine extended Phase I investigations, four required binding commitments at Phase I (M/17/012 *Kantar Media/Newsaccess*, M/17/021 *Applegreen/50% of Joint Fuels Terminal*, M/17/027 *Dalata/Clarion Liffey Valley/Clayton Cardiff Lane* and M/17/036 *Sean Loughnane/Crinkle Fine Foods*). There were no Phase II investigations or prohibitions in 2017. Four media mergers were notified to the CCPC in 2017.

In 2018, there were 98 notifications to the CCPC. Of the fourteen extended Phase I investigations, three required Phase II investigations (M/17/068 *Irish Times/Sappho (Irish Examiner)*, M/18/016 *Trinity Mirror/Northern & Shell* and M/18/036 *Enva/Rilta*) and five required formal commitments to alleviate competition concerns. The types of commitments obtained from the parties range from requirements to divest significant business facilities (M/18/036 – *Enva/Rilta* and M/18/009 – *BWG Foods/4 Aces*) to restrictions on access to confidential information among parties (M/18/031 – *Uniphar/SISK Healthcare*, M/18/042 – *Oaktree/Alanis/Lioncor (JV)* and M/18/016 – *Trinity Mirror/Northern & Shell*).

Four media mergers were notified to the CCPC in 2018 (M/18/001 *CMNL/North Dublin Publications*, M/18/016 *Trinity Mirror/Northern & Shell*, M/18/046 *Virgin Media/Casey Cablevision* and M/18/092 *FormPress Publishing (Iconic)/assets of River Media*). All were cleared at Phase I.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

Following a consultation in late 2017, the Department of Business, Enterprise and Innovation issued a Ministerial Order on 2 October 2018 revising the financial thresholds at which notification of a merger or acquisition to the CCPC is required.

As of 1 January 2019, pursuant to the Competition Act 2002 (section 27) Order 2018 (SI No. 388 of 2018), the CCPC must be notified of a proposed transaction where, for the most recent financial year:

- the aggregate turnover in the state of all of the undertakings involved is not less than €60 million; and
- the turnover in the state of each of two or more of the undertakings involved is not less than €10 million.



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## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There was a record number of notifications to the CCPC in 2018. In total, 98 mergers were notified, of which 14 resulted in extended Phase I investigations and three required Phase II investigations (M/17/068 *Irish Times/Sappho (Irish Examiner)*, M/18/016 *Trinity Mirror/Northern & Shell* and M/18/036 *Enva/Rilta*).

Five mergers resulted in formal commitments to alleviate competition concerns. The types of commitments obtained from the parties ranged from requirements to divest significant business facilities (M/18/036 – *Enva/Rilta* and M/18/009 – *BWG Foods/4 Aces*) to restrictions on access to confidential information among parties (M/18/031 – *Uniphar/SISK Healthcare*, M/18/042 – *Oaktree/Alanis/Lioncor (JV)* and M/18/016 – *Trinity Mirror/Northern & Shell*). This continues a trend by which the CCPC addresses vertical concerns identified in Phase I using behavioural remedies.

Following the introduction of the revised financial thresholds on 1 January 2019, there has been a significant reduction in the number of notified transactions (with only 16 mergers notified as of 20 June 2019 compared to 50 for the same period in 2018). Further, on 14 June 2019, the CCPC confirmed that it would move forward with plans to introduce a simplified procedure for mergers satisfying the revised threshold that result in only limited overlaps (ie, 15 per cent combined share or lower, in horizontal cases and 25 per cent or lower, in vertical cases). The CCPC intends on publishing draft guidance later in 2019, with the procedure expected to be adopted in early 2020.

# Israel

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Merger control is regulated under the Economic Competition Law, 5748-1988 (the Competition Law) and the regulations thereunder. The name of the statute was recently changed from 'the Restrictive Practice Law' in addition to some other amendments, some of which are further described below. The Israeli Competition Authority (ICA) is the agency in charge of the enforcement of the Competition Law.

The ICA is an independent government enforcement agency established in 1994. The ICA, headed by the Director General, is mandated to prevent the attainment of market power through merger control and anti-cartel enforcement, to restrain abuse by dominant firms and to preserve competition in the various markets.

In January 2019, the Israeli legislative body, the Knesset, passed a significant amendment to the Israeli Competition Law. In the field of mergers, the amendment substantially raised the threshold conditions regarding pre-merger notifications set out in section 17(a); the threshold now stands at 360 million shekels (about US\$100 million combined) of the joint sales turnover per year and a 10 million shekels annual sales turnover of each of the two parties to the merger. Prior to the amendment, the threshold was 150 million shekels of the joint sales turnover per year, and 10 million shekels annual sales turnover of each of the two parties to the merger. In addition, the Director General announced at the 2018 ICA convention that the ICA is considering raising the threshold of the annual sales turnover from 10 million to 20 million shekels.

Moreover, the 2019 amendment empowers the Director General to unilaterally extend a merger review period by an additional 120 days (ie, up to a total of 150 days). Prior to the amendment, the Competition Tribunal was the only body with the authority to extend reviews. The 30-days period for submission of an appeal on the Director General's decision will begin on the day the decision is published on the ICA website.

The Competition Tribunal, sitting with the District Court in Jerusalem, has an exclusive jurisdiction over non-criminal administrative antitrust proceedings. The administrative actions and decisions of the Director General are subject to judicial review by the Competition Tribunal and some decisions are subject to review by other courts. Criminal proceedings for violations of the Competition Law may be launched by the Director General on behalf of the state attorney general, and are conducted exclusively before the District Court in Jerusalem.

Civil proceedings under the Competition Law, including contractual claims, tort claims and class actions, may be brought before any competent court in Israel.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

A 'companies merger' is broadly defined in the Competition Law to include the acquisition of the principal assets of a company by another entity, or the acquisition of shares in a company by another entity through which the acquiring company is accorded:

- more than 25 per cent of either the nominal value of the issued share capital, or of the voting power of the acquired company;
- the power to appoint more than 25 per cent of the directors of the acquired company; or
- participation in more than 25 per cent of the profits of the acquired company.

The acquisition may be direct or indirect or by way of rights accorded by contract.

A 'principal asset' is an asset that constitutes a significant element of the company's competitiveness in a distinct area of activity. Thus, a separate division in the company may be regarded as a 'principal asset' even if it does not produce most of the company's revenues. However, the minority of the assets relating to a certain activity would not be regarded as 'principal assets'.

The law does not provide a conclusive set of requisites that will constitute a merger. Subsequently, even the acquisition of 25 per cent or less of any of the above-mentioned rights may constitute a merger, if further affinity exists between the parties (such as loans or involvement in the management of a firm).

A merger would require the Director General's prior approval, if several conditions are met, as detailed in question 5.

#### 3 | What types of joint ventures are caught?

According to the definition of a merger under the Competition Law, a joint venture may be regarded as a merger. However, because a joint venture may also fall within the wide definition of a restrictive arrangement, a question of classification arises.

The ICA's position in this regard is that each transaction is to be classified according to its economic essence. Several tests may assist with this classification. For example, according to the ICA's position, a joint venture creating a new activity would, in general, be classified as a restrictive arrangement, while a joint venture effecting a purchase of the existing activity of a party to the transaction would be classified as a merger. Further criteria that may assist with classification are, inter alia, the nature and intensity of the affinity between the parties, the level of structural integration created by the transaction and the stability of the affinity over time.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law defines 'control' as the possession of one of the following means of control: more than half of the rights to vote at the general meeting of a company or a similar body of another corporation, or the right to appoint more than half of the directors of a corporation.

It should be noted, however, that the Competition Law does not require the purchase of control for a transaction to be considered a merger. As mentioned, a purchase of even slightly more than 25 per cent of any of a company's rights detailed above in question 2 (and according to the ICA's policy, in some cases even the purchase of a smaller portion – for example, where the dispersion of holdings in the company entitles the purchaser, in fact, to a real influential power) would constitute a merger under the Competition Law.

The term 'control' is defined more broadly in the Antitrust Regulations, as the power to direct, directly or indirectly, the operations of the entity. This broad definition applies, however, only for the purpose of assessing whether the conditions for filing the abbreviated pre-merger notification forms have been met, and the magnitude of information required under that form.

#### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger requires the prior approval of the Director General if one or more of the following conditions are met:

- according to the 2019 amendment of the Law, the cumulative turnover of the merging entities in Israel, in the preceding fiscal year, now stands at 360 million shekels of the joint annual sales turnover, and a 10 million shekels annual sales turnover of each of the two parties to the merger. If a merging party has a holding company or subsidiary companies, its turnover will be determined by its consolidated financial statements;
- as a result of the merger, the share of the merging companies in the total production, sale, marketing or purchase of a particular asset or service and a similar asset or service, would exceed 50 per cent; or
- one of the merging companies, a subsidiary thereof, a controlling entity thereof or a subsidiary of that controlling entity holds a market share that exceeds 50 per cent of any market.

Certain transactions that do not meet the above-mentioned thresholds may still be regarded by the ICA as restrictive arrangements.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If any of the thresholds mentioned in question 5 are met, the filing of a pre-merger notification form is mandatory. In such cases, the parties to the merger must obtain the approval of the Director General prior to the implementation of the transaction.

According to the Competition Law, the Minister of Economy is authorised to exempt a merger from all or some provisions of the law on the grounds of foreign policy or national security, if he or she believes that it is necessary.

The notification guidelines point out certain circumstances where, while a transaction constitutes a notifiable merger, parties are not required to file with the ICA. The guidelines also specify certain circumstances where the ICA will be willing to consider providing parties to a merger with 'no-action' letters.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers have to be notified only if carried out between 'companies'. A 'company' is defined in the Competition Law as a company founded and registered in accordance with the Companies Ordinance (New Version) 5743-1983, including a foreign company so registered. Under the Companies Law, 5759-1999, a foreign company that holds a 'place of business' in Israel must be registered as a 'foreign company'.

The ICA's position is that a foreign entity that holds more than 25 per cent in any Israeli firm is considered a 'company' for the purpose of the mergers chapter in the Competition Law. Furthermore, any merger contemplated by a foreign entity that has a business presence in Israel (such as through a subsidiary, an agent or an office), other than through a strictly independent third party, is subject to the Competition Law. The test for assessing the existence of a 'place of business' would be whether the merging firm has substantial influence over the activity of its domestic representative.

Accordingly, a foreign-to-foreign merger will be considered a 'companies merger' under the Competition Law only if both parties hold a place of business in Israel according to the above-mentioned criteria.

When a foreign company is a party to a merger, the thresholds mentioned in question 5 are considered solely with respect to the company's activity in Israel, (ie, the sales turnover of the company within Israel and the company's market share in Israel).

A recent legislation proposal suggests extending the application of the Israeli merger regime with respect to foreign corporations. The main implications of the proposed legislation on foreign entities are described in question 35.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The same substantive test (see question 19) applies to all mergers, in all sectors.

In addition to the Director General's approval as required under the Competition Law, approvals of other government institutions may be required under different laws and regulations. For example, mergers in which governmental companies are involved require the approval of the government; in several business sectors the approval of the relevant governmental agency is required.

The only exception is under the Law for Promotion of Competition in the Food Sector, 2014, that regulates competition in the food industry. This law sets industry-specific thresholds for notification of opening and purchasing of new food stores based on concentration criteria.

There is no provision in the Competition Law regarding foreign investments. However, an investment that confers on a foreign entity considered to be a 'company' under the Competition Law (see question 7) more than 25 per cent of any of the rights detailed in question 2, would be, in general, deemed a merger of companies.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Competition Law does not determine any deadline for filing pre-merger notification forms. Yet, a merger that requires the approval of the Director General must not be implemented by any means – including, for example, by closing the transaction, by transferring assets or shares (even to a trustee on behalf of the purchaser), by actually managing the merged company, and the like – before it is cleared by the Director

General. As with many other violations of the Competition Law, failure to notify a notifiable merger is a criminal offence (in practice, criminal charges have only rarely been brought in such cases). The sanctions that apply in cases of unlawful mergers, including for not filing a pre-merger notification form, are described in question 12.

## 10 Which parties are responsible for filing and are filing fees required?

Each party to a merger is required to file its own pre-merger notification form. Currently, no filing fees are required for the submission of pre-merger notification forms.

As of April 2017, parties to a merger must carry out submission of merger notification form via electronic means (ie, by email). Physical submission of the merger notification form will be possible only when there is a sufficient reason preventing the parties from submitting the forms digitally.

## 11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Director General must render a decision within 30 days of the submission of the complete pre-merger notification forms by all parties to the transaction. If no decision is made within this period, the merger is deemed to be cleared.

According to the 2019 amendment of the Law, the Competition Tribunal is no longer the recipient of requests for the extension of a merger notification review, and that authority now vests with the Director General. As an outcome, the 30-day period may be extended either with the consent of the parties, or by the ICA's Director General. A merger that must be notified under the Competition Law must not be implemented prior to its clearance.

### Pre-clearance closing

## 12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The implementation of a notifiable merger prior to its clearance or without an approval is a criminal offence. The sanctions determined in the Competition Law were modified in the 2019 amendment of the Law, which annulled the classification of aggravating circumstances, but raised the penalty for being a party to restrictive arrangement to a maximum of five years' imprisonment, classifying the offence as a crime. In addition, fines may be imposed, up to about 2.2 million shekels for an individual, plus 14,000 shekels for each day the offence persists. In the case of a corporation, the fine or the additional fine, as applicable, will be doubled. Moreover, the Competition Law includes a strict liability offence for managers, under which any person serving in a corporation at the same time that an antitrust offence is being committed, in the role of an active director, a partner (other than a limited partner) or a senior administrative employee with responsibilities in the relevant field, has a criminal liability for the offence, unless it can be shown that the offence was committed without the manager's knowledge and that this manager took all reasonable measures to ensure compliance with the Competition Law.

Alternatively, the Director General may issue an administrative declaration, stating that a merger has been executed unlawfully, thereby exposing the merging parties to civil lawsuits, as such declaration constitutes prima facie evidence in any judicial proceedings.

Furthermore, the Competition Tribunal may order the separation of an entity merged in violation of the Competition Law on the application of the Director General and upon showing a reasonable likelihood of

significant harm to competition or injury to the public in respect of the product's price, quality, quantity, or regularity or terms of supply.

In practice, the director general has taken action against allegedly unlawful mergers in only a few cases, two of which resulted in criminal sanctions. The Competition Tribunal has considered only two cases in Israel brought by the Director General to separate an allegedly illegally merged entity: one in 2007 – *Prinir (Hadas 1987) Ltd and Milos (1989) Ltd* and the other in 2003 – *Baron-Fishman Communication Ltd and Yediath Achronot Ltd*.

Additionally, the Competition Law enables the Director General and parties to an unlawful merger to agree in the framework of a consent decree, inter alia, on an amount of money to be paid to the State Treasury in lieu of criminal procedures or an administrative declaration. The consent decree may include a provision, according to which the parties do not admit responsibility (ie, that a merger has been unlawfully executed). Over the past year, the Competition Tribunal approved two consent decrees. The first involved two construction companies: El Har Ltd and Taan Ltd. The companies made a transfer of shares according to a share purchase agreement, prior to the submission of pre-merger notification forms. The companies agreed to pay an amount of 250,000 shekels, and the director general undertook not to take additional enforcement measures in the matter. The second consent decree involved a share purchase agreement between Tal Hel Yasca Ltd and Fresh and Smooth Part 2 Ltd. Prior to the submission of pre-merger notification forms by either of the parties, the companies informed the director general that Tal Hel had transferred a sum of 5 million shekels to the acquired company, to enable its continued operation in light of its financial problems. According to the Director General, the provision of finance was part of the merger transaction, and therefore constitutes an implementation of the transaction before approval. The parties agreed to pay the State Treasury sums of 170,000 and 40,000 shekels, pursuant to an agreement that they will not admit to a violation of the provisions of the law and the Director General undertakes not to take additional enforcement measures against them in this matter.

The Director General can impose monetary sanctions in lieu of criminal indictment, inter alia, in case of an unlawful merger. In this respect, the ICA's guidelines on the enforcement procedures for the use of financial sanctions state that financial sanctions will be imposed mostly in the case of non-horizontal mergers (this does not, however, negate the possibility that in the appropriate circumstances the ICA would choose other administrative enforcement tools over criminal ones, in respect of horizontal mergers). The monetary sanction under the new amendment is up to 1 million shekels for a person that, inter alia, executed an unlawful merger. Regarding corporations, the 2019 amendment of the Law raised the amount of monetary sanctions to up to 100 million shekels, but not more than 8 per cent of the annual revenues for a corporation whose revenues in the preceding financial year exceeded 10 million shekels.

In October 2016, the Competition Authority published guidelines regarding the considerations of the Director General in determining the amount of financial sanctions. According to the said guideline, the amount of the sanction will be determined according to the following four stages:

- determination of the maximum amount of the sanction;
- determination of the severity of the violation based on the circumstances of the case (with an emphasis on the degree of damage that the breach may cause to competition or the public);
- examination of the violator's part in the violation, the extent of the violating party's influence on the performance of the violation and the actions taken by the violating party to stop or prevent the recurrence of the violation; and
- evaluation of external circumstances of the violation, such as the existence or absence of previous violations.

Between 2018 and mid-2019, the ICA objected to four merger notifications and approved with conditions three others. The ICA's research and analysis of the market for purchasing digital and physical commercial 'areas' of advertisement led to objection to a merger between two out of the five leading competitors. The ICA based its decision on the possible aggregate market power that the merger might create. The Director General expressed her concern that the merger might eventually lead to a decrease in the TV channels' advertisement income and, consequently, of their investment in creating original valuable content.

In its opposition to a merger between two medium-sized banks, the ICA's analysis revealed that the domestic banking sector is characterised by significant entry barriers that led to the absence of a new bank in Israel for decades. Consequently, this raised the ICA's concern that the merger would pave the way for the existing banks' ability to reach a balanced equilibrium and, eventually, increase banking prices. The examination took into consideration the regulator's efforts to ease customers' mobility between banks.

In another merger between banks (the Discount banking group and Dexia-Israel), the ICA's analysis found that the merging banks compete on providing credit facilities to municipalities and regional authorities. The merger was approved, conditioned on divestiture of some of the credit activities of the merging entities.

Another objection was raised by the Director General in the Israeli airlines sector, to a merger between Sun-Dor International Airlines and Israil Aviation. In this case, EL AL, Israel's largest airline, sought to merge its wholly owned subsidiary Sun-Dor with Israil. Israil, one of EL AL's only Israeli competitors, has a significant share in the domestic air market, and in recent years also recorded an increase in its international operations. Following the ICA's analysis, the Director General decided to oppose the merger for two main reasons. First, the merger will prevent EL AL from potentially competing on the routes to the southern city of Eilat, and thus strengthen the existing duopoly of Arkia and Israil in these routes. Second, EL AL's absolute and exclusive dominance in the provision of security services outside Israel, to all Israeli airlines flying abroad, raised concerns about EL AL's ability to refuse to provide the security services to its competitors, in order to push them out of some international lines.

In another case, the Director General approved an amendment to the conditions set on the already approved merger from 2002 between various telecommunications cable companies operating in Israel. The amendment resulted in a decision not to remove or reduce the prohibition on the merged company to participate in the market of sports channels and local original content production, distribution and ownership holdings. The decision was led by the concern that, if removed, the merged company will be able to 'push' competitors out of the multi-channel market, raise barriers to their entry and expansion, as well as diluting the variety of content and opinions because of the possible suppression of independent channel producers.

In the case of a merger between Reshet Media, one of Israel's leading media entities, and Channel 10 that was under financial duress, the Director General decided to approve the merger but to condition it by the sale of Reshet's holdings in its news company. The approval was based on the 'failing firm' doctrine weighing the potential competitive harm against the effect of the collapse and removal of a major TV channel from the market.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In general, if a foreign-to-foreign merger constitutes a merger according to the criteria of the Israeli Competition Law (as detailed in question 7) all the sanctions (as mentioned in question 12) are applicable. Nevertheless, we are unaware of any case in which the

Director General has sanctioned a foreign entity for unlawfully implementing a merger.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is no provision in the Competition Law enabling the closing of a transaction before it has been cleared; neither are there any official guidelines allowing that.

However, the Director General may agree with the parties to a foreign-to-foreign merger to refrain from taking action against the merger, under conditions ensuring that local competition will not be harmed during the period in which the ICA is reviewing the merger. A local 'hold-separate' arrangement may be such a solution.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

No special substantive test applies to public takeover bids.

Regarding the filing requirements of pre-merger notification forms, in the case of a purchase offer on the stock exchange, the ICA is willing to start reviewing a merger on the basis of the purchaser's notification. The ICA's position is that the time set by the Competition Law for reaching a decision does not start to run until the definitive signed agreement is filed and pre-merger notification forms are filed by all parties concerned.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

In 2004 the ICA introduced new regulations, which presented two new pre-merger notification forms; one is fairly detailed (the 'long form') and the other is an abbreviated form.

The long form expands significantly upon the information submitted to the ICA at the initial notification of the transaction. Such information would be:

- a description of the transaction;
- a description of the parties' business activities, including lists of their horizontal and vertical activities;
- with regard to each relevant market to the merger:
  - sales volumes;
  - market shares;
  - lists of customers, suppliers and competitors; and
  - a description of the types of customers of each party;
- an estimation of competitors' market shares;
- a description of the barriers to entry and to expansion; and
- a list of the agreements that each party has with its competitors in each relevant market.

The parties are also required to apply for an exemption for any ancillary restraint to the merger, which is not exempted under the block exemption for ancillary restraints. In addition, each party is required to mention whether it has been a party to another merger in the past three years.

Each party has to enclose with its pre-merger notification form the following documents:

- the merger agreement and its appendices;
- audited financial statements for the last two fiscal years (a foreign company may attach audited financial statements of entities through which it operates in Israel instead of filing its financial statements);

- prospectuses filed during the last five fiscal years; and
- other documents relevant to considering the competitive effects of the merger.

A party that has submitted another pre-merger notification form during the past year may submit a pre-merger notification that makes reference to the prior pre-merger notification form.

The general requirement is that the long form must be submitted. However, if all the following terms are met, the parties may file the abbreviated forms:

- the combined market share of the merging parties (including related entities) in the product market that is the subject of the merger transaction does not exceed 30 per cent;
- none of the merging entities, including related entities, is a monopoly (ie, market share in Israel does not exceed 50 per cent) in a market that is tangential to the market that is the subject of the merger; and
- none of the merging companies, including related entities, is a party to an arrangement with a third party that competes with it in the market for a product that is the subject of the merger.

The information required under the abbreviated form is much more limited and quite basic. It includes basic details on the submitting party, definition of the relevant market, the parties' estimated market shares in the relevant market and in horizontal or vertical corresponding fields, and lists of suppliers and customers.

If the abbreviated forms are filed, the ICA may require the parties, within 15 days, to submit the long form, in any one of the following cases: the terms for filing the abbreviated forms were not met, or if there is substantial doubt as to the accuracy of the information provided in the abbreviated form; the market definitions of the parties were not correct; or the combined market share of the parties in a market that is not the subject of the merger exceeds 30 per cent and the merger may raise a reasonable likelihood of material injury to competition.

As of January 2013, pre-merger notification forms may be submitted online.

The possible sanctions for supplying wrong or missing information are as follows:

- First and foremost, a pre-merger notification form that does not meet the requirements set forth above, does not constitute a 'merger notice'. Therefore, only upon submission of full notification forms by the merging companies, the time-limit for the Director General's decision, as specified in question 11 above, will commence.
- Section 239 of the Penal Law prescribes a maximum penalty of three years imprisonment for providing a false statement. In addition, providing false or misleading information can lead to charges with attempted fraud, under section 415 of the Penal Law. In this case, the perpetrator is also subject to up to three years' imprisonment, or five when committed in aggravated circumstances.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

The Competition Law does not divide the examination of mergers into different stages.

The process of a merger review is in general as herein described. Once pre-merger notification forms are submitted, the merger would be classified into one of the following three tracks: green, yellow and red – each one represents the likelihood that the merger might harm competition (the last category is assumed to substantially harm competition). Such classification is not required under the Competition Law; it

is not official and has no legal consequences, but was adopted by the ICA to make the review process more efficient and to shorten the period for decision-making.

If additional information is required by the ICA's professional staff (mainly by the department of economics, but also by the legal department), the ICA may require the parties to the merger or any third party (such as competitors, customers and suppliers of the parties to the merger), to provide it with the necessary information (regarding the authorisation to do so – see question 29). In addition, the Competition Law instructs the ICA to notify any merger to the relevant governmental agency, and the latter is invited to submit its opinion regarding the merger to the ICA.

The Director General may not clear a merger unless he or she has consulted with the Exemptions and Mergers Advisory Committee. In practice, the Director General consults with the Committee even in cases in which he or she tends to block a merger.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The Competition Law sets a review period of 30 days, during which the Director General is required to render a decision. According to the new amendment to the Law, this period can be extended by the ICA's Director General (expropriating the Tribunal's authority) or with the consent of the merging parties. If no decision is made within the prescribed period, the merger is deemed compatible with the Competition Law.

There is no provision in the Competition Law that compels the Director General to clear mergers within a shorter period. In practice, the majority of mergers are cleared within 30 days or fewer, especially those mergers that do not seem to raise any competitive concerns (green mergers). The average review period of merger applications in 2018 was 22.5 days. Furthermore, in special cases in which a particularly quick decision is necessary, such as the case of a collapsing company, the ICA would cooperate with the parties and make efforts to speed up the review process.

In May 2016, the ICA announced that it is initiating a fast track for the approval of mergers, designed to reduce excess regulation, and focus the ICA's resources on reviewing those cases that raise significant concern of harm to competition. Under the new procedure, mergers that clearly do not present a threat to competition will be directed to a fast-track approval (ultra-green merger). In such cases, the decision regarding the merger will be made within a period of time 'significantly shorter than 30 days'. However, the ICA did not commit to a specific timetable. Under the fast track, the parties are required to file a long pre-merger notification. In November 2016, the ICA published a report of its accumulated experience in applying this new procedure. According to the ICA, during the trial period that lasted three months, 20 mergers were handled in accordance with this procedure. The average review of these mergers was less than five days from the date of submission, a period significantly shorter than the average time frame for dealing with mergers that are not treated under the fast-track procedure. Furthermore, in February 2017, the ICA announced an amendment to the said procedure, according to which mergers that contain a request for a specific exemption to a restrictive arrangement will not be dealt with under the fast track, but will rather be examined in the regular merger review track.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The Director General shall object to a merger, or approve it subject to conditions if, in his or her opinion, as a result of the merger, there are

reasonable grounds for concern that competition in a market might be significantly harmed, or the public interest might be harmed in any of the following respects: products' prices, quality, quantity, as well as regularity and terms of supply.

In addition, when relevant, the ICA does take into consideration the 'failing firm doctrine'. In 2010, the ICA published guidelines on the subject, in which it stated the conditions that must be shown to carry out a merger based on the doctrine. For instance, in 2005, the ICA approved, subject to conditions, a merger between Shufersal Ltd and Clubmarket Marketing Chains Ltd (two Israeli food retail companies) on the basis of the doctrine. The ICA stated that the merger raises serious competition issues, and that normally it would have objected to it. The approval of the merger was nevertheless based on the 'failing firm doctrine', when it became clear that the alternative to approving the merger was the liquidation of Clubmarket. The Director General found that approving the merger, under specified conditions, constitutes a preferable alternative in terms of competition over the dissolution of the company. A more recent decision, dated April 2016, involved Mey Eden Bar-First Class Service Ltd and Electra Consumer Products (1951) Ltd. The mentioned companies sought to merge their activities in the import, marketing and distribution of filtered water bars. During the examination of the merger, Electra presented financial data indicating significant losses from its activity in the filtered water-bars sector. The ICA determined that losses, per se, cannot indicate that a company is about to exit the market. For example, penetration into the relevant markets is often accompanied by massive and long-term investments, which bear fruit only after a certain period of time. In addition, Electra claimed that it had decided to terminate its activity in the filtered water-bars sector, irrespective of the ICA's decision. To substantiate its claim, Electra presented public statements given by the company on the subject. The ICA determined that a general declaration is not sufficient, and without given proof of a formal decision reached by Electra's board of directors or relevant documentation, it cannot accept the claim.

## 20 | Is there a special substantive test for joint ventures?

Joint ventures that are classified as mergers are reviewed under the same substantive tests as any other merger. If a joint venture is considered a restrictive arrangement, the relevant rules would apply. Entry into a restrictive arrangement without the authorisation of the Competition Tribunal is prohibited, unless the arrangement has been specifically exempted by the Director General, or is exempted in accordance with one or more of the Block Exemption Rules issued by the Director General. Among the block exemptions that have been issued, a particular block exemption applies to joint ventures.

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

Any theory of harm may be examined by the ICA to prove, or alternatively disprove, the standard of harm to competition. In other words, the ICA shall examine all the competitive implications of each merger submitted for its approval, in any of the following respects: horizontal, vertical and conglomerate. This would include both static aspects and dynamic aspects such as market dominance issues and unilateral effects, concentration levels in the relevant markets, coordinated effects that might be created or strengthened as a result of the mergers, entry barriers, the likelihood of vertical and conglomerate foreclosure, harm to innovation and common ownership concerns. In this regard, in January 2011 the ICA adopted Horizontal Merger Guidelines that describe the methodology used by the ICA in the assessment of horizontal mergers and the main types of evidence on which the ICA would typically rely.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

While assessing a merger, the Director General may consider only competition and public interest considerations. Public interest issues may be considered only in the following limited contexts: products' prices, quality, quantity, as well as regularity and terms of supply. According to the Competition Law these are the only factors the ICA may take into account while assessing a merger; therefore, the ICA's decision may not be affected by other considerations, even during an economic crisis.

Nevertheless, in cases where the 'failing firm' argument is raised, the Director General will consider the potential effect on competition resulting from the merger, against the effect of the failing firm's exit from the market. Yet, the failing firm doctrine would apply only if several conditions are met, as described in the ICA's 2010 guidelines regarding the Failing Firm Doctrine, discussed above in question 19.

In addition, according to the Competition Law, the Minister of Economy is authorised to exempt a merger from all or some provisions of the law, if he or she believes that it is necessary on the grounds of foreign policy or national security.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

As provided in the 2011 Horizontal Merger Guidelines, when a merger raises substantial concern and the parties point to efficiencies that overcome the competitive concern, the ICA will conduct an efficiency examination to determine whether the improvement in the economic performance of the parties caused by the merger would overcome the apparent competitive harm. Only economic efficiencies that improve the parties' ability and incentive to compete in a way that serves the public interests, and could eventually lead to decreased prices, increased quality or variety, or technology improvement, will be considered under the ICA's efficiency examination.

For efficiency considerations to be taken into account, several conditions should be met: first, the parties have to prove that the efficiencies cannot be achieved by less harmful means than the merger; second, the onus is on the parties to prove actual and significant efficiencies in the short term and to point to the substantial portion that will eventually be transferred to the final customers. In this context, the extent of the efficiency being transferred to the final customer should outweigh the competitive harm that the merger might cause. Finally, the above-mentioned conditions should be proven by objective information, found mostly in independent sources that can be examined by the ICA.

For instance, in two merger applications filed during the years 2003 and 2005, the parties argued, inter alia, that their mergers give rise to efficiency gains: in 2003, Yehuda Steel Ltd sought to acquire a line of fusion equipment, as well as a rolling line from United Steel Mills Ltd. Yehuda claimed that the merger will improve the company's efficiency, and will likely lead to a reduction in the price of iron. The ICA stated that efficiencies are considered as a counterbalance to anticompetitive effects, but in this case decided to reject Yehuda's efficiency claim, stating that the alleged efficiency advantages can be reached without harming competition, as the equipment Yehuda sought to acquire is not unique and can also be purchased from other companies. In addition, the ICA noted that Yehuda had not proven that the consumers would benefit from the claimed efficiencies. The 2005 merger transaction involved the acquisition of Sonol Israel Ltd, by Dor Alon Energy Israel (1988) Ltd. Both companies are involved in the import, marketing and distribution of refined oil products, and are among the leading companies in Israel in the sale of gasoline and diesel at gas stations.

The parties argued that the merger would improve the deployment of gas stations and thereby enable greater competitive ability. It was further argued that the merger will increase efficiency in both the import of distillates and the utilisation of dispensing facilities. In this case as well, the ICA determined that the parties did not prove the existence of substantial efficiencies, or that the alleged efficiency will have an impact on the general public.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the merger is a notifiable merger (see question 5), the Director General may oppose a merger or approve it subject to conditions. In respect of those mergers that are not notifiable, the Director General may only interfere if the transaction amounts to a restrictive arrangement. If the Director General consents to a merger, any person that may be injured by the merger, any industrial association and any consumers' association may appeal to the Competition Tribunal against such decision. The Competition Tribunal may reaffirm the Director General's decision, revoke it or amend it.

The Competition Tribunal, at the request of the Director General, may also separate a merger that was unlawfully performed. Furthermore, the Director General may file a criminal indictment against parties to a merger that was unlawfully implemented or impose monetary sanctions in lieu of criminal indictment.

In the case of a full integration (statutory merger) the companies' registrar shall not register the merger in the records unless the merger has been cleared by the Director General (or the registrar is convinced that the Director General's approval is not required).

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

When a merger raises competitive concerns that can be mitigated by attaching conditions, the Director General will clear the merger with appropriate conditions rather than oppose it.

For example, in vertical mergers in which one of the merging parties holds market power, the Director General may require that such party does not discriminate against third parties. In horizontal mergers that create concentration problems in a specific market, a divestment may be required.

The ICA's policy is to prefer structural conditions to behavioural ones, and normally, for example, the ICA will not accept 'Chinese walls' as a solution for horizontal concentration concerns.

In July 2011, the ICA introduced a public statement regarding Remedies in Mergers that Raise Reasonable Ground for Significant Competitive Concern (the Remedies Statement). The Remedies Statement discusses the circumstances in which the ICA will block a merger and when it will approve a merger subject to conditions. Furthermore, it discusses the spectrum of conditions that the ICA may impose, and describes the circumstances under which those conditions will be used.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

While the Competition Law does not determine any conditions with regard to how divestitures should be implemented, in practice, the ICA has in recent years tended to require divestiture mainly on 'fix-it-first' terms. According to the ICA's Remedies Statement, when the

anticompetitive effects of the merger are immediate, the ICA's approval will be suspended until the parties will complete the divestiture. Hence, as the Director General's approval is in most cases valid for only one year, if the divestiture has not been concluded within one year, the approval will expire and the parties will be required to refile their pre-merger notification forms.

If, however, the requirement for divestment is not on 'fix-it-first' terms, the divesting party is given a limited period of time (ranging between a few months and a year) within which it must complete the sale. If the divesting party fails to complete the divestiture within this set period of time, the rights attached to the shares or the assets to be sold are usually transferred immediately to a trustee, which is given the power to sell the shares or assets at any price.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, only in a few cases of foreign-to-foreign mergers have remedies been required. No action has been taken so far against any foreign-to-foreign merger.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Approval of a merger does not inherently include the approval of the ancillary restraints related to it, except in cases in which a statutory exemption, or the block exemption to ancillary restraints to mergers, applies.

According to the Competition Law, an undertaking by the seller of a business, sold in its entirety, to the purchaser of the business, not to engage in the same type of business, would not be considered a restrictive practice, provided that this obligation does not contradict reasonable and acceptable practices.

Further, ancillary restraints may be exempted under the block exemption to restraints ancillary to mergers, which covers restraints such as non-compete and non-solicitation undertakings, undertakings to guarantee continuation of supply between the seller and the merged entity, and any other restraint that is essential for the preservation of the economic value of the acquired business, as long as the restraint is limited to a reasonable period of time. The non-compete, non-solicitation and guarantee of continuation of supply undertakings exemptions apply not only to the seller but also to such seller's controlling company and to any entity controlled by either of them.

The block exemption will apply only if certain conditions, which are detailed therein, are met.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The ICA considers the private sector, mainly competitors, suppliers and customers of the parties to the merger, as important sources of information. Yet, the ICA takes into consideration the fact that third parties may be motivated by their own interests and be biased against (or for) the merger.

The Competition Law provides the ICA with the authority to require any person to provide it with any information that would ensure or facilitate the implementation of the Competition Law. The ICA also makes use of this authority to obtain information required from third parties for the assessment of mergers.

The law does not stipulate an explicit legal duty to conduct hearings during the merger review period. However, anyone who wishes to oppose a merger may apply to the ICA and ask to be heard. This does not derogate from the legal right of any person who may be harmed by the merger decision to appeal to the Competition Tribunal.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Director General has to publish a notice of his or her decision with regard to any merger in the Official Gazette and in two daily newspapers.

In addition, if the Director General consents to a merger, a file has to be opened for the merger, which must contain the following documents: the pre-merger notification forms, excluding its mandated confidential sections and its exhibits; each decision of the Director General, the Competition Tribunal and the Supreme Court (in the case of an appeal) concerning the merger; copies of the announcements published by the Director General in the Official Gazette and in daily newspapers; and copies of each decision of the Director General concerning a restrictive arrangement that is ancillary to the merger.

Files of approved mergers must be available for inspection by the public in the offices of the ICA and on the ICA's website.

Any other information provided to the ICA by any person (including third parties to the merger) is kept confidential. A request to disclose such information may be made either under the Freedom of Information Act, or (for the purpose of an appeal) under the Administrative Tribunals Act. The disclosure of any such information must be in accordance with the procedures stipulated in the relevant laws.

In this context, it should be noted that, in November 2016, two cellular operators, Cellcom and Golan Telecom, requested the Competition Tribunal to disclose documents that the Director General collected while examining their merger case, before they filed an appeal on the Director General's decision to oppose the merger. The documents were provided to the ICA by third parties and contain trade secrets that concern the core of their activity. The Competition Tribunal rejected the request and stated that exposing these secrets to Cellcom and Golan – their competitors – is likely to significantly harm the interests of the third parties.

A recent legislation proposal issued by the ICA suggests establishing a limited disclosure procedure to enable third parties to have access to an appropriate protection against disclosure of trade secrets. The main provisions of the proposed legislation are described in question 35.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The ICA ascribes importance to inter-jurisdictional relationships and continuous cooperation in all competition matters. This includes the exchange of non-confidential information on enforcement policy and decisions, inter alia, the ICA is active in the Organisation for Economic Co-operation and Development and the International Competition Network. In the period 2016–2017, the ICA submitted several working papers and position papers to the Competition Committee, inter alia, regarding competition issues in aftermarkets, price discrimination and geographic market definition.

The ICA also takes part in the EU's Euro-Mediterranean partnership and its delegates contribute to the various workshops and seminars. The ICA also takes part in the TAIEX programme of the EU Commission, a programme aiming to strengthen the professional collaboration among antitrust authorities in Europe.

In 1999 the governments of Israel and the US signed an agreement regarding the application of their competition laws. The purpose of that agreement is 'to promote cooperation and coordination between the competition authorities of the parties, to avoid conflicts arising from the application of the parties' competition laws and to minimise the impact of differences on their respective important interests'. The parties agreed, inter alia, on consultation terms in competition matters and on exchange of information in enforcement efforts and regarding economic sectors.

During 2014, the ICA hosted a comprehensive workshop with the participation of delegations from the antitrust authorities of Brazil and Romania on the subject of investigations and intelligence.

The ICA also maintains close professional interaction with the European Commission and the competition authorities in the EU member states. Furthermore, the ICA's investigation department advised in the establishing operating theory for computer investigation and assisted in creating tagging lists to help develop the capabilities of new competition authorities.

In October 2018, the ICA hosted the ICN International Cartel Workshop, a three-day interactive conference to share experience among ICN members on the challenges faced and successes encountered in anti-cartel enforcement. The workshop was attended by senior level officials and employees from sections of agencies that deal with cartel offences, and by non-governmental advisors (NGAs) nominated by agencies. About 200 delegates attended the workshop from dozens of countries around the world.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

If the Director General objects to a merger or stipulates conditions for his or her consent, each of the companies seeking to merge may appeal to the Competition Tribunal within 30 days of the date on which the Director General's decision is received.

If the director general consents to a merger, whether conditionally or unconditionally, any person that may be injured by the merger, any industrial association and any consumers' association, may appeal to the Competition Tribunal against the Director General's decision, within 30 days of the date on which the Director General's decision is published in two daily newspapers. The filing of an appeal against the approval of a merger shall not cause the merger to be delayed, unless otherwise ordered by the Tribunal. The Competition Tribunal decision may be appealed to the Supreme Court within 45 days. For example, in October 2016, the Competition Tribunal rejected an appeal on the ICA's decision to object to the merger between Mey Eden Bar-First Class Service Ltd and Electra Consumer Products (1951) Ltd (specific details regarding the transaction were mentioned in question 19 above). In its decision, the Director General determined that the merger involves two of the three existing competitors in the branded water-bar market, and therefore raises a concern of price increase in the relevant market. The appellants disagreed with the market definition presented by the Director General, claiming that creating a distinction between the market as a whole and the branded water-bar market is an artificial differentiation. As stated, the Competition Tribunal rejected the appeal, and affirmed the market definition proposed by the Director General.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

An appeal must be submitted to the Competition Tribunal within 30 days. Interim orders and final decisions of the Competition Tribunal can be appealed within 45 days to the Supreme Court, the highest judicial

instance in Israel. There is no time limit for the review of appeals by the Competition Tribunal and the Supreme Court.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2018, the ICA reviewed and decided 205 pre-merger notifications. Four of the notifications were objected to by the ICA, and the ICA stipulated conditions in 2.1 per cent of the cases (compared to 2.4 per cent in 2017). The average examination time was 22.5 days. The proportion of the mergers reviewed by the ICA in 2018 that were foreign-to-foreign mergers was 17 per cent.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

In November 2016, the Antitrust Authority published a Memorandum of Law regarding the retention of information the ICA collects from third parties. The Memorandum deals with two main issues:

- The disclosure and review of documents relating to decisions taken by the Director General that can be appealed to the Competition Tribunal. Specifically, the memorandum seeks to anchor in legislation a procedure according to which information that the Director General received from entities operating in the market, which may contain sensitive trade secrets, will be revealed only to the attorney and economic experts of the appellant, rather than to the appellant itself, subject to signing a non-disclosure agreement.
- General protection of the confidentiality of information provided to the ICA. The memorandum sets forth an obligation on ICA employees not to disclose information transferred from entities while fulfilling their duties according to the Law, except when such disclosure is required for a criminal proceeding, and in circumstances where the information is required to exercise the ICA's powers or to fulfil the purpose of the Law. In addition, the memorandum suggests that the discovery of confidential information will be possible where the public interest in disclosing the information outweighs the reasons for not disclosing it.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In January 2019, an amendment to the Antitrust Law was passed (and changed the name of the Law to the Law of Economic Competition). The renewed law seeks to increase the enforcement of competition-related offenses, both on the criminal and administrative levels, while reducing the burden of proof of the ICA in criminal proceedings. The Law also imposes expanded criminal liability on corporate office holders, raising the ceiling of financial sanctions and maximum imprisonment, and also expanding the rules that apply to monopolies having a share of 50 per cent or more in a certain market, or whose market share is less than 50 per cent but which have 'significant market power'.

As stated in question 28, ancillary restraints may be exempted under the block exemption for restraints ancillary to mergers. In October 2017, the ICA published a draft of amendments to the block exemption:

- the ICA mainly proposes to expand the application of the block exemption so as to apply to restrictive arrangements that meet two cumulative conditions:



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- the first condition is that the main principle of the arrangement is not to reduce or prevent competition; and
- the second condition requires compliance with a fundamental criterion of the absence of significant harm to competition in the relevant market.

# Italy

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Law No. 287 of 10 October 1990 (the Law) (in particular, articles 5 to 7 and 16 to 19) contains the rules on antitrust control of concentrations and joint ventures. Presidential Decree No. 217 of 30 April 1998 (the Regulation) contains procedural and enforcement rules. The Law is enforced by an independent body, the Italian Antitrust Authority (IAA) in Rome. For utilities and other sectors subject to specific merger control regimes, see question 8.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Law applies to concentrations. A concentration occurs where:

- two or more undertakings merge;
- an undertaking or a person already controlling an undertaking acquires sole or joint control over the whole or parts of another undertaking; or
- two or more undertakings form a concentrative joint venture through the establishment of a new company (see question 3).

#### 3 | What types of joint ventures are caught?

The wording of the Law does not contain a clear definition of 'concentrative' and 'cooperative' joint ventures.

Generally speaking, the incorporation of a jointly controlled undertaking or the acquisition of joint control over a previously existing undertaking will give rise to a 'concentrative joint venture' (caught by the Italian merger control regime) provided that:

- the joint venture is a full-function joint venture; and
- the joint venture's main object or effect is not the coordination of the competitive behaviour of the parent companies.

This second part of the test is what differentiates the assessment of joint ventures in Italy with respect to the current EU merger law (as it remains consistent with the previous definition of concentration included in the pre-March 1998 EU law). This difference from the current EU merger control regime has been increasingly believed to be just theoretical, but recent cases have shown that this is not the case (see question 20).

To assess whether a joint venture is concentrative or cooperative, the 1994 European Commission Notice on the distinction between cooperative and concentrative joint ventures must be kept under consideration. Accordingly, full-function joint ventures are treated as 'cooperative' and appraised under the rules on agreements between undertakings (and not under the merger control rules) if, after the

transaction, both parents will remain actual or potential competitors in the same geographical and product market as the joint venture, or in a market that is upstream or downstream or neighbouring with respect to that of the joint venture, if certain conditions are met. Full-function joint ventures that are not 'cooperative' (concentrative joint ventures) will be treated as concentrations.

Concentrative joint ventures must therefore be notified to the IAA for appraisal under the merger rules and procedures described in this chapter.

'Cooperative joint ventures', in turn, are subject to the rules on restrictive practices. Article 2 of the Law, like article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements and concerted practices between undertakings that have as their object or effect a substantial restriction of competition in the national market or in a substantial part thereof. Under the Law, such agreements may be individually authorised, for a limited period of time, on grounds similar to those provided for under article 101(3) of the TFEU. Articles 4 and 13 allow undertakings to notify an agreement to the IAA for negative clearance or individual exemption. Following the entry into force of EU Regulation 1/2003, which mandates national competition authorities to apply articles 101 and 102 of the TFEU whenever the national competition laws are applied to cases where there is an 'interstate trade effect', the IAA has indicated that it will no longer accept filings for negative clearances or individual exemptions, even in the case of cooperative joint ventures, if they may affect interstate trade.

To obtain a negative clearance or an individual exemption for purely 'Italian' cooperative joint ventures (ie, where there is no interstate trade effect), the parties must file a request using a special form. Within 120 days of notification, the IAA must either declare that the cooperative joint venture does not infringe article 2 (negative clearance) or decide to initiate proceedings. The IAA, when initiating these types of proceedings, normally indicates a non-mandatory deadline of 120 days within which it will make a final decision.

At the end of proceedings, the IAA will issue a decision stating whether the joint venture infringes article 2 and if so, rule on the request for an individual authorisation.

Notification of cooperative joint ventures is not mandatory. However, if a joint venture may infringe article 2, the IAA may start an investigation on its own initiative or following a third-party complaint.

There is also the risk of claims by any party (including third parties) who has an interest in a declaration of nullity of the cooperative joint venture or in damages.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Article 7 of the Law contains a very broad definition of control for the purposes of merger control. First, the provision expressly refers to the definition of 'controlled companies' in the Italian Civil Code, namely:

- companies in which another company has the ability to control, directly or indirectly, including through fiduciary companies, the majority of votes at the shareholders' meeting;
- companies in which another company has, directly or indirectly, including through fiduciary companies, sufficient voting rights to exercise a dominant influence in its shareholders' meetings; and
- companies that are under the dominant influence of another company by virtue of contractual links.

Second, the concept of control also includes any legal or factual situation whereby one party can exercise (including jointly with another party) a decisive influence over an undertaking. Relevant factual or legal elements include ownership or other rights over the assets or part of the assets of the undertaking, and any rights, contracts or other legal relationships that confer a decisive influence in determining the composition, resolutions or decisions of the corporate bodies of an undertaking.

As a result (and also in light of the express general obligation contained in the Law to interpret its provisions in accordance with the relevant EU principles as developed by the EU institutions), the definition of control for merger control purposes under Italian law is very broad and substantially corresponds to the definition of control applicable under EU merger law. The Law may thus apply to the acquisition of minority shareholdings (provided that this is sufficient to confer joint or sole control over the acquired company – see below) and concentrative joint ventures. More precisely, consistently with relevant European Commission practice:

- a minority interest confers joint control over the acquired undertaking if, by virtue of the provisions of a shareholders' agreement or through other contractual or de facto mechanisms, the holder of the minority interest can exercise veto powers over certain 'strategic' decisions of the acquired company; and
- a minority interest can be sufficient to confer even sole control over an undertaking, given other factors, the most important of which is that the remaining shareholding is dispersed among a large number of shareholders.

Given the substantive approach to the notion of control, board or management representation that grants one minority shareholder a veto over strategic decisions, would be considered in assessing whether this minority shareholder holds joint or even sole control, and this irrespective of the actual shareholding held. Even merely contractual arrangements could give rise to a situation of control by a non-shareholder.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Law that provides two cumulative turnover thresholds has recently been modified. In August 2017, the Italian Parliament approved a law that decreased the first threshold (ie, the combined turnover of all undertakings concerned) from €499 million to €492 million, and – most importantly – introduced a twofold change of the second threshold by, on one hand, reducing from €50 million to €30 million the amount of the relevant turnover and, on the other, referring to the Italian turnover of each of at least two undertakings involved (and not, as it was under the old regime, only to the Italian turnover of the target). The thresholds are updated each year to reflect adjustments in the GDP deflator index, and the new figures are published in the IAA's Bulletin and on its website ([www.agcm.it](http://www.agcm.it)). The last change was in March 2019 and the test applicable since then requires that:

- the Italian turnover of all undertakings involved is higher than €498 million; and
- the Italian turnover of each of at least two undertakings involved is higher than €30 million (ie, this has not been revised from the 2017 legislative amendment referred to above).

Turnover is defined as the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year.

In the case of banks and 'financial institutions' (ie, firms active in securities investment, asset management, consumer credit or leasing), the turnover used for the purpose of calculating the thresholds is equal to the value of one-tenth of their total assets, excluding memorandum accounts, and, in the case of insurance companies, the value of premiums collected. As a matter of practice, with regard to the turnover of credit and other financial institutions, the IAA, therefore, still follows the guidance contained in the old 1994 European Commission Notice on the calculation of turnover.

The Law will not apply to any transaction caught by the provisions of the EU Merger Regulation (EUMR), with the exception of referrals, as provided for in the EUMR (as set out in the European Union chapter).

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Pre-merger filing is mandatory.

There are, however, a few exceptions according to which an acquisition or merger is not considered a 'concentration' within the meaning of the Law and thus does not have to be notified. These are:

- acquisitions of shares by banks or other financial institutions, solely for resale, in undertakings being incorporated or in relation to capital increases, as long as the acquiring institutions do not exercise any voting rights attached to the shares acquired and sell them on within 24 months of the original acquisition (financial exception); and
- acquisitions of, or mergers with, companies that do not carry out any economic activity and do not have any direct or indirect control over another undertaking, nor hold licences, permits, concessions, or any other rights that would allow them to engage in business activities, nor have direct or indirect control over another undertaking holding any of those rights.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Concentrations between foreign companies must be notified to the IAA whenever, by virtue of their sales in Italy, the parties satisfy the cumulative turnover thresholds. The presence of assets or subsidiaries in Italy is not a relevant factor for the purpose of determining the existence of a notification obligation. The rules of the Law therefore also apply to foreign-to-foreign mergers. The cumulative nature of the two turnover thresholds means that the jurisdictional nexus between a foreign-to-foreign deal and Italy is satisfied every time the merger turnover thresholds are met. The recent change in the Law (see question 5) further reinforces the local nexus requiring that at least two of the undertakings concerned generate material turnover in Italy for a transaction to be reportable.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Special powers apply to a wide range of M&A transactions relating to assets in specific industries: national defence and security, energy,

communications and transportation. These 'golden powers' (so-called as they replace the former 'golden share' provisions) impose mandatory filing obligations on the parties involved in any deal where key strategic assets and undertakings are being transferred and grant the government – not the IAA – far-reaching powers to impose vetoes and restrictions on such deals. Failure to comply with the new rules gives rise to heavy sanctions (see, for example, the approximately €74 million fine issued by the Office of the Prime Minister against Telecom Italia for failing to file about its acquisition of control by Vivendi – this fine is currently suspended). Recently, the Italian government has introduced amendments in the 'golden power' rules, broadening the scope of review, including critical or sensitive infrastructure (eg, storage and management of data or financial infrastructure), critical technology (eg, artificial intelligence, robots, semiconductors), security of procurement for critical high-tech inputs, and access to, or the capacity to control, sensitive information.

In addition, there are specific provisions applicable to special sectors, as outlined below:

- With regard to the cinema exhibition services, acquisitions leading to the creation of a market share of more than 25 per cent in one of the main Italian cities must be notified to the IAA.
- In the case of mergers involving banks, the IAA has to take a decision within 60 days of the submission date. The IAA will assess whether the concentration gives rise to any antitrust concerns, and the Bank of Italy, in line with its financial supervisory role, will assess the transaction under prudential rules in a parallel proceeding also lasting 60 days. In 2007, the Bank of Italy and the IAA signed a protocol agreement setting up procedural guidelines for the exchange of information in relation to concentrations with effects on banking markets.
- Mergers in the insurance sector are subject to the Law. However, IVASS, the relevant authority for insurance companies, which in 2013 became a division of the Bank of Italy, must be asked for a non-binding opinion before the IAA takes any measures.

Legislation prohibits 'interlocking directorates' in the banking, insurance and financial services sectors, making it illegal for individuals to sit on the board of more than one corporate body in competing undertakings in any of these sectors. Because the merger notification form requires the merging parties to fill in a section on interlocking directorates, merger control in the above-mentioned sectors can also be used as a means for spotting potential infringements of this law.

With regard to telecommunications, the 1997 Telecoms Law requires that before issuing a decision on any merger (or agreement) in the telecoms, broadcasting and media sector the IAA must require a non-binding opinion from the Italian Communications Authority (AGCOM). Further, a resolution (last updated in 2016) of the AGCOM provides that any concentration (as defined under the Law) involving undertakings active in the media sector and that meets the relevant alternative turnover thresholds (see question 5) is subject to a mandatory notification to the AGCOM, which could block or impose conditions on the transaction if it is likely to threaten pluralism in the relevant area. This obligation is in addition to the possible parallel filing to the European Commission or the IAA. In this regard, in April 2017 AGCOM ascertained that Vivendi's position, in light of the stake held in Telecom and the 28.8 per cent stake recently acquired in Mediaset (both giving Vivendi the possibility to exercise decisive influence over the two latter undertakings), constituted an infringement of a law that prevents any undertaking generating, directly or through affiliated companies, more than 40 per cent of the revenues in the electronic communication sector (ECS) from having more than 10 per cent of the Communications Integrated System (SIC). AGCOM concluded that, in 2015, Telecom registered revenues that could attribute to Vivendi a share exceeding 40 per

cent in the ECS, while Mediaset revenues could attribute to Vivendi a share exceeding 10 per cent in the SIC. According to AGCOM, Vivendi's position could produce negative effects on competition and pluralism in the media sector, leading to the strengthening of Mediaset and Telecom's positions in their respective markets. In particular, AGCOM was concerned that Vivendi, by leveraging Telecom and Mediaset's positions (also considering that media and telecommunications are neighbouring markets), could adopt exclusionary or discriminatory practices. In April 2018, to comply with AGCOM's decision, Vivendi transferred approximately 20 per cent of its voting shares in Mediaset to a blind trust. Finally, when undertakings entrusted with the operation of services of general economic interest, or operating under a statutory monopoly, wish to operate in markets outside the scope of their current activity, they must do so through a separate company (corporate unbundling). The incorporation of such new companies, or the acquisition of a controlling interest in existing companies operating in new markets, is subject to a prior filing to the IAA and there are penalties of up to €51,645 for failure to notify. The filing obligation applies irrespective of turnover. The IAA has published a notice regarding the formalities applicable. In particular, the notice specifies the situations in which notification is required, and the minimum information required. Since the introduction of this specific filing obligation in 2001, the IAA has prosecuted undertakings for failure to comply with this obligation 28 times, with fines ranging between €1,000 and €50,000.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A concentration must be notified prior to its implementation; that is, before the purchaser has acquired the ability to exercise a decisive influence over the behaviour of the target undertaking.

The earliest a notification can be submitted is as soon as the parties have agreed the essential terms of the transaction, which would allow the IAA to conduct a thorough appraisal. In general, the IAA prefers to be notified of a binding agreement; however, in exceptional cases, a filing has been accepted even before signing the final agreement, provided that the parties could assure the IAA that the main terms and conditions of the transaction – and in particular the aspects that are relevant for an antitrust analysis – would not change. While the IAA has generally adopted a strict approach to this issue, rejecting filings not supported by a binding agreement, its practice varies from one sectoral unit of the IAA to another, and it is advisable to discuss this with officials from the competent unit if necessary.

Fines for failure to notify may amount to up to 1 per cent of the worldwide turnover of the notifying party or parties in the last fiscal year. The IAA has informally indicated that it will adopt a zero-tolerance approach against those that disregard merger filing obligations. In 2016, the IAA opened two different proceedings concerning the banking sector, one against Banca di Credito Cooperativo di Roma and one against Banca per lo Sviluppo della Cooperazione di Credito for their failure to notify their acquisition of sole control, respectively, over Banca Padovana Credito Cooperativo in Liquidazione Coatta Amministrativa and Banca Romagna Cooperativa. The IAA closed both proceedings, imposing on the two banking institutions a €5,000 fine.

#### 10 | Which parties are responsible for filing and are filing fees required?

In the case of acquisition of sole control, the acquirer must make the notification. In the case of a merger or acquisition of joint control, each

party that merges or acquires joint control is obliged to notify. The parties may, however, file jointly using the same form by appointing a common representative.

No filing fees apply.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As a general rule, implementation of the transaction does not have to be suspended after filing but prior to clearance (although, as a matter of practice, in most cases the parties to a concentrative transaction make clearance by the IAA a contractual condition of closing). The IAA, when opening second-phase proceedings, may, however, order, with a formal decision in such regard, the parties not to implement the transaction until it concludes its Phase II review. However, this must be justified on the grounds that the transaction raises serious competition concerns. Since 1990, this has occurred only three times (the most recent case was *Unipol/Fondiaria* in 2012) (see question 26).

In any event, even if this order is issued, a public takeover offer may be completed during such a suspension period provided that the purchaser does not exercise voting rights at the acquired company's shareholders' meetings until the transaction has been cleared.

#### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Implementing a transaction subsequent to notification but prior to clearance does not give rise to any infringement under the law and so no sanction is applied. Nevertheless, this course of action involves the risk that where a transaction raises serious competition problems, the IAA will decide not to authorise it or to authorise it subject to remedies. Thus, if a transaction is closed prior to clearance, the antitrust risk (ie, the risk of a prohibition or conditional approval decision) will be largely borne by the acquirer only, unless otherwise provided by specific contractual arrangements.

While the absence of a standstill obligation attenuates the risk of 'jumping the gun' in the pre-clearance phase in this regard, undertakings must remain wary that any interaction between them prior to clearance and completion of the deal remain subject to review by the IAA under article 2 of the Law, the Italian equivalent of article 101 TFEU, as well as under the latter.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There are no sanctions for closing before clearance (see questions 11 and 12), provided completion occurs after a complete notification has been submitted.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

As indicated, a transaction, including a foreign-to-foreign deal, could be closed before clearance.

Thus, implementation of a foreign-to-foreign concentration, as well as concentrations involving national undertakings, can occur after having filed (and even before clearance), except where the IAA has issued a specific suspension order to the contrary when opening Phase II proceedings.

In relation to cases where the IAA has issued a specific suspension order, be it a foreign-to-foreign deal or not, while in principle acceptable,

the actual feasibility of a local 'hold-separate' arrangement will ultimately depend on the geographic dimension of the relevant markets and how such arrangement would affect the potential restrictive effects of the proposed concentration.

#### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

A national public takeover bid that may give rise, if completed, to a notifiable concentration must be submitted to the IAA at the same time it is filed with the Italian financial regulator (CONSOB). In the case of a national public bid (ie, public takeover subject to Italian capital market regulations), the term relating to the first-phase assessment period is reduced to 15 days. As indicated in question 11, where the IAA, having opened a second-phase investigation, issues a suspension order preventing the parties from closing, a public bid may nevertheless be completed provided that the purchaser does not exercise voting rights at the acquired company's shareholders' meetings until the transaction has been cleared. Non-national public takeover bids are subject to the provisions applicable to ordinary concentrations.

#### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Parties may still notify a transaction by completing a form, two copies of which need to be submitted to the IAA along with the relevant attachments. However, the IAA promotes electronic filing by CD-ROM and it is also possible to file by certified email.

Completing the form can be time-consuming. The information required includes details of the parties, description and details of the transaction, and information about the markets affected by the concentration. Additional detailed information on the relevant market must be provided whenever:

- more than one party is active on a relevant market and, after the concentration, they will hold a combined market share of not less than 15 per cent;
- after the transaction, one party will hold a market share of not less than 25 per cent when at least another party is present in an upstream or downstream market, or
- the target undertaking holds a market share of more than 25 per cent even if the other undertakings concerned are not active in the same market or in upstream or downstream markets.

As a matter of practice, the IAA tends to require full filings even where the market share thresholds indicated above are not met. Accordingly, the undertakings concerned should be prepared to supply the IAA with extensive market information in any event.

A considerable amount of documentation must be provided, including all documents concerning the transaction (ie, the execution copies plus the relevant signatory pages and related attachments), balance sheets and annual reports of the companies involved relating to the three financial years preceding the transaction. A power of attorney for the representative signing the filing must also be enclosed (with no particular formalities required). In practice, it is very difficult to file a complete notification in less than two weeks (in particular because the active cooperation of the notifying party or parties and of the target is required). The notification must be submitted in Italian, while as a matter of practice the IAA accepts attached documents (ie, transaction documents) in the original language (if in English, French or Spanish, while a translation may be required in relation to other languages).

The notifying party should indicate in its notification which information constitutes business secrets to be treated as strictly confidential (and the reasons for its confidentiality). Fines of up to €25,823 for failure or refusal to provide information and up to €51,645 for supplying false information may be imposed, but only in the case of Phase II proceedings. More broadly, depending on the relevance of the missing or false information to be provided, any such conduct could potentially amount to a criminal offence (although this remains a remote scenario).

The IAA operates a voluntary pre-notification practice. In those cases, at least 15 days before the relevant formal filing, the parties may file with the IAA a briefing paper describing the essential terms of the transaction and the market or markets potentially involved. The parties and the IAA may then meet informally to discuss possible competitive effects of the transaction and the scope of the information to be provided in the actual filing.

Moreover, the IAA publishes a 'notice of merger submission' on its website (subject to the parties' consent). The notice contains a summary description of the transaction and of the affected economic sectors. Third parties are then entitled to submit their observations within five days of the publication.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

The IAA has wide-ranging powers, which only apply, however, if second-phase proceedings are opened. It can gather all relevant information, order the production of documents, order inspections and make copies of corporate documents. Even during the first phase, it cannot be ruled out that the IAA may want to informally contact competitors, clients or suppliers to ask for comments or to verify whether the information submitted is true. In some cases, the officials may contact the parties directly to ask for clarifications or explanations of the transaction. The parties may make submissions in writing and may apply to be heard at hearings. As stated in question 16, fines of up to €25,823 for failure or refusal to provide information and up to €51,645 for supplying false information may be imposed, but only in the case of Phase II proceedings.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

A first-stage investigation takes 30 calendar days (15 for national public bids), after which the IAA may:

- clear the transaction if it does not raise serious doubts as to its compatibility with the Law; or
- open second-phase proceedings if serious doubts concerning the compatibility of the transaction with the Law arise.

Usually, the IAA does not issue a first-phase decision much earlier than 30 days from receipt of notification. This is because of various factors such as the amount of the information that the officials must consider, the internal procedural rules of the IAA and its considerable workload. However, in the least problematic cases the issuing of a decision before the expiry of the 30-day period cannot be ruled out.

If the IAA considers that the parties have not provided complete information, it may formally require such information to be submitted, and this interrupts the running of the 30-day period. This term will run afresh from the moment the IAA considers that the information is complete. It is not uncommon for the IAA to interrupt the 30-day review period through such information requests. However, as a matter of practice, the IAA's officials will normally seek to obtain the relevant information from the parties in an informal way (ie, over the phone), though this is typically done by setting very short deadlines (normally,

two to three days, sometimes even less). In principle, only when these deadlines are not complied with does the IAA issue a formal letter interrupting the 30-day first-phase period. The new procedure entailing an informal pre-notification meeting described in question 16 has been introduced, in part, to avoid these interruptions. During such a meeting, the IAA would generally make clear to the parties all the information that it needs to assess the competitive effects of the transaction, so that the parties will be able to provide a complete filing. Second-phase proceedings must be closed within 45 calendar days (unless the undertakings have failed to provide information available to them, in which case the term can be extended for a further 30 calendar days, although this extension can be made just once).

Accordingly, provided that the 30-day first-phase period is not interrupted, the overall duration of proceedings can run up to 105 calendar days.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A concentration is prohibited whenever it creates or strengthens a dominant position as a result of which competition is eliminated or substantially reduced in the Italian market. Despite this being in line with the pre-2004 EUMR substantive test, in practice the criteria for evaluating a merger are largely in line with the new EUMR test, and include market shares, the choice suppliers and users have, access to sources of supply or market outlets, the structure of the relevant markets, the existence of any barriers to entry, and supply and demand trends. The IAA in fact interprets the test broadly, thus effectively applying a test close to that of the current EUMR.

The IAA's approach has not been affected by the global economic crisis and, although in some cases the IAA has considered the current trends and companies' corporate restructuring in some markets as background elements of the transaction (for instance the *Stato Federale della Baviera/BayernLB Holding* case, a concentration related to a bank nationalisation in Germany and, most recently, the *Quaestio capital management/Banca popolare di Vicenza* (2016) and *Quaestio capital management/Veneto banca* (2016), both concerning the banking sector, and *Ferrovie dello stato italiane/Ferrovie del sud est* (2016), concerning the rail transport sector), it does not appear that this has been a key element in its merger assessment. The IAA has, however, been prepared to accelerate the procedure in such cases. The IAA has not used the failing-firm defence or any similar 'failing firm' theory over the past few years. Notably, in the *Emmelibri/Effe 2005 Gruppo Feltrinelli/Newco* case (2014) the notifying parties while putting forward defensive arguments highlighting that absent the merger EFFE 2005 would have ceased its distribution activities, explicitly excluded any failing firm defence. In 2012 the IAA issued a temporary suspension order to prevent the implementation of the proposed acquisition of Fondiaria Sai, the second-largest insurer in Italy, by Unipol, also one of the key players in the Italian insurance market, despite the rationale of the transaction being that of rescuing the target company's group from financial difficulties. The transaction was eventually cleared subject to structural remedies.

#### 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for concentrative full-function joint ventures, which are exclusively appraised under the broad 'dominance' test that applies to other concentrations. Cooperative joint ventures (and under Italian law this concept also includes full-function joint ventures where both parents remain in the same market of the joint venture)

are not treated as concentrations and are assessed under the restrictive practices test (see question 3). In January 2017, in the *Lottomatica/Admiral Entertainment/Newco* case the IAA, despite a referral back by the EU Commission, closed the proceedings considering that the notified joint venture had no structural nature and hence it did not amount to a concentration. In particular, it concerned the creation of a Newco (70 per cent by Lottomatica and 30 per cent by Admiral Entertainment – part of the Novomatic group) that would have been active in the gambling market (in the AWP and VLT machines segment). The parent companies would have remained active both in the gambling market at retail level and in the upstream market for the production and marketing of AWP and VLT software. Further, the transaction included a non-compete agreement between Lottomatica and Novomatic with regard to the Newco for the acquisition of gaming halls. Taking into account all these elements, the IAA considered that the transaction did not concern any transfer of business, but rather could lead to substantial cooperative effects, and therefore it opened proceedings under article 101 TFEU (the IAA closed the proceedings in May 2017, as the parties withdrew the transaction).

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The IAA is required to follow European Commission case law and practice, including that on collective dominance in merger cases. Even before the 2004 EU reform, the IAA was ready to apply the theory of coordinated effects to block a merger (eg, the 2002 *Granarolo/Centrale del Latte di Vicenza* case). The IAA has so far never applied the pure 'unilateral effects' theory of harm, now possible under the EUMR, when the transaction does not involve or lead to a situation of dominance, and some authors believe that this would not be possible under the Law. In *Ardagh Glass/FiPar Finanziaria di partecipazioni Industriali* (2011), the transaction involved horizontal effects in the glass and metal packaging sector. While, depending on the relevant market definition, the transaction could be seen as a three-to-two deal, the IAA cleared it without conditions essentially in consideration of the likelihood of entry and the role of potential competition. In its assessment, the IAA carried out an in-depth economic analysis, taking into consideration a number of elements, such as the structure of the markets and the fact that the merged entity would have faced strong competitive pressure from other potential players. The IAA cleared the merger in Phase I, noting that the creation of a single or collective dominant position was unlikely. The most recent case blocked by the IAA was the 2013 *Italgas-Aceagas/Isotina Reti Gas* case. In particular, the IAA blocked the proposed change of control of Italian gas distributor Isotina Reti Gas also because no other competing undertakings active in other areas in Italy would have an interest in participating in tenders for the award of gas distribution services where the parties were already present. This case was upheld by the Council of State in January 2015, overturning the first instance decision that had quashed it.

The IAA's enforcement history also includes challenges to vertical mergers on the basis of their expected foreclosing effects; challenges to conglomerate mergers in relation to the related potential portfolio effects that they might generate; and the strengthening of a joint-dominance situation based on multi-markets contacts of the undertakings concerned.

Unilateral effects were considered a serious concern in the *Arnoldo Mondadori editore/RCS Libri* case (March 2016), involving two of the main operators in the book publishing and book retail sectors. The dominant position that would have been gained by Mondadori in four distinct markets and corresponding sub-segments could have resulted in entry barriers in the market for the acquisition of authors' rights. Also,

the concentration would have likely resulted in the systematic refusal by the merged entity to provide book catalogues to other distributors, thus having an anticompetitive impact on both the upstream and downstream markets. Ultimately, the IAA cleared with conditions the acquisition of RCS Libri by Mondadori (see question 25).

On the other hand, in *Edenred Italia/Ristocheff* (2011), the IAA initiated a Phase II investigation as it was initially concerned by significant horizontal aspects, as the concentration could have strengthened the dominant position of the leading player in the luncheon vouchers market. The IAA eventually authorised the transaction without imposing conditions, as it concluded that, despite the large market share imputable to the combined entity post-merger, the operation did not produce significant anticompetitive effects on any of the relevant markets in light of factors such as the bidding nature of the relevant market and the absence of barriers to entry. By contrast, in March 2017 the IAA closed with commitments the *Gruppo Editoriale l'Espresso/Italiana editrice* case, concerning a transaction in the book publishing sector. According to the IAA, the transaction was likely to create or strengthen a dominant position in the advertising market for daily newspapers in the provinces of Turin and Genoa. In fact, the IAA noted that in the local area of Turin, the estimated combined market share post-merger would have been 90–95 per cent, while in the province of Genoa, the transaction would have led to a de facto monopoly. In this context, the IAA was concerned that third parties would have not been able to exercise any competitive pressure on the merged entity and the entry of new competitors was considered unlikely. The IAA accepted behavioural commitments consisting in the granting to third parties of licence agreements for advertising activities on the *Repubblica* newspaper both for Turin and Genoa local editions. In particular, the IAA considered the duration of these agreements (five years) sufficient to let third parties enter in the relevant market and exercise effective competition. The IAA took into account both horizontal and conglomerate effects in the 2016 *Reti Televisive Italiane/Gruppo Finelco* case, concerning a concentration in the radio broadcasting sector. In addition to the dominant position that the merged entity could have gained in the radio advertising market, the IAA also considered the dominant position already held by Reti Televisive Italiane in the free-TV advertising market. The IAA was concerned about the incentives that the merged entity would have had to foreclose in the sale of advertising space in both the radio and video advertising markets. Therefore, the acquisition was cleared with conditions. In particular, the IAA prohibited the merged entity from renewing any concession contracts through which the combined entity would have marketed the advertising space of two other radio broadcasters; in addition, the IAA required video and radio advertisements to be managed by two separate undertakings; lastly, the IAA imposed a four-year prohibition on acquiring new radio broadcasters and concluding new advertising concession contracts with other radio broadcasters.

The IAA is also interested in the 'harm to innovation' and 'common ownership' theories of harm to which the EU Commission has recently been paying attention; with regard to the former, when, in November 2018, the IAA authorised the *Luxottica Group/Barberini* merger upon commitments (ie, the merged entity would enter into supply agreements with all interested market operators), the imposed remedies were among other things based on IAA's concerns of reduction of ability to innovate by competitors.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

In principle, as a matter of law, a prohibited concentration may, exceptionally, be authorised by the IAA for reasons connected with the general interests of the national economy. However, the applicability of this

'general interest exception' requires the prior issuance by the Italian government of the necessary guidance criteria, something that has not occurred yet and is unlikely to happen in the near future. Something arguably similar occurred in 2008 in respect of an acquisition by Alitalia (in a situation of distress), but the clearance was then adopted by the IAA pursuant to specifically adopted (and time-limited) legislation.

Moreover, even in ordinary merger procedures, notwithstanding clearance by the IAA, the President of the Council of Ministers may prohibit, for essential reasons of national economy, an acquisition of an Italian company by a foreign company if, in the country of origin of the buyer, Italian companies are subject to discrimination, in particular in relation to their ability to acquire local companies. This provision is intended to ensure reciprocity, but it has never been used to date.

Having said so as a matter of law, it is clear that social considerations may have some influence over the review of certain mergers, although the IAA has always tried to distance itself from any situation that could not be fully explained on purely technical grounds.

Finally, in the banking sector, the IAA may approve a concentration, following a proposal from the Bank of Italy, even if this leads to the creation or strengthening of a dominant position, on financial stability grounds. Even if this power was not resorted to, in the *Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen* merger, this transaction was unconditionally cleared in May 2018 after a Phase II investigation (despite the sometimes very high market shares (above 60 per cent or even 70 per cent in the local retail catchment areas)), commitments having originally been deemed necessary. Clearance was given taking into consideration the functional and structural peculiarities of the banks and the fact that these were cooperative banks also supporting local economies, which had to change their corporate nature pursuant to new sector legislation.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Thus far the IAA has made it clear, albeit informally, that efficiencies are not autonomously considered in the context of merger assessment. In light of the enhanced role of merger efficiencies under EU law and taking into account the economic approach to merger analysis adopted and developed throughout the years by the IAA, it is possible that the treatment of efficiencies will in the future also have some, although limited, direct relevance under Italian law. In a case concerning newspapers and periodicals distribution (*M-DIS – Servizi Stampa Liguria – Società di Edizione e Pubblicazioni/GE-DIS*, 2013), the IAA conducted an analysis of the horizontal and vertical effects of the merger and assessed the efficiency claims raised by the parties. Also in the *SEL-Società elettrica altoatesina/Azienda energetica* case (2015) concerning the creation of a joint venture active in the markets for gas and electricity distribution, the IAA assessed the efficiency claims raised by the parties (in particular in terms of production and distribution costs savings, which would have been ultimately transferred to consumers), but concluded that these efficiencies were not specifically attributable to the transaction and ultimately authorised the transaction subject to conditions. The same assessment was made in the *2i Rete Gas/Nedgia* case (2018), also regarding the market for gas distribution, where the IAA concluded that the efficiencies claimed by the parties could not be considered as merger specific. Most recently, the expected efficiencies deriving from the concentration (avoidance of certain organisational duplications) were deemed suitable to have a positive impact on consumers, which helped with the unconditional clearance (in May 2018) of the *Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen banks* merger.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The IAA may block a transaction or clear it subject to conditions (offered by the notifying party) or measures (imposed by the IAA), or both. If a prohibited transaction has already been implemented, the IAA may order all measures, including divestment, that are necessary to restore the parties to their pre-merger positions. Should the parties implement the transaction despite a negative decision or fail to comply with the relevant conditions, the IAA may also impose fines of between 1 per cent and 10 per cent of the turnover of the businesses party to the transaction. This principle has been confirmed by the Supreme Administrative Court, which specified that the sanction for failure to comply with an IAA decision shall apply not only where the transaction was subject to an outright prohibition but also when the transaction is cleared subject to conditions and those conditions have not been complied with (*Edizione Holding/Autostrade*). Fines have been imposed in a number of cases, mostly in the maritime transport sector. In the *CIN/Ramo di azienda di Tirrenia di navigazione* case at the end of 2013, the IAA imposed fines of €500,000 and €271,000 for failure to comply with the conditions imposed in its conditional clearance decision adopted in June 2012. More recently (April 2016), the IAA sanctioned Moby €374,000 as it did not respect clearance conditions for the merger with Toremar, which had been authorised in 2011.

In 2014 the IAA reviewed one of the measures imposed in the *Telecom Italia/SEAT Pagine Gialle* case at the time of the merger between Telecom Italia and SEAT (2000). The merger had been cleared on condition, inter alia, that Pagine Bianche (the new phone directory) and Pagine Gialle (the Italian incumbent phone directory for residential and business numbers) were not jointly distributed. The IAA, taking into account corporate and legislative changes since its decision, removed this prohibition. In 2014 and 2015, the IAA reviewed the measures imposed in relation to: the life insurance sector in the *Banca Intesa/Sanpaolo IMI* case (2006 as amended in 2010); the insurance sector in the *Unipol/Fondriaria* case (2012); and the payments system network in the *Società per i Servizi Bancari – SSB/Società Interbancaria per l'Automazione – Cedborsa* case (2007). In light of market changes and of corporate and legislative changes, in July 2016 the IAA resolved to remove certain measures previously imposed in the *Unicredit/Capitalia* case (2007), concerning the banking and insurance sectors, as such measures (consisting, among others, in eliminating certain commissions for cash withdrawals and avoid entering in any partnership with Generali insurance group) were no longer justified. Further, in July 2016 and later on in January 2017, the IAA resolved to amend the measures imposed in the *Enrico Preziosi-Artsana/Newco-Bimbo Store* case (2015), concerning the manufacturing and distribution of toys and other products for babies and children (healthcare, nursing etc). In 2017 the IAA also resolved to amend one of the measures imposed in the *Gruppo Editoriale/l'Espresso* case concerning the book publishing sector.

In 2011 and 2013, the IAA blocked two mergers in the energy sector (*Compagnia Valdostana delle acque/Deval and Vallenergie and Italgas-Acegas/Isontina Reti Gas*) owing to the presence of barriers to entry and absence of potential competition.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

During both stages of the proceedings, the IAA may indicate to the notifying parties those elements of the proposed transaction that are likely

to distort competition and ask the parties to eliminate or modify them as a condition for clearance. Negotiations are often carried out between the IAA and the parties, during which the IAA may ask for, or the parties propose, structural undertakings such as the sale or divestment of a part of their business or the transfer of a trademark, or behavioural undertakings aimed at maintaining an effective degree of competition on the market. Divestitures in Phase I do not technically amount to commitments (which are only available in Phase II under Italian law) and the IAA is more inclined to go to Phase II if the transaction calls for significant remedies. They are therefore not binding and in the case of violation, the IAA may only consider that the factual scenario on which it based its clearance decision has changed and, accordingly, that the transaction that was cleared was different from the one actually implemented. The IAA cannot impose fines for their violation. This means that Phase I commitments have been very rare and must be clear-cut for the IAA to take them into consideration.

In a vast range of cases, commitments involved the adoption of structural remedies proposed by the merging parties. In 2016, the IAA accepted remedies in three cases: in the *Arnoldo Mondadori Editore/RCS Libri* case (2016), Mondadori would have acquired a dominant position in several markets in book publishing and retail. The IAA cleared the transaction subject to the withdrawal by RCS Libri of its participation in the publishing-house Marsilio and divestment of Bompiani (see question 21). Further, the IAA accepted various behavioural measures. Most notably, in the *RTI/Gruppo Finelco* case (2016) the IAA imposed only behavioural measures so as to limit potential vertical and conglomerate effects that could be produced by the merger. In particular, these measures consisted of the prohibition for the merged entity to conclude other advertising concession contracts so as to limit its market power. Most recently, in 2016, the IAA in the *A2A/Linea Group Holding* case imposed both structural measures to limit the market power of the merged entity and behavioural remedies to guarantee access and equal treatment to potentially interested third operators active in the relevant market. In 2017, in the *Gruppo Editoriale L'Espresso/Italiana editrice* case, the IAA imposed only behavioural measures considered capable of neutralising the horizontal overlaps between the merging parties and the risk to the independence of third parties in the relevant market (see question 21). In April 2018, in the *2i Rete Gas/Nedgia* case, the IAA imposed both structural and behavioural measures. In particular, in two of the relevant markets (ie, ATEM, the minimum territorial areas of the tenders in the natural gas distribution sector), the structural measure consisted in the divestment of some 2i Rete Gas assets conditional upon obtaining, by way of derogation from the standard public tender procedure in similar cases, a minimum reserve price, to reduce the risk of merely speculative acquisitions. Moreover, the potential buyers would have to be selected among operators who currently do not hold relevant market positions in the two ATEM. In the scenario where none of the interested parties would offer such minimum price, the alternative 2i Rete Gas would have to implement a set of behavioural measures aimed at reducing financial and information barriers to entry, thus increasing the degree of contestability in future tenders. In the *Profumerie Douglas/La Gardenia Beauty-Limoni* case, the structural measures imposed by the IAA consisted in the divestment of several retail stores. Finally, the above-mentioned commitments imposed in the *Luxottica Group/Barberini* case (2018) also show a significant degree of flexibility (particularly if compared to the EU Commission) towards behavioural (rather than structural) remedies (at least, as far as vertical or foreclosure issues are concerned).

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

As for the substantive conditions, the IAA relies upon the principles laid down by the European Commission in its 2008 Commitments Notice. Remedies may be offered in both stages of the proceedings (but see question 25). There are no particular rules as to their timing. However, although usually not expressly mentioned in the official merger clearance decisions or subsequent decisions, the recent financial crisis most likely played an important role in the extensions granted by the IAA to merging Italian banks to implement some of the measures attached to the clearances – namely the divestment of a number of local branches, which might be greatly affected by the lack of liquidity, the current restructuring that most banking groups are going through, or both (see question 19).

The IAA has indicated that behavioural remedies are the exception, in consideration of the difficulties associated with monitoring compliance (particularly, in relation to the 2000, 2002 and 2004 *Edizione Holding/Autostrade* cases). Nonetheless, along with structural measures the IAA has also continued to accept behavioural remedies (see question 25).

Given the short Phase II timeline that the IAA must follow (45 calendar days that can be extended only once for an additional 30 days), there is not a specific timing for proposing remedies, which thus should be discussed very early in Phase II.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In *Solvay Sodi*, which involved a foreign-to-foreign merger in the field of sodium carbonate, the IAA accepted a commitment by Sodi to dispose of a relevant part of the company's production in favour of a competitor established in Turkey and a commitment not to start anti-dumping action against imports in Europe by US competitors. The transaction was approved subject to these undertakings.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

As a rule, the IAA (unlike the European Commission) evaluates ancillary restrictions expressly together with the assessment of the related concentration. Their analysis takes into account the proportionality principle as well as the principles set out in the 2005 EU Notice on Ancillary Restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

In Phase I, the IAA – with the express consent of the parties involved in the notified transaction – informs the public of the filing of a transaction (see question 5) through a notice on its website. Any interested party, including customers and competitors, may then submit observations on the notified concentration within five business days of the publication of the notice on the website. Since the introduction of such 'notice of merger', the disclosure that a notification has been submitted has had the effect of further increasing the numbers of third-party interventions during Phase I.

Decisions whereby the IAA opens Phase II proceedings are published in the Bulletin of the IAA and posted on its website ([www.agcm.it](http://www.agcm.it)),

inter alia, for the purpose of enabling customers or competitors to intervene in the process through oral or written submissions. In many cases, customers and clients are contacted directly by the IAA, either informally or formally, by way of a request for information during the 'market test' phase. Experience shows that these contacts can influence the final decision of the IAA to a significant extent.

Third parties may lodge a complaint against a competitor that has not notified a concentration. Third parties must also be granted access to documentation under laws relating to the transparency of conduct that apply to public bodies. As recently stated by the Council of State (the Supreme Administrative Court deciding on second and last instance appeals against decisions of the IAA) third parties providing evidence that they have been harmed by a decision are entitled to bring an action for annulment of the decision before the relevant administrative courts.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The IAA now posts on its website a notice on the filing of any merger, inviting third parties to submit their observations. Further, decisions by which the IAA opens Phase II proceedings or closes proceedings are publicised in the IAA Bulletin and posted on its website. Normally there are three weeks between the time a decision is taken and its actual publication (this period is reduced to approximately one week or less in relation to decisions by which the IAA opens a Phase II merger investigation).

The legal framework for disclosure and access to file is contained in the Regulation. All parties having an existing, direct and immediate interest in the merger proceedings may request access to the file. Access is not granted to documents containing business secrets. The IAA officials are bound by professional secrecy obligations.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The IAA is strongly in favour of full cooperation with the European Commission and the creation of a network with other national competition authorities for the joint examination of transnational cases. In practice, in merger cases, informal contacts between the European Commission and the IAA are frequent, especially in cases where, although the EUMR applies, there is a substantial impact in Italy. One of the units within the IAA is specifically dedicated to the relationship with the Commission and the other national competition authorities (NCAs) in the context of the European Competition Network. Finally, the IAA is an active member of the International Competition Network, one goal of which is to promote international cooperation among NCAs.

In 2010, the record shows only one referral under article 22 of the EUMR, which eventually became case COMP/5959 *SCJ/Sara Lee*, and one request for referral made by the IAA under article 9 (the Commission concluded, however, that there was no need for the matter to be examined by the IAA – Case COMP/5960 *Crédit Agricole/Cassa di Risparmio della Spezia/Agences Intesa Sanpaolo*). No referral from the IAA to the European Commission appears to have been made under article 22 in recent years. But there have been four voluntary referrals back to the IAA under article 4(4) EUMR (in the *Lottomatica/Admiral Entertainment/Newco* case, the *Holcim Calcestruzzi-Colabaton/Conferimenti di impianti in Cava di Cusago* case, the *Sonepar Italia/Sacchi* case and the *CVC/La Gardenia/Limoni* case).

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Interested parties may appeal against a decision of the IAA to the TAR Lazio, which has exclusive jurisdiction in these matters. The TAR Lazio may annul a decision of the IAA only on the grounds of lack of jurisdiction or competence, violation of the law, or abuse or misuse of powers. The discretionary judgment of the IAA is not subject to judicial review except in limited circumstances. Decisions of the TAR Lazio are subject to appeal before the Supreme Administrative Court (Council of State).

In September 2015, TAR Lazio confirmed the remedies imposed by the IAA on Alitalia in 2012 with the aim of mitigating its dominant position, which had been not contestable in the previous three-year period because of ad hoc legislation. The contested behavioural measures consisted of the dismissal of four slots in Milan-Linate airport. According to TAR Lazio, Alitalia – which deemed it sufficient to dismiss two slots instead of four – did not provide any evidence capable of demonstrating that the measures imposed by the IAA were not proportional. Further, in 2016 TAR Lazio upheld the structural remedy imposed by the IAA in the *Enrico Preziosi-Artsana/Newco-Bimbo Store* case, which required the merged entity to divest 27 shops in an area where the combined market share of the merging parties exceeded 50 per cent of the relevant market (see question 25). Enrico Preziosi and Artsana tried to persuade TAR Lazio of the lack of proportionality of the imposed measures, owing to an incorrect definition of the relevant market. However, TAR Lazio confirmed the IAA's decision in its entirety, upholding the IAA's market definition and the method used for identifying the stores to be divested.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

Usually each judicial degree takes between one and two years and it is therefore possible to have judicial review completed in three to four years. However, the Supreme Administrative Court may transfer the case back to the IAA.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Because of the above-mentioned 2012 change in the law, which now entails two cumulative merger filing thresholds, the number of merger cases have substantially decreased. The IAA reviewed around 21 cases up to April 2018, 57 cases in 2017, 51 cases in 2016, 44 in 2015, 40 in 2014 and 59 cases in 2013 (which will leave the IAA far from the 451 cases in 2012 or even more so from the 843 and 817 cases respectively in 2007 and 2008). However, as highlighted below, the recent 2017 law change in the second threshold (summarised in question 5), has recently at least inverted this trend, and this was in fact triggered by the concern expressed by the IAA to the Parliament that its merger jurisdiction had been narrowed down too far.

In 2017, the IAA opened a Phase II investigation in only two cases. In the *Gruppo editoriale L'Espresso/Italiana Editrice* case, concerning the book publishing sector, the IAA's main concerns were the horizontal overlaps, as the merged entity would have had a 90–95 per cent market share in the local area of Turin and a de facto monopoly in the local area of Genoa (see question 25), and the IAA was concerned that third parties would not have been able to exercise competitive pressure on the merged entity and the entry of new competitors was considered

unlikely. The IAA accepted behavioural commitments to guarantee the entrance of new alternative operators and competitive pressure in the relevant market. In the *Italcementi/Cementir Italia* case, concerning the cement and ready-mix concrete sector, the IAA's main concerns were that Italcementi would have gained (or reinforced) a dominant position in the market as well as the fact that the transaction could have facilitated coordination among independent cement manufacturers, owing to the reduction of the number of undertakings. Moreover, the IAA also considered vertical effects, as the merged entity would have been also active in the ready-mix concrete sector. The IAA accepted structural commitments (ie, the divestment of some plants) as well as behavioural ones.

In 2018, the IAA pursued several Phase II investigations, particularly in the first months. In the *Profumerie Douglas/La Gardenia Beauty-Limoni* case, triggered by a voluntary referral under article 4(4) (see question 31), the transaction would have resulted in the aggregation of the first and second operators in the market, both being each other's closest competitor. As the combined entity would have gained a market share above 45 per cent in half of the relevant markets considered, and above 60 per cent in the other half, and as the IAA considered that the merged entity would not transfer to consumers any cost saving generated (see question 21), it was eventually deemed necessary to divest a number of stores to avoid overlaps in excess of 45 per cent in any of the 14 identified micro-markets. In *2/ Rete Gas/Nedgia*, regarding the distribution of gas in some regions in the south of Italy, the IAA was concerned that the concentration may lead to a strengthening of a dominant position in tenders for the awarding of the natural gas distribution service, which would have discouraged participation of competitors (see question 25). In the *Cassa Centrale Raiffeisen Dell'alto Adige/Gruppo Bancario Cooperativo Delle Casse Raiffeisen* case, the IAA's main concerns (which were ultimately abandoned – as already explained) were the horizontal overlaps in the bank funding market, as the merged entity would have had a 45–50 per cent market share in the local area of Bolzano. Finally, in the NOAH2/Mondial Pet Distribution case, concerning the distribution of pet products, the IAA found a potential significant impediment to effective competition, as the merged entity would have a market share well above 45 per cent in some local areas, and two divestitures were accordingly required. Later, in November 2018 the already cited *Luxottica Group/Barberini* merger was authorised by the IAA upon commitments, which were mostly grounded on foreclosure concerns because of the integration of the parties' respective frames and lenses capabilities.

In March 2019, a Phase II investigation was opened on the acquisition by Sky Italia of R2, the technical platform for the provision of terrestrial digital television services of Mediaset Premium. While this transaction may be abandoned – as anticipated – because of the concerns raised by the IAA, the case has been opened following a cooperation agreement between Sky and Mediaset that has already been in place for several months, and which, inter alia, resulted in the parties providing each other access to, and hosting in, the respective satellite and terrestrial digital platforms and channels, particularly after Mediaset's exit from the market of the pay-tv contents of Serie A and Champions League football games (somewhat anticipating the consequences of the deal).

Over the past years, the IAA, while dealing with a wide range of sectors, seems to have overall focused its attention on access to key inputs and facilities and barriers to entry.

For instance, the IAA has been particularly concerned about slots in the airline and maritime transport sectors. Besides the *Alitalia* case (see question 32), there have been two cases involving Moby, a major ferry operator in Italy and the Mediterranean, acquiring two formerly state-owned ferry operators (Toremarmar and Tirrenia Navigazione). In the *Moby/ToreMar-Toscana Regionale Marittima Phase II* investigation,

concerning the provision of liner transportation services for passengers and freight between the Tuscan coast and the Tuscan Islands, the IAA cleared the merger (in July 2011) subject to Moby's commitment to divest six slots on the Piombino-Isola D'Elba route to its competitors. However, in 2016 the IAA fined Moby €374,000 for its failure to comply with the measures imposed in 2011.

With regard to the sectors currently under scrutiny, the energy sector (in particular gas distribution) seems to attract the IAA's attention: after clearing the acquisition of SNAM (which in turn controls the largest operator Italgas), the IAA blocked the *Italgas-Acegas/Isontina Reti Gas* merger (see question 21). In *Compagnia Valdostana delle acque/Deval – Vallenergie*, the IAA determined that the merger would have created a near monopoly in the market for low-voltage retail energy sales to domestic clients in the Valle D'Aosta region. The merged entity would indeed have achieved a nearly 100 per cent share in terms of the number of points served in the domestic market and a 90+ per cent share in the non-domestic market for low-voltage connections. A good portion of the IAA's analysis focused on the negative impact of the regional regulations that provided a barrier to entry. During the investigation, the IAA rejected the merging parties' price commitment (ie, to freeze prices in the free market at particularly affordable levels for two years, with a possible extension to four) as the IAA deemed this insufficient to achieve the long-term elimination of the competition issues. In 2015, the IAA cleared with conditions a concentration in the electricity energy sector between Società Elettrica Altoatesina and Azienda Energetica. The IAA was concerned that the merged entity could restrict competition in the future market for a tender for the distribution of natural gas in the local area of Bolzano given the fact that the parties already held control over incumbent operators. The IAA imposed the complete sale of one of the subsidiaries involved in the tender and the divestment of a business, amounting to the 30 per cent share held in the market for the supply of natural gas to small-sized customers. Further, recently the IAA focused also its attention in the publishing and advertising sector: in fact, in 2016 and 2017 the IAA cleared with conditions three such concentrations, namely *Reti Televisive Italiane/Gruppo Finelco*, *Arnoldo Mondadori Editore/RCS Libri* and *Gruppo Editoriale L'Espresso/Italiana Editrice* (see earlier in this question).

Finally, from a merger control angle, the IAA increasingly seems to see itself as the watchdog for market structures at the local level, even going as far as identifying micro-markets through isochrone analysis, and requesting parties' and market data at such geographical level even for non-problematic concentrations. Local 'catchment' areas were also considered in the *Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen* banks merger, ultimately cleared without commitments in Phase II (2018).

## Reform proposals

### 35 | Are there current proposals to change the legislation?

Over the last few years the IAA has considered aligning the substantive test and the treatment of concentrative and cooperative full-function joint ventures with the EU merger rules, and the introduction of a simplified procedure for non-problematic mergers, but no formal steps have been taken in this respect.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The IAA decided six Phase II cases during 2018, and, in the first months of 2019, opened one; overall, it published 72 merger decisions in 2018.

While still displaying significantly diminished merger control activity compared to that up to the early 2010s, this year marks an increase compared to 2017 (which saw the clearing of only two Phase II operations) and may herald an inversion of the trend of contracting activity set in the 2013–2017 period. Said contraction appears mainly attributable to the significant reduction in the scope of IAA jurisdiction caused by a 2013 reform making the thresholds for notification cumulative, rather than alternative (pursuant to which, acquisitions even of very small undertakings by a large group used to regularly trigger a filing), thereby contributing to a steep drop from 500–600 filings per year to around 45–50. However, legislation passed in 2017, amending and lowering the second turnover threshold, has contributed to the higher activity in 2018.

In March 2019, the IAA opened Phase II proceedings on the acquisition by part of the Italian branch of television services provider Sky of the R2 unit Mediaset Premium, the technical platform for the supply of terrestrial digital television services of television content, and arguably the sole competitor of the Italian Sky branch. However, despite the formal abandonment of the deal by the parties, the IAA concluded with an innovative decision that the merger had in the meantime produced irreversible effects, having contributed to the exit of Mediaset Premium from the market and consolidating Sky's dominance. Consequently, the IAA imposed certain behavioural remedies to try to restore the competition conditions existing prior to the merger.

With regard to the cases that the IAA closed recently, the merger between eyewear colossus Luxottica and glass lens producer Barberini must be noted. The IAA imposed the commitment that the merged entity would enter into supply agreements with all interested market operators, among other things allowing the former clients of Barberini access to innovative products even where covered by IP rights, displaying openness to employing behavioural measures to remedy vertical or foreclosure issues, rather than exclusively structural measures.

Finally, a new IAA chairman (Roberto Rustichelli, a Naples commercial judge) started work in early May 2018; however, it is difficult to predict which shifts, if any, this change may entail to the IAA's agenda.

\* *The author would like to thank Riccardo Fadiga for his contribution to this chapter.*



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# Japan

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Chapter 4 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No. 54 of 1947, as amended) (the Antimonopoly Act or the Law) along with the relevant provisions of the Cabinet Ordinance and Regulations for the Law (the Ordinance and Regulations) prohibits certain forms of transactions including mergers and acquisitions, and sets out a filing requirement for certain transactions. The thresholds and detailed filing requirements are provided in the Law together with its Ordinance and Regulations. Criteria for business combinations that would cause substantive restraint to market competition and therefore are prohibited are set out in the 2004 Guidelines on the Application of the Antimonopoly Act for Reviewing Business Combinations as amended in June 2011 (the Merger Guidelines).

The Law is enforced by the Fair Trade Commission (FTC). The FTC is an external agency of the Cabinet Office (which is in principle equated with other government ministries positioned under the Cabinet), but the Law declares its independence from any external pressure as regards its operation. The empowered authority under the Law is the FTC but almost all the implementation procedures are delegated to the General Secretariat except for the ultimate high-level decision-making.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Share acquisitions, statutory mergers, statutory demergers, business transfers (ie, transfer of all or a significant part of the business of another company, transfer of all or significant business fixed assets of another company, leases of all or significant businesses of another company, delegation of management regarding all or significant businesses of another company, and contractual arrangements to share business profits and losses of another company) and the appointment of interlocking directorships are the categories of transaction regulated by the Law. Such transactions (or personnel arrangements) are prohibited if they cause substantial restraint of competition.

The Law sets out special rules for companies engaged in banking and insurance. Such companies are prohibited from acquiring more than 5 per cent (for companies engaged in insurance businesses, 10 per cent) of voting rights in another Japanese company, except for certain special cases, including when an approval by the FTC is obtained.

Share acquisitions, statutory mergers, statutory demergers and business transfers (transfer of businesses or business-related fixed assets only), if certain thresholds are met, are subject to a prior notification requirement. No filing requirement is imposed with respect to the creation of interlocking directorships.

#### 3 | What types of joint ventures are caught?

There are no specific separate rules for joint ventures. Typically, the establishment of a joint venture is caught by the filing requirement as are the respective acquisitions of shares in the joint-venture company by the investors, exceeding either the 20 or 50 per cent threshold. In contrast to the EU rules, no prima facie exemption is available based on the nature of the joint venture, such as whether it is full-function or whether it is not-for-profit, although such factors may be taken into account in the FTC's substantive review if it takes place.

The FTC normally examines, in the assessment of a joint venture, not only the possible unilateral anticompetitive effect potentially created by the joint venture itself, but also any coordinated anticompetitive effect on the competitive relationship between the parties to the joint venture. According to the Merger Guidelines, when each party transfers the entire business of a certain section or department to the joint venture, thereby creating a clear separation between the businesses of the joint venture and the parent companies, the FTC's examination is primarily limited to the unilateral anticompetitive impact of the joint venture itself. In other cases, the FTC also examines the risk that the parents of the joint venture collude with each other via the joint venture.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

In terms of the thresholds for the formal filing requirements, the present Japanese rules take a relatively simple approach. For share acquisitions, the Law provides thresholds defined by percentages (share acquisition to exceed 20 or 50 per cent), without using the concept of 'control' as in some other jurisdictions.

The concept of 'control' is, however, used to define the scope of a group company. Given that the filing thresholds rely on the Japanese turnover on a group company basis, the concept of control plays a significant role. It is provided by the relevant regulation that a parent-subsidary relationship is recognised when a company has control over another company's business or financial decision-making, taking into account various factors such as a minimum voting stake of over 40 per cent, board representation and loans.

For the purposes of substantive review, the concept of 'control' is also relevant. The Merger Guidelines provide detailed criteria to decide whether a share acquisition should fall under the scope of the FTC's examinations as to the competitive impact, and the criteria are primarily based on the concept of 'control', although the word 'control' itself is not used. For example, when the share acquisition results in a stake of over 50 per cent in the target company, or when the share acquisition results in over 20 per cent stake in the target company and the acquirer alone becomes the largest shareholder therein, the share acquisition qualifies for the FTC review (subject to certain exceptions) regardless of whether a formal filing obligation exists or not. Also, when the share acquisition

results in a stake of over 10 per cent in the target company and the acquirer ranks within the top three shareholders, various factors are considered to determine whether the FTC's substantive review should take place, such as the percentage of the resulting shareholding, distribution of stake between shareholders, mutual shareholding between the acquirer and the target, interlocking directorships between them, and their business relationships.

There is no concept of 'joint control' unlike in other EU-style jurisdictions. As a result, if a joint venture is owned by two parent companies, each 50 per cent, with equal rights in terms of number of board members or decision-making powers in key strategic issues (ie, deadlock relationship), none of the parents is regarded as having 'control' over the joint venture and therefore it is understood that the joint venture does not belong to either of the parents' groups for the purpose of merger control reportability. There is some room for case-by-case analysis and this aspect should be carefully evaluated, but this principle is unique to the Japanese system.

### Thresholds, triggers and approvals

#### 5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Different thresholds apply, depending on the transaction structures as illustrated below. The categorisation is based on structures used in the Japanese Companies Act and, as a result, it is often difficult to decide which category a foreign transaction would fall under. Generally speaking, the FTC tends to take an analytical approach looking to the exact contractual formats rather than the 'big picture'. For example, a foreign transaction that would be perceived as a transfer of business could be interpreted under Japanese law as a combination of multiple share acquisitions. When the reportability is unclear, it is safest to consult the FTC.

#### Share acquisition

A company acquiring shares in another company (where both are above a certain size, as described below) must file a notification with the FTC prior to the transaction, when all the following thresholds are met:

- the ratio of voting rights held by an acquiring company in an issuing company exceeds either of the 20 or 50 per cent thresholds;
- the acquiring party as a group has Japanese turnover of more than ¥20 billion; and
- the target as a group (the target entities and subsidiaries, not including the entities staying with the seller) has Japanese turnover of more than ¥5 billion.

When calculating Japanese turnover, in principle both direct and indirect sales in and into Japan made by the company group during the most recent financial year should be included except for intra-group captured sales.

There are separate rules for collective share transfer, which is a transaction form available under Japanese corporate law that allows more than two companies to create a common holding company. For this form of transaction, when one of the parties as a group has Japanese turnover of more than ¥20 billion and the other (another) party has Japanese turnover of more than ¥5 billion, the FTC filing is triggered.

#### Statutory merger or demerger

In respect of statutory mergers, a filing must be made with the FTC when both of the following thresholds are met:

- one of the parties as a group has Japanese turnover of more than ¥20 billion; and
- the other party as a group has Japanese turnover of more than ¥5 billion.

There are more detailed rules for statutory demergers.

#### Business asset transfer

Regarding business or business-related fixed-asset transfers, a filing must be made with the FTC when the following thresholds are met:

- the transferee company as a group has Japanese turnover of more than ¥20 billion and the target business or business-related assets satisfies any of the following:
  - whole business of another company with Japanese turnover of more than ¥3 billion;
  - key business of another company with corresponding Japanese turnover of more than ¥3 billion; or
  - whole or key part of another company's business-related fixed assets with corresponding Japanese turnover of more than ¥3 billion.

#### Substantive test

Even if a transaction does not meet this threshold, technically it is still subject to the substantive test set out in question 19. When the application of the substantive test is expected, parties are recommended to go through voluntary consultation with the FTC to avoid post-transaction remedy orders. This is not a legally binding rule and the Law does not stipulate any threshold for parties to consider voluntary consultation. The Merger Guidelines, however, provide useful yardsticks in this respect. The substantive test would catch non-notifiable transactions if the anticompetitive effect is material, in which case parties are advised to engage in voluntary consultation. In particular, when a transaction is subject to merger control in other jurisdictions (especially the United States and European Union) and the anticompetitive impact in Japan is expected to be substantial, the FTC tends to obtain such information via intergovernmental channels and sometimes contacts the parties, even in the absence of a filing obligation.

#### 6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory if the conditions discussed above are met. Transactions within the same company group are exempted from the filing requirement.

#### 7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes, foreign-to-foreign mergers have to be notified. The same criteria apply to foreign-to-foreign transactions.

#### 8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes. In respect of foreign shareholdings in Japanese companies, there are some regulated industries where foreign ownership levels are limited by specific sectoral legislation. For example, NTT, a holding company of the dominant national telephone carrier, must be less than 33.3 per cent foreign-owned. Also, foreign shareholdings must be less than 20 per cent for terrestrial and radio broadcasters and less than 33.3 per cent for domestic airlines.

Also, the Foreign Exchange and Foreign Trade Law applies to foreign direct inward investments to Japan, requiring a party that has made an investment in Japan to make a post-fact filing with the Ministry of Finance through the Bank of Japan within 15 days of such an investment in most cases. For certain industries (such as the energy sector) prior filing is required.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no deadline requiring a notification within a certain period of time following a particular transactional event (signing or board resolution, etc), although a notification must be made with the FTC 30 days prior to the closing of the transaction. When a notification is submitted, the FTC issues an acceptance notice to confirm the filing date, and the parties are subject to a 30-day waiting period following such date. If the parties fail to make the required filing or close in breach of the waiting period, a fine of up to ¥2 million may be imposed. However, to our knowledge no such criminal sanctions have ever been imposed, although parties that have failed to file are often requested to file a delayed report with a brief explanatory note setting out the reason for such delay and measures to be taken to avoid future negligence. The FTC can also apply to the court for annulment of any statutory merger or demerger for which the parties failed to file, but it has never yet done so.

In 2016, the FTC formally criticised, although with no penalty, a specific two-step structure used in an auction transaction with the aim of expediting the closing timeline by avoiding an initial FTC filing. This two-step structure was also investigated by overseas authorities including a financial penalty in China. This case demonstrated the FTC's increasing appetite to intervene more closely in potential gun jumping attempts.

#### 10 | Which parties are responsible for filing and are filing fees required?

In the case of a statutory merger or demerger, both companies intending to effect the merger or demerger are jointly responsible for filing. For a business transfer or business-related fixed-asset transfer and share acquisition, the acquiring company is responsible. The FTC does not charge any filing fees.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Where a notification to the FTC is required, the parties cannot close the transaction for 30 days following the filing. When a notification is submitted, the FTC issues an acceptance notice to confirm the filing date. It is possible that the FTC does not accept an initial submission as a sufficient notification, in which case the parties should revise the notification to ensure that all required information is provided in the notification. To avoid such uncertainties, as a practice recommended by the FTC, companies normally submit a draft notification informally to the FTC in advance for the FTC to review even if there is no substantive competition issue.

As in pre-notification consultation in the European Union, the parties can discuss the substantive issues with the FTC before submitting the notification formally, and this process can take several months if there are several rounds of questions and market testing is conducted, before the FTC grants an informal greenlight to submit formally.

As a unique rule of Japanese law, which is different from many other jurisdictions, once the 30-day waiting period lapses, the parties can close the transaction legally even if the FTC has not completed its substantive review, although as explained below the FTC can reserve the right to take action for a certain period of time by requesting additional material or information before the expiry of the 30-day waiting period.

If the FTC asks one or more of the companies during the waiting period to submit additional material or information, the FTC may still take action even after the expiry of the waiting period, subject to statutory time limitation: any action must be taken prior to the later of

120 days from the date of acceptance of the notification or 90 days from the date of submission of the additional material.

The FTC has the discretion to shorten the 30-day waiting period. In the old regime before the 2011 Amendment, the FTC was reluctant to shorten the waiting period except for very rare cases. However, in the new regime the FTC is likely to be more generous in agreeing to shorten the waiting period, although there is some uncertainty as to whether a shorter period is always available if applied.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There has been no precedent where the FTC challenged 'gun jumping' with a penalty. It is, however, possible under the Law for the FTC to take measures against transaction parties who have actually or effectively closed the transaction before the required clearance. In fact, as mentioned above, in 2016 the FTC formally criticised, although with no penalty, a specific two-step structure used in an auction transaction with the aim of expediting the closing timeline by avoiding an initial FTC filing. Considering the increasing global trend to regulate 'gun jumping', a similar level of caution as used in the most aggressive jurisdictions, such as the United States and European Union, is also prudent with regard to the FTC.

### Criminal penalty

A person who closes a transaction (executing a share transfer or registering a merger or demerger in the relevant company registry) before the expiry of the waiting period is subject to a criminal penalty of up to ¥2 million. As is the case for other criminal penalties under the merger control regime, in practice the FTC has so far not imposed such sanctions.

### Remedies

Apart from the criminal sanctions, the FTC may also order remedies that require the parties to take certain measures to restore competition in the relevant market if the transaction may restrict competition.

### Court action for annulment

Further, the FTC may petition the court for annulment of a merger or demerger on the ground that a transaction requiring a notification has been closed during the 30-day period described above, and the court may invalidate the transaction. The FTC has, however, never yet done so.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As discussed above, there have been no cases in which a sanction has been imposed against any company, either Japanese or foreign, for closing before clearance. However, the rules do allow the FTC to challenge foreign-to-foreign mergers as long as an impact exists and affects the Japanese market. In fact, the FTC proactively investigated BHP Billiton at the time of its merger discussions with Rio Tinto, which indicates the FTC's general policy of not hesitating to investigate foreign transactions.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under the Japanese rules, as long as the 30-day waiting period has lapsed, technically the parties can close a transaction legally without waiting for the FTC's substantive clearance (completion of substantive

review). However, even after the expiry of the 30 days, the parties remain exposed to the risk of receiving an FTC remedy order in a case where substantial antitrust concerns are raised by the FTC. Very occasionally, closing before clearance could become an issue in a foreign-to-foreign merger under a pressing schedule that cannot afford even the 30-day waiting period, but because of this risk, most companies choose not to close before clearance. The prohibition of closing itself does not extend beyond the 30 days, but technically the FTC may petition a court for an interim suspension of the deal.

It is not theoretically precluded that the parties try to agree with the FTC on a 'hold-separate' arrangement, but to our knowledge there is no precedent for such an attempt.

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

There are no competition law rules specifically applicable to public takeover bids. There is no clear rule as to when a notification can be filed with the FTC in the case of a takeover bid, but the announcement of the takeover bid is likely to become an important milestone for deciding the timing of notification, subject to case-by-case consultation with the FTC. It is generally understood that when a takeover bid requires an FTC notification, the registration statement for a takeover bid to be filed with the Japanese Financial Services Agency needs to disclose the merger filing requirements under the Law, and the offeror can express in the registration statement that failure to obtain the required antitrust clearance may cause the offeror to withdraw from the takeover bid.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

To file a transaction with the FTC, a company must comply with the format prescribed by the FTC (different forms are set out for each transaction category), which can be downloaded from the FTC's website. The filing, including parts of the additional documents to be attached to the form, must be in the Japanese language. As a result, when a foreign company prepares for a notification, sufficient time should be allowed for translation. Unlike Form CO in the European Union, which has to be prepared in flowing text, the Japanese form simply sets out tables into which reporting parties insert relevant information and data. An applicant is not expected to provide its own economic analysis of the market or detailed market data (except for very high-level data) in the filing. The FTC format on its own does not require notifying parties to fully express its own argument to justify the transaction.

The following are the details, among other things, that should be included in the form:

- descriptions of the companies involved including their affiliated entities and economic importance measured by assets or sales;
- the purpose and background of the transaction;
- information regarding shareholding relationships between the companies involved; and
- high-level market information, including types of products or services subject to horizontal overlap or vertical relationship between the parties, geographical coverage of such businesses, ranking and market shares of key players.

Additional documents must be provided (different requirements apply depending on the transactional category of share acquisition, statutory merger, demerger and business transfer, respectively), including the latest annual report, balance sheet, a profit and loss statement, articles

of incorporation, a copy of the transaction agreement, and a record of the shareholders' approval of the transaction.

To supplement the relatively simple notification form for a difficult matter, parties can submit additional information to supplement the notification form in the course of pre-notification consultation with the FTC, as in the European Union, to avoid Phase II, which makes the timetable more unpredictable. The 2011 amendment clarified in the implementation regulations that parties can submit such supplementary documents.

During the review, the FTC requests additional information, and sometimes these requests are more demanding than those of other authorities, particularly around supporting evidence as to market definitions. Recently, the FTC has also requested internal documents, although usually on a voluntary basis.

Submission of false information is subject to a criminal penalty of up to ¥2 million, but we are not aware of any cases where such a penalty was actually imposed.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

Parties can discuss issues with the FTC through pre-notification consultation as in the European Union. Companies are encouraged to use pre-notification consultation to avoid Phase II review, by submitting extensive information proactively at this stage if the transaction is potentially problematic.

Once a notification is submitted, if the FTC finds that the filing raises any issues under the Law in Phase I, it is likely to contact the parties informally first. The FTC can also formally request more information by a written request (report request) as mentioned in question 18, although such a formal request triggers Phase II review. Further, if the parties fail to respond properly to the FTC's request for information or otherwise the FTC considers that more proactive investigation is necessary, it may commence a formal investigation and has the power to interview relevant parties (eg, suppliers, competitors, employees, executives, customers) and examine related documents.

The FTC often interviews customers of the parties in addition to carrying out document-based assessment. If the parties are manufacturers with substantial production facilities, the FTC may visit such facilities. Such interviews and site visits could potentially take place either during Phase II review or, depending on the case, at the pre-notification stage.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

Following the submission of a notification, the FTC issues a notice that confirms the date when the FTC officially accepted the notification. The parties are subject to a 30-day waiting period starting from such date (Phase I). If the FTC requires one or more parties to the transaction to submit additional materials or information (report request) before the expiry of the waiting period, Phase II review is triggered. According to a literal reading of the Law, the parties can still complete the transaction upon the expiry of the 30-day period even when the FTC has not completed their substantive review, but once Phase II is triggered, the FTC may take action even after the expiry of the 30-day waiting period prior to the later of 120 days from the date of the FTC's acceptance of the notification or 90 days from the date of submission of the additional materials or information. Thus, the parties are subject to de facto prohibition from closing until a clearance is given.

The FTC issues a written confirmation of its clearance at the end of both Phase I and Phase II.

The FTC often shortens the waiting period in response to the parties' specific request. When Phase II review is triggered, the case is disclosed on the FTC website for third-party comments, and a summary of the FTC's analysis also appears on the website after the completion of the review.

Before the formal timeline starts, usually, in particular in a difficult case, there are informal pre-notification discussions as in the European Union. Especially where the FTC conducts market testing and there are several rounds of questions, this process can take several months.

There have been some recent cases where the FTC requested, on a voluntary basis, parties' internal documents. The requests were not as formal as those seen in the United States and European Union, but this may become a more common practice.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The FTC reviews individual mergers and acquisitions in light of whether competition in the defined market will be substantially restrained.

#### Safe harbour

For horizontal transactions, criteria suggested by the Merger Guidelines are:

- Herfindahl-Hirschman Index (HHI) after the business combination (post-HHI) is not more than 1,500;
- post-HHI is over 1,500 and not more than 2,500 and the increase in HHI is not more than 250; or
- post-HHI is more than 2,500 and the increase of HHI is less than 150.

For vertical and conglomerate transactions, the suggested criteria are:

- the combined market share is not more than 10 per cent in any related markets; and
- post-HHI is not more than 2,500 and the combined market share is not more than 25 per cent in any related market.

These numerical thresholds are not absolute but merely for indicative purposes, and the actual review process is conducted in the light of a number of factual elements, which are listed in the Merger Guidelines. It is also suggested in the Merger Guidelines that if the post-HHI is not more than 2,500 and the combined market share is not more than 35 per cent, the business combination is less likely to be regarded as restraining competition.

#### Factors to be considered

Different sets of factors apply to assess unilateral conduct and coordinated conduct that are expected as a result of the transaction, but generally speaking, the following are among the factors listed in the Merger Guidelines: market position of the parties and the state of competitors, imports, entry, competitive pressure from related or neighbouring markets, competitive pressure from users, overall business capabilities, efficiency and financial strength of the company parties. 'Failing firm' defence is not something that is regularly used and acknowledged, but while the hurdle is not low, it is worth exploring where such a claim is relevant.

#### 2011 amendment of guidelines

More detailed rules were included in the Merger Guidelines for the analysis of import pressure, and the possibility of defining 'global market' beyond the national market. This was to more accurately reflect the existing review practice of the FTC and no significant change to its review policy in substance has been observed so far.

#### 20 | Is there a special substantive test for joint ventures?

There are no specific criteria for joint ventures and, in principle, the substantive test set out in question 19 also applies to joint ventures. The Merger Guidelines, however, include a few general statements regarding anticompetitive behaviour that may arise in joint ventures. For example, it is stated that in assessing the effect of a joint venture on competition, the commercial relationship between the investors in the joint venture should be examined, given that the investors could, without having any direct capital tie-up between them, indirectly create an anticompetitive business combination. In this respect, whether the investors have transferred the business in a given sector to the joint venture entirely or partially is also taken into account. In the case of partial transfer of business where the investors still retain some interest or activities in the same business sector, the risk of anticompetitive effect is likely to be higher as compared with a case of complete transfer in a certain sector.

#### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

As a general principle, the Law prohibits and regulates three categories of anticompetitive activities of undertakings: private monopolisation, unreasonable restraint of trade (including cartels) and unfair trade practices. The rationale behind the merger control regulation is primarily to prevent private monopolisation. The Merger Guidelines do not directly address 'theories of harm' per se, and the underlying philosophy for merger control is ultimately governed by the general principle of 'whether a transaction would substantially restrain market competition'. However, it does provide different evaluation yardsticks for different transaction categories identified based on the structure and nature of the transaction. The Merger Guidelines have chapters on horizontal business combinations and vertical or conglomerate business combinations, or both, and also differentiate between the anticompetitive impact of unilateral conduct and that of coordinated conduct.

The FTC is currently considering the need to analyse the role and impact caused by 'big data' possessed by the merger parties in the context of merger review. This follows various discussions held, particularly in the European Union, and will become an additional consideration in Japan, for instance in mergers involving platform businesses.

Generally speaking, even compared to some other authorities, the FTC appears to be interested in hearing about new technologies and more generally 'innovation' aspects, so it is worth exploring this argument where it is relevant.

The concept of 'common ownership' could be captured by the FTC, considering that the Merger Guidelines indicate that a mere 10 per cent shareholding could be considered as having a potential impact on competition, but, at least currently, we are not aware of any specific initiative by the FTC to pursue this aspect.

#### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The Merger Guidelines do not expressly include non-competition issues to be considered in the review process.

#### Merger control in the context of specific industries

In certain regulated sectors, non-competition issues may be considered as part of the process of consultation with regulatory authorities. For example, for the purpose of certain telecommunications businesses, the transfer of a business licence as a result of a merger or acquisition is subject to approval by the Ministry of Internal Affairs. Likewise, as

regards air transport, approval from the Ministry of Land, Infrastructure and Transport is mandatory with a view to transferring business licences following a merger or acquisition. The Law includes special rules for share acquisitions in the banking and insurance sector as described above, and in examining applications for approvals, the FTC must consult with the Financial Services Agency (FSA). In addition to the Law, the Banking Law and the Law Concerning Insurance Businesses require banks and insurance companies to obtain FSA approval for certain mergers and acquisitions.

### Public interest

Public interest per se is not mentioned as a factor in the FTC review process, but especially in the context of regulatory assessment in a specific industry, public interest would be taken into account. This was debated in some expert communities in the context of a recent series of FTC merger reviews involving local banks, where the FTC expressed concerns at potential concentration in the relevant local markets, whereas some interested groups argued the public interest to be recognised in rescuing troubled local banks. To our knowledge, the FTC do not openly acknowledge 'public interest' as a factor in their review.

### Economic efficiencies

**23** | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is listed in the Merger Guidelines as a factor to be considered in the review process. However, the extent to which the improvement of economic efficiency offsets the anticompetitive impact is restricted by the following conditions: the efficiency improvement must be specific to the business combination and not capable of being achieved by other available means; the efficiency improvement must be practically possible; and it must enhance users' welfare. The Merger Guidelines also state that a merger or acquisition would rarely fulfil these three conditions when it generates a monopoly or a situation close to monopoly.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

**24** | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The FTC can either issue remedy orders to rectify a breach of the Law or petition a court for annulment of the transaction, although no precedents exist for the latter. For the purposes of the former, the FTC is required to give prior notice and provide the parties concerned with an opportunity to make submissions. If the FTC issues such an order and the parties are dissatisfied, they may request the FTC to hold a hearing.

### Remedies and conditions

**25** | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The Merger Guidelines clearly state that remedies can relate to the behaviour of the parties, although in principle a structural measure such as divestment is preferable. The Merger Guidelines list possible remedies, including divestment, such as partial transfer of business in a given sector, or termination of a business or capital relationship with other entities, or alternatively long-term supply agreements regarding the product concerned if the former is difficult to achieve. When such primary measures are not viable, the parties are advised to take, as secondary remedies, measures to promote imports or new entry into the relevant market, or to increase the independence of each undertaking

(eg, by setting up an information firewall or prohibiting the purchase of raw materials from a communal seller).

Types of remedy that have been ordered in the past include partial disposal of shareholding, abolition of interlocking directorships, partial transfer of business facilities, technology licensing to a competitor, production of certain competitors' products and prohibition of the acquirer's intervention in the target's own business decision-making. Compared to the general tendency, for example in the European Union and United States, to clearly prefer divestiture, it appears that the FTC may be more open to behavioural remedy options.

**26** | What are the basic conditions and timing issues applicable to a divestment or other remedy?

In terms of procedures to finalise the contents of remedies, the FTC introduced the Commitment System from the beginning of 2019, and the guidelines clearly state that in the context of finalising merger remedies, the timeline and procedural requirements under the new Commitment System will apply. It is not entirely clear from the guidelines, but the general understanding is that the traditional procedures for merger remedies (ie, with no timeline or specific documents required except for that the parties have to give details of the remedy in the final section of a formal filing once the remedy is decided) would technically continue to apply. As of the time of writing, this new mechanism has not been seen in operation in merger contexts, and as a result it is still unclear how it operates and also what the relationship is between the old rules and the Commitment System.

The following describes the current system.

### Conditions

The basic condition applicable to a divestment order or other remedy is that the remedy is able to restore the competition that is likely to be undermined, by limiting the freedom of the merging parties to set market prices and other market conditions. Upon request by the parties, the FTC sometimes subsequently permits the parties to modify or terminate remedies, provided that this would not result in a substantive restraint to competition.

There is no independent format to submit a proposed remedy or to agree on a remedy. When a remedy is agreed between the parties and the FTC during the review, either Phase I or Phase II, after the submission of notification, the parties are requested to submit an amendment of the original notification to reflect the agreed remedy.

### Timing

In principle, remedy measures should be implemented before a transaction comes into effect. However, when a remedy is to be implemented only after the transaction enters into force, the deadline to implement the remedy needs to be specified clearly and appropriately. In particular, in the case of a partial business transfer, ideally the purchaser should be decided and approval obtained from the FTC before the transaction takes effect, although unlike some other jurisdictions the requirement to secure upfront buyers and have them approved is not regarded as an established precondition for the FTC's clearance. At present, there is no EU-style established rule or practice of involving trustees.

**27** | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As long as a substantial restraint to competition in the Japanese market is expected, remedies are required even for foreign-to-foreign transactions. Indeed, foreign companies have agreed and implemented remedies in a number of previous transactions reviewed by the FTC. There is no recent precedent where a cease-and-desist remedy order

was issued for a foreign-to-foreign transaction, but this does not mean that the FTC is reluctant to order remedies regarding foreign-to-foreign transactions. It is simply because of the common practice, up until now, of arranging remedies on a voluntary basis before a cease-and-desist order is issued. If remedies cannot be agreed by the end of Phase II, a cease-and-desist order may indeed be possible.

### Ancillary restrictions

**28** | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is no express guidance in this respect either in the Law or the Merger Guidelines. In general, however, even if the FTC does not request or order remedies or bring court action for annulment regarding a transaction, the FTC can still challenge certain ancillary restrictions between the parties. In that sense, a merger clearance does not protect ancillary restrictions, and therefore ancillary restrictions are still subject to challenges on the basis of other competition rules. It is very likely, however, that the FTC would order the parties to exclude or amend anticompetitive ancillary provisions, if such arrangements are obvious at the time of merger control review. To that extent it is worth considering putting any ancillary arrangements before the FTC, as this may implicitly or explicitly provide a degree of comfort in implementing the arrangement.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

**29** | Are customers and competitors involved in the review process and what rights do complainants have?

Yes. The FTC often interviews customers of the parties as well as competitors.

Also, the law stipulates as a general right that anyone (therefore including customers and competitors) who perceives an infringement of the law may report to the FTC the relevant facts and call for appropriate measures to be taken. It is possible, although at present uncommon, for customers or competitors to make a complaint to the FTC in respect of certain transactions during the course of the review process. In this event, the FTC is then required to investigate and, even if it decides not to take any measures, it must inform the complainant of its decision.

There has been a precedent where the FTC started to investigate a foreign-to-foreign merger in response to a complaint raised by customers, even though a transaction did not trigger a filing.

### Publicity and confidentiality

**30** | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Reports filed with the FTC are not made public, although the contents could be partially summarised and disclosed if the transaction, either at Phase I or Phase II, has value as a precedent. In addition, in the rare event that the FTC issues a remedy order, detailed information will be fully disclosed. In 2017, the FTC started to disclose information on all filed cases in 2017, to include: parties' identities, industry, structure of the transaction, clearance date, short track or not.

### Website disclosure of Phase II cases

When Phase II is triggered, this fact is published on the FTC website for third-party comments. Further, in the case of a Phase II review, the final analysis and observations are made public as 'major business combinations' as an annual report on the FTC website, which is published every June. The FTC contacts the parties prior to such publication to

ensure that such public disclosure does not include trade secrets or any other commercial information that the parties would not wish to be made public. The parties can request the FTC to limit the information disclosed on the website so as to omit certain sensitive information. Some cases are disclosed on the website without disclosing the names of parties involved.

### Cross-border regulatory cooperation

**31** | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The FTC cooperates very actively with other major jurisdictions on specific cases. It is, therefore, very important that submissions to the FTC are consistent with those made in other jurisdictions, particularly the United States, the European Union and Korea.

### Cooperation in individual cases

In 1999, the governments of Japan and the United States concluded an agreement concerning Cooperation on Anticompetitive Activities. Similar agreements were signed in 2003 with the European Union and in 2005 with Canada. The primary purpose of these bilateral frameworks is to promote collaboration between the competition authorities of both parties in terms of information gathering and implementation of each party's antitrust legislation. Japan has also signed economic partnership agreements with Brunei, Chile, India, Indonesia, Malaysia, Mexico, Peru, the Philippines, Singapore, Thailand and Vietnam, and these contain a chapter on collaboration on antitrust issues. The actual status and development in the implementation of these bilateral instruments is not clear, particularly given the less active enforcement of merger regulations in some countries, but it seems that as regards large-scale multi-jurisdictional transactions (especially when involving US, EU and Korean authorities) the FTC does have extensive exchange of detailed information with other authorities in the course of its merger control review.

### Other policy discussions

The FTC has been active in various international forums (ICN, OECD, APEC, etc) including general policy discussions and capacity building for developing countries in connection with antitrust legislation.

## JUDICIAL REVIEW

### Available avenues

**32** | What are the opportunities for appeal or judicial review?

Under the previous rules, when the FTC issued a cease-and-desist order and the parties to the transaction were dissatisfied, they could request the FTC to initiate the procedure for a hearing and file a court challenge if they were dissatisfied with the FTC's decision. Since April 2015, the FTC hearing proceeding has been abolished and instead the first-stage appeal of the FTC's cease-and-desist order will be made to the Tokyo District Court. There are various discussions among practitioners as to how this new system should be used in practice.

### Time frame

**33** | What is the usual time frame for appeal or judicial review?

As described in question 32, a legal action to challenge the decision of the FTC must be filed within 30 days of the date on which the decision became effective. According to a report by the FTC, the Tokyo High Court has rendered its decision within one year in recent cases.

After the amendment, the time limit for filing an appeal with the Tokyo District Court will be subject to the general rules, under which the plaintiff must file an appeal within six months.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The latest data publicly available is for fiscal year 2018 (1 April 2018 to 31 March 2019). In this period a total of 321 filings were made.

The number of notified transactions slightly increased compared with fiscal year 2017, by 4.9 per cent.

Of the 321 cases filed during the fiscal year 2018, 315 were cleared in Phase I (98.1 per cent) and two cases were reviewed in Phase II (0.6 per cent).

In 2008, the FTC investigated the proposed acquisition of Rio Tinto by BHP Billiton. Under the old rules before the 2009 Amendment, the acquisition did not trigger the formal filing requirement, but the combined market share via direct export into Japan was high. The acquisition in 2008 was aborted and the investigation did not reach a final conclusion, but this case is a clear manifestation of the FTC's intention to intervene in foreign-to-foreign transactions as strictly as in domestic transactions.

### Reform proposals

35 | Are there current proposals to change the legislation?

A significant change took place in 2011, including abolition of prior consultation where a final clearance used to be informally given for difficult mergers. An EU-style pre-notification process has replaced this and, therefore, a final clearance will not be made until the legislative Phase I or Phase II review as provided by the Law. The Merger Guidelines were amended to include more detail on evaluating import pressure and assessing a global market. A further amendment was adopted in the Diet in December 2013 (to come into force in the first half of 2015 at the latest) to abolish the FTC hearing proceedings as a first-stage appeal and also to improve due process by expanding the scope of evidence disclosure at pre-decision stage and introducing a more systematic oral hearing as available in the European Union.

## UPDATE AND TRENDS

### Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There have been various discussions about how to treat data and privacy primarily in the context of internet platform businesses. As at the time of writing, it is still being discussed whether new legislation is needed in this area. The target of any such legislation or rules would be primarily behavioural conduct rather than merger reviews, but any new theory of harm would potentially affect merger reviews as well.



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# Kenya

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

In Kenya, merger control is regulated by the Competition Act No. 12 of 2010 as amended by the Competition (Amendment) Act No. 49 of 2016 (the Act), together with all subsidiary legislation and rules created thereunder. The Act is enforced by the Competition Authority (the Authority) and is headed by a director general who is vetted by the National Assembly.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Any transaction, irrespective of its size, which has the effect of being a 'merger' is subject to notification and prior approval by the Authority. The Act defines a 'merger' as an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.

In particular, it involves any transaction that results in the direct or indirect acquisition or establishment of direct or indirect control over the whole or part of the business of an undertaking by one or more undertakings. The Act provides a non-exhaustive list on how a merger may be achieved including:

- a purchase or lease of shares, an acquisition of an interest, or a purchase of assets of the other undertaking;
- the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently;
- the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;
- the acquisition by whatever means of the controlling interest in a foreign undertaking that has a controlling interest in a subsidiary in Kenya;
- in the case of a conglomerate, the acquisition of the controlling interest of another undertaking or in a section of the undertaking being acquired capable of being operated independently;
- vertical integration; and
- the exchange of shares between or among undertakings that result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings or by an amalgamation, takeover or any other combination with the other undertaking.

Moreover, the Consolidated Guidelines on the Substantive Assessment of Mergers under the Act (the Consolidated Guidelines), which have no force of law but are a guide on how the Authority assesses mergers, provide direction on the Authority's exercise of its jurisdiction to review

mergers. To the extent that a proposed transaction involves undertakings where at least one aspect of the merger will have an appropriate nexus on competition within Kenya or a substantial part of Kenya, the Authority will exercise jurisdiction.

For the extraterritorial application of the Act, see question 7.

#### 3 | What types of joint ventures are caught?

Currently, the Act does not have provisions relating to joint ventures. Nevertheless, under the Consolidated Guidelines, where a joint venture is structured so as to have the effect of a 'merger' as defined by the Act, then the merger control provisions will apply if the joint venture is a 'full-function' joint venture. A full-function joint venture is one that performs all the functions of an autonomous economic entity for a long duration (ordinarily 10 years or more). A joint venture that takes over the business activities of a parent company without direct access to the market or a joint venture that principally functions as the sales agent of a parent, or a joint venture formed for a specific period will not ordinarily be deemed to be a 'full-function' joint venture.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

A person 'controls' an undertaking under the Act if that person:

- beneficially owns more than half of the issued share capital or business or assets of the undertaking;
- is entitled to a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- is able to appoint, or to veto the appointment, of a majority of the directors of the undertaking;
- is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act, 2015;
- in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
- has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the points above.

Minority interests, board and management representations, contractual arrangements and other interests are captured where a person

exercises 'control' as contemplated above. The Consolidated Guidelines, however, indicate that the Authority will not ordinarily view an acquisition of a minority interest below 20 per cent of the voting securities of an undertaking held only for the purpose of passive investment without exercising influence over the affairs of the undertaking as an exercise of 'control'.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Currently, all 'mergers' (as such term is defined in the Act) are notifiable. In addition to the types of transactions identified in question 2, the Consolidated Guidelines and in particular, the Guidelines for Exclusion of Proposed Mergers from the Provisions of Part IV of the Act (the Merger Threshold Guidelines) indicate that transactions meeting any of the following thresholds require notification and approval before implementation:

- undertakings that have a minimum combined turnover or assets of 1 billion Kenya shillings and the turnover of the target undertaking is above 100 million Kenya shillings;
- undertakings in the healthcare sector, where the undertakings have a minimum combined turnover or assets of 500 million Kenya shillings and the turnover of the target undertaking is above 50 million Kenya shillings;
- undertakings in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds 4 billion Kenya shillings; and
- undertakings in the oil sector, where the merger involves pipelines and pipeline systems that receive oil and gas from processing fields belonging to and passing through the meters of the target undertaking, even where the value of the reserves is below 4 billion Kenya shillings.

Equally, the Consolidated Guidelines identify the following transactions for which exclusion from the provisions of Part IV of the Act may be applied for to the Authority:

- any mergers where the combined turnover or assets of the merging parties is between 100 million and 1 billion Kenya shillings;
- any mergers in the healthcare sector where the combined turnover or assets of the merging parties is between 50 million and 500 million Kenya shillings;
- any mergers in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger is below 4 billion Kenya shillings;
- any mergers in the carbon-based mineral exploration and prospecting sector;
- any acquisition of voting shares where the acquisition is less than 25 per cent, that does not amount to acquisition of direct or indirect control where the shares are acquired solely for investment purposes or in the ordinary course of business;
- any acquisition of further voting securities by an undertaking that already holds more than 50 per cent of the shares, unless the acquisition is a transfer of joint control to sole control; and
- any acquisition of assets that meet the merger notification thresholds, where the assets in question are those acquired solely as an investment or in the ordinary course of business, not leading to control of the acquired undertaking.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Presently, notification is mandatory. Provision has, however, been made for mergers to be excluded by the Authority from the requirements of Part IV of the Act upon application and approval by the Authority. In particular, the Consolidated Guidelines and the Merger Threshold Guidelines stipulate certain thresholds below and within which the Authority may consider excluding a merger from a 'full' notification. See question 5.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Act has extraterritorial application with respect to the conduct outside Kenya by a citizen of Kenya or a person ordinarily resident in Kenya, or a body corporate incorporated in Kenya or carrying on business within Kenya, or any person in relation to the supply or acquisition of goods or services by that person into or within Kenya, or any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya.

In determining whether it has jurisdiction over a foreign-to-foreign merger, the Authority considers both the merger notification thresholds (see question 5) and other economic and business factors to determine whether a foreign-to-foreign merger has a connection to competition within Kenya or a substantial part of Kenya. In particular, the Authority has identified the following as additional factors that it will consider in making such a determination:

- whether an undertaking party to the merger has a significant presence in Kenya, as evidenced by turnover or assets in or into Kenya;
- whether revenue is generated in Kenya by an undertaking party to the merger; or
- whether an undertaking party to the merger acquires direct or indirect control over the strategic commercial affairs of the other undertaking party to the merger and such strategic commercial decisions will have an effect on trade in or into Kenya.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act makes no provision restricting or regulating foreign investments into Kenya. However, the insurance, ICT, banking and air services industries are subject to sector-specific legislation that limits the extent to which non-Kenyan citizens can own undertakings licensed in Kenya. Moreover, mergers involving those industries have to obtain approval from the relevant regulatory authorities concurrently with merger control approval from the Authority:

- banks must obtain the approval of the Cabinet Secretary of the Ministry of Finance, where they intend to amalgamate or transfer the assets or liabilities of any banking institution;
- insurance companies are required to obtain the approval of the Insurance Regulatory Authority before a transfer or amalgamation of any insurance business can be effected, or before a party can acquire or dispose of more than 10 per cent of the paid-up share capital or voting rights of an insurer; and
- in the ICT sector, a holder of a communications licence is required to seek the approval of the Communications Authority of Kenya where a change in shareholding shall exceed 15 per cent or where an acquisition by an existing shareholder results in a 5 per cent increase in shareholding.

Kenya also has legislation in place that guides foreign direct investment into the country. The Investment Promotion Act No. 6 of 2004, and the Foreign Investments Protection Act Chapter 518 provide the regulatory framework for the promotion and facilitation of foreign investment into Kenya including obtaining licences necessary to invest in the country as well as protecting foreign investments once made.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Act has no deadlines for filing. However, parties to a merger are required to notify the Authority and obtain approval before implementing the proposed merger. For sanctions relating to implementation prior to notification and approval, see question 12.

#### 10 | Which parties are responsible for filing and are filing fees required?

The acquiring undertaking and the target undertaking in a proposed merger are each required to notify the Authority. Filing fees are payable based on the combined turnover or assets of the merging parties in Kenya.

The Act does not prescribe which party is responsible for the payment of filing fees, and in practice, the merging parties share the liability

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Ordinarily, the Authority acknowledges receipt of a merger application within three days of receipt.

The Authority is required to make a determination:

- within 60 days of the date that it receives a merger filing;
- if the Authority has requested for further information, within 60 days of the date of receipt of such information; or
- if the Authority has convened a hearing conference, within 30 days of the date of conclusion of the conference.

Moreover, if the Authority is of the view that a transaction is complex, it is permitted to extend the determination period by an additional 60 days prior to the expiry of any of the foregoing determination periods, by giving a written notice to the undertakings involved.

As indicated in question 9, implementation of the merger transaction is prohibited prior to clearance.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Consummation or 'implementation' of a merger transaction including the integration of activities of the merging businesses (even partly) prior to receiving clearance from the Authority is an offence under the Act. Payment of the full purchase price is deemed to be 'implementation' for purposes of the Act, but payment of a deposit of up to 20 per cent of the purchase price is permitted. It would seem therefore that any payment in excess of 20 per cent of the purchase price prior to clearance is prohibited. A merger that is implemented without complying with the notification and approval requirements of Part IV of the Act does not have legal effect in Kenya and parties cannot enforce any agreement in that regard in any legal proceedings.

Any person who fails to comply with the Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenya shillings, or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual gross turnover in Kenya of the offending undertakings.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions can, and as indicated in question 12 above, the Authority will, exercise its jurisdiction to impose sanctions in foreign-to-foreign mergers where the closing occurs prior to clearance.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Neither the Act nor the Consolidated Guidelines make any provisions for 'hold-separate/ring-fencing' arrangements being put in place in Kenya to enable foreign-to-foreign mergers to be implemented outside Kenya.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

No there are no special merger control rules. Where a public takeover is caught by the provisions of the Act, the provisions of the Act must be applied together with the requirements of the Capital Markets Act Chapter 485A, the Capital Markets (Takeover and Mergers) Regulations 2002, the Nairobi Securities Exchange Rules, the Companies Act 2015 and any other relevant sector-specific legislation.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Authority has published a prescribed merger notification form that the acquiring undertaking and the target undertaking are required to separately complete. The level of detail required depends upon the merger characteristics.

For undertakings applying for exclusion from the provisions of Part IV of the Act under and the Merger Threshold Guidelines, such undertakings are required to complete and file Schedule I (questions 1 to 18 only) and Schedule IV of the merger notification form.

For mergers at or above the prescribed thresholds and where the merging parties do not operate in the same line of business, or no vertical relationship exists between the parties, the undertakings are required to complete and file Schedule I (all questions) and Schedule IV of the merger notification form.

For mergers at or above the prescribed thresholds and where the merging parties operate in the same line of business or there are vertical relationships in existence between the parties, the undertakings are required to complete and file Schedule I, Schedule II and Schedule IV of the merger notification form.

For mergers at or above the prescribed thresholds and where the merging parties operate in the same line of business or there are vertical relationships in existence between the parties; or there is a high likelihood that the combined market share of the merging parties is above 35 per cent in one or more markets or one or more of the parties are dominant in at least one market, the undertakings are required to

complete and file Schedule I, Schedule II, Schedule III and Schedule IV of the merger notification form.

The Authority is not limited to the questions and responses in the merger notification form and if the information provided by either of the undertakings is not sufficient for purposes of making a determination on the proposed merger, the Authority may within 30 days of receipt of such notification request further information from the undertakings.

In addition, the merger notification form provides for the various documents to be filed:

- Schedule I requires parties to file a signed copy of the sale and purchase agreement, audited financial statements for the last three years, the latest annual reports, board resolutions and related documents regarding the merger and a breakdown of employees, and plans to realise cost savings, efficiencies and plans documenting investment evaluations;
- under Schedule II, parties are required to file documents prepared for the board of directors and regulatory bodies in relation to the proposed merger as well as reports, surveys, analysis or other documents assessing the proposed transaction with respect to its impact on competition, and the latest business plans, marketing plans, sales report and strategic plan; and
- Schedule III requires each party to a proposed merger to submit business plans, marketing plans, including for relevant subsidiaries and divisions and current strategic plan, periodic (such as monthly and quarterly) review of sales and market trends including by customer category and by different geographic areas for the last three years; and pricing schedules including terms of discounts and rebates offered.

Supplying the Authority with materially incorrect or misleading information is an offence under the Act and persons found guilty may upon conviction be liable to a fine of 5 million Kenya shillings or imprisonment for a term not exceeding five years, or both.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

After a merger notification form is received at the Authority's offices, the Authority ordinarily acknowledges receipt of the submission in writing and a case officer is assigned to analyse the proposed merger.

At first instance, the submission is evaluated to determine:

- its completeness, and where necessary additional information, may be requested, or clarifications sought;
- if the proposed merger is a 'merger' within the meaning of the Act;
- if the Authority has extraterritorial jurisdiction over the proposed merger;
- if the proposed merger meets the thresholds under the Merger Threshold Guidelines to determine if an application for exclusion from the provisions of Part IV of the Act is appropriate; and
- any requests for confidentiality that may have been sought, and if acceptable such confidentiality is granted by a letter early on in the evaluation process.

The case officer together with the Authority's mergers and acquisition division then undertake a complete merger assessment and make their recommendations to its board for a determination. The board then makes its determination, within the prescribed periods and its decision is communicated to the submitting parties.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 11 for the statutory timetable.

As a matter of practice, the Authority will in the case of a submission from exclusion of the provisions of Part IV of the Act, communicate its determination within 14 days of receipt of the merger notification form. Where the Authority determines that the proposed transaction is not a 'merger' or where an advisory opinion on a proposed transaction is sought, the Authority communicates its decision to the enquiring party in writing within 10 days.

### SUBSTANTIVE ASSESSMENT

#### Substantive test

#### 19 | What is the substantive test for clearance?

The Authority applies both the competitive effects test and the public interest test to any proposed merger transaction. In assessing the former, the Authority seeks to determine whether the proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. In determining the latter, the Authority will assess whether the proposed merger conflicts with government policies.

In applying the competitive effects test and the public interest test, the Authority will among other factors consider the extent to which the proposed merger is likely to:

- prevent or lessen competition or restrict trade or the provision of any service or endanger the continuity of supplies or services;
- result in any undertaking (including a non-party) acquiring or strengthening a dominant position in the market;
- benefit the public;
- affect a particular industrial sector or region;
- affect employment;
- affect the ability of small undertakings to gain access or be competitive in any market;
- affect the ability of national industries to compete in international markets; and
- benefit research and development and have an impact on technical efficiency, increased production, efficient distribution of goods and services or provision of services and access to markets.

Moreover, where a failing firm defence is used, the Authority considers the following:

- the failing undertaking would in the near future be forced to exit the market because of financial problems if not taken over by another undertaking;
- there is no less anticompetitive alternative acquisition other than the proposed merger; and
- in the absence of the proposed merger, the assets of the failing undertaking would inevitably exit the market.

In the matter of the acquisition of 70 per cent of the issued share capital of Telkom Kenya Limited (TKL) by Jamhuri Holdings Limited (salvaging a failing firm), the Authority arrived at the decision that post-merger, the transaction would not raise any competition concerns and that with respect to public interest issues, the audited financial statements of TKL showed significant losses before taxation for five consecutive years. Therefore, in the absence of the proposed transaction, TKL would have been forced to seek alternatives to borrowing as it was already heavily indebted, and would otherwise be forced to exit the market. Based on the fact that the transaction was likely to salvage a failing firm, the Authority fast-tracked the assessment of the transaction and approved it unconditionally.

## 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. The tests discussed in question 19 apply.

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

The Consolidated Guidelines indicate that the Authority will investigate all plausible theories of harm that would apply to each merger on a case-by-case basis.

The Authority will investigate market dominance and in so doing will define and identify the market of the goods and services produced by the parties to the proposed merger. It will also assess the unilateral and coordinated effects of the proposed merger where it is investigating a horizontal merger, and the vertical and conglomerate effects where it is assessing a non-vertical merger.

In all instances, the Authority's primary concern will be to ensure that the impact of the merger will not result in the prevention or lessening of competition by allowing the creation or increasing of market power or assisting in its exercise.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

The Act requires the Authority to take the interests of the public into consideration when assessing any proposed merger. The Consolidated Guidelines clearly indicate that the public interest test is applied regardless of the outcome of the competition test.

In considering the public interests, the Authority assesses the proposed merger's effect on employment, the ability of small and medium enterprises (SMEs) to gain access to or be competitive in any market; and the ability of national industries to compete in international markets and in a particular industrial sector.

In recent years, employment has been a specific area of focus for the Authority and in its assessment, it has evaluated the track record of the merging undertakings in relation to labour-related issues. Should the Authority determine that the proposed merger may result in job losses, it would require the merging undertakings to provide a justification and evaluate such justification against the countervailing public interest justifying the job losses. It may ultimately grant a conditional approval of the proposed merger and require written undertakings from the merging parties not to pursue redundancies for a prescribed period.

The Authority will also be likely to consider the impact foreign direct investment may have post-merger. Of particular concern is the potential of a foreign entity to move its procurement of goods and services from the local markets to the foreign markets, therefore negatively impacting local suppliers' ability to compete and maintain jobs.

The public interest guidelines under the Act seek to enhance and sustain employment through supporting measures to ensure no substantial job losses occur as a result of mergers and that the effects on employment are mitigated in the short run and salvaging of failing and dormant undertakings.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Consolidated Guidelines indicate that economic efficiencies are an important pillar of the competition test applied by the Authority when

reviewing a proposed merger. The extent to which the negative effects of a proposed merger will be compensated for by economic efficiency are evaluated on a case-by-case basis, and it would appear only acceptable where there is no public interest concern.

In the matter of the acquisition of 100 per cent of the issued share capital in Central Glass Industries Limited by Consol Glass Proprietary Limited from East African Breweries Limited, the competition test showed that the proposed merger would not lead to lessening or prevention of competition in the market for manufacture of glass containers. The Authority established that the proposed merger would instead lead to efficiencies in terms of increased production for the merged entity. To mitigate against any job losses and ensure efficiency in the proposed transaction, the merger was approved on condition that all existing 87 employees would be retained on the same terms and the merged entity would increase production from the current 31,500 metric tonnes to 36,500 metric tonnes within three years of the merger.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Authority has the power to approve merger transactions, approve merger transactions with conditions or reject merger transactions. All merger transactions seeking approval (and not exclusion from Part IV of the Act) have to be approved by the Authority's board, whereas merger transactions seeking exclusion from Part IV of the Act are excluded by the Authority's secretariat.

### Remedies and conditions

## 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues. The Authority has the power to set conditions to a proposed merger that it deems anticompetitive or presents public interest concerns.

The Authority may require structural remedies to the proposed merger, which include among others:

- divestment of the whole or part of an undertaking's business;
- the immediate transfer of contractual rights; or
- an amendment to the intellectual property rights of an undertaking.

The Authority may also impose behavioural remedies (where structural remedies are not commercial feasible) that are intended to limit the potential for the merged entity to behave anticompetitively in the post-merger market. The behavioural remedies include among others:

- the periodic provision of information to the Authority;
- an order requiring the merged entity to supply goods and services to a specific customer segment or geographical region;
- undertakings for the implementation of non-discriminatory pricing and supply or access of goods and services to customers;
- undertakings on price caps;
- restrictions on expansion;
- undertakings on access to critical technology; and
- restrictions on the merged entity not to approach any customers of the sold or divested business.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The stated objective by the Authority is that any remedial package it imposes on a proposed merger (including a requirement for divestiture),

is meant to 'restore or maintain competition while allowing for the realisation of merger-specific efficiencies and benefits'.

The implementation period for each remedial package is agreed to by the Authority on a case-by-case basis. Moreover, each remedial package agreed to by the Authority (whether structural or behavioural) must include the following elements:

- address the major areas of competition concern;
- have a low level of risk of not being successful;
- be capable of practical implementation and monitoring in Kenya; and
- be capable of resolving the identified areas of concern within a specified, preferably short, time frame.

In the event the remedial package includes a divestment, the Authority may require the appointment of divestment trustees to ensure the business to be divested is sold off to a suitable purchaser where the merging parties have been unable to offload that business within the agreed divestment period.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Act does not distinguish between local mergers and foreign-to-foreign mergers. The Authority has therefore approved some foreign-to-foreign mergers with conditions to remedy the anticompetitive effects of the merger and ensure compliance with the Act.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Authority will assess a proposed merger as a whole and where behavioural remedies are required, may impose ancillary restrictions. Such restrictions may include:

- restrictions on the merged entity not to approach any customers of the sold or divested business;
- a moratorium on job losses for a specified period;
- restrictions on output;
- restrictions on expansion; and
- restrictions on the merged entity changing existing business models, like distribution chains for a specified period.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Act permits any person (including a customer or a competitor) who is not a party to a proposed merger to voluntarily submit information relating to such proposed merger to the Authority at the application stage. However, once the Authority makes a determination on a proposed merger, only a party to the proposed merger or any other person against whom an order is made by the Authority can appeal to the Tribunal.

Additionally, having regard to any confidentiality claims made by the merging parties, the Authority as part of its assessment of a merger may consult competitors and customers as well as conduct market testing on the effects of a proposed merger or the effectiveness of a proposed remedial package.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Act permits any person submitting information or documentation to the Authority to make a claim for confidentiality in respect of that information or documentation. The Authority has provided a prescribed form for this purpose. Upon receipt of such a claim, the Authority assesses the request and notifies the claimant of their decision. In circumstances where the Authority refuses to grant confidentiality, any information submitted will be treated as confidential for a period of 14 days.

A submitting party may withdraw any information submitted to the Authority within 14 days if a request to grant confidentiality on that information has been declined. A person aggrieved by the decision of the Authority in a request for confidentiality may appeal to the Competition Tribunal.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Act mandates the Authority to liaise with other regulatory and public bodies in all matters relating to competition and consumer welfare, and as a matter of practice, the Authority cooperates and shares information with antitrust authorities in other jurisdictions. Moreover, the prescribed merger notification forms require merging parties to inform the Authority if a proposed merger will be notified with other antitrust authorities. In April 2016, the Authority and the COMESA Competition Commission entered into a cooperation agreement that formally obligates each party to inform the other of any enforcement activities it becomes aware of that affect the other party's interests.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

The Act established the Competition Tribunal (the Tribunal), which is mandated to hear and determine appeals against the decisions of the Authority. The Act requires the Authority and the Tribunal to give written reasons for their decisions. Both the Authority and an aggrieved party can appeal a decision of the Tribunal to the High Court of Kenya, whose decision shall be final.

### Time frame

## 33 | What is the usual time frame for appeal or judicial review?

An aggrieved party should give notice of its intention to appeal a decision of the Authority the Tribunal within 14 days of notice of the Authority's decision being published in the Kenya Gazette and submit the substantive appeal 16 days thereafter. The Tribunal shall, within 30 days of receiving such application, give notice of the application in the Kenya Gazette and invite interested parties to make submissions. If the application is designated by the Tribunal to be fast-tracked, the substantive hearing must be heard within six months of the application being so designated.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Authority has a mandate to enforce compliance with the Act and in this regard, it regularly undertakes investigations into unauthorised implementations of mergers. It reported that it had fined a gaming entity 15 million Kenya shillings for two unauthorised merger implementations. The Authority has over the past few years focused on the effects a proposed merger would have on public interest matters, such as the effects on the competitiveness of SMEs in the Kenyan and international markets, particular industries or sectors and the effects on employment. The Authority has been known to give conditional clearances to mitigate these risks, including obligations to maintain existing distribution chains or obligations to absorb employees or not to pursue redundancies for a prescribed period.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

See question 36.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

### Trends and updates

In 2018, the Authority circulated draft rules and regulations to the public for review and comment. These include the Competition (General) Rules, 2018 (the General Rules), the Merger Threshold Rules, 2018 (the Threshold Rules) and the amended Consolidated Guidelines on the Substantive Assessment of Mergers under the Act.

### General Rules

The General Rules propose various changes to the existing regulatory landscape, in particular, it is proposed:

- that document submission to the Authority can be made by hand, registered letter or by electronic means;
- that the following transactions would not qualify as mergers for the purposes of having to conform with the Act:
  - non-full-function joint ventures;
  - the appointment of receivers, administrators or entry into arrangements with creditors that does not result into change of control; or
  - certain acquisitions or leases of shares, interests or assets of another undertaking referred to the Act;
- that (i) restructurings and reorganisations within the same group, or (ii) mergers taking place entirely outside Kenya that had no local nexus shall not be subject to notification to the Authority;
- that in determining whether a merger has been implemented without an authorising order, the Authority may consider other facts including whether:
  - there has been an actual integration of any aspect of the merging businesses, including, but not limited to, the integration of infrastructure, information systems, employees, corporate identity or marketing efforts;
  - there has been placement of employees from the target undertaking to the acquiring undertaking;

- there has been an effort by the acquiring undertaking to influence or control any competitive aspect of the target undertaking's business, such as setting prices, limiting discounts or restricting sales to certain customers or of certain products; or
- there has been an exchange of information between the merging parties for purposes other than valuation or on a need-to-know basis during due diligence;
- that the Authority reserved the right to require any transaction that has been excluded from the provisions of Part IV of the Act to seek approval even if it falls beneath the exclusion thresholds when it is highly likely that it will substantially prevent or lessen competition or restrict trade or raise public interest concerns;
- that the Authority may prescribe structural or behavioural remedies to address any detriment posed by a merger that is likely to substantially lessen competition in the post-merger market in Kenya or engage in discussions with an undertaking to the merger or any other relevant party or experts with a view to identifying structural or behavioural measures that would improve any effects of the merger on the public interest or competition in Kenya or any substantial part of Kenya; and
- that in the event that a merger is approved with conditions, the Authority may require the merged entity to submit a compliance report on the implementation of the conditions that were issued.

### Threshold Rules

#### Full mergers

The Threshold Rules propose that the following mergers must apply for approval to the Authority as full mergers:

- (i) where the merging undertakings have a minimum combined turnover or minimum combined assets (whichever is higher) of 1 billion Kenya shillings and the turnover or assets (whichever is higher) of the target undertaking is above 500 million Kenya shillings;
- (ii) where, notwithstanding the thresholds set out in (i) above, the value of the turnover or assets (whichever is higher) of the acquiring undertaking exceeds 10 billion Kenya shillings, and the merging parties operate in the same markets or can be vertically integrated, except where the merging parties are required to notify the merger to the Common Markets for Eastern and Southern Africa Competition Commission (COMESA);
- (iii) in the carbon-based mineral sector, where the value of the reserves, the rights and the associated assets to be held as a result of the merger exceeds 10 billion Kenya shillings; or
- (iv) where the merging parties are required to notify the merger to COMESA, the transaction meets the thresholds set out in (i) above, and two-thirds or more of the merging parties turnover or assets (whichever is higher) is generated or located in Kenya.

### Exclusion

The Threshold Rules propose that the following transactions may be considered for exclusion by the Authority:

- transactions where the combined turnover or combined assets (whichever is higher) of the merging parties is between 500 million and 1 billion Kenya shillings; and
- transactions where the merging parties are engaged in prospecting in the carbon-based mineral sector irrespective of asset value.

### Exemption

The Threshold Rules propose that the following transactions be exempted from having to be notified to the Authority:

- transactions where the combined turnover or combined assets (whichever is higher) of the merging parties is between zero and 500 million Kenya shillings; and

- transactions where the merging parties are required to notify the transaction to COMESA, and two-thirds or more of the merging parties' turnover or assets in the COMESA common market (whichever is higher), is not generated or located in Kenya.

#### Determination of turnover or assets

- The Authority intends that the undertaking's most recent audited financial statements be used to guide it in calculating the merging parties' turnover or assets. Moreover, where the audited financial statements submitted are incomplete or unreliable, the Authority proposes to calculate the value of the sales or services of that undertaking by applying internationally accepted accounting standards.
- In making the calculations:
  - the Authority proposes that where additional transactions have occurred after the date of the most recent audited financial statements:
    - to exclude inter-company trading, in the case of turnover;
    - to exclude the value of recently divested assets or assets shown in an undertaking's balance sheet as having been used as consideration in a recent transaction, in the case of asset value; or
    - to include the value of recently acquired assets and the value of any asset received in exchange for recently divested assets;
  - the value of turnover for credit or other financial institutions shall be the total of interest and similar income, income from securities, shares and other variable yield securities, income from participating shares, from shares in affiliated firms, commissions receivable, net profit on financial operations and other operating income;
  - the value of assets or turnover in the case of a joint venture jointly controlled by an undertaking and third parties, shall be attributed equally between its controlling parents, irrespective of the size of their financial or voting interests; or
  - in relation to investment funds, the investment entity is to be deemed to have control over the various investment vehicles through the general partner or partners and therefore the relevant turnover or assets to be considered in a merger shall be the combined turnover or assets of all the entities that the investment entity has control over, either directly or indirectly through the various investment vehicles.

#### Relationship with COMESA

Under the Threshold Rules, undertakings are required to inform the Authority in writing when a transaction is notified to COMESA.



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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation principally consists of the Monopoly Regulation and Fair Trade Act (MRFTA), which was first enacted in 1980. Additional legal authority is found in the Enforcement Decree promulgated pursuant to the MRFTA, as well as the guidelines and standards issued pursuant thereto. Enforcement of the MRFTA rests with the Korea Fair Trade Commission (KFTC), an administrative body established under the jurisdiction of the prime minister that, as part of its work, sets standards and issues numerous notices and guidelines regarding its interpretation and implementation of the MRFTA.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Specifically, the following transactions are considered as a business combination that must be reported to the KFTC pursuant to article 12 of the MRFTA subject to the jurisdictional thresholds (see question 5):

- acquisition of 20 per cent (15 per cent in the case of domestic listed companies) or more of the shares of the target company;
- acquisition of additional shares by the shareholder who already owns the shares of the target company in the ratio set forth above to become the largest shareholder;
- participation in the establishment of a new joint venture company as the largest shareholder;
- acquisition of all or a principal portion of the business or fixed assets of the target company;
- merger with another company; and
- interlocking directorate; that is, occupation by a director, an officer or an employee of the acquiring company of a position as a registered director of the target company, while such person maintains his or her position in the acquiring company (except for an interlocking directorate between affiliated companies).

#### 3 | What types of joint ventures are caught?

The establishment of a new joint venture company will be subject to the merger control rules under the MRFTA if the participants meet the filing requirements.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control, in itself, is not one of the factors determining whether a particular business combination is subject to the reporting obligation. There are cases where a business combination may still be subject to

the reporting obligations even if the acquiring party cannot control the target company after the business combination, as long as the acquiring party acquires 20 per cent (15 per cent when the target company is a domestic listed company) or more of shares of the target company. Thus, minority and other interests less than control may be caught where such a transaction meets the filing thresholds.

The concept of control is important when the KFTC reviews the business combination for any anticompetitive effect. That is, if the business combination does not give rise to the acquiring party's control of the target company, such a business combination is generally presumed to have no anticompetitive effect by the KFTC.

In the case of stock acquisition and participation in the establishment of a new company, ownership ratio of 50 per cent or more will be regarded as control. In addition, even though the acquiring party's ownership ratio in the target company is below 50 per cent, the acquiring party will be regarded as having control over the target company if the acquiring party may wield substantial influence on the general management of the target company considering various factors, including interlocking directorate, degree of diversion in shares, relationship among shareholders and transactional relationship between the acquiring party and the target company. In the case of an interlocking directorate, control is recognised if the number of interlocking directors is one-third or more of total directors of the target company, or one or more of the interlocking directors is appointed as a representative director who may wield substantial influence on the general management of the target company. Meanwhile, control is always recognised in cases of merger and business transfer.

In addition, the KFTC's Merger Review Guidelines, which took effect on 28 December 2011, introduce a concept of 'joint control'. That is, even though the acquiring party cannot exercise sole control over the target company, if it has the ability to exert a material influence over the target company jointly with a co-acquiring company or the incumbent shareholding company, the acquiring party is deemed to have control over the target company. According to the KFTC's Merger Review Guidelines, the KFTC identifies a joint control, weighing various factors including without limitation ownership stake, power to designate directors and officers, power to veto key business decisions, contractual commitment to jointly exercise voting rights, and administrative power to operate the business.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Starting from 19 October 2017, the business combinations set forth in question 2 that trigger a reporting requirement to the KFTC are caught within the scope of the MRFTA where one of the parties in the business combination (including worldwide affiliated companies both before and after the business combination) has total assets or annual

turnover in the amount of 300 billion won (2 trillion won in the case of interlocking directorate) or more and the other (including worldwide affiliated companies both before and after the business combination) in the amount of 30 billion won or more. There is no reporting requirement if any of the parties involved, together with its affiliates, has total assets and annual turnover less than 30 billion won.

When the KFTC deems that a violation of the provisions of the MRFTA has potentially been committed, the KFTC may conduct the necessary investigation by its own authority even if the business combination does not meet the jurisdictional thresholds.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing with the KFTC is a mandatory requirement as long as the parties meet the above-mentioned requirements. Notification may be pre-closing or post-closing, depending on the type of business combination and amount of respective parties' total assets or turnover. As explained in question 9, the parties can opt to make a voluntary request for a review of the transaction even before a triggering event takes place.

However, there are some exceptions to the filing requirements according to the MRFTA. For example, if the company owns the stocks of the investment company under the Financial Investment Services and Capital Markets Act, the company shall not be subject to notifying the business combination. The obligation to notify shall not apply if the head of a central administrative agency concerned has consulted in advance with the KFTC regarding the business combination under the provisions of a different legislation.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Under the Enforcement Decree promulgated pursuant to the MRFTA, foreign-to-foreign mergers must be notified if the local nexus requirement is met in addition to the requirements in question 5. The local nexus requirement is that both of the foreign parties, together with their worldwide affiliates both before and after the business combination, should respectively have an annual turnover within Korea of 30 billion won or more. If only the target company is foreign, and the acquiring party is domestic, the foreign target company should meet the local nexus requirement. In contrast, if only the acquiring party is foreign, and the target company is domestic, the business combination is regarded as a domestic case and the local nexus requirement does not apply. In the case of the participation in the establishment of a joint venture company to be located in Korea, the local nexus requirement does not apply, even if the companies participating in the establishment of the joint venture are foreign companies.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

In principle, business combinations notification should be filed with the KFTC. However, the relevant sector regulators cooperative with the KFTC may have the authority to review and approve certain types of business combinations as follows:

- Ministry of Science, ICT and Future Planning (pursuant to the Telecommunications Business Act);
- Financial Supervisory Commission (pursuant to the Act on the Structural Improvement of the Financial Industry);
- Financial Supervisory Commission (pursuant to the Financial Holding Companies Act); and
- Ministry of Science, ICT and Future Planning and the Korea Communications Commission (pursuant to the Broadcasting Act).

In the aforementioned cases, the relevant government ministries may consult with the KFTC in regard to the anticompetitive nature of the transaction.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

In principle, within 30 days after the consummation of the underlying transactions (such as a merger or the acquisition of shares), the acquiring party must report such transactions to the KFTC. If a large company (with total assets or annual turnover of 2 trillion won or more on a consolidated basis) is involved in the business combination (except the interlocking directorate), the pre-merger notification must be filed any time after the date of signing the agreement and before the closing date. Furthermore, in a pre-merger notification case, the acquiring company may not acquire the new shares or complete the transfer of the business, nor may it register the business combination pending the KFTC's review. The reporting company may, however, voluntarily request the KFTC to conduct a prior review of the transaction in question even before entering into the agreement.

The MRFTA provides that if a reportable merger is not notified, the KFTC may impose an administrative fine of up to 100 million won upon those companies that failed to file. The KFTC imposed administrative fines of 327 million won in total on 25 cases that failed to file business combination reports in 2018.

#### 10 | Which parties are responsible for filing and are filing fees required?

The acquiring company is responsible for reporting the business combination to the KFTC. In the case of the establishment of a joint venture company, the party who becomes the largest shareholder is responsible for filing. No filing fees are required in Korea.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Taking effect from 22 June 2012, all notifications (both pre-merger and post-merger notifications) are subject to a 30-day waiting period after the filing date. In addition, the waiting period may be extended by up to 90 days where the KFTC deems it necessary. Prior to receiving a clearance from the KFTC, consummation of the business combination such as the transfer of stocks, registration of ownership and full payment of the purchase price is prohibited.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The KFTC may file actions against companies that close their transactions before clearance. In the case of a merger or establishment of a new joint venture prior to clearance, the KFTC may file a lawsuit to nullify the consummation of such business combination. In practice, the KFTC imposes an administrative fine of up to 100 million won on the company responsible for filing. This sanction is enforced without fail as long as the violation is detected.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions are also applied in cases involving closing before clearance in foreign-to-foreign mergers. The KFTC announced that they imposed sanctions on five foreign companies in 2012 for violation of the merger control rules (failure to report, delay in report as well as consummation before closing). The latest official data has not been opened to the public.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Because a foreign-to-foreign merger is also subject to a filing requirement, the KFTC will investigate whether the merger will have any anticompetitive impact on the relevant markets in Korea. In this regard, such solutions as a local 'hold-separate' arrangement in exchange with closing before clearance in a foreign-to-foreign merger have never been recognised in Korea.

#### Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

In the case of public takeover bids, the notification must be filed within 30 days of the date on which the acquisition of shares takes place even if a large company is involved in the transaction.

#### Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The reporting party must provide the KFTC with sufficient information to allow the KFTC to review the underlying transactions. Full details of transactions are required, and various forms must be completed and submitted together with supporting documents. The KFTC provides a list of necessary documentation relating to the proposed transaction to enable it to determine whether there will be any anticompetitive impact on the market if it is completed. Under this general rule, data or information on the financial statements of the parties, names of the shareholders of the parties, financial statements of affiliated companies (including organisation charts, etc), as well as market information in the relevant sector are required. If the KFTC deems it necessary, it may request further data or information. If the KFTC officer discovers the provided information is not correct or necessary information is missing, he or she may issue a request for supplementary information. In this case, the clock stops on the date the request is issued and restarts once the requested information is received.

#### Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

Once it has received the report, accompanied by relevant documents containing information relating to the proposed transaction, the KFTC has 30 days (subject to a 90-day extension) to deliver its determination. During this time, the report is circulated internally and officers handling the case are required to investigate the possibility of an anticompetitive effect on the market. If there is any material anticompetitive impact on the market arising from the business combination, the transactions may not receive clearance.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

After submission of the filing to the KFTC, the KFTC must, within 30 days, issue its decision on whether to grant clearance under the MRFTA. The 30-day period may, at the discretion of the KFTC, be shortened or extended by up to 90 days. Where such extensions are required, common reasons include the complexity of the potential transaction and the KFTC requesting additional information (whether owing to the incomplete nature of the information filed with the KFTC in the initial report or because the KFTC deems that the complexity of its investigation requires further data to enable it to reach a determination based on sufficient research on the question of clearance). In this case, the period required for submitting supplementary documents to the KFTC shall not be included in the review period. There is no formal mechanism for accelerating the review process, even though the KFTC may do so at its discretion.

## SUBSTANTIVE ASSESSMENT

#### Substantive test

### 19 | What is the substantive test for clearance?

The substantive test for clearance has no clear contours, but the essence of the test is the question of whether a proposed business combination has an anticompetitive effect on the relevant markets. In this regard, the definition of the relevant markets and the market concentration after the business combination are important starting points in determining whether there is any such effect. If the combined market share of the parties meets all the elements stated below, the business combination is presumed to have an anticompetitive effect on the relevant market:

- whether the combined market share of the company resulting from the business combination in question results in monopoly status. The test for monopoly status is whether the market share of a single company is 50 per cent or more in the relevant market or the aggregate market share of three companies or fewer is 75 per cent or more in the relevant market;
- whether the aggregated market share of the combined company is the largest in the relevant market; and
- whether the aggregated market share of the combined company exceeds that of the company holding the second-largest market share by not less than 25 per cent of the combined market share of the parties.

Other than the market share, factors to be comprehensively considered include unilateral anticompetitive effect, coordinated anticompetitive effect, level of foreign competition, possibility of new entry and existence of similar products and neighbouring markets.

A business combination, which is an otherwise prescribed one, can be permitted when the acquired party is a 'failing company'. According to the MRFTA, an allegedly failing company can qualify for the failing company exemption if the company meets the statutory test including, without limitation, experiencing capital erosion for a substantial period.

### 20 | Is there a special substantive test for joint ventures?

No. Normal review procedures for the business combination would also apply to joint ventures. However, some joint ventures formed by competitors in the relevant market may be considered as falling within one of the unfair collusive activities under the MRFTA. The Merger Review Guidelines also require the KFTC to take into consideration the possibility of collusion by competitors.

## Theories of harm

### 21 | What are the 'theories of harm' that the authorities will investigate?

Generally, the KFTC may consider various theories of harm depending upon the nature of the transaction involved. In most cases, unilateral and coordinated effects because of the business combination in question is one of the key considerations in the review of a horizontal merger. For vertical merger, vertical foreclosure and coordinated effects are considered. For conglomerate merger, potential harm to competition, exclusion of competitors, and raising entry barriers to market are considered. Along with the aforementioned, other factors may also be considered depending on the transaction.

## Non-competition issues

### 22 | To what extent are non-competition issues relevant in the review process?

Certain exemptions are available notwithstanding the fact that a particular transaction may appear to fall within the definition of activity that substantially restrains competition in a specific business area. Thus, the MRFTA provides some exceptions in cases: where efficiency-enhancing effects, which are deemed difficult to achieve without the contemplated merger, outweigh potential adverse effects of restricting competition; or where the merger involves a failing company whose total equity has been less than its paid-in capital on the balance sheet for a considerable period, and whose revitalisation is therefore deemed impossible without the business combination in question, and which at the same time meets the conditions set forth under the Enforcement Decree to the MRFTA. Conditions set forth under the Enforcement Decree cover situations in which it is difficult to continue to use the company's production facilities in the relevant market without a merger and it is difficult to form a business combination that is less restrictive of competition than the contemplated one.

In addition, in the review of efficiency-enhancing effects, factors such as increase of employment, economic development of non-metropolitan areas, stable provision of energy and improvement of environmental pollution should be comprehensively considered.

## Economic efficiencies

### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is one of the two exceptions under which the KFTC can allow merger transactions even though they result in an anticompetitive effect to some degree. In Korea, the efficiency argument is often presented, but has been accepted only in a few cases.

When considering the efficiency exception, the KFTC normally looks into the issue of whether a merger transaction will result in economies of scale, cost reduction, contribution to employment, and regional economic development, etc. In addition, for an efficiency argument to be successful, not only should the claimed economic efficiency be merger-specific (ie, the claimed economic efficiency may not be achieved through any measures other than the business combination in question), but also such merger transaction must be the last resort (ie, there must be no substitute measures that could be used to achieve the same result).

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The KFTC may issue corrective orders on parties of a business combination that causes an anticompetitive effect in the relevant market. Such orders include disposition of all or part of the shares acquired, transfer of business, etc. If the parties do not comply with the corrective measures, the KFTC may impose coercive fines for implementation, which may be imposed based on the number of days of non-compliance until the parties effectively comply with the corrective measures.

In the Merger Remedy Guidelines, the KFTC makes it clear that, in principle, it will consider structural remedies first and that behavioural remedies may also be imposed to support the structural remedies.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The KFTC may issue a corrective order to the extent that such order rectifies the anticompetitive effect. Such corrective orders can include prohibition of the merger, disposition of all or part of the shares acquired, resignation of an officer, transfer of business, cancellation of debt guarantees, public announcement of the fact that certain corrective measures are imposed, restriction on the types or scope of management that may produce anticompetitive effects on given business combinations, and any other corrective measures necessary to remedy the violation of law. For example, the KFTC has ordered the acquiring company to dispose of a part of its production lines to a third party in various cases.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestment has not been a generally imposed remedy in Korea. However, in more and more cases, the KFTC has ordered the acquiring companies to divest certain businesses or assets to third parties upon finding that the acquisition of those businesses or assets by the acquiring companies would result in a substantial market concentration and thus restrain competition in the relevant market. The types of remedy ordered by the MRFTA will depend on the degree of the anticompetitive effect of the particular transaction, the nature of the relevant market and the number of competitors, etc. Recent cases involving divestment allowed six months to one year to complete the divestment.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been instances where the KFTC has only imposed administrative fines against foreign companies that did not file at all or failed to file the report by the prescribed deadline. However, in 2007, there was the first corrective measure in connection with a foreign-to-foreign merger. In addition, in 2008 and 2010, while the KFTC was reviewing a foreign-to-foreign merger, the parties gave up the transaction because of the anticompetitive concerns raised by various competition authorities including the KFTC. In 2011, the KFTC imposed structural remedies on a proposed foreign-to-foreign merger in the computer hard disk drive industry. In 2013, the KFTC imposed corrective measures on two proposed foreign-to-foreign mergers in each of the semiconductor production facilities industry and TV SOC (system on chip, an integrated circuit that integrates all components of an electronic system) industry,

respectively. In 2017, for a merger between two foreign chemical companies, the KFTC ordered the parties to sell an asset that one of the parties owned within six months of the closing date. Also, for a share acquisition of a foreign ocean shipping company, the KFTC ordered the parties to withdraw from a consortium and prohibited extension of the contract term with the consortium for a specific sea lane. Furthermore, in January 2018, the KFTC imposed structural remedies on a proposed foreign-to-foreign merger in the mobile semiconductor industry (including near-field communication (NFC) technology).

### Ancillary restrictions

**28** | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The KFTC has never recognised these situations.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

**29** | Are customers and competitors involved in the review process and what rights do complainants have?

Yes, depending upon the case and the circumstances. In particular, in cases where conditions in a market could be affected by a merger, the KFTC may ask competitors or customers to provide data or information to enable it to determine whether there is any direct impact on the market that specifically relates to competition. However, there is no general procedure as regards asking the customers or competitors to provide their views on the merger. Any interested party to a merger and acquisition transaction may file its opinion with the KFTC in its review process.

### Publicity and confidentiality

**30** | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The MRFTA provides that anyone in the KFTC who deals with confidential business information must not reveal, publish or otherwise use such information other than for the purpose of enforcing the MRFTA.

### Cross-border regulatory cooperation

**31** | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The KFTC has played a major role in the International Competition Network for merger control issues. Furthermore, the KFTC also actively participates in many forums on competition issues in the Doha Development Agenda of the World Trade Organization and the Organisation for Economic Cooperation and Development. In addition, the KFTC has been involved in many bilateral discussions with other antitrust authorities in other jurisdictions including China, Germany, Japan, Russia and the United States.

The KFTC is also willing to cooperate with antitrust authorities in foreign jurisdictions in its anticompetitive review of a particular business combination. Especially in a foreign-to-foreign business combination, the KFTC cooperates with antitrust authorities in foreign jurisdictions that have similar anticompetitive concerns in designing effective corrective measures.

The KFTC cooperated with antitrust authorities in the United States and the European Union at the initial stage of review in the business combination case of stock acquisition of Hitachi GST by Western Digital.

## JUDICIAL REVIEW

### Available avenues

**32** | What are the opportunities for appeal or judicial review?

If the parties are dissatisfied with the KFTC's original decision or disposition of its appeal, an application for judicial review may be made to the Seoul High Court. In the event that the High Court upholds the applicant's complaint, the KFTC's decision will be reversed according to the terms of that court order.

### Time frame

**33** | What is the usual time frame for appeal or judicial review?

Any party engaged in a merger and acquisition transaction may file a complaint with the KFTC or court if it is dissatisfied with a ruling or order issued by the KFTC. A complaint must be filed with the KFTC within 30 days of receipt of the decision that is being challenged. The appeal is then reviewed by other divisions of the KFTC. The review by the KFTC must be over within 60 days of receipt of the appeal. The KFTC will then issue a decision regarding the appeal. If the complainant remains dissatisfied with the results of the KFTC's investigation and ruling, judicial review is open to them. An application to the courts for judicial review must be filed within 30 days of receipt of the KFTC's decision on appeal. The Seoul High Court, an intermediate level court, has exclusive jurisdiction over any appeal arising from decisions of the KFTC. Also, the complainant may choose to directly file a complaint with the Seoul High Court within 30 days of receipt of the decision that is being challenged, without filing a complaint with the KFTC.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

**34** | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2018, 702 business combinations were notified to the KFTC, 95 of which were foreign-to-foreign mergers. In the same year, the KFTC raised a significant competitive concern and imposed remedies for four cases. The KFTC imposed administrative fines on 23 cases for reporting violations under the MRFTA.

### Reform proposals

**35** | Are there current proposals to change the legislation?

The KFTC is contemplating an additional notification threshold based on the transaction amount for 'unicorn' deals. The current approach is pretty straightforward but may miss competition law control over the acquisition of highly valuable start-ups, which at the time of transaction may not have significant revenues or assets meeting the thresholds, but whose deal valuation is extremely high in anticipation of their potential importance in the markets ('unicorn' start-ups). Austria, Germany and the United States are a few countries that have introduced transaction-value-based thresholds. If newly adopted, the size-of-transaction test would intensify competition law enforcement in the era of the digital economy. However, this is still under consideration and open for further discussion.

On 27 February 2019, a new set of standards for reviewing mergers in R&D-intensive industries and those involving 'big data' was introduced in the Merger Review Guideline. The newly amended Merger Review Guideline marks one of the most significant progress in the KFTC's announced move toward bringing 'innovation market' and 'big data' issues within its regulatory purview, and it is expected that this

movement is likely to have a real impact on companies contemplating potential merger transactions in the relevant industries in terms of the level of scrutiny and review timeline.

## UPDATE AND TRENDS

### Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The KFTC reviewed a proposed acquisition of the global Dutch company NXP by the United States-based chipmaker Qualcomm. The merger notification was filed in May 2017. On 29 January 2018, the KFTC stipulated that Qualcomm must not acquire NXP's standard essential patents for NFC and various system patents. Qualcomm was also prohibited from selling bundled products or changing NXP's licensing. The KFTC ordered Qualcomm to make it possible for rival companies to function with NXP products. This decision was made on the ground that the proposed transaction would likely substantially restrain competition in the global market for cellular chipsets and the NFC.

In February 2019, the KFTC revised its Review Standard for Combination of Enterprises. The Standard regulates methods to define relevant markets and calculate market concentration, and provides criteria for determining anticompetitive effects when reviewing M&As in the innovation market. This would enable the KFTC to effectively review innovation-stifling effects that can be caused by a large company's acquisition of its potential competitors.

Also, by providing factors to consider when analysing anticompetitive effects of M&As involving Big Data, the KFTC enhanced the consistency of review and allowed companies to have better anticipation about M&A review results.

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# Liechtenstein

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Liechtenstein has been a member of the European Economic Area (EEA) since May 1995. European Union directives are implemented into Liechtenstein's legal system. There is no automatic implementation of EU law, however, as the EEA Joint Committee has to state first that a directive is part of the EEA 'acquis'. It is only with a respective resolution of the EEA Joint Committee that the obligation to incorporate arises.

Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation) regulates the control of mergers. The EEA Joint Committee has passed Resolution No. 78/2004 of 8 June 2004 confirming that the EU Merger Regulation is relevant for the EEA (Legal Gazette 2004 No. 234, LR 0.110.034.53).

Liechtenstein has no national merger control or antitrust law. The competition rules of the EEA Agreement (articles 53 to 60), and the EU competition law stated in Annex XIV (Competition) to the EEA Agreement are applicable; in particular the EU Merger Regulation. The provisions of the EU Merger Regulation are directly applicable in Liechtenstein with minor non-material adaptations as set out in Annex XIV to the EEA Agreement.

According to the EU Merger Regulation, mergers that do not meet the turnover thresholds of the EU Merger Regulation fall within the competence of the EU member or the European Free Trade Association (EFTA) states' authorities in charge of merger control.

The Law on Persons and Companies (PGR) of 20 January 1926, in its presently valid version (Legal Gazette 1926, No. 4, LR 216.0), contains provisions on mergers of companies limited by shares (article 352a et seq PGR). Article 351 et seq PGR regulate national mergers within Liechtenstein, whereas article 352a et seq PGR transpose Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies into Liechtenstein law.

In addition, the Law of 16 September 2009 on employee participation in cross-border mergers of limited liability companies (Legal Gazette 2009, No. 269, LR 216.222.3), in its presently valid version, has been enacted to transpose the Directive into Liechtenstein law. However, these Liechtenstein provisions on mergers of companies limited by shares as well as on employee participation in cross-border mergers do not contain a merger control provision in the sense of a control to prevent anticompetitive consequences. They stipulate a mere legality control of the merger.

The Liechtenstein Office of Justice controls the legality of the cross-border merger with respect to the execution and formation of a new company limited by shares under Liechtenstein law as a result of the merger. Further, it verifies the compliance with the law on the employee

participation in a cross-border merger of limited liability companies. Each of the following statements to the questions will contain a brief paragraph answering the question with respect to these national provisions, although strictly requirements imposed by company law are not considered to be part of the competition merger control regime. It needs to be kept in mind that they are only applicable for companies limited by shares.

The Law of 23 May 1996 on the Execution of the Competition Rules in the EEA (Legal Gazette 1996, No. 113, LR 172.013) in its presently valid version has been enacted in Liechtenstein to govern the execution of the competition rules in the EEA.

Pursuant to article 2 of the Law on the Execution of the Competition Rules in the EEA, the Office of Economic Affairs is the Liechtenstein authority with jurisdiction for the implementation of the competition rules in Liechtenstein, unless the jurisdiction of the national courts is provided. The Law foresees the necessary competencies for the Office of Economic Affairs to allow the surveillance authorities' investigations and to assist them.

Hence, as Liechtenstein has no national merger and antitrust laws of its own, the following answers are mainly based on the EU Merger Regulation and Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing the EU Merger Regulation. According to our information, Liechtenstein has had no mergers with an EU or EFTA dimension since the entry into force of the EU Merger Regulation. As a consequence, Liechtenstein has thus far had no practice or jurisdiction in this field.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Article 3 of the EU Merger Regulation defines a concentration as the change of control on a lasting basis, resulting from a merger of two or more previously independent undertakings or the acquisition of direct or indirect control of the whole or part of another undertaking.

The concentration needs to have an EU dimension, which is stipulated in article 1 of the EU Merger Regulation. Certain thresholds need to be fulfilled, which will be outlined in question 5.

Mergers of a Liechtenstein company limited by shares with a limited liability company formed in accordance with the law of an EEA member state and having its registered office, central administration or principal place of business with the EU are regulated according to article 352a et seq PGR.

#### 3 | What types of joint ventures are caught?

A joint venture is a relevant concentration under the EU Merger Regulation and thus, in Liechtenstein, provided it performs on a lasting basis all the functions of an autonomous economic entity, is also caught. A distinction is made between a full-function joint venture and a non-full-function joint venture.

Joint ventures are not caught under the merger provisions for companies limited by shares in the PGR.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

As the EU Merger Regulation is applicable, control is defined according to article 3 of the EU Merger Regulation. It means in essence the possibility of exercising decisive influence on an undertaking regardless of the means. The ownership or the right to use all or part of the assets of an undertaking, or the rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking are particular examples of the possibility to exercise decisive influence on an undertaking.

Issues of lesser importance than control in the meaning of the exercise of decisive influence on the activity of an undertaking (which is assessed having regard to the considerations of fact or law involved) are not caught. The mere board or management representation, without a majority, regularly will not mean control in the sense of the above.

Control is not defined, nor are minority and other interests less than control caught by the merger provisions for companies limited by shares in the PGR.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration needs to have an EU or EFTA dimension. If the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion and the aggregate EU-wide turnover or EFTA-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover of EFTA-wide turnover within one and the same EU member state or EFTA state, the threshold is met.

Even if the thresholds for a concentration with an EU or EFTA dimension are not met, the provisions of the EU Merger Regulation are nevertheless applicable in the following cases:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5 billion;
- in each of at least three EU member states or EFTA states, the combined aggregate turnover of all the undertakings concerned is more than €100 million;
- in each of at least three EU member states or EFTA states, included for the purpose of the above point, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and
- the aggregate EU-wide turnover or EFTA-wide turnover of each of at least two of the undertakings concerned is more than €100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover or EFTA-wide turnover within one and the same EU member state or EFTA state.

Further information depends on the competent authority: for example, the forms differ (see question 16) or the request can be made by the EFTA Surveillance Authority (ESA, see question 26). We are not aware of circumstances in which transactions falling below these thresholds may be investigated.

So far, no concentrations falling under the EU Merger Regulation have been notified to the ESA. Neither has a case falling below the thresholds of the EU Merger Regulation been referred to the ESA.

The merger provisions of the PGR do not contain jurisdictional thresholds.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notification of concentrations with an EU or EFTA dimension to the Commission is mandatory. However, the notification may already be made if the involved undertakings demonstrate good faith to conclude an agreement or to make a public bid that would result in a concentration with an EU or EFTA dimension (article 4 EU Merger Regulation).

According to article 4, section 4 of the EU Merger Regulation, a concentration may be referred to a certain EU member state or EFTA state if the concentration may significantly affect competition in a distinct market and should, therefore, be examined by that EU member state or EFTA state. If the case is referred by the Commission, no notification is required.

The filing of the merger to the Liechtenstein Office of Justice is mandatory insofar as the merger only becomes effective upon the entry in the Commercial Register (articles 351h and 352h PGR).

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Pursuant to recital 10 of the EU Merger Regulation, a concentration with an EU or EEA dimension is deemed to exist, regardless of whether the involved undertakings have their seat or their principal fields of activity in the EU, on condition they have substantial operations there and exceed the thresholds. Hence, foreign-to-foreign mergers may also fall under the EU Merger Regulation and may need to be notified, if the above prerequisites are met. There is no local effects test. There need to be substantial operations in the EEA; besides this, there is no local nexus test.

Foreign-to-foreign mergers do not have to be notified according to article 352a et seq PGR.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

In the course of a domestic or cross-border merger, an undertaking for collective investments in transferable securities (UCITS) may amalgamate with one or more other UCITS, irrespective of the legal form of the UCITS and whether the absorbing or transferring UCITS has its registered office in Liechtenstein. The merger of UCITS requires the prior approval of the Liechtenstein Financial Market Authority (FMA), if the transferring UCITS has its registered office in Liechtenstein (article 39 of the Law of 28 June 2011 on Certain Undertakings for Collective Investment in Transferable Securities (Legal Gazette 2011, 295, LR 951.31), in its presently valid version). The rules on the merger of UCITS apply mutatis mutandis to other structural measures.

The domestic or cross-border merger of an alternative investment fund (AIF) with one or more other AIFs is admissible. Depending on the constellation of the participating AIF, a notification or an approval of the FMA is required for such merger. The merger of AIFs shall be subject to prior notification to the FMA, provided that all participating AIFs are domiciled in Liechtenstein and the transferring AIF is not subject to authorisation (article 79 of the Law of 19 December 2012 on alternative investment fund managers (Legal Gazette 2013, 49, LR 951.32, in its presently valid version (AIFMG)).

The merger of AIFs requires the prior approval of the FMA, if the transferring AIF has its registered office in Liechtenstein and is subject to authorisation, or a participating AIF is domiciled abroad or the absorbing AIF has its registered office in Liechtenstein and the merger constitutes

a material change to the authorisation or the constitutive documents of the AIF (article 80 in connection with article 25 of the AIFMG).

The aforementioned rules on mergers of AIFs in principle apply to other structural measures respectively.

Several Liechtenstein laws state filing requirements in case of the acquisition of significant participations in an undertaking or controlling influence on an undertaking such as the Liechtenstein Banking Law, the Law on Tender Offers, the Law on Financial Conglomerates, the Law on the Disclosure of Important Participations of Quoted Companies, the Law on the Surveillance of Insurance Companies, the Asset Management Law and the Law on Investment Funds.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The EU Merger Regulation does not determine deadlines for filing. However, the notification of the concentration needs to be made before its implementation.

Pursuant to article 14(2) of the EU Merger Regulation, the ESA and the European Commission may impose fines, when a concentration is intentionally or negligently not notified prior to its implementation, unless expressly authorised by article 7(2) or by a decision taken pursuant to article 7(3) of the EU Merger Regulation.

The merger plan must be filed with the Liechtenstein Office of Justice at least one month prior to the shareholders' general meeting, which is intended to resolve on the consent. If the merger plan is publicly accessible without cost on the website of each company, it is sufficient to place a notice on the website of the Liechtenstein Office of Justice referring to the companies' websites providing the merger plan and its publication date (article 351d, sections 1 and 1a PGR).

#### 10 | Which parties are responsible for filing and are filing fees required?

The parties to the merger or those acquiring joint control need to notify the concentration. In all other cases, the notification needs to be effected by the person or undertaking acquiring control (article 4(2) of the EU Merger Regulation).

The company management of the transferring and of the absorbing company has to file the merger and its consequences to the Liechtenstein Office of Justice. However, the management of the absorbing company has the right to file the merger for the transferring company (article 351g, section 1 PGR) as well.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A concentration may not be implemented either before its notification or until it has been declared compatible with the common market, unless a derogation has been granted (article 7 of the EU Merger Regulation).

For a cross-border merger of a Liechtenstein company limited by shares, the Liechtenstein Commercial Register, which is a department of the Office of Justice, will verify whether the conditions precedent for a merger have been fulfilled and will issue a pre-confirmation (article 352e PGR).

Within six months of the issuance of the pre-confirmation, all involved companies need to file the merger plan as well as a possible agreement with the Liechtenstein Office of Justice, which controls the legality of the cross-border merger with respect to its execution and the formation of a new company limited by shares under Liechtenstein

law as a result of the merger. Furthermore, it verifies the compliance with the Law on the employee participation in a cross-border merger of limited liability companies (article 352f PGR).

The registration of a cross-border merger in the Commercial Registry is only admissible after a legality control according to article 352f PGR (article 352h, section 1 PGR).

The merger only takes effect after it has been entered in the Commercial Register of the absorbing company and it may only be entered in the Commercial Register of the absorbing company after it has been entered for the transferring companies (article 351h PGR). The transfer of the assets and liabilities and the dissolution of the transferring companies takes effect together with the entry of the merger in the Commercial Register.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The ESA and the European Commission may fine a person or an undertaking for closing before clearance (article 14 of the EU Merger Regulation). The validity of any transaction (in connection with a concentration with an EC/EEA dimension) carried out before its notification or until it has been declared compatible with the common market shall be dependent on a decision of the European Commission or on a respective presumption (article 7, paragraph 4 of the EU Merger Regulation). Moreover, the Commission may take the appropriate measures to ensure that the undertakings concerned dissolve the concentration, or may take interim measures (article 8, paragraphs 4 and 5 of the EU Merger Regulation).

There are no recent cases where sanctions have been imposed.

There are no specific sanctions for closing before clearance for mergers of companies limited by shares in the PGR. Article 351l PGR states the liability of the members of the company management of the transferring company in relation to their shareholders for their negligent or wilful behaviour in the course of the preparation and accomplishment of the merger.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions could be applied in cases involving closing before clearance in foreign-to-foreign mergers if they have substantial operations in an EU member state or an EEA state and exceed the thresholds. However, no such case has been reported for Liechtenstein.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No such solutions exist in which it would be acceptable to permit closing before clearance.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

Article 7(2) of the EU Merger Regulation determines that a public bid or a series of transactions in securities, by which control is acquired from various sellers, may be implemented on the following conditions:

- the concentration is notified to the European Commission or the ESA without delay; and

- the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the European Commission or the ESA.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The special forms provided for in the Annexes of Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing the EU Merger Regulation must be used for a notification of a concentration pursuant to the EU Merger Regulation: Form CO (Annex I) or Short Form CO (Annex II).

Generally, the Short Form CO may be used when a notification is submitted that is unlikely to raise completion concerns. The exact conditions are stipulated in paragraph 1.1, subparagraph 3 of Annex II of EC Regulation No. 802/2004 of 7 April 2004. In all other cases Form CO must be used.

Section 1 et seq of Annex II of EC Regulation No. 802/2004 states in detail the information that must be provided in the form (eg, description of the concentration, information about the parties, details of the concentration, ownership and control). All required information must be correct and complete. If a notification in any material respect is incomplete, the Commission informs the notifying parties in writing. In such a case the notification shall become effective on the date on which the complete information is received by the Commission (article 5, paragraph 2 Regulation (EC) No. 802/2004). In order to carry out the duties assigned to it by the EU Merger Regulation, the Commission by simple request or by decision may require the concerned persons to provide all necessary information (article 11, paragraph 1 EU Merger Regulation). The Commission may by decision impose fines to relevant persons (eg, where they intentionally or negligently supply incorrect information in response to a request (article 14, paragraph 1 EU Merger Regulation)).

The Ordinance of 11 February 2003 on the Commercial Register, in its presently valid version (Legal Gazette 2003, No. 66, LR 216.012) determines in articles 69 and 70 the required level of detail for the filing.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

Before the notification, the European Commission may be consulted to informally and confidentially confirm the jurisdiction of the European Commission, identify key issues and possible competition concerns and ascertain deadlines.

In Phase I the European Commission issues a formal clearance decision upon the notification of a concentration if the merger does not raise 'serious doubts as to its compatibility' with the common market.

If the concentration raises 'serious doubts', the European Commission issues a decision to initiate proceedings (ie, to proceed with an in-depth Phase II investigation).

The Phase II decision clears or blocks the merger.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

Pursuant to article 10 of the EU Merger Regulation, the European Commission or the ESA must decide within 25 working days and provide clearance in cases that do not raise 'serious doubts as to its compatibility' with the common market. The period begins on the working day following the receipt of the notification. Under certain conditions the period may be extended by 20 days. In all other cases, an in-depth investigation will follow, which takes 90 days and may even be extended to 105 days.

The concentration is deemed compatible with the common market if the Commission or the ESA have not taken a decision within the given time limits. The time frame for clearance cannot be speeded up.

As Liechtenstein has had no mergers with an EU or EFTA dimension since the entry into force of the EU Merger Regulation, there is no pertinent practice.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

There is no particular substantive test for clearance with respect to Liechtenstein. However, the European Commission or the ESA will apply the considerations stated in article 2 of the EU Merger Regulation.

A concentration may not significantly impede effective competition in the common market or in a substantial part of it. The structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the European Union or EFTA must be taken into consideration. In addition, the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition, must be assessed when deciding whether a concentration is compatible or incompatible with the common market. Moreover, the Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The Commission considers the following three criteria to be especially relevant for the application of a 'failing firm' defence. First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anticompetitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings VIII re Failing Firm (2004/C 31/03)).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

#### 20 | Is there a special substantive test for joint ventures?

There is also no particular substantive test for joint ventures with respect to Liechtenstein. The European Commission or the ESA assesses whether the joint venture significantly impedes effective competition. A joint venture may not result in an appreciable restriction of competition

between undertakings that remain independent (recital 27 of the EU Merger Regulation).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

### Theories of harm

**21** | What are the 'theories of harm' that the authorities will investigate?

The Liechtenstein Office of Economic Affairs does not assess and investigate itself whether a concentration is compatible or incompatible with the common market. It reports potential cases to the ESA. The ESA makes an overall assessment in accordance with article 2, paragraph 1 of the EU Merger Regulation. The ESA (or the Commission) for such an assessment applies several theories of harm (eg, for horizontal mergers it considers whether by such merger there is a reduced competitive pressure and thus an increased ability to raise prices). Furthermore, for vertical mergers the ESA may examine whether by such merger there is an input foreclosure (ie, a restriction of competitor access to procurement markets) or a customer foreclosure (ie, a restriction of competitor access to sales markets).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

### Non-competition issues

**22** | To what extent are non-competition issues relevant in the review process?

See questions 19 and 21.

### Economic efficiencies

**23** | To what extent does the authority take into account economic efficiencies in the review process?

See questions 19 and 21.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

**24** | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

At the request of the European Commission, the Liechtenstein Office of Economic Affairs may, according to article 3 of the Law on the Execution of the Competition Rules in the EEA and article 12 of the EU Merger Regulation, require information from the involved Liechtenstein undertakings of a concentration, inspect business files or may have the files inspected and verified by an expert. Apart from that, the Liechtenstein Office of Economic Affairs may ask the European Commission and the ESA to control a merger.

The European Commission may conduct all necessary inspections of undertakings and associations of undertakings. It may impose fines, require the undertakings concerned to dissolve the concentration or, if a restoration is not possible, any other measure appropriate to achieve such restoration as far as possible, take interim measures appropriate to restore or maintain conditions of effective competition (article 8 of the EU Merger Regulation).

The merger only becomes effective after it has been entered in the Commercial Register in case of national or cross-border mergers of companies limited by shares under the PGR. Hence, the Office of Justice may refuse to enter the merger in the Commercial Register if the legal requirements have not been fulfilled.

### Remedies and conditions

**25** | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy competition issues. However, the European Commission usually applies behavioural remedies rather than structural remedies.

See question 24 for national or cross-border mergers of companies limited by shares under the PGR.

**26** | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The conditions are that a concentration has already been implemented and that a concentration has been declared incompatible with the common market, or that a concentration has been implemented in breach of a condition included in a decision, or in cases where a joint venture constituting a concentration would not fulfil the criteria laid down in article 81(3) of the Treaty on the Functioning of the European Union.

The Liechtenstein Office of Justice controls the legality of the cross-border merger with respect to the execution and formation of a new company limited by shares under Liechtenstein law as a result of a merger. Furthermore, it verifies the compliance with the law on employee participation in a cross-border merger of limited liability companies. It does not assess the effects of a merger on the market. If the legal requirements of articles 351 to 352k PGR for the merger with respect to the execution and formation of a new company limited by shares are not met, the entry of the merger to the Commercial Register (and thus the validity of the merger) may be postponed or refused.

**27** | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The European Commission may impose remedies in foreign-to-foreign mergers if they fall within the application of the EU Merger Regulation as in mergers involving undertakings from EU member states or EEA states.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

### Ancillary restrictions

**28** | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A decision declaring a concentration compatible is deemed to cover restrictions directly related and necessary to the implementation of the concentration (article 8(2) of the EU Merger Regulation).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

**29** | Are customers and competitors involved in the review process and what rights do complainants have?

The European Commission may hear other natural or legal persons showing sufficient interest (article 18(4) of the EU Merger Regulation). Furthermore, the European Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation (article 11(7) of the EU Merger Regulation).

The Commission must base its decision only on objections on which the parties have been able to submit their observations. The rights of defence must be fully respected in the proceedings (article 18(3) of the EU Merger Regulation).

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

### Publicity and confidentiality

**30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?**

Only general information or surveys that do not contain information relating to particular undertakings or associations of undertakings may be published. Information acquired through the application of the EU Merger Regulation and covered by the obligation of professional secrecy may not be disclosed. All information acquired as a result of the application of the EU Merger Regulation may only be used for the purpose of the relevant request, investigation or hearing (article 17 of the EU Merger Regulation and article 4b of the Law on the Execution of the Competition Rules in the EEA).

Decisions of the European Commission are published, but shall have regard to the legitimate interest of undertakings in the protection of their business secrets (article 20(2) of the EU Merger Regulation).

The documents provided to the Commercial Register for the registration of the merger may be inspected by parties having a justified interest (article 953 PGR and article 18 of the Ordinance of 11 February 2003 on the Commercial Register).

### Cross-border regulatory cooperation

**31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?**

The Liechtenstein Office of Economic Affairs and the Liechtenstein EEA Coordination Unit cooperate with the European Commission and the ESA. As Liechtenstein, as far as we have seen, has not had a case under the EU Merger Regulation so far, there exists no practice with respect to the cooperation between antitrust authorities.

In case of a cross-border merger of a company limited by shares under the PGR, the Office of Justice informs the involved foreign authorities (article 352h PGR).

## JUDICIAL REVIEW

### Available avenues

**32 | What are the opportunities for appeal or judicial review?**

Decisions of the European Commission and the ESA may be reviewed by the European Court of Justice or the EFTA Court (article 16 of the EU Merger Regulation).

### Time frame

**33 | What is the usual time frame for appeal or judicial review?**

No general comments can be made as there has been an insufficient number of cases to calculate an average time frame.

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## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

**34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

The European Commission pursues foreign-to-foreign mergers if they have an EU or EEA dimension and the aggregate turnover of the concerned undertakings exceeds the thresholds given by the EU Merger Regulation.

This question is not applicable for national or cross-border mergers of companies limited by shares under the PGR.

No current enforcement concerns of the authorities are known with respect to Liechtenstein.

### Reform proposals

**35 | Are there current proposals to change the legislation?**

No, there are no current proposals to change the Liechtenstein legislation.

# Malaysia

Shanthi Kandiah

SK Chambers

## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Malaysia's general competition legislation, namely the Competition Act 2010 (CA), sets out prohibitions on anticompetitive agreements and abuses of dominance, but not merger control. While mergers are not expressly excluded from the scope of the CA, there is acceptance that the competition regulator, the Malaysian Competition Commission (MyCC), has no merger control mandate.

There are sector-specific laws and guidelines that regulate the antitrust aspects of mergers in the aviation services sector and the communications and multimedia sectors, enforced by the Malaysian Aviation Commission (MAVCOM), and the Malaysian Communications and Multimedia Commission (MCMC) respectively.

MAVCOM has competition policy powers under the Malaysian Aviation Commission Act 2015 (MACA). This is presently the only statutory merger control regime in Malaysia.

MAVCOM has published the following guidelines on mergers:

- Guidelines on Substantive Assessment of Mergers (the SAM Guidelines);
- Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger (the NAP Guidelines); and
- Guidelines on Aviation Service Market Definition.

For the communications and multimedia sectors, the existing Guideline on Substantial Lessening of Competition (SLC Guideline) issued by the MCMC expressly states that the regulator considers that mergers involving telecommunications and multimedia licensees must be investigated as 'conduct which has the purpose of substantially lessening competition in a communications market' (under section 133 of the Communications and Multimedia Act 1998 (CMA)). On 17 May 2019, the MCMC issued the final versions of the following guidelines:

- Guideline on Mergers and Acquisitions (the M&A Guidelines); and
- Guideline on Authorisation of Conduct (the AC Guidelines).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The MACA encompasses both horizontal and non-horizontal mergers (vertical and conglomerate). A merger is deemed to occur if:

- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings;
- as the result of the acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of assets, of another undertaking (the second undertaking) is to

place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate in the part concerned of the business in which the undertaking was engaged immediately before the acquisition; or

- a joint venture is created to perform, on a lasting basis, all the functions of an autonomous entity.

Section 48 MACA, read together with the Third Schedule, lists excluded commercial activities, agreements and mergers.

### Communications and multimedia sectors

The MCMC's SLC Guideline provides that the MCMC regards mergers to be 'conduct' falling within the scope of sections 133 and 139 of the CMA. The definition of mergers and acquisitions (M&A) under the M&A Guideline is similar to that set out in the MACA.

The competition regulation regime established by the CMA does not contain any express provisions for merger control and assessment. As such, there is no process nor is there a legal requirement that parties to a merger or acquisition should notify the MCMC in respect of such transactions. In spite of the lack of clear provisions, the MCMC has said that it will assess mergers affecting the communications and multimedia sector that are voluntarily submitted to it in the manner set out in the M&A Guidelines. The advantage that the procedures established through the M&A Guidelines is that they enable merging parties to:

- obtain the Commission's view in respect of the competitive effects of a M&A; and
- decide whether to apply to the Commission for authorisation of a M&A where it is consistent with national interest subject to various undertakings or in a restructured form to avoid breaching the provisions of the CMA.

It is likely that MCMC is attempting to replicate the informal clearance regime that operates in Australia. There is a natural incentive for merging parties to seek clearance of any anticipated or completed merger, to ensure that mergers are not subject to an unexpected review by the MCMC, thereby providing greater transaction certainty.

It should be noted that the competition provisions under the CMA apply only to licensees. The four (major) individual licence categories under the CMA require licensees to be companies incorporated in Malaysia as a standard licence condition.

#### 3 | What types of joint ventures are caught?

### Aviation services sector

The MACA treats full-function joint ventures as mergers. The SAM Guidelines explain that such a joint venture 'operates in an aviation service market and performs the functions normally carried out by enterprises in that market'. Factors to determine 'intention' include:

- commitment of resources by the parent enterprises – the period of the joint venture must be long enough to cause a lasting change in the structure of the enterprises concerned or provide for continuation beyond such specified period;
- joint ventures established for a short definite period and to carry out a specific project may be considered as not having an operation on a lasting basis; and
- joint control by the parties to the joint venture where such enterprises are capable of exercising decisive influence with regard to the activities of the joint venture.

**Communications and multimedia sectors**

The CMA does not define ‘joint venture’. However, the M&A Guideline describes an approach similar to that in the MACA.

**4 | Is there a definition of ‘control’ and are minority and other interests less than control caught?**

**Aviation services sector**

The SAM Guidelines explain that ‘control’ can exist via:

- ownership of the assets of the enterprise;
- the right to use all or part of the assets of the enterprise; or
- the rights or contracts that enable the exercise of decisive influence regarding the composition, voting or decisions of the enterprise.

Control can be acquired directly or indirectly. Examples of direct control are by becoming holder of the rights or contracts, whereas indirect control may occur through acquisition of the power to exercise rights. It can be determined by examining links between the acquirer and the enterprise having indirect control such as the source of funding and family relations between the acquiring person or enterprise.

**Communications and multimedia sectors**

‘Control’ is not defined or explained under the CMA. The M&A Guideline explains that control can be achieved through:

- amalgamating with another firm to form a merged entity;
- acquiring the assets of another firm and replacing that firm; or
- through acquiring direct or indirect control over another firm.

The test for control is whether a firm can exercise ‘decisive influence’ over the activities of another firm by reason of rights, contracts or other means. ‘Control’ can be obtained through:

- legal control (ie, having more than 50 per cent ownership of all voting rights); or
- de facto control (ie, circumstances that allow one firm to influence another’s activities to affect key strategic commercial behaviour).

**Thresholds, triggers and approvals**

**5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?**

**Aviation services sector**

For notification and assessment of a merger, parties should self-assess whether a merger can give rise to a substantial lessening of competition within any market affecting Malaysia, and whether a merger notification should be made to MAVCOM. MAVCOM is more likely to investigate a merger or anticipated merger where:

- the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least 50 million ringgit; or
- the combined worldwide turnover of the merger parties in the financial year preceding the transaction of the merger parties is at least 500 million ringgit.

**Communications and multimedia sectors**

The MCMC has not prescribed any jurisdictional thresholds but has taken the position that a market share of more than 40 per cent is indicative of dominance.

The M&A Guideline provides guidance on thresholds for notification and assessment:

Type of merger	Notification threshold
Proposed horizontal merger	<ul style="list-style-type: none"> <li>• At least one of the parties to the merger is a licensee in a dominant position; or</li> <li>• if the threshold above is not met, the merger would result in the proposed merged firm obtaining a dominant position. A post-merger market share of the proposed merged entity of 40 per cent or more would be indicative of this.</li> </ul>
Completed horizontal merger	<ul style="list-style-type: none"> <li>• The merged entity is a licensee in a dominant position.</li> </ul>
Proposed non-horizontal merger	<ul style="list-style-type: none"> <li>• At least one of the parties to the merger is a licensee in a dominant position.</li> </ul>
Completed non-horizontal merger	<ul style="list-style-type: none"> <li>• The merged or acquired entity is a licensee in a dominant position.</li> </ul>

**6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?**

**Aviation services sector**

The MACA has a voluntary notification regime.

**Communications and multimedia sectors**

The regimes for both notification and assessment of a merger, as well as authorisation of conduct, are voluntary.

**7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?**

There are no such special notification requirements for either sector.

Under the MACA, a local effects test is applied (ie, whether a merger transacted or executed outside Malaysia has an effect on competition in any aviation service market in Malaysia).

The CMA applies extraterritorially to licensees or providers of relevant facilities or services in a place within Malaysia.

**8 | Are there also rules on foreign investment, special sectors or other relevant approvals?**

**Aviation services sector**

Applicants for an air service licence, air service permit or group handling licence must either be a Malaysian or a company incorporated in Malaysia under direct or indirect control of a Malaysian. It is understood that foreign shareholding is allowed subject to significant local shareholding.

**Communications and multimedia sectors**

Licences are only offered to Malaysian incorporated companies. In 2011, the Ministry of International Trade and Industry liberalised foreign shareholding thresholds to 70–100 per cent, depending on licence category. However, the MCMC, as the licensing authority, permits 30–49 per cent foreign shareholding for certain licence categories and higher shareholding requests will be entertained on a case-by-case basis. Import permits are required for importation of communications equipment.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

- 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

#### Aviation services sector

Merger parties have the option of notifying both completed and anticipated mergers. For anticipated mergers, notification and application can be made to MAVCOM when:

- merger parties have a bona fide intention to proceed with the anticipated merger;
- details of the anticipated merger are available; and
- the anticipated merger has been, or may be, made public.

For completed mergers, notification can be made at any time, but merger parties are encouraged to do so as soon as possible after the merger is completed. There are no sanctions for failing to file, per se, but MAVCOM in its final decision can impose a financial penalty if it is satisfied the infringement was intentional or negligent.

#### Communications and multimedia sectors

For notification and assessment, parties should submit their transactions prior to completion. An application for authorisation of conduct can be made before, during or after submitting an application for assessment pursuant to the M&A Guidelines.

- 10 | Which parties are responsible for filing and are filing fees required?

#### Aviation services sector

A party to an anticipated merger or involved in a merger is responsible for filing. MAVCOM does not presently impose such fees but will do so via regulations in future.

#### Communications and multimedia sectors

Licensees can apply to the MCMC for authorisation of conduct and notification and assessment. Under the M&A Guideline, the MCMC will not accept multiple parallel applications for assessment of a merger. The M&A Guidelines provide that the acquiring party (for a proposed M&A) or the merged entity or entity that has acquired control (for completed mergers) are the appropriate parties.

- 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

#### Aviation services sector

The regime is non-suspensory but parties proceed at their own commercial risk as MAVCOM has the power to unwind mergers and impose financial penalties for infringement. The duration for the assessment of an application will be determined on a case-by-case basis.

#### Communications and multimedia sectors

In theory, the notification and assessment regime under the M&A Guideline appears to be a non-suspensory regime. Parties can proceed with the M&A without automatic sanctions.

Similarly, where parties apply for authorisation, the regime is non-suspensory as licensees can apply before, during or after submission of an assessment application. There is no requirement to seek authorisation.

### Pre-clearance closing

- 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Not applicable.

- 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No.

- 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Where MAVCOM has commenced, but not completed, an investigation, it has the power to direct parties to suspend the effect of, or desist from acting in accordance with any agreement, desist from any conduct that is suspected to infringe a prohibition or to do, or refrain from doing, any act (but that shall not require the payment of money).

### Public takeovers

- 15 | Are there any special merger control rules applicable to public takeover bids?

Takeovers and mergers in Malaysia are subject to the Malaysian Code on Takeovers and Mergers 2010.

### Documentation

- 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

#### Aviation services sector

The NAP Guidelines provide that a notification and application shall be made in the form and manner determined by MAVCOM, supported by the required documents and information. In the Notification and Application form for an anticipated merger or a merger published by MAVCOM, the information and supporting documents required by MAVCOM consist of, among others:

- details of the parties to the merger;
- information on the merger including description of the turnover of the merger parties, structure of the merger and change on the ownership structure of the merged entity;
- description of the relevant aviation service market, including the relevant service market, geographic market and temporal market where applicable;
- competitive effects of the merger including unilateral and coordinated effects of the merger, barriers to entry, and countervailing buyer power;
- economic efficiencies (if any) including description of significant economic efficiencies and nature of the economic efficiencies; and
- social benefits (if any) including description of significant social benefits and the nature of the social benefits.

MAVCOM may refuse to accept incomplete or incorrect applications.

Failing to disclose relevant information, evidence, documents or providing false or misleading information, evidence, documents to MAVCOM is an offence carrying a fine of up to 500,000 ringgit, imprisonment up to three years, or both.

### Communications and multimedia sector

For authorisation of conduct, applicants will need to prepare Form 2 and the relevant supporting documents as stated in Annexure 3 of the AC Guidelines. The following information, among others, needs to be submitted:

- description of the proposed conduct and any documents detailing terms of such conduct;
- markets that the conduct is likely to affect;
- market characteristic;
- the time frame for which authorisation is sought;
- benefits of the conduct from the perspective of national interest;
- who is likely to benefit from the conduct;
- how are the benefits distributed; and
- how the conduct has been framed to minimise anticompetitive effect.

Failure to provide sufficient information may render the application to be invalid. If applicants knowingly give false or misleading information, they commit an offence that carries a fine of up to 20,000 ringgit, or imprisonment not exceeding six months, or both.

For notification and assessment, applicants will need to prepare Form 1 and Form 2 as well as the relevant supporting documents, full details of which can be found in Annexures 1 and 2 of the M&A Guideline.

Incomplete applications will be rejected by the MCMC. The MCMC may revoke a notice of no objection to a notification and assessment that was approved, if information provided by a licensee was materially incomplete, false or misleading. The CMA also provides that knowingly giving false information is an offence that carries a fine of up to 20,000 ringgit, or imprisonment not exceeding six months, or both.

### Investigation phases and timetable

**17** | What are the typical steps and different phases of the investigation?

#### Aviation services sector

For notification and assessment, upon receiving a complete application, MAVCOM will first determine whether the merger or anticipated merger falls within the meaning of section 54 MACA. If it does, MAVCOM will publish a summary of the application for public consultation.

Next, MAVCOM will proceed with two phases of its assessment – Phase 1 involves evaluating the possible competitive effects through gathering of information. MAVCOM will then issue a proposed decision and publish it for public consultation. Following this, MAVCOM will make a final decision of non-infringement or proceed to Phase 2, which involves a more detailed and extensive examination of the effects of the merger or anticipated merger. A proposed decision will be published for public consultation and applicants can make written representations in response to a finding of infringement. MAVCOM will then consider public feedback and written representations before making its final decision. The duration for the assessment of an application will be determined on a case-by-case basis.

MAVCOM also has the power to investigate a merger or anticipated merger that raises competition concerns under the MACA. The process of such an investigation is not expressly spelled out.

#### Communications and multimedia sectors

The assessment for notification is proposed to be broken down into two phases under the M&A Guideline and is similar to MAVCOM's approach. The Guideline also indicates time frames for investigation – Phase 1 should be completed within 30 business days from receipt of a valid Form 1 application, Phase 2 should commence within 10 business days of a valid Form 2 application and is expected to complete within 120 business days. The time frame for an investigation for both Phase 1 and Phase 2 may be completed in less or more time than indicated if the

MCMC considers that it is warranted in the circumstances of the M&A being assessed.

If the MCMC reaches the view that it is likely to issue an unfavourable decision, it will issue an applicant with a statement of issues setting out its preliminary findings and the grounds on which it reaches its conclusions. The applicant will be given 30 days to respond. The MCMC will then object or not object to the merger and issue the relevant notices.

A similar process and time frames are envisaged for an authorisation application as provided in the AC Guidelines.

These timelines may be extended by the MCMC at its absolute discretion and may be reviewed by the MCMC, taking into account the practical considerations.

**18** | What is the statutory timetable for clearance? Can it be speeded up?

See question 17.

### SUBSTANTIVE ASSESSMENT

#### Substantive test

**19** | What is the substantive test for clearance?

#### Aviation services sector

Mergers that have resulted or may be expected to result in a substantial lessening of competition in any aviation service market are prohibited.

The 'failing firm' defence is available. This will be considered in the counterfactual analysis where a merger party may claim that, without the merger, it would exit the relevant market and competition would be lost anyway.

#### Communications and multimedia sectors

Section 133 CMA prohibits 'any conduct which has the purpose of substantially lessening competition in a communications market'.

The failing firm defence is available where:

- the financial situation of the firm has deteriorated to such an extent that without the M&A, it and its assets would exit the market in the near future;
- there are no serious prospects for restructuring the business; and
- there are no less anticompetitive alternatives to the M&A.

**20** | Is there a special substantive test for joint ventures?

See question 3.

#### Theories of harm

**21** | What are the 'theories of harm' that the authorities will investigate?

#### Aviation services sector

Generally, MAVCOM will look at whether a merger or anticipated merger is likely to lead to substantial lessening of competition by way of unilateral and coordinated effects. To determine unilateral effects, MAVCOM would consider:

- profitability of any price increase or reduction of supply;
- whether other competing enterprises would increase their capacities or expand their commercial operations in response to any price increase or reduction of supply;
- existence of any close substitutes of the service provided by the merger parties; and
- the possibility of new competitors entering the relevant aviation service market.

In assessing coordinated effects, MAVCOM will consider the structure and characteristics of a relevant aviation service market, any history of coordination in the said market, factors that would indicate the characteristics of a relevant aviation service market and how such factors would impact the coordinated effects of a merger.

### Communications and multimedia sectors

As per the M&A Guidelines, when assessing whether a merger results in coordinated effects of horizontal mergers on competition, the MCMC will attempt to establish whether a merger materially increases the likelihood that firms in a market will successfully coordinate their behaviour or strengthen any existing coordination, and will take into account the following conditions:

- the ability of firms to align on the terms of coordination;
- incentives to maintain coordination; and
- weak competitive constraints.

In determining unilateral effects of horizontal mergers, the MCMC will consider:

- whether the products and services are close substitutes;
- whether rivals have an incentive and the ability to respond to a price increase;
- the significance the merger parties have to the competitive process; and
- the competitive constraint each of the merger parties exerted on each other prior to the merger.

For non-horizontal mergers, the MCMC also looks at coordinated effects and unilateral effects. For coordinated effects, the same factors for establishing coordinated effects in a horizontal merger will be relevant to non-horizontal mergers. For unilateral effects, the MCMC will take into account foreclosure, barriers to entry and access to commercially sensitive information.

### Non-competition issues

**22** | To what extent are non-competition issues relevant in the review process?

#### Aviation services sector

A party affected by an infringement decision by MAVCOM may within 14 days of the date notice of the decision is given, apply to the Minister for an exemption from the prohibition on the ground of public interest considerations. This exemption will be confined to matters of public or national security and defence.

### Communications and multimedia sectors

Section 140(2) CMA states that the MCMC can authorise a conduct if it is satisfied that the authorisation is in the national interest. The MCMC will use the national policy objectives in section 3(2) as the basis to decide whether or not the conduct should be authorised.

A cost-benefit analysis is used to examine if a conduct promotes national policy objectives. This analysis is guided by four steps – market definition, market structure analysis, analysis of economic impact, and analysis of benefits from the perspective of national interest. The MCMC can exercise its discretion and vary these steps, if necessary.

### Economic efficiencies

**23** | To what extent does the authority take into account economic efficiencies in the review process?

#### Aviation services market

A merger party may claim that there are significant economic efficiencies arising directly from the merger, including supply-side or

demand-side efficiencies. Examples of supply-side efficiencies that may be considered include cost reduction, removal of double marginalisation in vertical mergers, increase in investment, differentiation of aviation services, and increase in capacity and network of aviation services. Examples of demand-side efficiencies include increased network of aviation services available to buyers, price effects of complementary aviation services, and benefits of 'one-stop shopping'.

### Communications and multimedia sectors

As part of the process of conducting a cost-benefit analysis (see question 22) in relation to authorisation of conduct, detrimental effects of a conduct will be analysed from the perspective of economic efficiency, namely production efficiency, allocative efficiency and dynamic efficiency – examples specified are economies of scale and scope and pooling of resources.

For the notification and assessment regime, efficiencies (including economic efficiencies) will be considered as part of the assessment of whether there is a substantial lessening of competition.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

**24** | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

#### Aviation services sector

If an infringement is found in a merger or an anticipated merger, MAVCOM can take the following actions:

- order to cease infringement promptly;
- specify steps that should be taken by the infringing enterprise to bring the infringement to an end;
- impose financial penalties that shall not exceed 10 per cent of worldwide turnover of the infringing enterprise over the period that the infringement occurs; and
- provide any other direction as MAVCOM deems appropriate.

The NAP Guidelines provide examples of directions:

- prohibiting an anticipated merger from being carried into effect;
- ordering a merger to be dissolved or modified;
- requiring parties to enter into agreements designed to lessen or prevent the anticompetitive effects arising from a merger or an anticipated merger;
- requiring a merger party to dispose its businesses, assets, shares or rights in a specified manner; and
- providing a performance bond, guarantee or other form of security on such terms and conditions as may be determined by MAVCOM.

Additionally, MAVCOM may issue interim measures in the context of an investigation (but not for notification and assessment):

- suspending the effect or desisting from acting in accordance with any agreement suspected of infringing any prohibition;
- desisting from any conduct that is suspected of infringing any prohibition; and
- to do or refrain from doing any act, but that shall not require payment of money.

### Communications and multimedia sectors

The CMA sets out administrative actions available to the Minister or the MCMC:

- the Minister can modify, vary, revoke, impose further special or additional conditions of an existing individual licence;
- the Minister, on MCMC's recommendation, can suspend or cancel an individual licence; and

- the MCMC can direct a licensee in a dominant position to cease conduct that substantially lessens competition and implement appropriate remedies.

No specific provision for remedies can be found in the CMA. The MCMC has the power to determine the appropriate remedy subject to ministerial direction and the object of the CMA.

In administering the section 133 CMA prohibition and failure to comply with MCMC's directions pursuant to section 139 CMA, the MCMC may enforce the following remedies:

- interim or interlocutory injunction against any prohibited conduct; and
- fine up to 500,000 ringgit or imprisonment up to five years or both upon conviction. Offenders would also be liable for a further fine of 1,000 ringgit per day or part of a day during which the offence is continued after conviction.

Under the M&A Guidelines, the MCMC is also empowered to include the following directions in its notice of objection, including requirements that the licensee:

- must not transfer or assign any licences or spectrum assignment granted pursuant to the CMA to another entity for a proposed merger; and
- must not further integrate with another merger party if a merger has completed and involves a licensee in a dominant position and has the effect of substantially lessening competition in a communication market. The MCMC may also prevent the merged entity from trading.

## Remedies and conditions

### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

#### Aviation services sector

A merger party may, voluntarily or upon invitation, propose an undertaking to do or refrain from doing anything, which MAVCOM has the right to accept or reject. If MAVCOM accepts, it must close the investigation without finding of infringement or imposition of a penalty. Undertakings can be both structural and behavioural.

#### Communications and multimedia sectors

In respect of authorisation, MCMC can require the licensee to submit an undertaking regarding its conduct in any matter relevant to the authorisation. Licensees can subsequently withdraw such undertaking and the authorisation that was granted based on the undertaking provided will be deemed to have never been given.

With respect to the notification regime, it is not clear if MCMC would be prepared to accept voluntary commitments offered by parties to a merger as part of the informal assessment process without having to go through a formal authorisation clearance pursuant to section 140 CMA.

### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

#### Aviation services sector

MAVCOM can impose remedies upon finding an infringement by taking into consideration:

- whether the remedial action can restore the competition that would be substantially lessened as a result of a merger or an anticipated merger;
- whether the remedial action would be effective to stop the infringement or to remedy, mitigate or prevent a substantially lessening

of competition effect arising from the merger or an anticipated merger; and

- the cost of monitoring the remedial action.

The NAP Guidelines spell out conditions applicable to the sale of business as a structural remedy:

- such business is required to be capable of being fully separated from the merger party;
- the approval of the purchaser may be required prior to the sale of the business; and
- to consider an enterprise that is willing to pay a commercially reasonable price for a business as an alternative purchaser even if the price is lower than the price that a merger party is willing to pay for the acquisition of that business.

In this regard, MAVCOM may specify that the sale must be completed within a certain period of time, failing which an independent trustee may be appointed, to monitor the operation of the business pending disposal or to handle the sale at the expense of such merger party.

MAVCOM may consider behavioural remedies in the following situations:

- divestment of business would be impractical or disproportionate to the nature of the competition concerns; and
- behavioural remedy is necessary to support structural divestment; for example, MAVCOM may direct a merger party to refrain from approaching buyers of the divested business for a specified period so as to allow the buyers of the divested business to be a viable and effective competitor.

## Communications and multimedia sectors

The MCMC is given the power to request for an undertaking regarding a licensee's conduct in any matter relevant to the authorisation. Undertakings that the MCMC may require with an authorisation of conduct may include:

- proceeding with the merger in a substantially restructured form;
- a specific division to be sold off;
- the negative competitive effects of the merger to be addressed in some other form;
- expand or allow fair and reasonable access to vital infrastructure or services to customers or competitors;
- not acquire assets within a specific time period, if doing so would have the effect of strengthening the merged or acquired entity's market power; and
- in the case of a firm acquiring direct or indirect control of another, all dealings between the parties will continue on arm's length basis and measures will be put in place to ensure this remains the case

### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

None published.

## Ancillary restrictions

### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The powers given to MAVCOM and the MCMC (in the M&A Guideline) appear to be wide enough to make decisions covering ancillary restrictions, but the circumstances in which decisions by MAVCOM and the MCMC would cover ancillary restrictions is unclear.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

#### Aviation services sector

Customers and competitors may be contacted for information gathering under the Phase 1 assessment and public consultation. It is unclear who would be the parties involved in an investigation where MAVCOM is not notified.

Any individual or enterprise may make a complaint to MAVCOM regarding any suspected infringement of Part VII MACA in the aviation services. Those who suffer loss or damage as a result of infringement have a right to civil action.

#### Communications and multimedia sectors

Under the M&A Guideline, the MCMC's assessment of competitive effects of a M&A involves public consultation with competitors, customers and even suppliers.

A person can lodge a complaint regarding any suspected infringement to the MCMC. However, the MCMC may decide whether to give a complainant the opportunity to appear before MCMC in relation to an investigation. As mentioned above, an interim or interlocutory injunction can be sought by anyone, against any prohibited conduct under the CMA.

#### Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

#### Aviation services sector

Commercial information is not automatically treated confidentially. Confidentiality is available to claims that MAVCOM determines to have merits prior to issuance of its proposed decision and a decision in a voluntary regime. There is no mention of confidentiality safeguards in relation to MAVCOM's public consultations. Hence, it is prudent for a merger party to specify that the information disclosed to MAVCOM is of a 'commercial and confidential' nature.

#### Communications and multimedia sector

The AC Guideline allows a licensee to provide confidential information in a separate annexure from the application form, clearly marked as 'confidential'. A public inquiry may form part of the investigation process under this route if the conduct in question is of significant interest to consumers or licensees. The MCMC may decide not to publish evidence or material presented to the inquiry or lodged with the MCMC that it considers to be confidential in nature.

Confidentiality is partially warranted in the M&A Guideline. An applicant has to redact commercially sensitive or confidential information to be used in the MCMC's consultations with third parties.

Under the M&A Guideline, the MCMC would conduct a limited confidential assessment of a M&A where its confidentiality needs to be preserved.

#### Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

None published.

## JUDICIAL REVIEW

### Available avenues

32 | What are the opportunities for appeal or judicial review?

#### Aviation services sector

Persons affected by MAVCOM's decisions may apply to the Minister for a merger or anticipated merger to be exempt from the prohibition on the ground of public interest. MAVCOM's decision, act, omission, refusal, direction or order can also be challenged in the High Court.

#### Communications and multimedia sectors

An applicant's right to appeal against the MCMC's decision to the Appeal Tribunal exists under the CMA. The M&A Guideline explains that M&A parties may appeal for review of the MCMC's decision. Appeals are not available to third parties nor on the MCMC's determinations that a M&A party is in a dominant position.

A person affected by the Minister's or the MCMC's decision or other action may apply to the court for a judicial review upon exhausting all other remedies under the CMA.

### Time frame

33 | What is the usual time frame for appeal or judicial review?

#### Aviation services sector

Applications for exemption must be made within 14 days of the date of MAVCOM's notice. Appeals to the High Court must be made within three months of the date on which the decision was communicated.

#### Communications and multimedia sector

There is no time frame prescribed by the CMA for appeal to the Appeal Tribunal at this juncture.

The time period for application for judicial review is three months from the date the grounds of application first arose or when the decision was first communicated to the applicant.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

None that have been made public.

### Reform proposals

35 | Are there current proposals to change the legislation?

See question 36.

## UPDATE AND TRENDS

### Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Malaysia remains a notable exception to the general trend within jurisdictions in East Asia to adopt a merger control regime as part of their competition law framework. Based on news reports, it is understood that the MyCC has begun the process of seeking legislative amendments to include new provisions on mergers and acquisitions into law. The MyCC aims to implement a merger control regime by the end of 2019.

Until this amendment to the law is made, the MyCC has clarified that it is not in a position to evaluate or prevent anticompetitive mergers

and acquisitions from taking place. It can only act if the merged entity starts abusing its dominant position.

The MCMC has finalised and issued the M&A Guideline and AC Guideline on 17 May 2019, shortly after the announcement of the proposed merger between Axiata Group Bhd (Axiata), owner of Celcom Axiata Bhd, and Norwegian Telenor Group (Telenor), owner of DiGi.com Bhd. It is unclear whether the parties have notified the merger for assessment or whether they are pursuing an application for authorisation.



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# Malta

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The principal legislation governing mergers is the Control of Concentrations Regulations (CCRs). The CCRs have been issued as subsidiary legislation (SL 379.08) under the Competition Act (CA, Chapter 379 of the Laws of Malta), which is the main legislation regulating competition in Malta, together with the relative provisions of EU law.

Merger control is regulated exclusively by the CCRs, with the exception of partial-function joint ventures regulated by the relevant provisions of the CA, including articles 5 and 9 that implement articles 101 and 102 of the Treaty on the Functioning of the European Union (formerly articles 81 and 82 of the EC Treaty).

The relevant regulatory body is the Director General (DG) who heads the Office for Competition, which is the major key player in all stages. Concentrations must be notified to the DG, who then has the obligation of conducting the prescribed assessment within the established time frames. The undertakings' concerned and interested third parties may request the DG to submit his or her decision for review by the Competition and Consumer Appeals Tribunal (the Appeals Tribunal), and the DG must comply with the request.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The CCRs apply to a 'concentration' defined as follows: the merging of two or more undertakings that were previously independent of each other; or the acquisition by one or more undertakings or the acquisition by one or more persons or undertakings already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more undertakings, whether occurring in Malta or outside Malta when in the preceding financial year the aggregate Maltese turnover of the undertakings concerned exceeded €2.3 million and each of the undertakings concerned had a turnover in Malta equivalent to at least 10 per cent of the combined aggregate turnover of the undertakings concerned.

#### 3 | What types of joint ventures are caught?

The CCRs specifically provide that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, namely a 'full-function joint venture', is considered to be a 'concentration'. Accordingly, such joint ventures, or the acquisition of control of joint ventures are also caught by the CCRs and the CA.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined as having the possibility of exercising decisive influence on an undertaking, in particular:

- through ownership or the right to use all or part of the assets of an undertaking; or
- through rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking, provided that even persons or undertakings not holding such rights or entitled to such rights under the contract concerned are deemed to have acquired control if they have the power to exercise the rights deriving therefrom.

Minority and other interests are not specifically mentioned in the legislation, but if they bring about a change in control, there will be a concentration within the meaning of the CCRs.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The CCRs establish a series of thresholds that have to be met for a concentration to be notifiable to the DG. Such thresholds are based on turnover.

In the case of mergers or takeover bids occurring in or outside Malta, in the preceding financial year the aggregate turnover in Malta of the undertakings concerned exceeded €2.3 million and each of the undertakings concerned had a turnover in Malta equivalent to at least 10 per cent of the combined turnover of the undertakings concerned. The Office for Competition has always interpreted the 'aggregate turnover' threshold to relate solely to turnover in Malta.

In the case of concentrations consisting of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts that are the subject of the transaction are taken into account with regard to the seller or sellers. Nonetheless, where two or more such transactions take place within a two-year period between the same persons or undertakings, they are treated as one and the same concentration arising on the date of the last transaction.

In the case of credit institutions and other financial institutions, the turnover includes the sum of the following income items, after deductions of value added tax and other taxes directly related to such items, where appropriate, that are received by the institution or its branch in Malta:

- interest income and similar income;
- income from securities;
- income from shares and other variable yield securities;
- income from participating interests;

- income from shares in affiliated undertakings;
- commissions receivable;
- net profit on financial operations; and
- other operating income.

In the case of insurance undertakings, the turnover consists of the value of gross premiums written. This comprises all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including outgoing reinsurance premiums and after deduction of taxes and parafiscal contributions (payments made by the employer to family compensation funds) or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

The aggregate turnover of an undertaking concerned is calculated by adding together the respective turnovers of the following:

- (i) the undertaking concerned;
- (ii) those undertakings in which the undertaking concerned, directly or indirectly:
  - owns more than half the capital or business assets;
  - has the power to exercise more than half the voting rights;
  - has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings; or
  - has the right to manage the undertakings' affairs;
- (iii) those undertakings that have in the undertaking concerned the rights or powers listed in (ii);
- (iv) those undertakings in which an undertaking as referred to in (iii) has the rights or powers listed in (ii); and
- (v) those undertakings in which two or more undertakings as referred to in (i) to (iv) jointly have the rights or powers listed in (ii).

Where undertakings concerned by the concentration jointly have the rights or powers listed in (ii) above, in calculating the aggregate turnover of the undertakings concerned, no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in (ii) to (v) above, but account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, this turnover being apportioned equally among the undertakings concerned.

The CCRs bestow numerous powers upon the DG to be able to carry out his or her duties and undertake all necessary investigations into undertakings and associations of undertakings. Thus, the DG has the power:

- to examine the books and other business records;
- to take or demand copies of or extracts from the books and business records;
- to ask for oral explanations on the spot; and
- to enter any premises, land and means of transport of undertakings.

The undertakings and associations of undertakings must in turn submit to such investigations, ordered by decision of the DG.

Similar investigative powers are also provided in the Competition Act. In such cases the DG may request any undertaking or association of undertakings to furnish him or her with any information or document in its possession that he or she may have reason to believe is relevant to the matter under investigation, within such time as in the circumstances of the investigation the DG may consider reasonable. The DG's power is only limited with respect to documents or the disclosure of information subject to the duty of professional secrecy.

To date, the Maltese national authorities have not referred any cases below these thresholds to the European Commission.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of a notification to the DG is mandatory for all types of concentrations. The CCRs contain a concentration notification form (Form CN) that must be followed in all cases. Regulation No. 1269/2013 of 5 December 2013 amending Regulation No. 802/2004 has also aimed to simplify and expedite the examination of concentrations that are unlikely to raise competition concerns by requiring notification through a short form.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Although no specific reference to foreign mergers is made in the relevant laws, it is nonetheless quite clear that foreign-to-foreign mergers are also caught. This, inter alia, emerges from the inclusive definition of 'concentration', which catches mergers and takeovers 'whether these occur within or outside Malta', thereby including foreign-to-foreign mergers. In addition, the definition of concentration requires each of the undertakings concerned to have a turnover in Malta as specified in question 5.

The CCRs adopt a local effects test in prohibiting concentrations that might lead to a substantial lessening of competition in the Maltese market or part thereof.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Apart from tax rules, money laundering and the legislation on collective investment schemes, there are no rules or provisions concerning foreign investment or foreign direct investment.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations shall be notified to the DG prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest, within 15 working days. For a concentration to be considered as notified, the notification must be carried out in accordance with the rules set out in the schedule to the CCRs and the notification fee specified in the same schedule must be paid on notification. In default, the DG will declare the notification to be incomplete and hence invalid.

Penalties for failure to file a notification before implementation are a fine of between €1,000 and €10,000.

Penalties for putting into effect a concentration before its notification are a fine up to 10 per cent of the turnover of the undertaking that benefits from the transaction.

Where a director, manager, secretary or other similar officer of the aforesaid undertaking is responsible for the premature concentration of his or her undertaking and another undertaking, said person will be deemed to be vested with the legal representation of the undertaking and will be jointly and severally liable for the payment of the fine.

Where the infringement occurred prior to the coming into force of the Malta Competition and Consumer Affairs Authority Act in 2011, the provisions relating to fines and periodic penalty payments as existing prior to the coming into force of the Act are deemed to apply.

## 10 Which parties are responsible for filing and are filing fees required?

Notification is to be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings. This means that in the case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification; in the case of a public bid to acquire an undertaking, the bidder must complete the notification. However, in the cases where the concentration consists of a merger or the acquisition of joint control, the notification is to be made jointly by the parties to the merger or by those acquiring joint control as the case may be. Each party completing the notification form is responsible for the accuracy of the information that it provides. The notification fee, which was introduced in 2007 by Legal Notice 49 of 2007, must be paid by the notifying party or parties on submission of the duly completed notification form and such fee amounts to €163.06.

It is also relevant to point out that although pre-notification meetings with the DG are not mandatory, they are recommended. In fact, the Form CN explicitly states that pre-notification meetings are extremely valuable to both the notifying parties and the DG in determining the precise amount of information required in a notification and, in the large majority of cases, will result in a significant reduction of the information required. Accordingly, notifying parties are encouraged to consult the DG regarding the possibility of dispensing with the obligation to provide certain information.

## 11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Following the submission of all the required information, the DG has to take a decision regarding the applicability of the CCRs to a concentration within six weeks. Where he or she finds that the notified concentration falls within the scope of the CCRs, the DG will initiate proceedings. The law, however, allows the extension of this period to two months in cases where at any time during the first five weeks, the undertakings concerned submit commitments aimed at modifying the concentration in such a way as to make it compatible with the CCRs. Up until the fifth week, the notifying party may also request a moratorium of three weeks to discuss and present substantially revised commitment proposals. However, it is up to the DG to decide whether or not to accede to such a request. If, following modifications, the DG finds that the concentration does not infringe the CCRs, the DG shall issue a decision declaring such concentration to be lawful. The decision is also considered to cover restrictions that are directly related and necessary for the concentration's implementation. The DG may also choose to attach conditions and obligations to ensure that the undertakings comply with the commitments they entered into.

Where the DG finds that a concentration raises serious doubts as to its lawfulness in terms of the CCRs and decides to initiate proceedings, he or she shall, save in the case of modifications, issue a decision declaring that the concentration is unlawful within not more than four months from the date on which proceedings were initiated. However, when the undertakings concerned submit commitments with a view to rendering the concentration lawful in terms of the CCRs, following the DG's initiation of the said proceedings and within three months of the initiation of the said proceedings, they may request that this four-month period be suspended for up to one month for proper consideration of such commitments, thereby extending it to a possible five months. In cases of concentrations deemed not to raise serious doubts as to their legality in terms of the CCRs and falling within the ambit of the simplified procedure, the DG shall issue a short form decision to that effect within four weeks of notification. The simplified procedure applies to the following categories of concentrations that are deemed not to raise

serious doubts as to their legality in terms of the provisions of the CCRs, unless the DG, in exceptional cases and in view of the economic conditions pertaining to the market and the parties to the concentrations, deems otherwise:

- two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of Malta because the turnover of the joint venture or the turnover of the contributed activities, or both, is less than €698,812.02 in the territory of Malta and the total value of assets transferred to the joint venture is less than €698,812.02 in the territory of Malta;
- two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a market that is upstream or downstream of a product market in which any other party to the concentrations is engaged; or
- two or more undertakings merge or one or more undertakings acquire sole or joint control of another undertaking and two or more of the parties to the concentrations are engaged in business activities either in the same product and geographical market and their combined market share is less than 15 per cent or in a product market that is upstream or downstream of a product market in which any other party to the concentration is engaged and their combined market share is less than 25 per cent.

The simplified procedure is available where there is not going to be a substantial lessening of competition.

Generally, implementation of the transaction must be suspended until clearance. However, the law specifically allows the implementation of a public bid that has been notified, provided that the acquirer does not exercise the voting rights attached to the security or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DG. Furthermore, in all cases the DG may, upon a reasoned request and after having taken into account the effect of a suspension (eg, major financial risks) and the threat of competition, grant a derogation from the obligation to suspend transactions prior to clearance and this derogation may be subjected to conditions and obligations to safeguard effective competition. The Office for Competition has to date never received such a request.

The DG shall examine the notification and shall determine within a six-week period whether to proceed with one of the following methods:

- conclude that the concentration notified does not fall within the scope of these regulations and record that finding by means of a decision;
- conclude that the concentration notified, although falling within the scope of these regulations, does not raise serious doubts about its lawfulness in terms of the CCRs and decide not to oppose it; the DG shall declare it to be a lawful concentration and such a declaration shall also cover restrictions directly related and necessary to the implementation of the concentration; or
- initiate proceedings after concluding that the concentration notified falls within the scope of these regulations and raises serious doubts as to its lawfulness in terms of the provisions of these regulations. All proceedings are deemed to be closed by means of a decision, which, subject to certain exceptions, must be taken within not more than four months of the date on which proceedings are initiated.

Where the DG finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts as to its lawfulness, the DG may decide to declare the concentration to be a lawful concentration.

The CCRs state that all the aforementioned time periods shall be suspended in a number of cases where, inter alia, the information given is not provided in full.

Where the DG has not taken a decision within the time limits set in the CCRs, the regulations state that the concentrations shall be deemed to be lawful.

The general rule states that a concentration shall not be put into effect either before its notification or until it has been declared lawful. However, the CCRs contain the following exceptions. The above rule does not apply in cases of a public bid that has been notified to the DG and on the basis of a special derogation granted by the DG, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments.

The DG will grant, at his or her discretion, said derogation upon a reasoned request before notification or after the transaction, after taking into account, inter alia, the effects of the suspension on one or more undertakings concerned in a concentration or on a third party, and the threat to competition posed by the concentration. Furthermore, such derogation may be made subject to conditions and obligations to ensure conditions of effective competition.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a transaction is carried out before clearance, apart from any penalties that may be levied for this breach, its validity will depend on whether clearance is eventually granted. If the result is that the concentration is allowable under the CCRs, then it is likely that the transactions will be deemed valid.

The CCRs contain special rules regarding securities. The provisions discussed in question 11 shall have no effect on the validity of transactions in securities, including those convertible into other securities admitted to trading on a market, which is regulated and supervised by the competent authorities appointed under the law and that operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of the provisions of the CCRs.

A concentration shall not be put into effect either before its notification or until it has been declared lawful pursuant to a decision under Regulation 6(1)(ii) or Regulation 8(2) or on the basis of a presumption according to Regulation 9(7).

Nevertheless, severe penalties apply for breaches of the provisions of the CCRs. The CA stipulates that a person found guilty of a breach is liable in solidum with the undertaking in whose interests he or she was acting to a fine up to 10 per cent of the turnover of the said undertaking.

The CCRs also provide for penalties in situations where clearance or derogations from suspension are granted subject to certain conditions or obligations, which are then breached by the undertakings. In these cases, as in the case where the DG orders the cessation or dissolution of the concentration, the applicable punishment under the CA shall be a fine ranging between €1,000 and €10,000.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No specific reference is made to foreign-to-foreign mergers in the relevant laws and the normal provisions are applicable.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Local authorities are empowered to take the necessary remedial action in the case of a foreign-to-foreign merger that is in breach of the CCRs. Naturally such a merger would be acceptable if it has a minimal effect on the Maltese market. 'Hold-separate' arrangements may be used, but, nevertheless, the merger is likely to be caught under the CCRs if, notwithstanding the arrangement, it results in a lessening of competition in the Maltese market.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

A public bid that has been properly notified is not suspended before clearance, provided that the acquirer does not exercise the voting rights attached to the security or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DG in terms of the CCRs.

The CCRs stipulate that the bidder acquiring an undertaking or part thereof must submit the notification. Furthermore, in such cases, Form CN specifically requires:

- a declaration of whether any public offer for the securities of one party by another party has the support of the former's board of directors or other bodies legally representing that party; and
- a copy of the offer document, which, if unavailable at the time of notification, should be submitted as soon as possible and no later than when it is posted to shareholders.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification of concentrations is to be made in accordance with the provisions of the Form CN contained in a schedule attached to the CCRs. This form requires the applicants to supply details about, inter alia:

- the notifying party and all parties to the concentration;
- the nature of the concentration;
- the extent to which the parties are involved in the concentration;
- the economic and financial structure of the concentration;
- the proposed structure of ownership and control;
- the worldwide and Maltese turnover;
- details on product and market descriptions (including structure of supply and demand, market entry and pre-existing agreements in the market) together with all supporting documentation; and
- all ancillary restraints entered into by the parties to the concentration and other involved parties (including the seller and minority shareholders).

Until all the required information is supplied, the notification will be deemed to be incomplete and no time frames shall commence until all the necessary information and details are supplied.

The CCRs list four types of documents to be submitted:

- copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties of a public bid;
- in a public bid, a copy of the offer document; if it is unavailable at the time of notification, it should be submitted as soon as possible and not later than when it is made available to the shareholders;
- copies of the most recent annual reports and accounts of all the parties to the concentration; and

- where at least one affected market is identified: copies of analyses, reports, studies and surveys submitted to or prepared for any members of the board of directors, the supervisory board, or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to competitive conditions, competitors (actual and potential) and market conditions.

Where a party supplies incorrect or misleading information relating to a deal, intentionally or negligently, they may be liable to an administrative fine of not less than €1,000 and not more than €10,000, as imposed by the DG. In addition, the DG may also revoke his or her decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

The investigative process can be broadly divided into two separate phases. The first phase commences from notification and lasts until the initial decision is issued, whereby the DG determines whether to start proceedings. The second phase comes into effect when, upon finding that a concentration raises serious doubts as to its lawfulness in terms of the CCRs, the DG initiates proceedings to further investigate and, if need be, induce modification by the applicants of the said concentration to bring it within the parameters of the CCRs.

Within this second phase, undertakings may submit commitments with a view to rendering the concentration lawful and the DG may in turn request the supply of certain additional information as well as order certain investigations to be carried out. At the end of this phase, the DG either declares the concentration to be in breach of the CCRs and therefore prohibits it, or else finds it to be allowable subject to the imposition of certain conditions, restrictions or modifications and issues a decision to that effect.

In the case of concentrations deemed not to raise serious doubts as to their legality in terms of the CCRs and falling within the ambit of the simplified procedure, the DG shall issue a short-form decision to that effect within four weeks from notification.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 11.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

To determine whether a concentration is deemed to be legal, the CCRs require the DG to take into account, inter alia, the need to maintain and develop effective competition in the Maltese market, the geographical and product markets and potential competition from other undertakings. The test for product markets stipulates, inter alia, the need to give regard to issues of substitutability, conditions of competition, prices and cross-price elasticity of demand. The geographic market test comprises an analysis of the area in which conditions of competition are sufficiently homogeneous and distinct from neighbouring areas. In this regard, the Maltese market, when distinct from the EU market, is generally considered as one single geographical area.

Other factors taken into account in making an assessment of a notified concentration include:

- whether the business or part of the business of a party to the concentration has failed or is likely to fail (to the best of our knowledge, there have not been any instances where this failing-firm defence has been raised);
- the market position of the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users and their access to supplies or markets;
- any legal or other barriers to entry;
- supply and demand trends for the relevant goods and services;
- the interests of the intermediate and ultimate consumers;
- the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition; and
- the nature and extent of development and innovation in a relevant market.

#### 20 | Is there a special substantive test for joint ventures?

As explained previously, certain joint ventures fall under the CCRs. In addition to a general substantive test applicable to concentrations in general (see question 19), in case of a joint venture the DG should have particular regard as to whether two or more parent companies retain significant activities in the same market as the joint venture or in a market that is neighbouring, downstream or upstream from that of the joint venture, and as to whether the coordination resulting from the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The Office for Competition would request all the information as set out in Form CN for the purposes of assessing a concentration. This would include an investigation and determination of:

- its market share thresholds;
- whether or not there is overlap between the relevant geographic market and relevant product market;
- market power; and
- whether there is an effect on the competition in the Maltese market.

It will also consider whether the benefits derived from the merger outweigh the effects on competition in Malta. However, the company has to prove that these efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services.

The Office for Competition is concerned with mergers that have horizontal effects (where two or more parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 per cent or more) and vertical effects (where one or more of the parties to the concentration are engaged in business activities in a product market that is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market share is 25 per cent or more, regardless of whether there is or is not any existing supplier or customer relationship between the parties to the concentration). Mergers having vertical effects will most probably create barriers to entry in the market or will increase the possibility of parties colluding in the market.

The Office for Competition is also concerned with the following issues:

- supply and demand, including supply and distribution structures, maintenance of service networks and the identity of major suppliers and customers;
- existing cooperative agreements within the market; and
- certain cases of conglomerate mergers, especially where the merger creates or enhances portfolio power.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The CCRs grant the DG discretion to hear other persons or undertakings showing a sufficient interest in the concentration. Apart from representatives of the administrative or managerial bodies of the undertaking concerned, the representatives of the employees of such undertakings shall on request be entitled to be heard. It appears that concentrations that may have the effect of terminating employment will almost certainly not be looked upon favourably by the authorities.

Any third parties showing a sufficient interest in the concentration shall apply in writing to the DG, whereby they will be informed in writing by the DG himself or herself of the nature and subject matter of the procedure. A time limit shall also be set within which the interested parties may make known their views in writing. Furthermore, the DG may approve a request to develop an argument verbally whenever a third party puts forward such a request in their written submissions.

Other issues that may be taken into consideration are the effects of the concentration on research and development.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The CCRs lay down the framework for various economic considerations to be made. In determining whether a concentration is prohibited or not, the DG is obliged to take into account, inter alia, whether the business or part of the business, or a party to the concentration has failed or is likely to fail; and the economic and financial power of the undertakings concerned.

Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration are allowed if the undertakings prove that such efficiency gains cannot be attained otherwise and are verifiable in the form of lower prices, greater innovation and choice or quality of service to consumers.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The merger control legislation in Malta allows the relevant authority to perform the following:

- the imposition of conditions and restrictions upon the applicants when granting clearance, thereby regulating the transactions to be performed;
- a revocation of clearance where:
  - the decision is based on information supplied by the undertakings that turns out to be incorrect or obtained by deceit; or
  - the undertakings concerned commit a breach of a commitment attached to the decision;

- the imposition of fines on the undertakings concerned where such undertakings are in breach of any of the provisions of the CCRs; and
- a declaration of invalidity of concentrations.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Notifying parties that are informed by the DG that the concentration they notified raises serious doubts as to its lawfulness under the CCRs, may, within the prescribed time frames (see question 11), enter into negotiations with the DG and effect modifications or otherwise submit commitments and restrictions to which the concentration will be subjected in case of clearance. There are no restrictions as such as to the method to be proposed by the notifying parties and the undertakings concerned are given adequate opportunities to remedy the situation by proposing a remedy, including divestments. Clearance will only be given, however, if the remedies have been agreed to by the DG and the concentration will not lessen effective competition.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

No specific conditions for such remedies are established by law. The conditions would generally be stipulated by the DG and may include a time frame within which divestments or other remedies must be implemented.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Although there are foreign-to-foreign mergers which, from time to time, are notified to the Maltese authorities, so far, no occasions have arisen where such mergers were objected to in Malta. Generally, where the Maltese authorities may have had cause to object to any such merger, this would also have been stopped or objected to by authorities elsewhere, foremost among which is the European Commission.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

If the parties to a concentration or other involved parties (including seller and minority shareholders), or both, enter into ancillary restraints that are directly related to and necessary to implement the concentration, these restrictions may be assessed in conjunction with the concentration itself.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The CCRs place a considerable emphasis on customers and the preservation of their rights. In fact, Form CN requires the provision of details of the five largest independent customers of the parties to the concentration in each affected market. Within this framework, it may be envisaged that the DG will consult these customers to determine the effect that the proposed concentration will have upon them. Moreover, the notification is required to be published and upon such publication, any interested third party, including competitors, may come forward and present their objections to the DG.

Furthermore, before taking any second-phase decision (see question 17), the DG may, if he or she deems it necessary, request information from or hear other persons or undertakings that show a sufficient interest in the concentration. A request of information to a third party by the DG, which, in the course of his or her investigations has not been answered, operates to suspend the running of time within which the DG is bound to give a decision, although this shall not extend the maximum allowable time frame for a decision.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Following notification, the proposed concentration is published in a local daily newspaper and in the government gazette, inviting third parties to make submissions. The information given concerns the actual notification, the names of the parties, the nature of the concentration and the economic sectors involved.

The CCRs do, however, oblige the DG, who is bound by professional secrecy, to take account of the legitimate interests of the undertakings concerned in the protection of their confidentiality and business secrets. Furthermore, information acquired by the DG during hearings or following a request made to the parties for an investigation shall be used only for the purposes of that hearing and information requested may not be disclosed.

Finally, decisions taken by the DG are published, but the CCRs once again oblige the DG to have regard for the legitimate interests of undertakings in the protection of their business secrets.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Although there is no provision to this effect, there is little doubt that, where necessary, the Office of Competition will cooperate with foreign authorities. The Office for Competition is the designated competition authority under article 35 of EC Regulation 1/2003 and, as such, must cooperate with the European Commission. The Office for Competition is also a member of the European Competition Network, and is often involved in cooperation relating to various matters including investigations, interpretations and liaison with foreign authorities.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Throughout the investigation process preceding the decision, all parties may make new submissions and proposals to remedy any situation that may raise doubts as to the lawfulness of the concentration.

The persons, undertakings or association of undertakings concerned or any third party entitled to a hearing in accordance with the CCRs (see question 22) may, within 20 days of notification or publication of the decision, request that the DG submit his or her decision for review by the Appeals Tribunal and the DG shall forthwith comply with this request. The submission for review shall not, however, automatically suspend the decision unless the Appeals Tribunal, upon a reasoned request by a party to the appeal, and after considering the submissions of the DG, suspends the decision, administrative fine or daily penalty payment under such conditions it deems fit, stating its reasons. The decision of the Appeals Tribunal shall be final.

The Appeals Tribunal may annul the whole or part of a decision taken by the DG under the CCRs and in such cases, the periods referred to in question 11 shall recommence from the date of the decision of the Appeals Tribunal, or if a decision from such Tribunal is filed, from the date of the judgment of the Court of Appeal. The CA also provides for a situation where the DG may revise or alter his or her decision where the information on which it was based had been false, misleading or incomplete, or the market conditions had changed significantly.

At present, there is no appeal to a higher authority from a decision of the Appeals Tribunal. However, this does not preclude an appeal to the Civil Court on grounds of a breach of the principles of natural justice by the Appeals Tribunal. See, for example, *Simonds Farsons Cisk plc v Agent Direttur ta' L-Ufficju tal-Kompetizzjoni Gusta et*, decided by the First Hall of the Civil Court on 27 October 2004, and *Imnara Limited v Ufficju għall-Kompetizzjoni*, decided by the Appeals Tribunal for Competition and Consumer Matters, on 20 March 2013. The case of *S&D Yachts Limited v Direttur tal-Ufficju tal-Kompetizzjoni Gusta et*, decided by the First Hall of the Civil Court on 20 April 2010, is regarding a matter of judicial review.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

See question 32.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

To date there have been no foreign-to-foreign merger cases that have been objected to in Malta. Generally, where the Maltese authorities may have had cause to object to any such merger, this would also have been stopped or objected to by authorities elsewhere, foremost among which is the European Commission.

The Maltese Competition Authority in its role as Competition and Consumer Affairs Authority has continued to focus primarily and carried out investigations on matters that affect consumer welfare. The Authority specifically focused on promoting further competition to have a wider choice of products as well as ensuring consumers' rights are adequately protected, while also giving significant importance to matters such as energy efficiency and food safety. The Authority issued an online public consultation on antitrust damages in relation to Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states of the European Union. Furthermore, it issued a public consultation on the Consumer Alternative Dispute Resolution (Residual ADR) Regulations. It also issued a Consultation on a proposed Act to amend the Competition Act (see question 35).

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The CCRs were amended in 2011, primarily by amending the appeals procedure, notification of the DG's decision and fines and penalties that may be imposed. Implementing Regulation 1269/2013 was passed on 5 December 2013 amending Regulation No. 802/2004 on the control of concentrations between undertakings. Because this is directly effective, the Maltese relevant regulations have not been amended to reflect such changes.

The Malta Competition and Consumer Affairs Authority Act came into force in 2011. By virtue of this Act, the Malta Competition and

Consumer Affairs Authority has been created. The Office for Competition is now part of this Authority. One of the responsibilities of this Office is the examination and control of concentrations between undertakings in terms of their effect on the structure of competition on the market.

Within the Office for Competition, the Inspectorate and Cartel Investigations Directorate is responsible for detecting and curtailing cartels and carrying out inspections in terms of the CA. The Communications, Energy, Transport and Financial Services Market Directorate shall be responsible for concentrations in regulated markets. The Primary, Manufacturing and Retail Markets Directorate focuses on restrictive practices and concentrations in other sectors of the economy.

The Maltese Competition Act was amended through Act XXV of 2017 to implement the provisions of Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law provisions.

In 2018, the Authority issued a Consultation on a proposed Bill to amend the Competition Act. It was proposed to replace the Competition and Consumer Affairs Tribunal and instead extend the competence of the Civil Court (Commercial Section). Sworn applications could be filed for review before the court on both points of law and fact regarding any infringement decision, cease and desist or compliance order, interim measure, administrative fine or daily penalty payment or daily administrative fine adopted or imposed by the Director General (Competition) in terms of the Competition Act. It was also proposed that appeals from a judgment of the court could also be made on both points of law and fact; at present appeals from the Competition and Consumer Appeals Tribunal may only be made on a point of law. The filing of the sworn application before the Civil Court (Commercial Section) would have the effect of suspending the administrative fine imposed by the Director General pending the final determination of the review. One of the new provisions of the draft Bill concerns undertakings' rights of defence in connection with investigations carried out by the Office for Competition. The right against self-incrimination was always recognised by the Office for Competition as a right pertaining to undertakings during investigations as it is a right that stems from European case law. However, this protection against self-incrimination will now be explicitly included in the proposed amendments to clarify the position of an undertaking that is the subject of an investigation. Bill 80 of 2019 was formally presented to Parliament in March 2019 and is still being debated at time of writing.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Bill 80 of 2019 is currently being debated and reviewed by the Maltese Parliament. The Bill, which was originally put into motion in 2018, is intended to amend the Competition Act by extending the powers of the Civil Court (Commercial Section) in relation to matters concerning the Director General (Competition), as well as officially including rights against self-incrimination in connection with investigations carried out by the Office for Competition.

The credit crisis left the Maltese economy relatively unscathed and it did not particularly affect Merger Control in Malta. The regulatory regime in place has withstood all the tests and proven to be sound.



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# Mexico

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The original Federal Economic Competition Law came into force in 1993 (amended in 2006 and 2011), and its implementing regulations governed merger control. Enforcement was the exclusive responsibility of the Federal Competition Commission (FCC). In 2013, the FCC was substituted by a new agency, the Federal Economic Competition Commission (COFECE).

In June 2013, stemming from an unprecedented constitutional reform in the field of telecommunications, two new agencies were created, the aforementioned COFECE and the Federal Institute of Telecommunications (IFT), both autonomous bodies, with legal personality. The IFT is the agency that reviews pre-merger notifications related to the telecommunications and broadcasting industries, and the COFECE reviews the rest of the premerger notifications in the other areas of the economy.

The Federal Economic Competition Law (FECL) was approved in Congress and was published in the Official Gazette on 23 May 2014. The FECL replaces the 1993 Act and came into force on 7 July 2014. The core of the merger analysis was not changed, but the order of the Chapter of Merger Control and its articles was modified. The FECL preserved most of the substantive provisions of the old Act; however, it created a newly designed agency.

Organic statutes for both the COFECE and the IFT were issued in July 2014 and September 2014 (modified in October 2014) respectively.

In November 2014, the COFECE issued the FECL's Regulatory Provisions (updated in February 2018), while in January 2015 the IFT issued the FECL's Regulatory Provisions for the Telecommunications and Broadcasting Industries.

COFECE issued its Guidelines for merger review in October 2015 (updated in April 2017), and is achieving notable influence, both in merger enforcement and advocacy functions.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Article 61 of the FECL employs a very broad interpretation of 'concentrations', a term that includes mergers, acquisitions of control or any acts by which shares, trusts, equity, partnerships and assets of any kind are concentrated. Straightforward business vehicles that meet monetary thresholds should thus be informally referred to the COFECE before filing.

#### 3 | What types of joint ventures are caught?

Under Mexican competition law, joint ventures above jurisdictional thresholds (see question 5) are subject to clearance before they are completed. Assessment of these cases is similar to that of other concentrations (see question 20).

Although joint ventures are not addressed directly in the statute or regulations, current practice considers such arrangements as concentrations and thus subject to pre-notification rules if and when thresholds are met. Joint ventures are currently subject to rule-of-reason analysis, and where there are substantial horizontal or vertical issues in a particular case, it is therefore strongly advisable to explain and be prepared to substantiate the absence of anticompetitive concerns and efficiencies expected to arise from the joint venture to avoid incurring outright prohibition.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The FECL does not provide an explicit definition of control. However, the Supreme Court has stated that a firm can exert decisive influence or control over others *de jure* or *de facto*. Transactions meeting the broad definition of 'concentration' (merger, acquisition of control or any act) and the monetary thresholds must be notified, regardless of the nature of what is being acquired. However, minority interests, non-controlling or any other ancillary participation should be claimed as of lesser concern (or mitigating factors) in merger review. Transactions that meet the pre-merger notification thresholds (see question 5 below), including transactions related to minority or other interests less than control, must be filed before the authority.

Minority and other interests less than control are caught, and COFECE has not formally considered 'non-controlling' interests as of lesser concern. Certain minority acquisitions are not subject to merger control, especially acquisitions by investment funds (less than 10 per cent), provided certain requirements are met.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are three monetary thresholds defined in article 86 of the FECL. It is sufficient to trigger one of the three sections to be bound to notify a transaction.

#### Section I

The value of the transaction must exceed the threshold of 18 million times the Unit of Measure and Update (the UMU, a benchmark common to all legal thresholds, currently about US\$79 million, considering an

exchange rate of 19.23 Mexican pesos per US\$1). By 'value', COFECE considers the price (or consideration agreed upon) paid by the purchaser, including money, liabilities or some type of exchange of shares or other assets to be paid in Mexico.

## Section II

It has two components: the first part refers to the transfer of at least 35 per cent of shares, assets or other form of participation; and the second part is to determine if the agent object of the transaction owns assets or had sales in Mexico, regardless of destination, for more than 18 million times the UMU (about US\$79 million).

## Section III

It also has two components. The first one refers to accumulation of assets or social capital for more than 8.4 million times the UMU (about US\$37 million). In case the transaction does not refer to the acquisition of all the shares of the target, the proportional value that is actually acquired is taken into account. With respect to this component, the value of the assets actually accumulated is assessed, and the value considered, refers to the higher figure between the commercial value and the value stated in the financial statements.

With respect to the second part of this section, COFECE considers the sum of assets or annual sales of the parties involved, separately or jointly, with a value that exceeds 48 million times the UMU (about US\$210 million).

## Sources of information for notification purposes

For the determination of the value of assets, sales or shares, the source of information are the financial statements. The required financial statements must be audited. Exceptionally, in the event of not having audited financial statements, internal financial statements may be submitted, as long as they comply with accepted financial information standards in Mexico or the country of the notifying agent.

The relevant variables to be considered in these financial statements are as outlined below.

### Value of assets

For this test, COFECE considers the higher value of: total value of the assets as stated in the balance sheet; or commercial value of the assets, which may differ from the value stated in the financial statements.

In case of accumulation of assets consisting of shares, the value of these will be obtained from the seller's financial statements. In cases where that value cannot be obtained, the amount of the assets can be calculated as a proportional amount of the assets of the acquired object.

### Value of sales

The FELC refers to annual sales. COFECE may also assess the concept of 'income', which appears in the statement of income of the financial statements.

Concentrations that are below the thresholds provided for in article 86 the FELC may result as questionable and thus become subject to investigation.

COFECE welcomes informal inquiries from parties regarding specific doubts as to threshold analysis. Written but non-binding comfort letters may be requested if parties are clearly identified and proper powers of attorney are submitted with sufficient data to assess the specific problems prompting such inquiry.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The FECL provides for mandatory pre-merger notification only, that is, those mergers or 'concentrations' meeting or exceeding the monetary

thresholds prescribed by law. However, parties may voluntarily file a notification even if the transaction does not meet or exceed the thresholds and the agency may process it as a mandatory filing, or parties may seek a non-binding opinion from the COFECE for planning purposes.

The FECL exempts from notification (article 93 of the FECL) among others, the following:

- mergers where the acquirer increases its participation in the acquired party over which the acquirer holds control since its incorporation or starting of operations dates, or when the COFECE has already authorised the acquisition of such control;
- corporate restructures (ie, when all participating parties belong to the same 'control group' with no third party involved);
- transactions involving firms listed on stock exchanges (Mexican or foreign) where the acquirer is allowed to purchase in one or several acts less than 10 per cent of the corresponding stock or title, and said acquirer may not exercise control over or influence the administration or corporate strategy, and may not exercise voting rights for 10 per cent or more of the stock, and may not appoint or remove the target's members of the board, directors or managers; and
- acquisitions of stock, trusts, investments or similar titles by one or more purely speculative investment fund provided that they do not already own assets or participation in any target's competitors.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

It should be expected that all mergers affecting assets or operations of economic agents doing business in Mexico will in principle be subject to pre-merger notification. However, article 86 of the FECL states that thresholds are to be assessed on a national impact basis: 'assets' are understood to include only those located within Mexican territory; and 'sales' are now understood to be only sales originated in Mexico. Only parties with combined worldwide assets or sales of approximately US\$210 million or more will have to notify foreign-to-foreign transactions provided that the target (worth about US\$37 million or more) is located in Mexico. There is no nexus test.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Mergers in some sectors or areas restricted for purposes of foreign investment also need to be cleared with the relevant authorities. Mergers in telecommunications are heavily regulated and will not be cleared by COFECE, but a specialised sectorial agency (IFT). In any event, compliance with legislation and other administrative filings should be consistently planned to avoid further requests or unwanted delay.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The FECL provides that mergers reaching or exceeding legal thresholds must be notified to COFECE or the IFT before they are carried out. A general recommendation regarding a deal with evident complexity or antitrust concerns would be:

- to consult on complex horizontal mergers with the respective agency before any important information is actually shared between parties;
- to exchange letters of intent or enter into similar agreements, subject to COFECE or IFT approval;

- to refrain from actual transfer of assets or administration; and
- to refrain from publicly announcing completion or closing.

If a special time frame for the deal or special confidential arrangements are needed, it is advisable to approach the agencies to obtain their approval of such arrangements.

Penalties for not filing reportable transactions may be up to 5 per cent of the turnover in Mexico of the parties involved.

#### 10 Which parties are responsible for filing and are filing fees required?

Article 88 of the FECL provides that all participating parties must file, but at the same time accepts that one party may act as a common representative. Parties should be seen to be disclosing the information needed for a proper assessment of the merger. Because each merger may raise different economic and legal issues, according to the specific market circumstances of the case, it is advisable to make sufficient plans before appearing before the respective competition agency so that information that is best suited to the purpose of convincing the authorities can be supplied, thereby avoiding requests that may delay full completion of the deal. In any case, once all the data has been gathered and the briefs or questionnaires have been completed, it is generally advisable to have access to both parties' data and information, except for information that is clearly confidential. The filing fee for a notification is the equivalent to about US\$9,000.

#### 11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Article 87 of the FECL orders parties not to close all reportable transactions until the final resolution is issued. Thus, there are no waiting periods.

#### Pre-clearance closing

#### 12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

While there are no specific sanctions for closing before clearance, article 127, section VII states that penalties for 'illegal transactions' may be up to 8 per cent of parties' involved turnover in Mexico. A non-reported transaction may be deemed an 'illegal transaction'. Two recent transactions were fined for closing before notification (fines between US\$1 million and US\$3 million).

#### 13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No. As stated in question 7, foreign-to-foreign transactions with no effects in Mexico are not bound to be notified. But if the transaction has to be notified and the parties close before clearance, penalties will be triggered therein.

#### 14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign-to-foreign transactions with no effects in Mexico are not bound to be notified. Foreign-to-foreign transactions with effects in Mexico must be authorised before closing.

#### Public takeovers

#### 15 Are there any special merger control rules applicable to public takeover bids?

No.

#### Documentation

#### 16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filings can be of two basic kinds. The 'general' procedure, with ordinary time frames (60 working days to issue a resolution), and a 'fast-track' procedure for simple and evident cases, with a shorter time frame (15 working days, as discussed in the following sections). The information that should be submitted is the same for both procedures, but the fast-track procedure requires further detail to prove that it is 'evident' that the merger is not anticompetitive and that the parties are not 'potential competitors', which requires a higher burden of proof. Parties usually opt to file under the ordinary procedure, which requires the data and information necessary to define the relevant market and to assess market power, in which case they are faced with a rather cumbersome questionnaire or with preparing a technical brief addressing the competition issues and even offering econometric analyses to support complex cases.

Solid market data and economic reasoning offer the best guarantee of good results and of avoiding misunderstandings of a factual or analytical nature. A balance must be struck between quantity of data and simplicity of argument. Most of the time spent before filing should be dedicated to the planning of information gathering so as to avoid delays and minimise the risk of the competition agencies' opposition.

All information must be in Spanish, with proper translations of non-Spanish material.

Depending upon the complexity of the transaction and the extent and quality of the information available, a typical filing may be 10 to 40 pages long (excluding the formal and analytical annexes). It may take anything from one to six weeks to complete the filing in non-complex cases.

Article 89 of the FECL points out the notification brief must include:

- names of the parties involved in the transaction;
- names of legal representatives;
- description of the transaction;
- explanation of the rationale of the transaction;
- incorporation deeds and public by-laws of the parties involved;
- financial statements of the parties;
- description of the parties' stock structure;
- activities of economic agents involved to the transaction, about holding an interest in the capital stock, management or in any activity of companies which may produce or trade similar or related goods or services to or having substantial relationship with the goods and services of the economic agents participating in the concentration;
- parties' and competitors' market share information;
- location of parties' facilities;
- description of products or services manufactured or sold by the parties involved; and
- any other important information.

If the notifying parties fail to submit the information requested in article 89 of the FECL, COFECE may declare the transaction as not filed (section II, article 90 of the FECL). In addition, parties may be fined for up to approximately US\$750,000 for submitting false information.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

Parties are welcomed by the staff to engage in pre-notification informal conversations. Article 92 of the FECL grants parties the right to request, from the day of filing, that the transaction should be reviewed under a 'fast-track' procedure if the parties can convince COFECE that the proposed transaction evidently may not lessen, harm or impair the competitive process. If the parties are successful, COFECE shall issue a ruling within 15 business days (15 days upon the issuance of an admissibility ruling issued by COFECE stating that no further information is needed for assessing the transaction). The fast-track analysis includes a general principle subject to several conditioning factors: parties must state that the acquirer does not already participate in markets related to the target's relevant market. In practice, fast-track proceedings are rarely used.

When the written notification fails to comply with the requirements established in article 89 of the FECL, the authority, within the following 10 business days after the notification has been filed, shall inform the notifying parties that their notification is not complete and will grant an additional 10-business-day period for the parties to submit the missing information or documents. Said period may be extended per request of the notifying party in duly justified cases (the 'basic information request').

Once the notification brief is complete, the competition agency may issue a second request of information and data within 15 business days.

After the second request for information is met, the competition agency has 60 business days to issue a ruling. If the authority fails to issue such ruling, under a 'sunset provision' the filing is deemed approved by default (although this is a most uncommon event). Before the 60-business-day period elapses, the authority may extend this period by up to an additional 40 business days, which would bring the whole filing review period to a total of around 105 business days, depending on when time is counted from in each specific case. In extreme cases, however, the final resolution could take up to 155 business days.

A hands-on and fully cooperative approach by the parties may shorten the review process. The staff is usually expected to verify key data/information.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 17. In addition, parties may be asked to explain, orally or in writing, some of the data or arguments in the filing (a formal second request for information). The respective competition agency may conduct an investigation to complement information contained in the filing, which may involve requesting data or information from competitors, clients or suppliers. Each agency's enforcement branch then produces a report with a recommendation to be submitted to each authority's seven-member Commissioners' Panel. This panel issues a ruling. Parties may appeal against the ruling before a federal judge strictly on constitutional grounds.

Article 90 of the FECL defines the timeline for clearance since notification to the final resolution (see quick reference table and question 17).

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The main substantive test is whether the transaction will reduce, impair or prevent competition. Theoretically, the pro-competitive effects of

the proposed transaction should be weighed against the anticompetitive effects.

The main test is then broken down into three sub-tests:

- acquisition of market power to the extent of being able to determine price levels or restrict output in the relevant market;
- intent to displace or the effect of displacing competitors orientated to obstruct or with the effect of obstructing market entry; and
- intent to facilitate, or the effect of facilitating monopolistic practices by merging parties (rule-of-reason offences or 'abuse of dominant position' such as refusals to deal, exclusivity agreements, resale price maintenance, boycotts, predatory pricing, discrimination, cross-subsidies and other vertical conduct cases, as well as potential incentives to incur in horizontal behaviour).

In May 2015, COFECE issued a Resolution related to the technical criteria for calculating and applying a quantitative index in horizontal merger analysis. According to this Resolution, COFECE uses the Herfindahl-Hirschman Index (HHI), and the proposed 'safe harbours' are:

- the value of the increase of HHI ( $\Delta$ ) is less than 100 points;
- the value of HHI after the transaction is below 2,000 points; and
- the value of HHI after the transaction is between 2,000 and 2,500 points,  $\Delta$  is located between 100 and 150 points, and the resulting economic agent after the transaction is not one of the four largest economic agents in the relevant market.

The history of rulings shows that special circumstances, such as an alleged failing firm, although sometimes addressed in the past, are rarely awarded notable influence.

### 20 | Is there a special substantive test for joint ventures?

No. See question 3.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

Precedents or practice may not be associated with any single theory of harm. Depending on the case at hand, the agencies focus on the analysis of a combination of the following outcomes: market dominance, joint dominance, unilateral effects, coordinated effects and vertical foreclosure. However, no special predominance on any theory may be singled out. However, rulings to condition or block transactions show mostly concerns over high combined market shares, even in the presence of broad geographical market definitions such as, for example, the 'North American Area'.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The 2013 constitutional reform created the new COFECE and IFT as autonomous bodies. Therefore, when reviewing mergers, non-competition issues should not be relevant for the review process.

However, because COFECE and the IFT are still young agencies. There are no public precedents regarding this particular issue.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Article 55 of the FECL formally recognises that the agency must review claimed efficiency gains stemming from the merger (or the conduct)

that favourably affect the competition process. These efficiency gains may include the following: the introduction of new products, products on bargain sale, defective or perishable products, cost reductions arising from the creation of new technologies and production methods, integration of assets, increases in the scale of production, the introduction of technological innovation, the combination of productive assets or investments to improve the quality or extend the attributes of goods and services, improvements in quality, and others that do not cause a significant increase in prices or a significant reduction in consumer choice, and others causing such net contributions to consumer welfare that outweigh anticompetitive effects.

However, at the time of writing, no transaction has been cleared under findings based on economic efficiencies. Despite theoretically being accepted by the statute, in practice the agency is rather resistant to admit allegations thereon: in a transaction that was blocked in 2017 by COFECE (*REA/Magnekon*), parties appeared to have submitted a comprehensive study of merger-specific efficiencies with quantitative support. Moreover, alleged efficiencies represented potential reductions in variable costs, which are generally expected to benefit final customers. In addition, the parties submitted alleged evidence of a recent transaction in the same relevant market in which the efficiencies originally estimated in that case were obtained and actually passed through customers. COFECE concluded that many of the claimed efficiencies had positive effects, but decided to rule that the parties failed to prove that those efficiencies would be passed on to consumers. The resolution did not include estimations of potential harm to allow balancing pro-competitive effects against expected anticompetitive effects.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

**24** | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The competition agencies may order divestiture of assets, impose conditions or block the whole transaction outright. COFECE has imposed stringent conditions in several cases.

### Remedies and conditions

**25** | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Article 90, penultimate paragraph, of the FECL allows parties to offer undertakings that may remedy potential antitrust concerns during the review process, including divestment of certain assets or behavioural remedies as a condition for clearance. The notifying parties may submit, from the moment the written notification is filed and until one day after the concentration is scheduled for a Board of Commissioners session, draft conditions to avoid impairing, damaging or preventing the competitive process and free market access as a result of the concentration.

Rulings show that the COFECE often addresses or accepts undertakings related to divestment of assets.

**26** | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The conditions will depend upon the nature and extent of the antitrust concerns at hand; however, COFECE may accept schedules that set up timing and other relevant facts to ensure that parties comply with agreed undertakings. COFECE may appoint a trustee, for example, to oversee specific divestiture procedures. The Commission's Technical Secretariat performs these oversight and compliance functions.

Regarding transactions considered to pose possible risks to the competitive process, COFECE informs the notifying parties about the risks identified (within a 10-day period prior to the case being scheduled for a Board of Commissioners session), to allow the parties to propose conditions or remedies that may correct the aforementioned risks.

**27** | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no public track record of a special nature, as foreign-to-foreign mergers with no effects in Mexico are not bound to be notified. For transactions with effects from 2013 to 2018, 18 transactions were subject to undertakings; some of them were even subject to investigation or penalties stemming from the lack of compliance thereof.

### Ancillary restrictions

**28** | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is not uncommon for COFECE rulings to include restrictions concerning potential spill-over effects over related markets under its powers to prevent anticompetitive conduct. In addition, COFECE may impose remedies to address the effects of anticompetitive restrictions. COFECE has published guidelines regarding ancillary restraints, mostly referred to non-compete covenants.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

**29** | Are customers and competitors involved in the review process and what rights do complainants have?

In complex cases, COFECE issues requests for information to customers or competitors to strengthen its analysis (notifying parties do not have access to these responses). Third parties have no legal rights to access a merger file. Filings and submitted documents, as well as third parties' responses of information, are not public.

### Publicity and confidentiality

**30** | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Notifications and the process of merger review are not public. The only publicity given to any process is the publication of a redacted version of the final decision.

According to article 124 of the FECL, the information and documents obtained directly by the competition agencies during its investigations and inquiries will be considered as reserved information, confidential information or public information, under the terms of article 125 of the FECL.

During the investigation, access to the file is forbidden to third parties, and, in the aftermath of the procedure, only firms with legitimate legal interest may have access to it, with the exception of information classified as confidential.

Public officials will be subject to responsibility of the information they are presented with. When an order of a competent authority compels the presentation of information, the COFECE and the aforementioned authority shall dictate the measures that will be in place to protect the confidentiality in the terms of the FECL.

Article 125 of the FECL states that confidential information will only be considered as such when requested by the economic agent, and proves its confidentiality. That is, the merging parties involved are

asked to identify their confidential information and to prove that the standards of confidential information protection are applicable. Under no circumstances will COFECE or the IFT be compelled to provide confidential information, nor will it be able to publish it. It will have to keep the information safe to this effect.

The public officials of the competition agencies shall abstain from publicly issuing declarations or revealing information related to the files or matters in process at the respective agency and that could cause harm or directly affect the parties involved, until the economic agent subject to investigation has been notified of the final resolution, preserving at all times the obligations that result from this article.

The COFECE has a strong reputation for keeping the confidentiality of all data and documents provided.

### Cross-border regulatory cooperation

**31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?**

Mexico has entered into several international arrangements (agreements implementing competition chapters, annexes or memoranda of understanding) to coordinate and cooperate in competition enforcement matters, including: NAFTA (NAFTA was signed in 1994, but the competition cooperation agreement implementing the competition chapter is dated July 2000), the European Union (2000), the European Free Trade Association (2000), the United States (2000), Israel (2000), Canada (2001), Chile (2004), Korea (2004), Japan (2004), El Salvador (2007), Russia (2010), Nicaragua (2011) and the Dominican Republic (2012). Such arrangements provide the usual positive comity, exchange of non-confidential information, coordination, cooperation and related items.

Waivers are commonly requested in multi-jurisdictional transactions.

## JUDICIAL REVIEW

### Available avenues

**32 | What are the opportunities for appeal or judicial review?**

From the creation of COFECE and the IFT as autonomous constitutional bodies, and as stated in article 28 of the Mexican Constitution, actions or omissions of COFECE and IFT may be challenged only through indirect *amparo* (recourse on constitutional grounds) judgment.

The 2013 constitutional reform states that the resolutions issued by COFECE or IFT may be contested only by filing of indirect *amparo* and will not be subject to suspension. In cases in which COFECE imposes fines or orders the divestiture of assets, those resolutions will be executed until the *amparo* proceeding is resolved. The *amparo* proceeding will be conducted by specialised judges and courts in the terms of article 94 of the Constitution. In no case will ordinary or constitutional remedies against proceeding acts be accepted.

The judiciary has set up specialised tribunals of circuit and district courts in areas of economic competition, broadcasting and telecommunications. Since the 2013 constitutional reform, legislation or regulations offer little incentives for recourse of merger cases before courts. Hence, the specialised circuit courts and district judges have reviewed no merger cases in which COFECE has imposed conditions or blocked transactions. The courts have reviewed cases in which COFECE has imposed fines on unreported transactions and have confirmed COFECE's decisions.

### Time frame

**33 | What is the usual time frame for appeal or judicial review?**

For court recourse, parties must file petitions within 15 business days of being notified of the final resolution. A district judge may take several months to issue its ruling. Parties may appeal before a circuit tribunal as a last resort. The appeal may take between one and five years to be ruled upon. As indicated in the previous question, the Council of the Federal Judiciary has established new specialised circuit tribunals and district courts in the fields of economic competition, broadcasting and telecommunications.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

**34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

In 2018, the COFECE resolved 175 cases. Of those cases, three were blocked and one was conditioned. The most recent notable cases reviewed in 2018 were *Rheem/GIS* and *Bayer/Monsanto* (see question 36).

Current enforcement concerns for both agencies include the implementation of the Federal Law of Economic Competition, the publication of refined technical criteria and predictable rulings, lack of procedural transparency and the effectiveness and incentives of recourse to competition and telecomm courts.

COFECE is currently facing considerable challenges in enforcing competition principles amid wider government efforts to return influence to state-controlled entities in industries such as oil and energy.

### Reform proposals

**35 | Are there current proposals to change the legislation?**

No. The current Federal Law on Economic Competition was approved in Congress, published in the Official Gazette on 23 May 2014, and came into force on 7 July 2014.

As stated before, in June 2013, Congress made amendments to article 28 of the Mexican Constitution concerning telecommunications industries. Amendments include the creation of the IFT, which is entitled to review competition issues (mergers, acquisitions and monopolistic practices) in telecommunications industries.

## UPDATE AND TRENDS

### Key developments of the past year

**36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

#### Rheem/GIS

COFECE blocked the proposed concentration between Rheem Manufacturing Company (Rheem) and Grupo Industrial Saltillo (GIS) which consisted in Rheem's acquisition of GIS's water heating assets. Both companies overlap in the production, distribution or wholesale commercialisation of electric and gas tank-type water heaters, both residential and commercial, in Mexico.

Otherwise Rheem would have become the main competitor in Mexico with significant market share in the relevant markets. Rheem and GIS competitors have a limited portfolio of products, low market shares and low brand recognition. Thus, no participant was identified with the ability to effectively counteract price increases resulting from the concentration. In addition, barriers to entry were found to limit entry of new participants or the growth of existent participants. Rheem and

GIS proposed certain undertakings, but were rejected as insufficient to prevent negative effects to the structural conditions and competition dynamics of the market.

#### **Bayer/Monsanto**

COFECE conditioned the concentration between Monsanto and Bayer to the divestment of the genetically modified cotton seed business, the vegetable seed business and certain non-selective herbicides that belong to Bayer. COFECE's assessment concluded that Bayer would become the sole supplier of genetically modified cotton seeds in Mexico and would gain significant market shares in the markets for crops such as onion, cucumber, tomato, watermelon, melon and lettuce as well as non-selective herbicides. The Agency found that these markets feature high entry barriers, mainly in terms of the difficulty and time required for research and development of new products, restrictions in legal frameworks, and high levels of investment required.

The undertakings proposed by Bayer and Monsanto entail the divestiture of their vegetable seed business and the genetically modified cotton seed business to BASF. COFECE determined that this company has the capacity and incentives to vigorously compete in the involved markets. For the analysis of this transaction, COFECE collaborated with competition agencies of several jurisdictions.

**CASTAÑEDA Y ASOCIADOS**  
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# Morocco

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The Moroccan merger control rules used to be laid down in Law No. 06-99 of 5 June 2000 (Dahir No. 01-00-225) on free pricing and competition and its enforcement Decree No. 2-00-854 (the former legal framework).

Under the former legal framework, the Chief of Government had decision-making power and the Competition Council had a consultative role when the notified concentration was likely to infringe competition. The opinions of the Competition Council mentioned in this article were released by the Competition Council under the former legal framework.

The new Moroccan merger control rules are set out in Law No. 104-12 of 30 June 2014 (Dahir No. 1-14-116) on free pricing and competition (the Competition Law) and its enforcement decree No. 2-14-652 of 1 December 2014 (the Decree) and in Law No. 20-13 relating to the Competition Council of 30 June 2014 (Dahir No. 1-14-117) and its enforcement Decree No. 2-15-109 of 4 June 2015.

The Competition Law and Law No. 20-13 significantly modify the roles of the merger control authorities:

- the merger control function has been transferred to the Competition Council; and
- the administration, through the Chief of Government or the delegated governmental authority, retains residual powers (in particular, an evocation power on the decisions of the Competition Council for matters of public interest).

It should be noted that the Competition Law had, in principle, entered into force in December 2015, after the issuance of the ministerial order of the Minister of Foreign Affairs and Governance No. 3633 (3 December 2015) referred to the Minimis Rules, but has only been applicable since the appointment of the new president and members of the Competition Council, which occurred in November and December 2018.

When the notified concentration concerns specific sectors, sectoral regulators are consulted by the Competition Council. This includes the National Telecommunications Regulatory Authority (ANRT) for the telecommunications sector; the High Authority for Audiovisual Communication (HACA) for the audiovisual market; the Bank Al Maghrib for banks; the Financial Market Authority (AMMC) for the capital market; the Insurance and Social Security Directorate for insurance; and the National Ports Agency (ANP) for ports.

Article 109 of the Competition Law provides that, unless the relationship between the Competition Council and the sectoral regulators is addressed in the constitutive texts of these institutions, the Competition Council will, from a date defined by a future regulation, exercise its jurisdiction on all sectors.

In the specific case of the telecommunications industry, it should be noted that Law No. 24-96 authorises the ANRT to enforce the

concentration control provisions in its industry. To the best of our knowledge, this jurisdiction has never been implemented by the ANRT.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

According to article 11 of the Competition Law, a concentration occurs where:

- two or more previously independent undertakings merge;
- one or more persons, already controlling at least one undertaking, acquire, directly or indirectly, whether by purchase of securities or assets, by contract or by any other means, control of the whole or parts of one or more undertakings; and
- one or more undertakings acquire, directly or indirectly, whether by purchase of securities or assets, by contract or by any other means, control of the whole or parts of one other or more other undertakings.

The Competition Law also states that the creation of a joint venture performing on a lasting basis all the functions of an economic entity shall constitute a concentration within the meaning of the Moroccan merger control law.

#### 3 | What types of joint ventures are caught?

Joint ventures might fall under the scope of the Competition Law provided that they perform on a lasting basis all the functions of an economic entity (article 11 of the Competition Law).

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law defines control under article 11 as resulting from rights, contracts or any other means that confer, either separately or in combination, having regard to the considerations of fact or law involved, the possibility to exercise a decisive influence on the activity of an undertaking and, notably:

- ownership rights or rights of use over all or parts of the assets of an undertaking; or
- rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Competition Law and the Decree introduce additional turnover notification thresholds to the pre-existing market-share threshold. Under the

new legal framework, a concentration must be notified to the Competition Council when one of the three following conditions is fulfilled:

- the combined aggregate worldwide pre-tax turnover of all the undertakings or groups of natural or legal persons parties to the concentration is equal to or more than 750 million dirhams;
- the aggregate Moroccan-wide pre-tax turnover of at least two of the undertakings or groups of natural or legal persons concerned by the concentration is equal to or more than 250 million dirhams; or
- the undertakings that are parties to the concentration, or that are the subject of the concentration, or the undertakings that are economically linked to them, have generated altogether, during the previous calendar year, more than 40 per cent of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market.

The Decree provides that different turnover thresholds may be established for certain specific sectors or geographic areas by the Chief of Government or the governmental authority delegated by the latter for this purpose.

The Moroccan legislation does not define the undertakings that are 'economically linked' to the undertakings that are parties to the concentration or the subject of the concentration and we assume that this term includes at a minimum their subsidiaries, their parent companies and their sister companies.

According to the Competition Council, it is necessary to notify a transaction when only one of the parties involved, for example the target company, has a market share exceeding the 40 per cent threshold and when the planned concentration will thus not lead to any addition of market shares. The Competition Council has already examined concentrations where the acquirer was not present in the same sector as the target company in Morocco (for example, Opinion No. 36/13 relating to the acquisition of 6 per cent of the capital of CMA CGM by the Strategic Investment Fund) and where only the target company was active in Morocco (for example, Opinion of November 2011 relating to the acquisition by CCPL of Ono Packaging Maghreb and Opinion No. 37/13 relating to the acquisition of 49 per cent of the shares and voting rights of Terminal Link by China Merchants).

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Under article 12 of the Competition Law, the filing is mandatory and the Moroccan legislation does not provide for any exception to this rule.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers have to be notified where they fulfil one of the thresholds set out in question 5.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Concerning foreign investments, a convertibility regime has been set up in favour of foreign investments by the 'Instruction Générale des opérations de change 2013' of the Foreign Exchange Office, amended by 'Instruction Générale des opérations de change 2019'. Concerning foreign exchange regulations, the convertibility regime guarantees to the foreign investors concerned total freedom to carry out their investment operations in Morocco, transfer any income from such investments, and transfer back any income resulting from the transfer or liquidation of their investments when the investments have been made in foreign currencies. The convertibility regime holds that an investor must, within

four months of the date of the foreign investment, file a report with the Foreign Exchange Office including all the details and supporting documents of the transaction (investor's identity, business sector, amount, bank certificates, etc).

Certain sectoral authorities are in charge of the regulation of special sectors:

- telecommunications – ANRT;
- the audiovisual market – HACA;
- banks – Bank Al-Maghrib;
- the capital market – AMMC;
- insurance – the Insurance and Social Security Directorate; and
- ports – ANP.

According to Law No. 20-13, the Competition Council shall seek the opinions of the sectoral regulators on competition issues relating to their sectors of activity. Article 8 of Law No. 20-13 provides for a consultation procedure.

Article 109 of the Competition Law provides that, unless the relationship between the Competition Council and the sectoral regulators is addressed in the constitutive texts of these institutions, the Competition Council will, from a date defined by a future regulation, exercise its jurisdiction on all sectors.

In the specific case of the telecommunications industry, Law No. 24-96 and its enforcement decree authorises ANRT to enforce the concentration control provisions in its industry. To the best of our knowledge, this jurisdiction has never been implemented by the ANRT.

Moreover, specific turnover thresholds may be established for certain specific sectors or geographic areas by the Chief of Government or the governmental authority delegated by the latter for this purpose.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The transaction must be notified to the Competition Council before its completion, as soon as the parties concerned are able to present a sufficiently concrete file to allow the investigation of the case and, in particular, when they have entered into an agreement in principle, signed a letter of intent, or as of the announcement of a public offer.

The sanctions for not filing are as follows:

- for legal entities responsible for filing: a fine amounting to a maximum of 5 per cent of the pre-tax turnover made in Morocco during the last fully closed financial year, increased, when applicable, by the turnover made in Morocco during the same period by the acquired company; and
- for natural persons responsible for filing: a fine of a maximum amount of 5 million dirhams.

Moreover, upon failure to file a notification, the Competition Council compels the parties, subject to a daily penalty payment, to notify the operation, unless they revert to the previous state of affairs.

#### 10 | Which parties are responsible for filing and are filing fees required?

This notification obligation is the responsibility of the natural or legal persons who acquire control of all or part of an undertaking or, in the case of a merger or the creation of a joint venture, of all parties concerned, who must then notify jointly.

There are no filing fees.

### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Competition Council must rule on the transaction within 60 days of receipt of the complete notification file (Phase I). In case of opening of an in-depth investigative phase, the Competition Council has 90 additional days to take its decision (Phase II). These time limits may be extended or suspended in the cases listed in question 18.

Under article 12 of the Competition Law, the filing has a suspensive effect. The parties are thus not entitled to implement their concentration plan as long as the Competition Council (or the administration, if it takes on the case) has not authorised the transaction.

Nevertheless, in case of duly motivated need, the parties can ask the Competition Council for an exemption to this suspensive effect, allowing them to actually complete all or part of the transaction without waiting for an authorisation decision of the competition authorities and without prejudice of this decision (article 14, paragraph 2 of the Competition Law).

#### Pre-clearance closing

### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

According to article 19 of the Competition Law, closing a concentration before clearance may lead to the application of the fines imposed for failure to file a concentration as set out in question 9.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No specific rules concerning the sanctions to apply in cases involving closing before clearance in foreign-to-foreign mergers are established by the Moroccan competition legislation and the sanctions for closing before clearance set out in question 12 should be applicable in these cases.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Moroccan legislation provides no specific solutions permitting closing before clearance in a foreign-to-foreign merger.

In case of duly motivated need, the parties to a foreign-to-foreign merger can, however, ask the Competition Council for an exemption to the suspensive effect to allow them to close the transaction before clearance (article 14, paragraph 2 of the Competition Law).

#### Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

No specific merger rules are applicable to public takeover bids. The Competition Council seems to apply the general rules and principles of the Moroccan legislation to assess such concentration, as illustrated in its Opinion No. 9/10 relating to the public takeover bid launched by Kraft Foods Inc over Cadbury Plc.

#### Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification file submitted to the Competition Council must contain specific information and documents listed in the Decree as regards:

- the contemplated operation (including a copy of the agreement subject to the notification);
- the undertakings concerned and the groups to which they belong (including in particular their annual accounts, a list of their main shareholders, etc);
- a presentation of the relevant product and geographic markets concerned (including the markets shares of the parties); and
- when a market is affected, a detailed presentation of this market and of the firms active in this market (including the market shares of the parties).

A market is considered to be affected when:

- one or more undertakings operate on the concerned market and have an aggregated market share reaching 25 per cent or more;
- at least one of the concerned undertakings operates on the concerned market and another of the concerned undertakings operates on the upstream, downstream or associated market, whether or not there exist supplier relations, as long as all the concerned undertakings reach a 25 per cent market share; or
- the operation leads to the eviction of a potential competitor on the market.

In case of wrong or missing information in the notification file, the Competition Council can impose the fines for failure to file a concentration as set out in question 9 and also withdraw its authorisation decision. Unless the parties revert to the previous state of affairs, they must once again notify the transaction within one month from the withdrawal of the decision.

#### Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

Upon receiving a notification file, the Competition Council must publish a release containing, in particular, a non-confidential summary of the transaction and the time frame in which interested third parties are invited to make observations.

During Phase I, the Competition Council will examine the file and designate a case officer to follow up the file and conduct the investigation.

If the Competition Council considers, at the end of Phase I, that serious doubts remain as to the risk of infringing competition (or at the request of the governmental authority in charge of competition), a Phase II investigation is opened to conduct an in-depth analysis of the transaction.

During Phase II, a report is sent to the parties and to the Government Commissioner. This report contains a statement of the facts as well as the elements of information on the basis of which the case officer has based its analysis and the observations of the parties, if any.

Hearings at the Competition Council are not public. Only the concerned parties and the Government Commissioner may attend such hearings. The Competition Council may also hear all persons in a position to contribute information on the case.

At the end of Phase II, a draft of the decision is communicated to the concerned parties who may present their observations within 10 days.

## 18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for clearance is as follows:

### Phase I (60 days)

According to article 15 of the Competition Law, the Competition Council must rule on the transaction within 60 days of receipt of the complete notification file.

If commitments are offered by the parties, this 60-day time limit is extended by 20 days.

In case of particular necessity, such as the finalisation of the commitments, the parties may ask the Competition Council to suspend the deadline for a maximum of 20 days.

At the end of Phase I, the Competition Council may either:

- decide that the notified transaction does not fall under the scope of the merger control;
- authorise the operation subject, where applicable, to the effective implementation of the remedies proposed by the notifying parties;
- open an in-depth analysis of the transaction (Phase II) if it finds that serious doubts remain as to the risk of infringing competition; or
- refrain from adopting any of the above decisions.

Within 20 days after having received a copy of the decision or having been informed of it by the Competition Council, the governmental authority in charge of competition may ask the Council to open a Phase II investigation.

The transaction is deemed to be authorised upon the conclusion of this 20-day time limit.

### Phase II (90 days)

According to article 17 of the Competition Law, the Competition Council must determine within 90 days whether the transaction is likely to infringe competition, notably by creating or strengthening a dominant position or a buying power that places suppliers in a position of economic dependency. The Competition Council also assesses whether the contemplated transaction brings a sufficient contribution to economic progress to offset the competition infringements.

If the notifying parties offer commitments to remedy the anticompetitive effects of the contemplated operation less than 30 days before the end of the 90-day deadline, the deadline will then expire 30 days after the reception of the commitments. Moreover, the 90-day deadline may be suspended for up to 30 days at the parties' request in case of particular necessity, notably to finalise their commitments.

The deadline may also be suspended by the Competition Council, in particular when the notifying parties have failed to provide it with the requested information or to inform it of the occurrence of a new material event. The time limit resumes when the cause of the suspension has been addressed.

The Competition Council may, at the end of the Phase II, either:

- authorise the operation subject to, where applicable, the effective implementation of commitments offered by the notifying parties;
- authorise the operation, while requiring the parties to take all appropriate measures to ensure sufficient competition or to comply with instructions destined to provide a sufficient contribution to economic progress to offset the competition infringements; or
- prohibit the concentration and require the parties, when applicable, to take all appropriate measures to re-establish sufficient competition.

Upon receiving a copy of the decision or being informed of it by the Competition Council, the Chief of Government, or the delegated governmental authority, may within 30 days exert its power and issue a decision

on the transaction for reasons of public interest (such as industrial development, competitiveness of the companies within the international context or job creation).

The transaction is deemed to be authorised when this 30-day time limit has expired.

The Moroccan competition legislation does not contain any accelerated procedure.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for clearance is whether the planned concentration is likely to infringe competition, notably by creating or strengthening a dominant position or a buying power that places suppliers in a position of economic dependency.

During Phase II, the Competition Council also takes into account whether the contemplated concentration brings a sufficient contribution to economic progress to offset the competition infringements.

#### 20 | Is there a special substantive test for joint ventures?

The Moroccan legislation does not provide for a special substantive test for joint ventures.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The Competition Council assesses the effects of the concentration on competition and determines whether the transaction would lead to:

- horizontal effects: the Council examines whether the concentration would lead to an overlap of the merging parties' activities and to an addition of their market shares that would create or reinforce a dominant position on the relevant market and allow the merging parties to act independently from their competitors and customers;
- vertical effects: the Competition Council assesses whether the concentration would foreclose the access to the upstream markets (Opinion relating to the acquisition by Vitol and Helios of Shell du Maroc and Butagaz Maroc);
- conglomerate effects: the Competition Council examines whether the concentration would lead to an expansion and a diversification of the merging parties' product ranges and trademarks that would increase their market power and enable them to impede competition through practices such as tie-in sales or bundled rebates (Opinion No. 31/12 relating to a concentration concerning the SNI and Kraft Foods Maroc); and
- coordinated effects: the Competition Council assesses whether the merging parties will, after the transaction, be able to coordinate their behaviour on the market and whether the transaction will thus lead to the creation or the strengthening of a collective dominant position (Opinion No. 9/10 relating to the public takeover bid launched by Kraft Foods Inc over Cadbury Plc).

To carry out this assessment, the Competition Council defines the relevant product or services market and the geographical dimension of these relevant markets and conducts in particular an analysis of the market structure, the market shares of the parties involved and of their actual and potential competitors, the entry barriers, the importations and exportations on the relevant markets, the customers and the suppliers of the parties involved.

## Non-competition issues

**22** | To what extent are non-competition issues relevant in the review process?

During Phase II, the Competition Law requires the Competition Council to assess whether the operation concerned provides a sufficient contribution to the economic progress to offset the competition infringements.

Thus, the Competition Council conducts not only a competitive assessment, but also an economic assessment of the concentration.

For example, in its Opinion relating to a concentration concerning the SNI and Danone (No. 32/12), the Competition Council had taken into account the fact that Danone's strategy was in line with the goals of a Moroccan environmental programme.

Therefore, the parties involved in the concentration are also asked by the Competition Council about the aim of the transaction and its impact on Moroccan economic situation (the contemplated investments, the anticipated impact of the transaction on the employment situation, the evolution of the range of products or services offered to the consumers, etc).

Non-competition issues are also taken into account when the Chief of Government, or the delegated governmental authority, exercises its power and issues a decision on the transaction for reasons of public interest (such as industrial development, competitiveness of the companies within the international context or job creation).

## Economic efficiencies

**23** | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies should be taken into account in Phase II of the review process, during which the Competition Council has to assess whether the concentration provides a sufficient contribution to economic progress to compensate for its anticompetitive effects.

The efficiencies that are taken into account by the Competition Council are, in particular, the improvement of product quality, product diversification, technical improvement in the relevant sector, price reductions, job creations, increase in exports, and the stimulating effect of the transaction on the competitive environment of the relevant market.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

**24** | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Council may prohibit a transaction at the end of Phase II and, if necessary, require the parties to take all appropriate measures to re-establish sufficient competition.

The Council can also authorise the operation, while requiring the parties to take all appropriate measures to ensure sufficient competition or to comply with instructions destined to provide a sufficient contribution to economic progress to offset the competition infringements.

Similarly, at the end of Phase II, the Chief of Government or the delegated governmental authority may prohibit a transaction after having considered the case.

In addition, according to article 20 of the Competition Law, if an undertaking abuses its dominant position or a state of economic dependency, the Competition Council may enjoin the undertakings concerned to modify, complete or terminate all of the agreements and measures that gave rise to the concentration of economic power that enabled these abuses. The Competition Council can apply these provisions even if these measures have already been subject to the merger control process.

## Remedies and conditions

**25** | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Structural or behavioural remedies can be proposed by the notifying parties or imposed by the Competition Council to remedy or compensate the adverse effects of the planned concentration on competition.

In 2012, the Competition Council rendered its first opinion regarding commitments (Opinion No. 31/12 relating to a concentration concerning the SNI and Kraft Foods Maroc) where it recommended the Chief of Government authorise the transaction subject to Kraft Foods respecting various behavioural commitments, such as not practising tie-in sales or offering bundled rebates, and complying with the competition code of conduct and compliance programme. The Council highlighted the fact that these commitments should be made public.

**26** | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The parties are allowed to propose commitments:

- along with the notification file;
- at any moment before the end of Phase I; or
- during Phase II, as soon as they have been informed of its opening.

When commitments are offered by the parties during Phase I, the 60-day time limit is extended by 20 days and may be suspended for a maximum of 20 days at the parties' request to finalise their commitments.

If commitments are offered by the parties during Phase II less than 30 days before the end of the 90-day deadline, the deadline will expire 30 days after the reception of the commitments. The Phase II deadline may also be suspended for up to 30 days at the parties' request to finalise the commitments.

The Competition Council, at the end of Phase I or Phase II, and the Chief of Government (or the delegated governmental authority) if it evokes the case, may authorise the operation subject to the effective implementation of commitments by the parties.

**27** | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To the best of our knowledge, the Competition Council, which was reactivated in 2009, has not yet required remedies in a foreign-to-foreign merger.

### Ancillary restrictions

**28** | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

To date, this is uncertain. The Competition Law and the Decree do not address this issue. The decisional practice of the Competition Council will certainly clarify this point in the future and should follow the position of the European Commission.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

**29** | Are customers and competitors involved in the review process and what rights do complainants have?

After receiving the complete notification file, the Competition Council publishes a press release that contains a non-confidential summary of the transaction and indicates the time frame in which interested third parties are invited to make observations.

In addition, the Competition Council has the faculty to hear any third party in a position to contribute to its information and to conduct a market test.

### Publicity and confidentiality

**30** | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Upon receipt of a notification file, the Competition Council publishes a press release that indicates:

- the name of the concerned parties;
- the nature of the transaction;
- the concerned economic sectors;
- the time frame in which interested third parties are invited to make observations; and
- a non-confidential summary of the transaction provided by the parties.

When parties communicate documents or information to the Competition Council, they must indicate which elements they consider as business secrets (article 31 of the Competition Law). The General Rapporteur ensures that this information is reserved to the Competition Council and the Government Commissioner and that a non-confidential version of the documents is prepared, if needed.

Except in cases where the communication or the consultation of documents containing business secrets is necessary to the exercise of the rights of defence of a concerned party, the president of the Competition Council may deny to a party the communication or consultation of these documents.

Moreover, the disclosure by one of the undertakings involved of information obtained during the process concerning another party or a third party is punishable by a 10,000 to 100,000 dirham fine (article 32 of the Competition Law).

According to article 13 of the Decree, the merger decisions of the Competition Council and of the governmental authority in charge of competition are published in the Official Bulletin and are available on their websites.

### Cross-border regulatory cooperation

**31** | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Since its reactivation in 2008, the Moroccan Competition Council has started to liaise with foreign antitrust authorities.

Indeed, an association between Morocco and the member states of the European Communities was established by the Euro-Mediterranean Agreement in 2000 and a mechanism of cooperation between European and Moroccan competition authorities was put into place by decision No. 1/2004 of the EU-Morocco Association Council of 19 April 2004 adopting the necessary rules for the implementation of the competition rules.

In the framework of this cooperation, the Moroccan Competition Council has developed a twinning cooperation with the German competition authority thanks to which it has benefited from training conducted by European experts, technical assistance and study visits in European competition authorities.

A bilateral cooperation has also been established with Tunisia and many exchanges have since taken place (training courses, conferences, etc).

Furthermore, the Competition Council has been a member of the International Competition Network (ICN) since April 2010 and the 2014 annual conference of the ICN took place in Marrakech.



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The Moroccan Competition Council is also a founding member of the Euro-Mediterranean Competition Forum (EMCF), an informal regional network that was set up in 2012, and is presiding over the Coordinating Committee of the EMCF together with the Austrian Federal Competition Authority.

In 2017, the Moroccan Competition Council also entered into a cooperation agreement with the competition authority of China.

Moreover, in 2019, the Moroccan Competition Council announced a strengthening of its bilateral cooperation with the Portuguese Competition Authority and a cooperation with the Chilean National Economic Prosecutor.

## JUDICIAL REVIEW

### Available avenues

**32** | What are the opportunities for appeal or judicial review?

Merger decisions of the Competition Council and of the Chief of Government (or the delegated governmental authority) may be appealed to the administrative chamber of the Moroccan Supreme Court.

### Time frame

**33** | What is the usual time frame for appeal or judicial review?

Article 46 of the Competition Law provides that an appeal against merger decisions must be lodged by the concerned parties or the Government Commissioner within 30 days of receipt of the merger decision notification.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

**34** | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Competition Law has only been enforced by the Competition Council since it became operational again at the end of year 2018. Therefore, the enforcement concerns of the Competition Council still have to be identified.

**Reform proposals****35 | Are there current proposals to change the legislation?**

There are no current proposals to change the legislation, as the Competition Law and Law No. 20-13 were adopted in June 2014 and have only been applicable since the appointment of the new president and members of the Competition Council in November and December 2018.

**UPDATE AND TRENDS****Key developments of the past year****36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

The application of the Competition Law and Law No. 20-13 relating to the Competition Council, which transfer the merger control function to the Competition Council, has taken effect after the appointment of the Competition Council's new president and members in November and December 2018.

During the first semester of 2019, the Competition Council has received several merger notifications and issued its first merger decisions.

# Netherlands

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Dutch Competition Act of 22 May 1997 (the Act), which entered into force on 1 January 1998. The general rules on administrative procedure, as laid down in the General Act on Administrative Law, cover enforcement of the Act as well as various procedural aspects.

The body in charge of enforcement is the Authority for Consumers and Markets (ACM), which is competent to take decisions pursuant to the Act. On 1 April 2013, the ACM was created through the merger of the Netherlands Consumer Authority, the Netherlands Independent Post and Telecommunication Authority and the Netherlands Competition Authority (NMa). The ACM is authorised to initiate proceedings, to order parties infringing the Act to cease their behaviour and to take administrative measures. The ACM is an independent agency, as was its predecessor in competition enforcement, the NMa, since 2005. The Minister of Economic Affairs remains responsible for competition policy and may give the ACM general policy instructions but may not give instructions in specific cases. The ACM is headed by a board consisting of three members. In 2018, Chris Fonteijn left the ACM as chairman of the board. He was replaced by Martijn Snoep on 1 September 2018.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Act applies when any of the following operations occur:

- two or more previously independent undertakings merge;
- one or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings; or
- a joint venture (whether concentrative or coordinative) is established that performs, on a lasting basis, all the functions of an autonomous economic entity.

#### 3 | What types of joint ventures are caught?

'Full-function' joint ventures (ie, joint ventures that perform, on a lasting basis, all the functions of an autonomous economic entity) are caught by Dutch merger control. Cooperative aspects of joint ventures are not caught by Dutch merger control, but governed by the cartel prohibition contained in article 6 of the Act, which closely resembles article 101 of the Treaty on the Functioning of the European Union.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined as the ability to exercise a decisive influence on the activities of an undertaking on the basis of factual or legal circumstances. The term control does not refer to day-to-day management but to important strategic decisions. Minority shareholdings and other interests that give rise to 'control', for example, as a result of contractual veto rights or if a smaller shareholding allows blocking of important strategic decisions because of qualified majority voting requirements, are also caught. If a company is governed by the rules applicable to statutory two-tier entities (ie, with a separate board of directors and supervisory board), the ACM takes the view that this does not mean that the majority shareholders are not able to have decisive influence within the meaning of the Act.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration falls within the scope of the Act if:

- the aggregate worldwide turnover of the undertakings concerned in the previous calendar year exceeds €150 million; and
- the individual turnover in the Netherlands of each of at least two of the undertakings concerned was at least €30 million in the previous calendar year.

The interpretation of 'undertaking concerned' is similar to that applied under the EU Merger Regulation (EUMR). Where the concentration is implemented through the acquisition of control over parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts that are subject to the transaction will be taken into account in the determination of turnover.

Turnover refers to the net turnover as defined in the Dutch Civil Code. This is the income from the supply of goods and services from the business of the legal person after the deduction of rebates and the like and of tax on turnover. The ACM has indicated that the interpretation of 'tax on turnover' is similar to that applied under the EUMR.

For credit and financial institutions, the general thresholds apply, but the calculation of the turnover differs. The turnover is, in general terms, calculated by taking the sum of interest income and similar income, income from securities, commissions receivable, net profit on financial operations and other operating income, after the deduction of VAT and other taxes directly related to these items.

For insurance companies, the €150 million threshold also applies, but it refers to the value of gross premiums that was received from Dutch residents. With respect to pension funds within the meaning of the Dutch Pension Act, alternative thresholds apply: €500 million

combined gross written premium of which at least two undertakings concerned received €100 million from Dutch residents.

Separate thresholds apply in relation to the healthcare sector if at least two of the undertakings concerned have achieved a turnover of €5.5 million from the provision of healthcare in the preceding calendar year. If that is the case, the concentration falls within the scope of the Act provided that:

- the aggregate worldwide turnover of the undertakings concerned in the previous calendar year exceeds €55 million; and
- the individual turnover in the Netherlands of each of at least two of the undertakings concerned was at least €10 million in the previous calendar year.

Concentrations that fall below these thresholds can in principle not be reviewed by the ACM unless the companies infringe other parts of the Act. The Minister of Economic Affairs can, however, temporarily reduce the thresholds for certain categories of undertakings, although this measure does not apply retrospectively. The reduction lasts five years, but can be prolonged.

If there is any doubt about the necessity of a notification, the ACM encourages 'pre-notification' meetings to discuss such jurisdictional difficulties.

Transactions that fall within the scope of the EUMR do not (with limited exceptions provided for in the EUMR, as set out in the European Union chapter) fall under the Act.

New legislation has been introduced, with effect from 1 January 2014, prescribing prior mandatory notification to the Dutch Healthcare Authority (NZa), if a merger involves a healthcare provider that employs 50 or more persons. The NZa will apply primarily a procedural test, to see whether the parties have taken due account of the interests and opinions of stakeholders. If an NZa notification is required, the transaction cannot be implemented until the NZa has provided clearance (and cannot be implemented until the ACM has also provided clearance if a subsequent ACM notification is needed). In 2017, the NZa, for the first time, imposed a fine of €70,000, for the failure to notify a healthcare merger. The ACM will only accept a notification if the NZa has provided prior clearance. These rules are expected to change. The additional test applied by the NZa will be performed by the ACM after legislative changes have been implemented.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory. The Act prohibits the implementation of concentrations that fall within the scope of the Act before they have been notified to the ACM and a period of four weeks has passed. With regard to the acquisition of shares, the ACM is of the opinion that concentrations are implemented when the shares in question are transferred. The ACM may, at the request of the notifying party, grant a (conditional) exemption to the prohibition to implement the transaction before clearance (see question 36).

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

With respect to the geographical allocation of turnover, the ACM follows the guidance as provided by the European Commission's Consolidated Jurisdictional Notice in attributing turnover to the Netherlands.

If the turnover thresholds are met, foreign-to-foreign mergers must be notified, even if the companies concerned do not have a physical presence in the Netherlands. Joint ventures may also need to be notified, if the parent companies meet the notification thresholds, even if the joint venture is not active in the Netherlands. The substantive

test only applies to impediments to competition on the Dutch market or parts thereof.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Specific rules pertaining to special sectors govern a few Dutch markets. Concentrations involving companies in the banking and insurance sectors are subject to the merger control provisions of the Act. A protocol has been drawn up between the ACM and the Dutch Central Bank, setting out rules for the exercise of supervisory powers in these sectors in cases requiring urgent action. It describes the cooperation between the ACM and the Dutch Central Bank in concentrations involving the financial sector in which there is extreme urgency (such as a possible insolvency) to ensure that emergency situations are dealt with quickly. This protocol was applied for the first time to the acquisition of Friesland Bank by Rabobank. Friesland Bank was in financial difficulty and could not continue independently. The competition authority and the Dutch Central Bank granted Rabobank permission to acquire Friesland Bank without going through the normal notification process.

The ACM agreed a protocol for cooperation in mergers with the NZa. The protocol specifies how the ACM and the NZa will keep each other informed in merger cases, how information is exchanged between them and how they can consult each other on, for example, market definition issues. The ACM has entered into a number of cooperation agreements with other authorities and government departments, including for example the financial markets supervisor, the authority for personal data and the Dutch gambling authority.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Like the EU rules, the Act provides for a two-phase filing procedure: the notification (first stage) and the licence (second stage). The Act does not require that an agreement be signed or that a controlling interest be acquired before notification is possible. A concrete intention to engage in a transaction is sufficient. The ACM has to decide whether a licence authorising the transaction is required within four weeks starting the day after the receipt of the notification. If a licence is required, a second-phase examination will be necessary. To initiate the second phase, the parties (or party) concerned must submit a separate application. The ACM must decide on the licence application within 13 weeks.

The implementation of a concentration before the ACM has provided clearance can lead to administrative penalties (see questions 11 and 12). If the parties provide incorrect or incomplete information in their notification, the ACM can impose a fine of €900,000 or 1 per cent of the annual worldwide turnover of the company (whichever is higher).

## 10 | Which parties are responsible for filing and are filing fees required?

In case of a merger, the acquiring companies have to notify the transaction. Where a company acquires control of another company, the obligation to notify applies to the acquiring company. With regard to public bids, the bidder has to notify the transaction. The filing fees are €17,450 for the notification and €34,900 for the licence application.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The implementation of a concentration pending the statutory waiting period of four weeks following notification of the proposed concentration is prohibited. There are two exceptions to this rule. The implementation of a public bid is not prohibited if the ACM is notified immediately and the acquirer does not exercise its voting rights. Further, the ACM may for serious reasons (such as risk of irreparable harm) grant a dispensation from the prohibition at the request of one of the notifying parties. The ACM quite regularly grants exemptions to the standstill obligation in cases involving a target company in financial distress. If the parties go ahead with implementation of the transaction prior to obtaining clearance, they assume the risk that competition concerns are subsequently identified by the ACM, which may require amendment or even unwinding of the transaction.

If the ACM decides that an application for a licence is required, the concentration will be further suspended for the 13-week period following the application for a licence. Here again, an exemption can be granted upon request to prevent serious damage.

The four-week and 13-week periods will be suspended from the day on which the ACM requires further information from the undertakings involved in the concentration until the day on which such information is provided. The ACM frequently makes use of its power to request additional information. Parties should take possible requests for additional information and following up on those requests into account when planning the timing of the notification and the implementation of a concentration.

The notifying parties have the possibility to submit a reasoned request to suspend the four-week period. The ACM will allow such a suspension if it assists in the assessment of the notification. This voluntary suspension may only be requested once. In addition, the 13-week period can be suspended, at the request of the notifying party or at the initiative of the ACM. In both cases, written assent of all undertakings concerned is required.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The implementation of a concentration before the ACM that has been notified thereof or during the subsequent period of four weeks, or of a concentration for which a licence is required where no licence is granted, may result in a void transaction. In addition, the ACM can impose administrative penalties, such as fines up to a maximum of €900,000 or 10 per cent of the annual turnover of the company (whichever is higher), which can be imposed on each party that is responsible for filing.

The ACM may also make an order, backed by periodic penalty payments, that the undertakings concerned cease or reverse the infringement.

The competition authority has imposed fines for implementing a concentration without having notified and received clearance in several cases, indicating that it is fully prepared to impose tough sanctions for gun jumping violations. An example is the sale by the Dutch state of shares in Fortis Corporate Insurance to Amlin. Amlin did not notify this transaction before transferring the shares. The competition authority therefore imposed a fine of €1,366,000 on Amlin. In 2012, the Court of Appeal for Trade and Industry ruled that the seller is not responsible for filing the proposed transaction and that therefore the competition authority is not entitled to impose sanctions on the seller. In addition, in 2013, the District Court Rotterdam ruled that the fine imposed on Amlin should be reduced to €130,000 because the method used to calculate

the fine led to an arbitrary result. The ACM had imposed the fine in the year after the concentration was implemented, meaning that the turnover of Fortis Corporate Insurance was also taken into account when determining the amount of the fine. Had the authority imposed the fine during the year that the concentration was implemented, the Fortis turnover would have been excluded, resulting in a much lower fine.

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As indicated in question 12, the ACM is prepared to impose sanctions for gun jumping violations. The Dutch competition authority has also shown its willingness to impose sanctions in foreign-to-foreign mergers that have not been notified before implementation. An example concerns the acquisition of Vinnolit and Vintron by Advent. Vinnolit and Vintron were both German undertakings that were acquired by Advent. Because of an incorrect calculation of the turnover of Advent in the Netherlands, the parties had determined that a notification in the Netherlands was not necessary. After implementation, however, Advent noticed its mistake and voluntarily informed the competition authority. The competition authority found that the parties had violated the Act and imposed sanctions on Advent and the sellers.

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Specific solutions are not available, but a divestment or other measure before closing, so that the notification thresholds are no longer met, means that clearance is no longer required. In addition, the parties also have the opportunity to request a derogation from the prohibition on implementing an intended concentration before clearance from the ACM (see question 11).

### Public takeovers

## 15 | Are there any special merger control rules applicable to public takeover bids?

The implementation of a public bid is exempt from the prohibition on implementing an intended concentration before clearance provided that the ACM is notified immediately and the acquiring party does not exercise its voting rights.

### Documentation

## 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Standard forms (in Dutch) must be used for both the notification and the licence application (an unofficial English language version is available on the ACM's website). The notification form requests information on the undertakings concerned such as a description of their business activities, a description of the sectors in which they are active, information on the group (if applicable), and a financial outline of the preceding year showing the total turnover and the turnover in the Netherlands. Further, the notification form requests a description of the transaction and supporting documentation (the supporting documents can be submitted in another language, though the ACM may ask for a translation), such as the most recent annual accounts and reports of the undertakings, the most recent documents showing the intent to effectuate the concentration and the granting of powers of attorney by the undertakings concerned to the designated contact person or persons. Parties must also submit market research reports and, if there is an overlap between their activities, information on their major competitors,

customers and trade organisations active in the sectors in which the parties' activities overlap. Moreover, parties must indicate whether there are any ancillary restraints and if they wish the ACM to declare whether they fall within article 10 of the Act (see question 28). If there are markets to be investigated, parties should provide both value and volume-based market share figures. Parties are also asked to indicate whether the concentration has been or will be filed with any other competition authority in the EU and, if so, to provide details.

The ACM has the authority to impose fines of up to €900,000 or 1 per cent of the relevant turnover of the undertaking concerned (whichever is higher), if it has been provided with wrong or misleading information. Such fines are imposed only very rarely. An example is a fine of €468,000 (reduced on appeal to €312,000) for providing incomplete information regarding activities of subsidiaries and for understating market shares. It cannot be excluded that the ACM may follow the recent practice of the European Commission whereby the provision of accurate and complete information is more critically assessed and more sanctions are imposed in this respect.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

Cases that do not present substantive competition concerns are typically submitted to the ACM after a brief call to indicate that the filing will be submitted. Cases that do potentially present substantive competition concerns are typically submitted to the ACM after pre-notification discussions. However, pre-notification discussions are optional and parties may choose to immediately make a formal filing even if it raises competition concerns.

Upon receipt of the notification, the ACM must take a decision within four weeks (this period can be suspended, if a reasoned request is submitted by the notifying parties). This period will start running the day after the receipt of the notification provided that it is not a Saturday, Sunday or public holiday. The ACM will publish the fact of notification within a few days, assess the notification and, when necessary, ask the undertakings involved for further information. Information may also be requested from third parties such as customers, suppliers and competitors. Third parties with sufficient interest are allowed to intervene. The parties will be informed of the conclusions of the investigation and requested to indicate the parts of the decision that they consider confidential. The decision is then published. The vast majority of cases are decided within four weeks. Some cases take longer, owing to suspension of this time period resulting from requests for additional information and replies to these (see question 11).

If the ACM considers that it cannot clear the concentration within the first phase, it will determine that a licence is required. Following receipt of the application for a licence, an in-depth second-phase investigation will commence. The ACM must take a decision within 13 weeks following the application for the licence. It will ask the notifying parties, as well as third parties, for further information and can also commission expert reports. If the assessment reveals competition concerns, the ACM will usually (although it is not obliged to do so) communicate its preliminary assessment in writing to the undertakings concerned and to affected third parties. The undertakings may respond to this document, propose remedies or do both. The ACM is also, in certain circumstances, willing to organise intermediate state of play meetings.

If a notified case fulfils certain requirements, the ACM may issue a summary decision. The ACM has published guidelines on when a case definitely does not fulfil these requirements, and is therefore not a candidate for a short-form decision. It will normally issue a short-form decision if it is clear that Dutch merger control is applicable, that the concentration does not raise any competition concerns and if there are

no objections from third parties. The adoption of a short-form decision may speed up the process.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The vast majority of cases are cleared through a short-form decision. Those cases, which do not present substantive competition concerns, are usually cleared in three to four weeks from notification. The ACM is willing to provide clearance even faster when the parties can explain the need for doing so. Examples include financial distress of the target company and the need to safeguard business continuity. The ACM's approach to pre-notification meetings is set out in guidelines. Simple cases do not require lengthy pre-notification discussions. Informally announcing the notification a few days in advance is sufficient for cases that do not raise potential concerns.

For more complex cases, if the ACM decides that a licence is required that triggers an in-depth second-phase investigation, a decision will need to be adopted within 13 weeks of the application for the licence. However, the ACM often stops the clock to request further information, which extends the time frame for obtaining a second-phase decision significantly. To illustrate, second-phase investigations in recent years on average lasted more than 280 days in total.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A licence application will be required where the ACM considers that a concentration may significantly impede effective competition (SIEC) in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position. A licence will be granted if the ACM concludes after its second-phase investigation that this will not occur. As this test mirrors the SIEC test in the EUMR, it will cover all competition issues raised by mergers, including unilateral effects cases.

#### 20 | Is there a special substantive test for joint ventures?

Joint ventures performing on a lasting basis all the functions of an autonomous economic entity are dealt with under Dutch merger control, but are subject to the same substantive test as other concentrations.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

Since the 2007 amendment to the Act, the test applied is whether a proposed transaction significantly impedes effective competition in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position. In applying the test, the ACM generally applies the same criteria and theories of harm as used by the European Commission, including the criteria set out in the horizontal and non-horizontal guidelines, and by the European courts.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

Only competition issues are relevant in the ACM's review process. However, if the ACM refuses to issue a licence authorising an envisaged concentration, the Minister of Economic Affairs may, in response to a request to that effect, decide that a licence will be granted if this

is desirable for general interest reasons – either economic or non-economic – that outweigh the expected detriment to competition. To date, the Minister has not made use of this power. It should be noted that this is a separate power of the Minister, not a right to give instructions to the ACM in specific cases (see question 1).

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Dutch competition authority has generally not paid specific attention to economic efficiencies in the review process. Since the alignment of the test with the EUMR in 2007, there is more room for taking efficiencies into account. In 2009, the competition authority considered an efficiency defence in a case concerning the merger of two hospitals in the province of Zeeland. In that case, at first instance, the competition authority had concerns regarding the market power of the combined entity as there appeared to be no real alternatives to these hospitals. After the hospitals submitted an 'efficiency defence' claiming that the merger would lead to consumer benefits, the competition authority stated that the present Act leaves room for the competition authority to take such efficiencies into account. Subsequently, the competition authority concluded that, in that case, the parties' claim was 'unsubstantiated' and could, therefore, not be accepted. The parties thereafter submitted a significant remedy package, which was accepted by the competition authority. The transaction was ultimately cleared. It is believed that the ACM will be as reluctant as the Commission in accepting efficiencies as a justification for clearing a concentration that would otherwise fall foul of competition law. The authority will especially focus on whether it is credible that efficiency gains will be passed on to consumers.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a concentration is implemented despite a standstill obligation, it is null and void and the ACM may order it to be reversed within a specified time limit. Contravention of the standstill obligation as well as of several other merger control provisions (eg, supply of incorrect information) may be sanctioned with fines or an order to remedy the infringement, subject to periodic penalty payments on non-compliance with such order, or by a combination of these sanctions.

The administrative fine for refusal to cooperate amounts to €900,000 or a maximum of 1 per cent of the relevant turnover of the undertaking concerned (whichever is higher).

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Since 1 October 2007, the Act has provided the possibility of offering remedies during the notification stage of the investigation. This possibility exists if the competition problem is clear and it is certain that the remedies will remove this problem. The ACM may attach conditions to the decision. The Act provides that if the ACM imposes conditions in the notification stage, the suspension obligation stays in place until the conditions are fulfilled. This reduces the importance of this possibility in practice. It is also possible to make amendments to the original notification, thereby alleviating the concerns of the ACM. If the original notification is amended, the transaction (as notified in the amended notification) may be closed after the decision is adopted.

The ACM may attach conditions to the granting of a licence in the second phase; for example, that changes be made to the intended transaction, or certain aspects of it.

The competition authority's 2007 guidelines on remedies set out both its procedural and substantive policy. They are similar to the approach of the European Commission in that both divestment (ie, structural remedies) and behavioural remedies are possible, though structural remedies are preferred. In relation to some past concentrations involving hospitals, the ACM accepted a behavioural remedy in the form of a price cap to address competition concerns. However, in the more recent *Stichting Albert Schweitzer Ziekenhuis/Stichting Rivas Zorggroep* (2015) case involving hospitals, the ACM indicated that it considered a behavioural remedy in the form of a price cap to be unsuitable. Therefore, it seems unlikely that the ACM will accept a behavioural remedy in the form of a price cap in relation to hospitals in the future, similar to its position with respect to other sectors. The ACM will only accept an amendment of the original notification if a structural remedy is used.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The remedy guidelines set out the basic conditions for a divestment or other remedy. The guidelines are modelled closely on the European Commission notice on remedies and Commission practice.

The undertakings concerned should take the initiative in proposing adequate remedies, preferably in the pre-notification discussions. Structural remedies are preferred to behavioural remedies and, according to the guidelines, the ACM does not accept behavioural remedies in the notification phase.

Proposals offered by the undertakings concerned must include an adequate and proportional solution to the competition concerns of the ACM. The conditions that the ACM includes in a first-phase decision must remove the identified competition concerns and be implemented before the transaction is closed. Conditions that the ACM includes in a second-phase decision must ensure that the concentration does not significantly impede effective competition. These conditions generally involve divestment of the businesses that give rise to the impediment of competition, or severance of links between the undertakings concerned and these businesses. Where divestments are involved, the purchaser must be independent of the undertakings concerned and should have sufficient expertise and financial resources to guarantee the continuity of the activities of the business. As the divestment is intended to ensure that the market remains competitive, the ACM has the right to approve the prospective purchaser. Where the undertakings concerned are not able to divest the businesses concerned, the ACM may require the appointment of a trustee who will ensure that this process is carried out. The undertakings concerned must ensure that prior to the sale, the activities of the business to be divested remain intact and that their continuity and position on the market are not jeopardised. Where the conditions laid down are aimed at ensuring that a certain business remains independent of the parties involved in the takeover, the undertaking concerned must take measures to guarantee that such independence will continue to exist in the future. The ACM may supervise the divestment process for a limited time (and may require the divestment of the activities concerned). On timing, the guidelines clearly favour discussing remedies in the pre-notification meetings and strongly recommend submission of remedies at least one week prior to the end of the four-week time limit. With remedies in the licence phase, the guidelines state that, as a general practice, the ACM will inform the parties of the competition problems it perceives in its preliminary assessment, typically after eight weeks. This gives parties the opportunity to submit remedies should they not have done so at an earlier

stage. At this stage, remedies in the licence phase should be proposed at least three weeks prior to the deadline for the decision.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In the ACM's decisional practice there have only been a limited number of cases involving remedies. To date, we are not aware of any that involved foreign-to-foreign mergers. However, parties have amended their filing in response to the competition authority's concerns in at least one concentration involving two foreign-owned undertakings, which sought to take joint control over two Dutch undertakings.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

When submitting a notification, parties must indicate whether there are any ancillary restraints. Parties may ask the ACM to declare that the related arrangements fall within article 10 of the Act, meaning that they are directly related to and necessary for the implementation of the concentration as a result of which the cartel prohibition contained in article 6 of the Act does not apply to the restraint.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The ACM may request information from customers, suppliers and competitors on the envisaged transaction or relevant markets. Third parties whose interests are directly involved may submit their comments on the proposed transaction to the ACM and are invited to express their view on the preliminary assessment issued by the ACM eight weeks after the application for a licence. In practice, the ACM attaches value to observations made by third parties. This is especially the case in relation to concentrations involving hospitals, where the ACM will attach significant importance to the opinion of health insurers and patients.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

After a notification, and following the filing of an application for a licence, the ACM publishes an announcement in the Official Gazette and on its website, inviting interested parties to submit their views on the proposed transaction. Decisions by the ACM, including a decision that a licence is required and decisions to end procedures, are also made public. Sensitive information (ie, business secrets) is omitted from these publications. Prior to publication, parties are given the opportunity to submit a reasoned request that certain information is to be treated confidentially and removed from public documents. If the ACM disagrees, it will inform the parties in due time, so as to allow them to file for an injunction against publication.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The ACM cooperates formally and informally with foreign competition authorities; for example, as a member of the European Competition

Authorities and the International Competition Network and with the Commission, as a member of the European Competition Network. It may inform the relevant competition authorities if it requests information from foreign companies and may provide competition authorities in other jurisdictions with information it has collected. The ACM contacts other competition authorities where a transaction is filed in several jurisdictions and may exchange information or coordinate its proceedings with these authorities. The notification form also requests parties to indicate whether the transaction has been, or will be, notified to other antitrust authorities.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

Appeals against decisions by the ACM must be lodged with the District Court of Rotterdam (Chamber of Administrative Law). The judgment of the District Court may be further appealed to the Court of Appeal for Trade and Industry in The Hague. Any person whose interests are directly affected may appeal against a decision. The Minister of Economic Affairs may, in response to a request, grant a licence for an envisaged concentration even though the ACM has refused to grant one (see question 22). Decisions of the Minister are also subject to judicial review.

In 2012, the District Court of Rotterdam reduced the sanction imposed on the newspaper publisher Wegener. The competition authority had imposed a fine of €19 million for non-compliance with conditions imposed in a decision granting a licence for a merger. The District Court of Rotterdam reduced the sanction to €2 million. The competition authority had moreover imposed sanctions on five individuals. The District Court reduced the fines imposed on three of these and annulled the decision in relation to the remaining two individuals.

In 2016, the Court of Appeal for Trade and Industry annulled the ACM's 2012 prohibition decision involving biscuit producers AA ter Beek and Continental Bakeries. Continental Bakers produces private label biscuits while AA ter Beek produces private label biscuits in addition to branded biscuits. According to the ACM, the upstream market for the production of biscuits comprises both private label and branded products, meaning that the combined market share of the parties would be very high. The market definition was based on reasoning by the ACM that, when purchasing biscuits, retailers will take into account pricing for both private label and branded biscuits. The court annulled the decision on the basis that the ACM had not investigated and explained properly why and how the upstream market should cover private label and branded products, as a result of the purchasing behaviour of retailers.

In 2016, the Rotterdam District Court upheld, on appeal by Vodafone, a 2014 ACM clearance decision in relation to the acquisition of sole control by Dutch incumbent telecom operator KPN in Reggefiber, a fibre optics cable operator. KPN already had joint control in Reggefiber, which was cleared in 2008 subject to remedies. The ACM had cleared the change from joint to sole control unconditionally, on the basis of sector-specific regulation that, in its view, prevented competition concerns. The sector-specific regulation, inter alia, requires KPN to put in place Chinese walls, act in a non-discriminatory manner and it imposes maximum prices. The District Court agreed that the sector-specific regulation could be taken into account by the ACM in its prospective analysis when assessing the effects on the concentration. The court accepted that the sector-specific regulation is sufficient to prevent concerns.

In 2017, the Rotterdam District Court dismissed two appeals against ACM clearance decisions. One case related to the clearance decision by the ACM of the acquisition by the Lotto of the Staatsloterij, which was appealed by Stichting Speel Verantwoord and Lottovate. The Rotterdam

District Court dismissed the appeal and the case is now pending in the Court of Appeal for Trade and Industry. The other case the Rotterdam District Court dismissed related to the clearance of the acquisition by Brocacef of Mediq, which was appealed by Mosadex.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

While the time frame for appeal and judicial review will depend on the courts' agendas and workloads, litigation may take up to a year, and perhaps longer. The Court of Appeal for Trade and Industry considers that appeal at the District Court level as well as subsequent appeal to the Court of Appeal for Trade and Industry should each take at most two years, to prevent a violation of the right of a fair trial as contained in the European Convention on Human Rights.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2010, the competition authority imposed fines in three cases for breaching article 34 of the Act (ie, implementing a concentration without having notified and therefore failing to receive clearance prior to closing). In 2001, a fine was imposed in the case of a foreign-to-foreign merger: only German undertakings were involved in the transaction. The competition authority repealed this fine in 2002.

In its latest annual report, the ACM indicated that it would focus in the coming year in particular on the digital economy, the energy market, ports and transport, (digital) data, the healthcare sector and the pharmaceutical sector (noting in particular its research into prices of medicines, the report of which is expected to be published in 2019). However, not all these priorities may become relevant in the context of merger control.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

It is expected that new legislation will enter into effect by which the ACM will take over the test currently performed by healthcare regulator NZa in relation to concentrations involving healthcare providers. This test, which will apply in addition to ACM's merger control assessment, consists primarily of a procedural test, to see whether the parties have taken due account of the interests and opinions of stakeholders. However, it is uncertain if this legislative proposal will in fact be introduced.

In addition, some mostly technical changes to the Dutch Competition Act are expected. This includes the removal of an existing legal requirement to, in case of conditions attached to a Phase I clearance decision, observe the conditions prior to being allowed to implement the concentration.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2018, 108 merger notifications were submitted to the ACM and 97 decisions were taken. The vast majority were short-form decisions. Of the reasoned decisions, five relate to the healthcare sector (ie, more than 50 per cent of all reasoned decisions). One Phase II decision and



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one amended Phase II decision were adopted in 2018, both relating to the healthcare sector. This further illustrates the importance of healthcare concentrations to the ACM.

In July 2018, the ACM published a decision amending the 2016 Phase II decision in the *Brocacef/Mediq* case. In 2016, the ACM had concluded that the transaction would lead to a significant impediment to effective competition in the supply of products and services by pharmacies on the retail market in a number of geographic areas, including Ermelo (a village in the Netherlands). In Ermelo, two pharmacies were preferred partners of Mediq and one pharmacy was a franchise of Brocacef. As of 1 January 2018, the two preferred partner pharmacies terminated their relationship with Mediq/Brocacef, resulting in the removal of the overlap. Therefore, Brocacef requested the ACM to amend its Phase II conditional clearance decision by removing one of the pharmacies listed as a remedy-pharmacy as a condition to the decision. The ACM granted Brocacef this request.

The substantive Phase II decision of 2018 also involved the healthcare sector and related to the combination of Bergman Clinics and Healthcare Clinics, which was unconditionally cleared by the ACM in December 2018. The Phase II investigation focused on the following: (i) a potential deterioration in the bargaining power of health insurers with regard to the combined entity; or (ii) market power or unilateral effects on the local market for the supply of eye care in Amersfoort. The ACM concluded that there would be (virtually) no change in the bargaining position of the combined entity with regard to the health insurers, and thus no competition concerns. As to the supply of eye care in Amersfoort, the ACM assessed whether the parties were each other's closest competitors and eventually concluded that they were not. The ACM also found that competitors could relatively easily and sufficiently quickly expand their operations in Amersfoort if the health insurers so requested. The ACM cleared the transaction.

Another noteworthy case was the concentration between ZorgSaam Zorggroep Zeeuws-Vlaanderen and Warmande – two healthcare providers specialised in both intramural and extramural elderly care – where the ACM concluded that there were concerns on the relevant markets, but that Warmande would imminently disappear from the market (as it was in financial difficulties) and thus accepted the parties' 'failing firm defence'. Indeed, the ACM considered that without the concentration all Warmande's personnel and patients would move

to ZorgSaam. The ACM finally concluded that there were no other operators that showed any interest in acquiring (the activities of) Warmande or becoming active in the region of West Zeeuws-Vlaanderen. Therefore, it concluded that there were no alternatives to the concentration and accepted the failing firm defence.

In 2017, the ACM focused on, inter alia, the digital economy and online consumers, conducting several investigations and closely monitoring competition in the online domain. For 2018 to 2019, the ACM has published its agenda in 2018 and identified four key priorities: the digital economy, energy markets in transition, prescription drug prices and ports and transport. Indeed, throughout 2018 the ACM has focused on these areas and it is expected to continue that focus throughout 2019.

# North Macedonia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Because of the obligations undertaken with the Stabilisation and Association Agreement between the Republic of Macedonia and the European Communities and their member states and the ongoing process of harmonisation of the North Macedonian legislation with the European Union (EU) acquis, the new Law on Protection of Competition (LPC) entered into force on 13 November 2010 (Official Gazette of the RM No. 145/10), and was subsequently amended and supplemented in 2011, 2014, 2016 and again in 2018.

The purpose of the LPC as a primary source of competition law in North Macedonia is to ensure free competition on the domestic market to stimulate economic efficiency and consumer welfare.

In 2012, on the basis of the LPC, the government of North Macedonia adopted nine by-laws (Decrees):

- Decree on the detailed conditions for block exemption of certain types of agreements for transfer of technology, licence or know-how;
- Decree on the detailed conditions for block exemption of certain types of research and development agreements;
- Decree on the conditions for block exemption of certain categories of horizontal agreements for specialisation;
- Decree on block exemption of certain categories of insurance agreements;
- Decree on block exemption of certain categories of agreements on distribution and servicing of motor vehicles;
- Decree on block exemption of certain categories of vertical agreements;
- Decree on the detailed conditions on agreements of minor importance (*de minimis*);
- Decree on the form and content of the notification for concentration and the documentation to be submitted with the notification; and
- Decree on the detailed conditions and procedure under which the Commission for Misdemeanour Matters decides on immunity from fines and reduction of fines (*leniency*).

They regulate some specific institutions that are prescribed within the LPC to enable the proper enforcement in the practice of, as well as total harmonisation with, EU principles, especially the secondary legislation of the EU.

The body responsible for implementing the LPC is the Commission for the Protection of Competition (the Commission). The Commission is an independent state body with the status of a legal entity, and is independent in its working and decision-making within the scope of its competencies as determined by the law.

The Commission supervises the application of the provisions of the LPC by monitoring and analysing the conditions of the market to the

extent necessary for the development of free and efficient competition, as well as conducting procedures and making decisions in accordance with the provisions of the law.

The misdemeanour procedure is conducted and the misdemeanour sanction is imposed by a separate Commission for Misdemeanour Matters within the Commission for the Protection of Competition.

From 2012 to the end of 2016, the Commission adopted a set of various guidelines aiming to elaborate in more detail the provisions of the LPC and the Decrees, as well as to give instructions on the manner of proceeding of the Commission and assessment of various competition issues:

- Guidelines on the term concentration (2012) – harmonised with the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings;
- Guidelines on the application of article 7, paragraph 3 of the LPC (2012) – harmonised with the Commission Notice – Guidelines on the application of article 81(3) of the Treaty (text with EEA relevance);
- Guidelines on determining the cases in which the Commission shall pass a decision on assessment of the concentration in simplified form (2012) – harmonised with the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (2005/C 56/04);
- Guidelines for the method of submission and filing of notifications for concentration (2015) – harmonised with Commission Regulation (EC) No. 802/2004 dated 21 April 2004 for implementing Council Regulation (EC) No. 139/2004 on control of concentrations between enterprises;
- Guide for detecting collusive agreements in the procedures for granting public procurement agreements (2015) – harmonised with the recommendations for prevention and avoiding of collusive tendering of international organisations, such as the OECD;
- Guidelines for assessment of horizontal concentrations for the purposes of the LPC (2015) – harmonised with the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 5 February 2004, pages 5 to 18;
- Guidelines for assessment of vertical and conglomerate concentrations (2015) – harmonised with the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings Official Journal C 265 of 18 October 2008;
- Guidelines for possible amendments and undertaking of commitments with regard to the notified concentrations, acceptable for the Commission, according to the LPC (2015) – harmonised with the Commission Notice on remedies acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004;

- Guidelines for the vertical restrictions (2015) – harmonised with the Commission notice – Guidelines on Vertical Restraints, Official Journal C 130, 19 May 2010, page 1;
- Guidelines for the implementation of article 7 of the LPC for horizontal agreements for cooperation (2015) – harmonised with the Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, Official Journal C 11, 14 January 2011, pages 1 to 72;
- Guidelines for defining the cases in which the Commission shall usually determine that certain concentrations assessed are compliant with the law (2016) – harmonised with the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (2013/C 366/04); and
- Guidelines for immunity or reduction of fines – leniency (2016).

## Scope of legislation

### 2 | What kinds of mergers are caught?

The LPC's merger control rules are based on the concept of change of control. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings; or
- the acquisition of direct or indirect control of the whole or parts of one or more other undertakings by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by means of an agreement or in other manner stipulated by law.

### 3 | What types of joint ventures are caught?

The creation of a joint venture that permanently performs all the functions of an autonomous economic entity (full-function joint ventures) shall constitute a concentration according to the provisions of the LPC (ie, the acquisition of direct or indirect control).

The Guidelines on the term concentration closely defines the specific requirements under which the joint venture would be considered a concentration.

The full-functionality criterion envisages the application of the LPC for the creation of joint ventures by the parties, irrespective of whether the relevant joint venture is created as a 'greenfield operation' and whether the parties contribute assets to the joint venture that were previously in individual ownership. In these circumstances, the joint venture must fulfil the full-functionality criterion to constitute a concentration. Even though a joint venture may be a full-functioning undertaking and thus economically autonomous from an operational perspective, that does not mean that it enjoys autonomy as regards the adoption of its strategic decisions or on the contrary the jointly controlled undertaking could never be considered as a full-functioning joint venture and therefore the condition, under which the joint venture would constitute a concentration under the provisions of the LPC, would never be met. Hence, for the application of the full-functionality criterion it is sufficient for the joint venture to be autonomous in an operational respect.

The full-functionality in fact means that a joint venture must operate on the market, performing functions that are normally carried out by the undertakings operating on the same market. For that purpose, the joint venture must have a management dedicated to its daily operations and access to sufficient resources including finance, personnel and assets (tangible and intangible) to perform its business activities on a permanent basis within the framework determined in the joint venture agreement.

The Guidelines on the term concentration outlines more specific directions with respect to the situations that would be considered when examining the notification of concentration in cases involving joint ventures (for example, the sufficient resources to operate independently on a market, the activities outside the specific function of the ruling (parent) undertakings, sale and purchase relations with the ruling (parent) undertakings, sustainable operations (operations on a lasting basis), and changes in the activities of the joint venture).

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Pursuant to the LPC, control shall comprise rights, contracts or any other means that either separately or in combination, and having regard to the factual or legal conditions confer the possibility of exercising decisive influence on an undertaking, in particular through:

- ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that confer decisive influence on the composition, voting or decisions of the bodies of the undertaking.

Control is acquired by persons or undertakings who are holders of the rights or have acquired the rights under the contracts referred to above, or that still have the power to exercise such rights under the contracts even though such persons or undertakings have not been holders of such rights or have not acquired the rights under the contracts.

Minority interests may fall within the definition of control if they are associated with veto rights over strategic decisions of the undertaking. Contractual arrangements, such as: organisational contracts under law; or lease of the enterprise's business, which grants control over the management and the resources; or right to use the enterprise's assets, may also lead to change of control on a lasting basis, despite the fact that property rights or shares are not transferred.

With the Guidelines of the Commission regarding the term concentration, the Commission provided more information and instructions as to questions when the concentration arises in accordance with article 12 of the LPC, thus specifying the types of control.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The participants in a concentration are obliged to notify such concentration to the Commission, if:

- the collective aggregate annual income of all the participating undertakings, generated by sale of goods or services on the world market, exceeds the equivalent amount of €10 million expressed in denars counter value, made during the business year preceding the concentration, and where at least one participant is registered in North Macedonia;
- the collective aggregate annual income of all the participating undertakings, generated by sales of goods or services in North Macedonia, exceeds the equivalent amount of €2.5 million expressed in denars counter value, made during the business year preceding the concentration; or
- the market share of one of the participants exceeds 40 per cent or the total market share of the participants in the concentration exceeds 60 per cent in the year preceding the concentration.

The LPC does not specify any conditions under which the Commission would be competent to investigate transactions falling below the above-mentioned thresholds.

**6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?**

The filing is mandatory and there are no exceptions provided in the law. Therefore, any merger qualifying as a concentration that meets the turnover thresholds or market share thresholds must be filed.

**7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?**

The implementation of the LPC is not limited only to practices undertaken within the territory of North Macedonia, but also abroad if they produce certain effects on the territory of North Macedonia. The LPC shall be applied to all forms of prevention, restriction or distortion of competition that produce an effect on the territory of North Macedonia, even when they result from acts carried out or undertaken outside the territory of North Macedonia.

If the thresholds are fulfilled, the presumption stands that a foreign-to-foreign merger produces effects in North Macedonia, and it has to be notified in North Macedonia.

**8 | Are there also rules on foreign investment, special sectors or other relevant approvals?**

There are no special provisions on foreign investments or on special sectors in the LPC; the general rules shall apply.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

**9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?**

The deadline for filing the notification is generally described: the participants are obliged to notify the Commission before implementation of the concentration and following the conclusion of the merger agreement, or the announcement of a public bid for the purchase or acquisition of a controlling interest in the charter capital of the undertaking.

Failure to notify is a misdemeanour penalised by a fine amounting to up to 10 per cent of the value of the aggregate annual income of the undertaking made in the business year preceding the year when the misdemeanour was committed. In addition to the fine, the Commission for Misdemeanour Matters may impose to the legal person a temporary ban on the performance of specific activity in duration of three to 30 days, and to the natural person – a ban on the performance of an occupation, activity or duty in duration of three to 15 days.

The competition authority in North Macedonia has had a past track record of sanctioning the undertakings for failure to notify the concentration when the jurisdictional thresholds were met (even for foreign-to-foreign mergers).

**10 | Which parties are responsible for filing and are filing fees required?**

Merging undertakings or acquirers of joint control are obliged to submit a joint notification of the concentration arising as a result of a merger or of a concentration resulting from the acquisition of a joint control.

In all other cases the notification shall be filed by a person or undertaking that acquires control of the whole or part of one or more other undertakings.

The initial filing fee is set at a fixed amount of 6,000 denars and is payable with filing. An additional fee of 30,000 denars will be charged for a decision declaring the concentration compliant with the provisions

of the LPC, and is payable after the concentration has been appraised by the Commission.

**11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?**

The concentration shall not be performed either before its notification to the Commission or after the submission of the notification until a decision is made declaring the concentration compliant with the LPC or before the expiry of the legal terms in which the Commission should pass the decision. This shall not prevent the implementation of a public bid for the purchase of securities or a series of securities transactions, including those convertible into other securities for the purpose of trading on the market if the concentration has been notified to the Commission without delay, and the acquirer of securities does not exercise the voting rights attached to the securities in question, or does so only to the extent that is necessary to maintain the full value of its investment and based on a Commission's decision for exemption.

After the complete notification is received, the Commission has up to 25, or at most 145, business days, depending on the case, to pass its decision.

### Pre-clearance closing

**12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?**

If the undertakings do not comply with the suspension obligation as stipulated in article 18 of the LPC, then such undertakings are committing a serious misdemeanour and can be fined with up to 10 per cent of the value of the total annual income of the undertaking (respectively, of the group) realised in the business year preceding the year in which the concentration was performed. The total annual income is calculated under article 16 of the LPC. In addition, the Commission may impose temporary bans, as defined in question 9.

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

If the undertaking does not file a notification on concentration in cases of foreign-to-foreign mergers that fall under the provisions of the LPC, the Commission for Misdemeanour Matters shall impose a fine amounting to up to 10 per cent of the value of the aggregate annual income of the undertaking made in the business year preceding the year when the misdemeanour was committed. In addition to the fine, the Commission for Misdemeanour Matters may impose temporary bans, as defined in question 9.

The Commission for Misdemeanour Matters imposed fines in several cases involving closing before clearance in foreign-to-foreign mergers.

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

All mergers (not only foreign-to-foreign) that fulfil the thresholds can apply for an exemption from the suspension obligation by submitting a justified written request, which is subject to approval by the Commission (article 18 of the LPC).

The Commission may, upon a reasoned request by the participants in a concentration, adopt a decision to allow an exemption from the obligations that the concentration shall not be performed before its notification and clearance. In deciding upon the request for exemption, the Commission shall, inter alia, take into account the effects of the suspension of the concentration on one or more undertakings concerned by the

concentration or on a third party, as well the threat to the competition posed by the concentration. This exemption may be subject to imposing of conditions and obligations to ensure an effective competition. The exemption may be applied for and granted at any time, that is, prior to filing of the notification or following the transaction that refers to the public bid for the purchase of securities or a series of securities transactions, including those convertible into other securities for the purpose of trading on the market. The Commission prescribed a special form of request for exemption, regulating in general manner its content; however, details of the documents to be enclosed to the request are not provided. The decision following the request for exemption has to be issued within 15 days of the day of receipt of the complete documentation necessary to assess the request.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules applicable to public takeover bids.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The LPC does not prescribe special form for submission of the notification. It only stipulates that the notification of the concentration must include an original of the legal act that is the basis for the creation of the concentration (or a verified transcript thereof), financial reports of the participants regarding the business year preceding the concentration (in the original or a verified transcript thereof); a certificate from the trade register or other register of legal persons containing the basic information on the undertaking, the registered office and the scope of operation of the participants (in the original or a verified transcript thereof) and data regarding the market shares of the participants, as well as the shares of their competitors. As of August 2016, the Commission ex officio obtains the financial reports and registration documents for the participants in the concentration registered in North Macedonia.

However, the Regulation on the form and content of the notification of concentration and necessary documentation that shall be submitted along with the notification sets out detailed rules with regard to the notification's content and format (written and electronic) as well as additional enclosures. Inter alia, the notification on concentration should contain the following information: a short resume on the notification – excluding any confidential information (to be published on the Commission's website), exact data on the participants in the concentration (name, address, business activity, annual income gained on a group level in the business year preceding the concentration – worldwide and on the North Macedonian market, calculated under article 16 of the LPC), detailed description and legal basis of the concentration, relevant markets and market shares of the participants in the concentration and their main competitors, etc.

The notification for concentration should mandatorily include a statement signed by or on behalf of the notifying party relating to the accuracy of the data, information and documents enclosed to the notification, and its awareness of the consequences of submitting false or misleading data to the Commission (in this case a misdemeanour fine could be imposed on the notifying party of up to 1 per cent of the value of its total annual turnover, calculated under article 16 of the LPC; and more important, the Commission may revoke its decision declaring that the concentration is compliant with the provisions of the LPC if it was adopted on the basis of such false or incomplete data for which one of the participants in the concentration is responsible or they were

obtained by way of deceit, and they had a decisive influence when adopting the decision).

In addition to the compulsory data, the Commission may require the submission of all other data considered necessary for the evaluation of the concentration. In particular, this would take place in cases of horizontal relations (where two or more of the participants in the concentration are engaged in business activities related to the same market of goods and geographical market) or vertical relations (when one or more of the participants in the concentration are engaged in business activities on the market of goods that is upstream or downstream in relation to the market of goods in which any other participant in the concentration participates) between the participants in the concentration, provided that in cases of horizontal relations their mutual market share is higher than 15 per cent, and in cases of vertical relations their individual or mutual market shares are equal to or higher than 25 per cent.

The Guidelines for submission and filing of the notification for concentration prescribe the form and content of the introductory (first) page of the notification for concentration, which is of a very general nature. In addition, the Guidelines provide some more technical details about the form, content and technical description of the elements of the notification of concentration (all mandatory data to be provided on a separate sheet of paper, to include description of the circumstances related to the concentration, or to indicate and elaborate that such information is not relevant for the assessment of the concentration, to provide a detailed list of all enclosures, etc).

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

The Commission shall examine the notification once it is received, and decide:

- that the notified concentration does not fall under the provisions of the LPC;
- to declare the concentration as compliant with the provisions of the LPC if:
  - it finds that the concentration notified, although falling under the provisions of the LPC, shall not have as its effect significant impediment of effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position (significant impediment of effective competition);
  - the participants, after the notification is filed, have modified the concentration, and the Commission finds that as result of those changes the concentration shall no longer have as its effect significant impediment to effective competition; or
  - to initiate an in-depth procedure if it finds that the concentration notified falls under the provisions of the LPC and may have as its effect the significant impediment of effective competition. No appeal or legal action on instituting an administrative dispute is allowed against this procedural order.

In August 2016, the Commission adopted separate Guidelines that define the cases in which it will usually declare certain concentrations compliant with the competition rules in a simplified procedure (within the term of 25 working days, as explained in question 18), aiming to make the merger control procedure more focused and effective.

During the in-depth procedure, the following steps may occur:

- the Commission may decide to adopt a decision declaring that the concentration is compliant with the provisions of the LPC, if after the notification is filed or after the performed concentration modifications by its participants, the Commission finds that the

concentration shall not have as its effect significant impediment of effective competition;

- the participants in the concentration may enter into commitments with the Commission with a view to rendering the concentration compliant with the provisions of the LPC. In this case the Commission may adopt a decision declaring that the concentration is compliant with the provisions of the LPC and in the same decision shall determine the conditions and impose obligations intended to insure that the participants act in line with the commitments undertaken with the Commission; any breach of the commitment attached to the decision declaring the concentration as compliant with the LPC is a justified reason for the Commission to revoke such decision; or
- the Commission may adopt a decision declaring that the concentration is not compliant with the provisions of the LPC if it finds that the concentration shall have as its effect a significant impediment of effective competition.

## 18 | What is the statutory timetable for clearance? Can it be speeded up?

Once the Commission receives all the data and documents, it shall issue a certificate of completeness and start to examine the notification of the concentration. Within 25 working days of receipt of the complete notification, the Commission shall make the decision on the compatibility of the merger with the LPC, or it shall make a procedural order initiating an in-depth procedure if it finds that the notified concentration falls under the provisions of the LPC, but might not be compliant with the LPC.

This term may be extended up to 35 working days if the participants in the concentration undertake commitments in relation to the Commission with a view to rendering the concentration compliant with the LPC.

If an in-depth procedure has been initiated, the decision appraising the concentration has to be passed within 90 working days of the date of initiating the procedure. At any time following the initiation of the procedure, the time limits may be extended by the Commission in agreement with the participants in the concentration and the total duration of each extension may not exceed 20 working days.

If the Commission has not adopted a decision within the prescribed deadlines, the concentration shall be considered to be compliant with the provisions of the LPC.

By exception, the time limits stipulated with the LPC shall not be binding on the Commission when, as a result of circumstances for which one of the participants is responsible, the Commission had to request ex officio from the undertakings to submit necessary data regarding their economic and financial standing, their business relations, data regarding their statutes and decisions, and the number and identity of the persons affected by such decisions, as well as other necessary data, or if the Commission had to perform other relevant actions by inspection and obtaining of evidence on the site.

The procedure cannot be speeded up.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A concentration that significantly impedes the effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position of its participants, is not in compliance with the provisions of the LPC.

#### 20 | Is there a special substantive test for joint ventures?

To the extent that the creation of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of undertakings – part of the joint venture that remains legally independent, such coordination shall be appraised according to the criteria applicable to the prohibited agreements, decisions and concerted practices as well as the exemptions thereof.

In making such an appraisal, the Commission in particular shall take into account whether the parties to the joint venture continue to retain, to a significant extent, the activities on the same market as the joint venture or on the market that is downstream or upstream from that of the joint venture or on a neighbouring market closely related to the market of the joint venture; and the coordination that arises as a direct effect from the creation of the joint venture affords the parties in the joint venture the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The Commission shall investigate whether the concentration shall significantly impede the effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position of its participants.

In making the appraisal of the concentration, the Commission especially takes into account:

- the need to maintain and develop effective competition on the market or in a substantial part of it, especially in terms of the structure of all markets concerned and the actual or potential competition from undertakings located in North Macedonia and outside North Macedonia; and
- the market position of the undertakings concerned and their economic and financial power, the supply and alternatives available to suppliers and users, as well as their access to the supplies or markets, any legal or other barriers to entry on and exit from the market, the supply and demand trends for the relevant goods or services, the interest of the consumers and the technological and economic development, provided this is a benefit for the consumers and the concentration does not form an obstacle to competition development.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not reviewed by the Commission; they are reviewed by other competent state bodies.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Commission will take into account economic efficiencies to the extent that the parties are able to offer a defence that the efficiency gains will benefit consumers.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Interim measures for restoring or maintaining effective competition may be imposed when the concentration has:

- been implemented before filing the notification and its clearance (as compliant with the LPC);
- been implemented contrary to the conditions and commitments attached to the decision for its clearance; and
- already been implemented and declared not compliant with the provisions of the LPC.

The Commission has the power to annul its decision for clearance of the concentration and to declare that the concentration is not compliant with the LPC, and, if necessary, impose measures and obligations to restore effective competition on the relevant market. In this procedure, the Commission is not bound by the time limits outlined in question 18.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues.

After the notification is filed, the participants may enter into commitments (divestiture or behavioural remedies) with the Commission with a view to rendering the concentration compliant with the provisions of the LPC. In its decision the Commission shall attach conditions and impose obligations intended to ensure that the participants act in line with the commitments entered into with the Commission, with a view to rendering the concentration compliant with the provisions of the LPC.

In December 2015, the Commission adopted the latest Guidelines for possible amendments and undertaking of commitments with regard to the notified concentrations, acceptable for the Commission, according to the LPC.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no strict provisions in the LPC related to the basic conditions and timing issues applicable to a divestment or other remedies; the situation is appraised by the Commission on a case-by-case basis.

Under the Guidelines mentioned in question 25, the parties may modify the concentration to eliminate the competition concerns and obtain clearance of the concentration. Such modifications have to be fully implemented in advance of a clearance decision.

However, it is more common that the parties submit commitments (adequate to eliminate the competition concerns and to ensure competitive market structures) with a view to rendering the concentration compliant with the LPC, and that those commitments are implemented following clearance.

The commitments could include the following.

### Divestiture

Sale of a business unit (assets or part of the business) to a suitable purchaser – which is used to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.

The divestiture has to be completed within a fixed time period agreed between the parties and the Commission: a period for entering into a final agreement ('first divestiture period' – to take around six

months, and 'trustee divestiture period' – to take an additional three months), and a further period for the closing of the transaction (to take three months). The deadline for the divestiture shall normally start on the day of the adoption of the Commission decision. These periods may be modified on a case-by-case basis.

### Removing links between the parties and competitors

In cases where these links contribute to the competition concerns raised by the merger (such as divestiture of a minority shareholding in a joint venture, or waiving of rights linked to minority stakes in a competitor, comprehensively and in a permanent way, or termination of agreements with companies supplying the same products or providing the same services).

### Other structural remedies

Other structural remedies such as granting access to the key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs on non-discriminating terms, which may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects.

### Commitments

Commitments are possible relating to the future behaviour of the undertaking after the concentration, which may be acceptable only in very specific circumstances (such as change of long-term exclusive contracts, other non-divestiture remedies – such as promises by the parties to abstain from certain commercial behaviour, for example, bundling products, only in cases of conglomerate structures).

The parties have to submit enough information relevant for assessment of the commitments. The Commission may grant waivers or accept modifications or substitutions of the commitments only in exceptional circumstances. This will very rarely be relevant for divestiture commitments.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, there has been one foreign-to-foreign merger with remedies imposed, which have been duly fulfilled by the merging parties. On 8 July 2015 and 4 July 2018, the Commission conditionally approved another two mergers; fulfilment of the commitments is ongoing.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

If the concentration is approved, it is considered that the clearance decision includes the ancillary restrictions. The Guidelines on restrictions directly related and necessary to concentrations from 2011 sets out principles for assessing whether and to what extent the most common types of agreements (non-competition clauses, licence agreements, purchase and supply obligations) are deemed to be ancillary restraints. It introduces the principle of self-assessment of the ancillary restrictions; however, the parties may request from the Commission to provide its opinion on the residual character of the restrictions with regard to specific novel or unresolved issues giving rise to genuine uncertainty, when such a case is not already covered by the Guidelines. The provisions of article 7 (regulating prohibited agreements, decisions and concerted practices) and article 11 of the LPC (regulating abuse of dominant position) shall apply to restrictions that cannot be regarded as ancillary restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

After the short resume of the notification of the concentration (which includes the name, headquarters and subject of activity of the participants in the concentration) the type of concentration – whether it is a merger, or acquiring a joint control, etc is published on the website of the Commission, all interested parties (including the customers and competitors) can provide their comments, opinions and remarks regarding the concentration concerned within the deadline stipulated by the Commission. Their input will be adequately assessed by the Commission and addressed in the decision upon the notified concentration.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The participants in the concentration should clearly mark all the confidential data in the notification. However, the Commission shall accept the classification of data as a business secret if it concerns data that have economic or market value and whose discovery or use may lead to economic advantage of other undertakings. When submitting data classified as a business secret, the undertaking is obliged to justify such determination by indicating objective reasons.

The participants in the concentration should take particular care of the fact that the short resume of the notification of concentration should not contain any confidential data and business secrets, as it is published on the Commission's website, and is a forum for interested parties to provide their comments, opinions and remarks.

After adopting a decision on concentration, the Commission delivers the decision to the notifying party, asking it to clearly mark all confidential data.

The non-confidential versions of the decisions of the Commission and the Commission for Misdemeanour Matters are published in the Official Gazette of the Republic of North Macedonia and on the website of the Commission. The judgments, that is, the decisions of the court, are published only on the Commission's website.

The president and the members of the Commission and its employees, as well as the president and the members of the Commission for Misdemeanour Matters are obliged to keep business or professional secrets regardless of how they have been learnt. The obligation to keep business or professional secrets lasts for five years as of the termination of the employment with the Commission or after the expiry of the term of office of the president or the Commission member. The above persons may not give public statements that could harm the reputation of the undertaking or statements on the measures they have undertaken or the procedures they have initiated while performing the activities under their competence until they are final, unless it regards the announcement of general information.

The parties in the procedure are not entitled to inspect, transcribe or copy any documents that are a business or professional secret within the definition under the LPC.

## Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission participates in the implementation of projects of international authorities and the authorities of the European Union, and cooperates with the authorities of other countries and institutions in the area of competition, mainly through sharing the experience. The Commission has signed memorandums of cooperation with the competition authorities of countries in the region (such as Serbia, Bosnia and Herzegovina, Kosovo, Bulgaria, Croatia and Turkey). North Macedonia has been a member of the International Competition Network. The Commission is not allowed to share any confidential information related to any ongoing or finished cases.

In November 2012, in Vienna, an Energy Community Competition Network within the frameworks of the Energy Community was established with the execution of the Joint Declaration on Cooperation between the Competition Authorities of the Contracting Parties and the Energy Community Secretariat. The competition authorities of Albania, Bosnia and Herzegovina, Croatia, North Macedonia, Moldova, Montenegro, Kosovo, Serbia and Ukraine, signatories of the Agreement for the Establishment of the Energy Community, the competition authorities of Armenia and Georgia, as member observers, the Energy Community Secretariat and the competition authorities of Austria – all signatories of the Declaration, jointly agreed for the establishment of the Energy Community Competition Network for the purpose of protection of competition.

In February 2005, the OECD Regional Centre for Competition (RCC) in Budapest was formed. The RCC organises seminars and training for the employees of the competition authorities of south-eastern European countries. They are very useful tools for exchange of information and for gaining experience with other competition authorities.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Participants in the procedure are entitled to lodge lawsuits with the Administrative Court of North Macedonia against decisions of the Commission adopted during the administrative procedure as well as against decisions of the Commission for Misdemeanour Matters.

The Law on Administrative Disputes applies to disputes initiated in accordance with the above. As of 1 July 2011, decisions of the Administrative Court can be appealed to the Higher Administrative Court. The Supreme Court decides on extraordinary legal remedies against decisions of the Higher Administrative Court.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

A lawsuit can be lodged with the Administrative Court against decisions of the Commission adopted in administrative procedures within 30 days of receiving the decision, not deferring the enforcement.

A lawsuit can be lodged with the Administrative Court against decisions of the Commission for Misdemeanour Matters within eight days of receiving the decision and the same shall defer the enforcement of the decision.

Decisions of the Administrative Court can be appealed to the Higher Administrative Court within 15 days of receiving the decision of the Administrative Court.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

So far, all of the Commission's merger decisions have been complied with.

The LPC introduced misdemeanour procedures in which the Commission for Misdemeanour Matters shall simultaneously determine the existence of violation of the LPC, the existence of a misdemeanour, and it shall also impose certain fines as sanctions for such behaviour. It is expected that the structure of the LPC shall expedite the enforcement and the system of sanctioning LPC violations, as it will no longer be necessary for the violation to be initially determined in an administrative procedure, which would then be followed by a separate misdemeanour procedure.

On 8 July 2015, the Commission conditionally approved a merger in the telecommunication sector. On 4 July 2018, the Commission conditionally approved a foreign-to-foreign merger in the sector of construction materials (modular suspended ceilings). Fulfilment of the commitments in both cases is ongoing.

### Reform proposals

35 | Are there current proposals to change the legislation?

At present there are no proposals for adoption of regulations or for any changes (amendment and supplement of the current regulation) pending. The new by-laws on the basis of the LPC were adopted in March 2012 and are still in force. With this set of by-laws, competition legislation under the LPC is up to date with the most important parts of EU legislation. The Commission regularly adopts and publishes on its website specific guidelines on various competition issues.

## UPDATE AND TRENDS

### Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The merger control track record in 2018 includes 60 unconditionally approved concentrations, and one case where the clearance was made conditional on fulfilment of the relevant commitments. No misdemeanour sanction for failure to notify concentration was imposed in the past year; the same refers to the conditionally approved transactions, temporary measures and annulled decisions (referring to previously approved mergers).

The average duration of the procedure in 2018 was 20 business days from the day of receipt of complete notification.

The Commission continues to monitor fulfilment of the commitments (structural remedies) in the telecommunications sector undertaken by the parties (case Up No. 08-1 from 2015), as well as the commitments in the sector of construction materials – modular suspended ceilings (case Up No. 08-4 from 2018).



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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation for merger control in Norway is Chapter 4 of the Norwegian Competition Act of 5 March 2004 (the Competition Act) and the Regulation on Notification of Concentrations of 11 December 2013 (the Notification Regulation). Both the Competition Act and the Notification Regulation were amended with entry into force on 1 July 2016, as further described in the questions below.

The Norwegian Competition Authority (NCA) is the primary enforcer. The Ministry of Trade and Fisheries (the Ministry) handled all appeals against decisions of the NCA until 1 April 2017. As of that date, however, a new Board of Appeals handles the appeals against decisions of the NCA made after that date, according to the Act of 15 April 2016 (in force partly on 1 July 2016 and partly on 1 April 2017) amending the Norwegian Competition Act. The board is independent, although it is administratively subordinated to the Ministry. The decisions of the Board of Appeals may be directly appealed to the Court of Appeal.

Previously, the Council of State could render decisions in merger cases involving questions of principle or interests of major significance to society. In doing so the Council of State could take into account policy considerations other than the effect of the transaction on competition. However, as of 1 April 2017 the Council of State's prerogative in rendering decisions in merger cases has been removed.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The merger control rules of the Norwegian Competition Act apply to 'concentrations', the same concept as found in the EU Merger Regulation (EUMR). According to section 17 of the Competition Act, a concentration is deemed to arise where two or more previously independent undertakings or parts of undertakings merge, or one or more persons already controlling at least one undertaking, or one or more undertakings, acquire direct or indirect control on a lasting basis of the whole or parts of one or more other undertakings.

#### 3 | What types of joint ventures are caught?

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity constitutes a 'concentration' and is therefore subject to the merger control rules of the Competition Act. This concept of 'full-function joint venture' is the same as under the EUMR.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The concept of 'control' is the same as under the EUMR. As defined in section 17 of the Competition Act, 'control' is constituted by rights, contracts or any other means that, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking, or rights or contracts that confer decisive influence on the composition, voting, or decisions of the decision-making bodies of an undertaking.

Control is acquired by persons or undertakings that are holders of or entitled to rights under the contracts concerned, or have the power to exercise the rights deriving therefrom.

Acquisitions of minority shareholdings that do not confer control are not subject to the mandatory merger filing requirement of the Competition Act. However, it follows from section 16a of the Competition Act that the NCA may intervene against acquisition of holdings in an undertaking even if the acquisition will not lead to control of that undertaking. An order by the NCA to submit a notification of an acquisition of a minority shareholding must be given within three months of the time of final agreement. According to the preparatory works, this provision does not cover board or management representations as such, which are to be appraised in accordance with section 10 of the Competition Act (corresponding to article 101 of the Treaty on the Functioning of the European Union). The same presumably applies for contractual arrangements.

If an acquisition has been made through successive purchases, the NCA may intervene against the transactions that have taken place within two years from the date of the most recent acquisition.

Under the present Competition Act, which entered into force on 1 May 2004, the NCA has only intervened once against an acquisition of a minority shareholding that did not confer control. This happened in March 2019, when the NCA intervened against Sector Alarm's acquisition of 49.99 per cent in the vertically integrated competitor Nokas.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration must be notified to the NCA if:

- at least two of the undertakings concerned each have an annual turnover in Norway exceeding 100 million kroner; and
- the combined annual turnover in Norway of the undertakings concerned exceeds 1 billion kroner.

The principles for calculation of turnover in Norway are the same as under the EUMR.

The NCA may choose to investigate transactions falling below the thresholds, and require a notification. An order by the NCA to submit a notification under these circumstances must be given within three months of the time of final agreement or acquisition of control, whichever occurs first. In the above-mentioned case of Sector Alarm, the NCA also ordered Sector to submit a notification for the acquisition of sole control over Nokas' security alarm portfolio, although the acquisition fell below the threshold. This decision was also later upheld by the Board of Appeals.

If the turnover thresholds of the EUMR are met, Norwegian competition authorities will not have the authority to review the merger and no notification is required in Norway, except for transactions involving markets for products that fall outside the scope of the EEA Agreement. The rules of the EUMR on referral of cases between the Commission and national competition authorities are largely applicable to Norway through Protocol 24 of the EEA Agreement.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The Competition Act contains a mandatory obligation to notify a concentration to the NCA, provided that the jurisdictional thresholds are met (see question 5). If the jurisdictional thresholds are not met, the concentration can be notified voluntarily. The same applies to minority shareholdings that do not confer control (see question 4).

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Neither the Competition Act nor the Notification Regulation contains particular rules or exceptions for foreign-to-foreign transactions. The turnover thresholds for notification apply regardless of whether the undertakings concerned are established in Norway. However, the Competition Act does contain a 'local effects test', as it only applies to transactions that have effect, or are liable to have effect, within Norway or in a market of which Norway is a part.

The NCA has confirmed that a merger filing is not required where a transaction does not meet this test. As regards the meaning of local effects, the NCA has taken the position that only effects on competition are relevant and that such effects must pertain to a market within Norway or a wider market that includes Norway. Accordingly, transactions that only affect markets outside Norway will not meet the local effects requirement.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There is no general legislation in Norway applicable to foreign investments. Within some sectors there is special legislation on concessions, limitations on ownership, etc, in particular within the finance, aquaculture and energy sectors. The Norwegian Media Authority's control over media ownership was abolished as of 1 July 2016, rendering review of changes in media ownership the exclusive responsibility of the Competition Authority.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no deadline for filing. As long as the transaction is not implemented, it is up to the parties to decide when to submit the notification.

The NCA may impose fines of up to 10 per cent of the undertaking's turnover for not filing. In practice, the NCA will fine the undertaking for closing before clearance if it has failed to notify (see question 12).

#### 10 | Which parties are responsible for filing and are filing fees required?

In the case of mergers, the obligation to notify rests with the merging parties jointly. If two or more undertakings acquire joint control over one or more other undertakings, the obligation to notify rests with the acquiring undertakings jointly. If a single undertaking acquires control over one or more other undertakings, the obligation to notify rests with the acquiring undertaking. No filing fees are required.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The automatic standstill rule applies to all concentrations that are subject to notification to the NCA, until the NCA has concluded its handling of the case.

The NCA has granted a number of exemptions from the standstill obligation on a case-by-case basis. This includes several cases concerning acquisitions where the target has been in financial difficulties and the value of the target business could be significantly diminished if the parties could not begin implementation prior to the NCA's clearance.

#### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Infringement of the standstill obligation may entail significant fines. Such fines may be imposed to transactions where the parties are fully integrating their business, as well as transactions where only partial integration has taken place. The NCA may issue a fine of up to 10 per cent of the undertaking's turnover. In February 2014, the NCA issued a record high fine of 25 million kroner for infringement of the prohibition against implementation. Other than that case, and one case where a company was fined 700,000 kroner in December 2014, the fines have been well below 1 million kroner. The latest fine, from May 2017, was 300,000 kroner.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In principle, sanctions also apply to cases involving closing before clearance in foreign-to-foreign mergers. So far, however, no sanctions have been applied in such cases.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Competition Act does allow for an exemption from the prohibition against implementation of concentrations on a case-by-case basis. By obtaining such exemption, the parties to a foreign-to-foreign merger may be allowed to close the transaction as long as Norwegian markets (or markets of which Norway may be a part) are not affected. An exemption on this basis has so far only been granted in one case.

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

A specific regulation provides for an exemption for public takeover bids from the automatic standstill obligation, corresponding to article 7(2) of the EUMR.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The level of detail required in a notification depends primarily on the existence of affected markets (overlap between the undertakings concerned), and the position of the undertakings concerned on those markets. The requirements are relatively extensive if the undertakings concerned have a combined market share of more than 20 per cent in a market, or more than 30 per cent in two markets that are vertically connected. These market share thresholds were harmonised with those in Form CO of the Implementing Regulation under the EUMR as of 1 July 2016.

The notification is to include the following categories of information:

- contact information;
- description of the transaction;
- descriptions of the undertakings concerned;
- descriptions of affected markets (see thresholds mentioned in the paragraph above), including as a minimum a description of the market structure, lists of the most important competitors, customers and suppliers, and a description of barriers to entry;
- account of any efficiencies;
- whether the concentration is subject to notification to other competition authorities;
- latest version of the agreement constituting the concentration, including any attachments; and
- annual reports and annual accounts of the undertakings concerned.

The notification must be submitted in Norwegian.

Any business secrets must be clearly marked in the notification, and all confidentiality claims must be substantiated for the notification to be regarded as complete. Furthermore, a proposal for a public version of the notification is to be included with the notification. The NCA is required to publish some basic information about every notification on its website.

The Notification Regulation includes a system of Simplified Notification. On conditions similar to those of the 'Simplified Procedure' under the EUMR, the notifying parties may submit a Simplified Notification.

If the parties do not satisfy the above-mentioned requirements for the notification, the deadlines for NCA's handling of the case will not start running until the information requirements are met, see question 18. Section 32 of the Competition Act also contains a legal basis to fine or (in the most severe cases) sentence an imprisonment, if the parties or others provide the NCA with incorrect or incomplete information. So far, only one undertaking has been sanctioned for submitting incorrect or incomplete information. In this case from 2009, the NCA imposed a fine of 50,000 kroner on the undertaking. Our understanding is that the threshold for the NCA applying such sanctions is very high.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

There is no obligation to consult with the NCA before filing a merger notification. In complex cases, it is, however, often advisable to approach

the NCA at an early stage and present the main issues and available data, and to enter into pre-notification discussions. Confidentiality is respected, so that discussions may take place before the deal is signed. Traditionally, pre-notification has historically not been very common in Norway, but following the changes to the filing system in 2014, the NCA has promoted pre-filing discussions.

For more information on the different phases of the investigation, see question 18.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

Upon submission of a notification, the NCA has 25 working days to give notice that intervention may take place (Phase I). The NCA must briefly state its reasons for doing so. If no notice of possible intervention is given, the transaction is cleared. In non-problematic cases, it is the NCA's practice to clear the case before expiry of the deadline in Phase I by way of an informal notice.

If the notifying parties present remedies within 20 working days of submission of the notification, the initial deadline of the NCA is extended by 10 working days. In such a case, the NCA may accept and make binding the remedies within the extended deadline. However, no remedy decisions have been made in Phase I according to this procedure.

If the NCA does give notice of possible intervention, it has 70 working days (ie, 45 additional working days) (Phase II) from receipt of the notification to either accept and make binding any remedies presented by the notifying parties or issue a reasoned draft prohibition decision. If the notifying parties present remedies later than 55 working days after submission of the notification, the deadline of the NCA is extended accordingly.

The parties have 15 working days to submit their comments to a draft prohibition decision. After the parties submit such comments, the NCA has 15 working days to issue its decision. If remedies are presented after the NCA has issued its reasoned draft prohibition decision, the deadline of the NCA to issue its decision after comments from the parties can be extended by 15 working days. As of 1 July 2016, the NCA can, on request or approval from the parties, extend its final deadline to issue its decision with 15 additional working days. In such cases the maximum timetable for clearance is 145 working days.

The deadlines of the NCA are primarily prolonged owing to incomplete notifications and presentation of remedies by the parties. The NCA has a strict approach to marking of business secrets and substantiation of confidentiality claims, and has on numerous occasions not accepted notifications as complete on those grounds.

In cases where the NCA considers intervention in Phase II, and where acceptable remedies are not presented at an early stage, the NCA will usually exhaust its deadlines before making a final decision. The review process in such cases could take about six months if remedies are submitted during the in-depth investigation.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The NCA shall intervene against a concentration if it significantly impedes effective competition (SIEC test), in particular as a result of the creation or strengthening of a dominant position and does not entail efficiencies that outweigh the losses resulting from restricted competition. This substantive test was introduced on 1 July 2016, and is harmonised with that of the EUMR. According to preparatory works, decisional practice under the EUMR is directly relevant under the Norwegian Competition Act.

Until 1 July 2016, the NCA was to intervene against a concentration if it created or strengthened a significant lessening of competition (SLC test). In principle, if a significant restriction of competition were deemed to have existed pre-merger, there was no de minimis threshold with respect to concentrations that would entail a further reduction of competition. Under the current SIEC test, the threshold for intervention is arguably higher in such cases. However, according to the preparatory works, the change from the SLC to the current SIEC test is not regarded as having any practical significance for which concentrations the NCA will intervene against.

The former SLC test was based on the total welfare standard, meaning there was no requirement that the efficiencies in question were passed on to consumers. However, under the current SIEC test the consumer welfare standard applies, which implies that efficiencies must be passed on to consumers to be relevant.

Under the SIEC test, the NCA also has to assess whether the transaction will generate any efficiency gains that will outweigh any competition concerns, as well as assessing the parties' arguments relating to a potential 'failing firm' defence. The NCA's practice indicates a high threshold for clearing concentrations on efficiencies or the failing firm defence.

## 20 | Is there a special substantive test for joint ventures?

Section 16 of the Competition Act contains a special substantive test for joint ventures. Similar to article 2(4) of the EUMR, the NCA shall consider whether the joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent. Such coordination shall be appraised in accordance with section 10 of the Competition Act (corresponding to article 101 of the Treaty on the Functioning of the European Union).

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

The NCA will investigate possible unilateral, coordinated, vertical and (theoretically) conglomerate effects of the concentration (see question 19).

Under the former substantive test, the NCA stated that the notices of the European Commission will be largely relevant in the assessment under the Competition Act. Subsequent to the introduction of the SIEC test on 1 July 2016, the notices and decisional practice of the European Commission in the field of merger control have direct relevance.

See question 4 regarding common ownership concerns.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues cannot be taken into account by the NCA or the Board of Appeals when reviewing merger cases. Up until 1 April 2017, the Council of State could, however, do so in cases involving questions of principle or interests of major significance to society (see question 1). The Council of State has previously allowed mergers on grounds of agricultural and industrial policy considerations. However, as of 1 April 2017, the Council of State's prerogative in rendering decisions in merger cases has been removed.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

The NCA's practice indicates a high threshold for clearing concentrations on efficiencies. In intervention decisions, alleged efficiencies are typically mostly dismissed by the NCA. However, some Phase II clearance decisions do refer to efficiencies as part of the grounds for clearing the concentration, although the level of scrutiny of efficiencies may not have been as high as in intervention decision. In the anomaly decision A2017-1, the NCA cleared Telia's acquisition of Phonero based on efficiencies, although having found the concentration to significantly impede effective competition.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the conditions for intervention are fulfilled (see question 19), the NCA must either prohibit the concentration or accept and make binding the remedies presented by the notifying party or parties.

### Remedies and conditions

## 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Both structural and behavioural remedies may be offered as remedies. In general, divestitures are considered more likely to succeed than behavioural remedies. See also questions 18 and 24.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

A remedy must be considered by the NCA as being sufficient to alleviate the competition concerns raised by the transaction. See question 18 for timing issues.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Since the entry into force of the current Competition Act in 2004, the NCA has intervened against four transactions in which both parties were headquartered outside Norway.

In a case relating to oil drilling services, the NCA required the divestiture of Norwegian subsidiaries of one party. The concentration in question was later cleared by the Ministry on appeal. In a case regarding ticket services, the NCA accepted behavioural remedies. The Ministry later overruled this remedy, and instead imposed a structural remedy (divestment of the acquirer's subsidiary in Norway).

In a case concerning laboratory services, the NCA also imposed a structural remedy (divestment of the acquirer's subsidiary in Norway). Finally, in May 2012 the NCA accepted behavioural commitments in a case concerning two Sweden-based suppliers of car spare parts, both having significant activities in Norway.

## Ancillary restrictions

### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Ancillary restrictions are covered by the clearance decision. Ancillary restrictions are treated in the same way as under the EUMR. A clearance of the concentration is deemed to cover ancillary restraints.

Restrictions are considered as 'ancillary' if they are directly related to the concentration and necessary to its implementation. A further condition is that the concentration, together with the ancillary restrictions, does not significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, see question 19.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties such as customers and competitors in particular are regularly involved in merger procedures before the NCA, primarily as sources of market information for the NCA.

The NCA will normally conduct relatively extensive investigations, including written requests for information addressed to third parties, in particular in cases that go to Phase II. Furthermore, the NCA will usually turn to third parties if in doubt as to whether or not to close the case during Phase I.

The formal rights of third parties and complainants are limited to a right to see non-confidential versions of the documents in the NCA's case file. If so requested, affected third parties will normally be allowed a meeting with the NCA to express their views.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The NCA is obliged by law to protect business secrets and other confidential information. However, as the general rule in Norwegian public administration law is that all documents are public, only the information that is considered business secrets, such as market shares and strategic information, is kept confidential.

Any business secrets must be clearly marked in the notification and other documents submitted during the process, and any secrecy claims must be substantiated (see also question 16). Furthermore, a proposal for a public version of the document being submitted must be included.

The NCA is required to publish some basic information about every notification on its website.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The NCA is part of the network of European Competition Authorities (ECA) and exchanges basic information about notified concentrations within this network on a regular basis. The NCA has close contact with other Nordic competition authorities, both on a general basis and in individual cases where such contact is advantageous to the NCA's case handling, including in individual merger cases.

Last year, a new cooperation agreement between the Nordic (Danish, Finnish, Icelandic, Swedish and Norwegian) competition

authorities also entered into force, expanding the level of cooperation. The Nordic competition agencies may now, to a greater extent, exchange confidential information with each other, and have easier access to formally request information from companies located in another Nordic country.

The NCA is also a member of the EFTA Network of Competition Authorities (the members are the EFTA Surveillance Authority and the national competition authorities of the EFTA states party to the EEA Agreement: Norway, Iceland and Liechtenstein). The NCA is regularly invited to participate in meetings and working groups of the European Competition Network of the EU Commission. However, these networks are not primarily established to be forums for discussions about individual merger cases.

Furthermore, the NCA is a member of the International Competition Network. The NCA also regularly participates in meetings and discussions within the OECD involving competition issues.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

As of 1 April 2017, an independent Board of Appeals handles appeals against decisions of the NCA. Before this date the appeals against the NCA's decisions were handled by the Ministry, and the Council of State could also render decisions in merger cases involving questions of principle or interests of major significance to society. After the implementation of the Board of Appeals, however, the Council lost its prerogative.

The Board of Appeals has not yet handled an appeal against a merger decision of the NCA. The most recent appeal handled by the Ministry was in January 2017. The Ministry upheld the NCA's decision to prohibit the acquisition by the owner of the largest pizza restaurant chain of its main competitor. In August 2016 the Ministry upheld the NCA's decision to prohibit the acquisition by a timber and wood pulp company of a close competitor. Before this appeal the Ministry had not handled any appeals since 2012, when they assessed a case concerning the main garden centre operator in Norway.

Since 1 April 2017, the merger decisions of the NCA can only be appealed to the Board of Appeals. Only decisions by the Board of Appeals can be subject to judicial review. No merger decisions have been brought before the courts to date, neither under the former nor under the current appeals regime.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

A decision to intervene (prohibition or remedies decision) by the NCA may be appealed to the Board of Appeals within 15 working days. The NCA must forward the appeal to the Board of Appeals within 15 working days after receiving it, and the Board of Appeals must provide its decision no later than 60 working days after its receipt of the appeal. The same rules applied to appeals dealt with by the Ministry prior to 1 April 2017.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since the entry into force of the present Competition Act on 1 May 2004, the NCA has intervened in a total of 45 merger cases (as at May

2019). Of these, 30 received approval with remedies; the remaining 15 were blocked. A minority of these cases were appealed to the Ministry. Of the 45 intervention decisions of the NCA, four concerned transactions in which both parties were headquartered outside Norway (see question 27).

In the past 10 years, the NCA has, inter alia, focused on the following markets in which competition in the NCA's view faces special challenges: the end-user market for electric power, the TV market, the retail fuel market, the telecoms market, the grocery market, and the dairy products market. Merger cases within these sectors are probably monitored with particular attention.

Lately, the NCA has paid particular attention to the following markets: retail banking, books, telecoms, taxis, security services and the grocery market. In the budget letters from the Ministry for 2019, the Ministry mentions that the grocery market should be given special attention, as in previous years.

The NCA has in 2018 also continued its focus on effective competition in local markets and on its use of quantitative methods (eg, diversion ratios and Gross Upward Pricing Pressure Index (GUPPI) analyses). In principle, the focus on effective competition in local markets has seemingly not been affected by the increased notification thresholds that were introduced as of 1 January 2014.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

There are no current proposals to change the legislation, as the Competition Act has gone through a major revision during the last couple of years.

As of 1 July 2016, the substantive test for clearance was harmonised with that of the EUMR (ie, by having the NCA prohibit concentrations that significantly impede effective competition (SIEC test), in particular as a result of the creation or strengthening of a dominant position). This included introducing a consumer welfare standard.

Several amendments to the Competition Act and the Notification Regulation, mentioned above, entered into force on 1 July 2016, including the introduction of the SIEC test for clearance of mergers (see question 19). Most of these amendments have moved the Norwegian merger regime closer to EU harmonisation.

As of 1 April 2017, the Board of Appeals handles the appeals against decisions of the NCA. The board is independent, although it is administratively subordinated to the Ministry. The decisions of the board may be directly appealed to the Court of Appeal. As of the same date, the Council of State's prerogative in rendering decisions in merger cases was removed.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The NCA blocked no mergers in the past year (May 2018 to May 2019) but cleared two mergers subject to commitments. This number is higher than in 2017 when only one merger was cleared subject to commitments, but low compared to 2016 when the NCA blocked three mergers. The relatively low number of interventions during the past year is probably a matter of coincidence based on case-specific circumstances.

The first intervention decision is St1 Norge's acquisition of the marine gasoil provider Statoil Fuel & Retail, which was cleared on structural remedies in June 2018. Both parties were larger providers of gasoil in Norway and the NCA considered them as close competitors. The NCA identified three local regions where the acquisition would

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lead to a significant impediment to effective competition. The acquisition was cleared on condition that St1 Norge did not acquire control in two regions and to sell its existing base in the last.

The second intervention decision is Sector Alarms' acquisition of a minority shareholding in the vertically integrated competitor Nokas, which was cleared on structural remedies in March 2019. The deal consisted of two acquisitions with the security alarm provider Sector Alarm as the acquiring party. The first of a minority stake of 49.99 per cent in Nokas, and the second a takeover of Nokas' limited household and SME security alarm portfolio. The NCA intervened against both acquisitions, which is the first time the NCA has intervened against a minority shareholding, as well as a merger falling below the filing threshold. In essence, the NCA only considered the horizontal aspects of the case and intervened based on the number of competitors allegedly being reduced from three to two, leading to an upwards pricing pressure and facilitating tacit coordination with its remaining competitor. The acquisition was cleared on condition that Sector dropped the acquisition of the security alarm portfolio and agreed to reduce its minority stake in Nokas to 25 per cent.

# Pakistan

Waqqas Mir and Fatima Waseem Malik

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant merger control legislation in Pakistan is primarily the Competition Act, 2010 (the Act) and the Competition (Merger Control) Regulations 2016 (CMCR 2016). The Act is a piece of federal legislation (ie, an Act of Parliament) and succeeds the successive presidential ordinances (temporary legislation enacted in 2007, 2009 and 2010 by the President of Pakistan) on the subject of anticompetitive practices. The Act is enforced by the Competition Commission of Pakistan (CCP) – established by the Act as an independent regulator at the federal level. The CCP's top tier consists of members (appointed by the federal government) from among whom one is appointed by the federal government as the chairman. Many substantive and procedural details of merger control are set forth in CMCR 2016, which has repealed the earlier Competition (Merger Control) Regulations 2007 (CMCR 2007) that were issued under a temporary legislation (under a presidential ordinance in 2007).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The definition of 'merger' in the Act and CMCR 2016 covers mergers, acquisitions, amalgamations, combinations or joining of two or more undertakings or parts thereof. If a merger that meets or exceeds specified thresholds 'substantially lessens competition by creating or strengthening a dominant position', it is caught by the competition regime. Without prejudice to this, any merger that meets or exceeds thresholds specified by CMCR 2016 has to receive clearance from the CCP. This is a mandatory requirement.

#### 3 | What types of joint ventures are caught?

Joint ventures are covered within the definition of merger under the Pakistani competition law regime. However, joint ventures are only caught if (i) thresholds specified by CMCR 2016 are met, (ii) the joint venture results in the creation of a new entity by two or more collaborators, (iii) the new entity is subject to joint control, performing functions independently on a lasting basis, and (iv) results in substantial lessening of competition by creating or strengthening a dominant position. However, if conditions (i) to (ii) are met, then clearance has to be obtained for setting up a joint venture.

The CCP has generally made clear its view while granting clearances in the past that if two independent or even related companies collaborate on a particular (usually a one-off) project without creating a new entity, then with all other things being equal, no clearance would be required from the CCP.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The primary legislation (ie, the Act) does not provide any definition of 'control'. However, Regulation 3 of CMCR 2016 provides an 'explanation' regarding 'control'. 'Control' can exist either in relation to assets, or composition, voting or decisions of an entity. This explanation sets out a fairly loose definition of control by defining it as influence capable of being exercised as a result of securities (being not less than 10 per cent of their market value), contracts or any combination thereof. For the purposes of determining control, securities shall mean shares in the share capital of an undertaking carrying voting rights and includes any other security that entitles the holder thereof to obtain or exercise voting rights. This influence, in the case of assets, covers ownership of, or the rights to use all or even a part of, the assets of an undertaking. Alternatively, control is defined as influence capable of being exercised by reason of rights or contracts that enable decisive influence to be exercised with regard to composition, voting or decisions of any organs of an entity. Hence, in the case of assets, control has not been defined in terms of decisive influence and under this broader definition any ownership or right to use even a part of the assets of an undertaking would be covered.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

If the thresholds laid down in CMCR 2016 are met, then filing a pre-merger clearance before the CCP is mandatory. Thresholds have been specified in relation to the value of gross assets of merging parties or their annual turnover linked with the value of the transaction or voting shares. Pre-merger clearance has to be obtained if the following thresholds are met:

- the value of gross assets of the acquirer undertaking exceeds 300 million Pakistani rupees or the combined value of parties to the acquisition transaction or merging entities is 1 billion Pakistani rupees; or
- the annual turnover of the acquirer in the preceding year was 500 million Pakistani rupees (or more) or the combined turnover of parties to the acquisition transaction or merging entities is 1 billion Pakistani rupees or more; and
- the transaction relates to shares or assets of the value of 100 million Pakistani rupees or more (ie, value of transaction threshold); or
- the acquisition results in the acquirer holding (post-merger) more than 10 per cent of the voting shares.

In a nutshell, if either one of the first two thresholds is met then the CCP examines whether either one of the third or fourth thresholds is

met. Where this condition is satisfied, it becomes mandatory to file – provided one or both parties do business in Pakistan.

Generally, merger parties being asset management companies (AMCs) carrying out asset management services may not be required to make an application for clearance unless:

- the merger results in a situation where post-merger the collective exposure of the AMC for itself and in all its collective investment schemes in a single entity is more than 25 per cent of total voting rights, then pre-merger clearance has to be obtained; or
- if post-merger, the value of total assets under the management of the AMC will be 1 billion Pakistani rupees or more, then pre-merger clearance has to be obtained; and
- the transaction relates to acquisition of shares or assets of the value of 100 million Pakistani rupees (or more); or
- in case of acquisition of shares by an undertaking, if an acquirer acquires voting shares, which taken together with voting shares, if any, held by the acquirer shall entitle the acquirer to more than 10 per cent voting shares.

Therefore, in case of AMCs, the CCP examines whether the transaction meets either one of the first two thresholds and one of the third or fourth thresholds.

Furthermore, transactions that do not meet the prescribed thresholds will not be required to obtain pre-merger clearance. However, such transactions may still be subject to investigation in case they contravene any other provision of the Act.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory as per the Act and CMCR 2016. Exceptions exist in certain cases even if thresholds are met. The following exceptions are specified in CMCR 2016:

- if a holding company increases its stake in a subsidiary;
- if a holding company merges or enters into a joint venture with one or more of its subsidiaries or if the subsidiaries of a holding company merge with each other or enter into a joint venture with each other;
- if a bank, insurance company or investment company engages in trading of shares for its own account for earning of dividend income with no intention of acquiring a controlling interest in the company it invests in;
- if shares have devolved by inheritance or through a gift deed or a will;
- voting shares acquired by securities underwriters;
- voting shares pursuant to a right issue unless acquirer's percentage share in outstanding voting securities increases directly or indirectly;
- real property or goods acquired in the ordinary course of business as long as the acquirer does not hold on to 'substantially all' of the relevant assets; and
- unexplored real resource property acquired for development or exploration purposes.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The law catches all those transactions where the parties do business in Pakistan and meet the relevant thresholds. The way the CCP interprets 'doing business in Pakistan' is quite broad; direct sales as well as sales through a third party are covered. If foreign-to-foreign mergers meet the relevant thresholds and the merger can affect competition within Pakistan, then these have to be notified to the CCP. Usually, the CCP

will only look to the effects on competition in the local market where foreign players have a local presence. A recent example of this is the merger between Nestlé SA (incorporated in Switzerland) and Pfizer (incorporated in Delaware, US), where Nestlé SA acquired Pfizer's nutrition food business. Nestlé Pakistan Limited is a wholly owned subsidiary of Nestlé SA in Pakistan. Pfizer's subsidiary also exists in Pakistan. As products of both companies are available in Pakistan and as both had a local presence, the CCP required parties to file a clearance application.

There is no specific local effects test laid down by the CCP. However, the Act covers all matters that occur and distort competition within Pakistan – this has been interpreted to mean that only the effects in the local market have to be seen, even if the origin is elsewhere.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Foreign investors coming into Pakistan are advised to engage a law firm to approach the Board of Investment, which offers a one-window facility for all relevant approvals and documentation required by the federal and provincial governments. If a foreign company is setting up a place of business in Pakistan or incorporating a local subsidiary, it shall have to approach the Securities and Exchange Commission of Pakistan (SECP) for the relevant registration. The SECP will also require details of any foreign national directors of a local company or a foreign company setting up a branch office in Pakistan. The Ministry of the Interior coordinates with the Board of Investment in granting security clearance to foreign nationals who are directors of local companies or foreign companies entering Pakistan. Details of these procedures can be provided by local lawyers.

Sector-specific regulators exist, among others, for sectors such as banking, aviation, insurance companies, capital markets, non-banking finance companies, telecoms, media, oil and gas as well as the electricity or power sector. Depending on the type of activity, licences may be required and the details of these application and processing procedures should be sought from local law firms.

With the promulgation of the Companies Act 2017, a merger may also require approval from SECP. Advice should be sought from local law firms on ensuring compliance with provisions of this law, where it is applicable.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Act and CMCR 2016 lay down that pre-merger clearances have to be filed as soon as an agreement in principle for the merger takes place, or a non-binding letter of intent to proceed with the merger is signed.

Section 11(12) of the Act sets out that sanctions can be imposed where parties have consummated a merger without complying with the pre-merger clearance procedure. Sanctions include the CCP's power to undo a merger or prohibit it altogether. However, this can only be done after issuance of a show-cause notice and opportunity of a hearing at the end of the Phase II review (if any). Penalties under the Act also include fines of up to 75 million Pakistani rupees or up to 10 per cent of the annual turnover of the undertaking or entity involved.

While the CCP has imposed heavy penalties in cases involving abuse of dominant position or prohibited agreements, it has never imposed a penalty for non-compliance with merger control provisions. In practice, where undertakings file for clearance with any delay, they also file an application for lenient treatment (note, not leniency) and condoning of the delay. These have up until 2014 been routinely granted.

## 10 | Which parties are responsible for filing and are filing fees required?

Parties to the merger are equally responsible for the filing, although in practice the parties usually decide between themselves who should file the application. In the case of an acquisition of shares or assets, the acquiring party must be the notifying party to the merger application in accordance with section 11(2) of the Act. The party filing the application is supposed to issue a notice of filing to all other parties to the merger, with a copy of such notice to the CCP, stating that the application will be or has been made.

Filing fees are required and vary with turnover of parties to the merger or value of assets under management (the latter in case of AMCs). The minimum filing fee is 300,000 Pakistani rupees and depending upon the turnover of the parties to the transaction, can go up to 2.25 million Pakistani rupees.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The CCP is bound under the Act and CMCR 2016 to decide pre-merger applications within a specified number of days. Initial filing begins in the Phase I review. No objection in 30 working days means, as per the law, that the CCP has no objection to the merger. Normally, the CCP will issue a clearance within 30 working days. If the CCP wants to take the merger application to a Phase II review, it shall take this decision within 30 working days of filing and communicate this to the parties. However, a Phase II review has only been initiated in eight cases since the CCP's inception in 2007.

If and when a Phase II review is initiated by the CCP (and this happens very rarely) the CCP then has another 90 working days within which to conduct an extended review. If no decision is made within 90 working days of starting of the Phase II review, then as per the law the CCP shall be deemed to have had no objection and the proposed merger shall be deemed cleared.

Because the scheme of the law is that clearance has to be obtained before consummation of the merger, the CCP expects parties not to complete or implement the transaction until clearance has been granted. However, if the filing is late or if the parties satisfy the CCP that the matter will not go beyond a Phase I review, the transaction does not have to be suspended. If the parties have already completed the merger, it is good practice to place on record an application requesting the condoning of the delay without imposition of any penalties.

Where, after a Phase II review, the CCP wants to prohibit or undo a merger, it shall issue a notice after an inquiry report. Thereafter, a hearing is held (normally within 15 working days of the issuance of the notice) and, after a quasi-judicial proceeding, a final order is passed.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The sanctions applicable to closing before clearance will essentially be the same as sanctions for not filing. Closing or non-filing will both violate section 11(12) of the Act which, read with sections 38 and 31 of the Act, provides for the penalties mentioned above. However, as explained above, the CCP has never applied sanctions since its inception in 2007 for non-filing or closing before clearance. When it comes to mergers, its focus has been ensuring awareness and implementation of the law rather than its enforcement with penalties.

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There are no examples of sanctions having been applied in foreign-to-foreign mergers.

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The law envisages asking for pre-merger clearance before closing. However, in practice the CCP has always condoned delays as long as parties seek clearance for the merger and give sufficient reasons with a request for condoning of the delay.

In practice, the CCP's mergers department takes the position that there is no bar to a 'hold-separate' arrangement. However, this facilitative approach is different from the letter of the law, which requires pre-merger clearance. The safest way would be to notify the CCP of the merger and ensure requisite filing with the commitment that, until final clearance is given, the parties will put in place a 'hold-separate' arrangement.

### Public takeovers

## 15 | Are there any special merger control rules applicable to public takeover bids?

Under the competition law regime, there are no special merger control rules applicable to public takeover bids. Generally, public takeovers are regulated by the SECP and the Pakistan Stock Exchange. The Securities Act, 2015 (Securities Act) and the Listed Companies (Substantial Acquisition of Voting Shares and Take-Overs) Regulations 2008 (Take-Over Regulations) prescribe a separate procedure for offers to acquire shares of a public listed company. The Securities Act is a piece of federal legislation and repeals the previous Listed Companies (Substantial Acquisition of Voting Shares and Take-Overs) Ordinance 2002 (Repealed Take-Over Ordinance) which related to the substantial acquisition of voting shares and takeovers of listed companies. The Securities Act along with the Take-Over Regulations, made under the Repealed Take-Over Ordinance and validated by the Securities Act, regulate takeovers. This supplements and does not exclude the Act and CMCR 2016.

The Securities Act does not apply to, inter alia, mergers under any law for the time being in force except in cases of acquisition of voting shares in a listed company. The Securities Act prescribes thresholds regarding the aggregate percentage of shareholding to be acquired in a listed company, which if met, trigger disclosure requirements or obligations of making a public offer of the acquisition of voting shares, as the case may be.

Advice should be sought from local law firms on ensuring compliance with provisions of this law, where it is applicable.

If the thresholds are met, the CCP clears public takeover bids following the Act and CMCR 2016.

### Documentation

## 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Significant details go into preparation of a filing and local legal practitioners specialise in this field. The repealed CMCR 2007 carried a form (appearing in its Schedule) that was to be filled out along with supporting evidence. Although the CMCR 2016 refers to a form, the same has not been annexed to the CMCR 2016. Instead the official CCP website ([www.cc.gov.pk](http://www.cc.gov.pk)) provides two forms (a short form and a long form) that must be filled out along with supporting evidence for purposes of

a filing. While the long form can be used for all transactions, the short form may only be used for acquisition of shares on the capital markets, conglomerate mergers, or group re-structuring. The short form is a relatively new addition and, as there is still uncertainty regarding its applicability, in practice preference is given to the long form.

The long form is an 11-page document and the information that needs to go into a filing includes (but is not limited to):

- an executive summary of the notified merger specifying (i) parties to the merger; (ii) the nature of the merger; (iii) the area of activities of the parties to the merger; (iv) the relevant product and geographic markets in which the merger is likely to have an impact; and (v) the expected time frame for completion of various stages of the merger;
- corporate information about the parties and their holding and subsidiary companies;
- details of the transaction and consideration involved;
- nature of the merger and the markets on which it will have an impact;
- copies of all relevant agreements, analyses, reports provided to board of directors of relevant companies;
- market shares (pre- and post-merger) along with details of sales, production, volumes as the case may be;
- relevant market studies and anticipated changes in the market post-merger;
- explanation of the relevant market (product-wise as well as geographical);
- copies of business plans for the current year and the preceding five years;
- cooperative effects of any joint ventures and justifications; and
- any ancillary restraints being imposed or anticipated and their necessity.

On the other hand, the short form is a two-page document and the information that needs to be provided includes (but is not limited to):

- corporate information about the parties and their holding and subsidiary companies;
- nature and detail of the transaction;
- relevant market studies and anticipated changes in the market post-merger;
- explanation of the relevant market (product-wise as well as geographical); and
- any ancillary restraints being imposed or anticipated and their necessity.

Furnishing false or misleading information or impeding the work of the CCP carries a penalty of up to 1 million Pakistani rupees.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

The statutory timetable for clearance is 30 working days for a Phase I review. This 30-working-day period begins from the date of filing the pre-merger clearance application. Most applications, unless they raise serious concerns, receive clearance within 30 working days of filing. Except for rare cases, most mergers are granted clearance after a Phase I review – within 30 working days. If a Phase II review begins in the wake of serious competition-related concerns, the time period (once the Phase II review begins) is 90 working days within which the CCP will make a decision. In practice, a decision is usually made within two to two-and-a-half months. The time frame also depends on how quickly parties respond to any queries by the CCP. Two worrying instances of slight delays in recent years involve applications by GlaxoSmithKline plc and Novartis AG. In GlaxoSmithKline's case, the Phase II review

began on 13 November 2014. Final clearance was given through an order dated 20 February 2015 – slightly longer than the statutory period of 90 working days. And in the case of application by Novartis AG, the clearance was sought through an application on 29 August 2014 but the final approval after a Phase II review was given on 9 February 2015. However, these two cases represent the exception rather than the rule.

Failure to make a decision within the relevant 30- or 90-working-day period has been deemed by law to mean that the CCP has no objection to the merger.

The only way of speeding up this process is to file a formal application before the CCP to expedite the process. Arrangements should also be made with lawyers to follow it up on the administrative side with the CCP.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The law prescribes a 30-working-day period for clearance of all Phase I applications. Most transactions are cleared in Phase I. The law specifically says that if the CCP does not raise any objection to a transaction within 30 working days of it being notified, then the transaction is deemed cleared. In practice, the CCP says that this 30-working-day period only begins to run from the time a complete application is submitted. This means that, in many cases, when you file an application before the CCP, it will usually write back to you within a week or two and demand more information. Once you furnish that, the CCP will say that the time is now running. There is no set timeline for how long it takes for a decision. In most cases, a decision is given within four weeks from the time of initial filing. In other cases, it has taken until six weeks, since the CCP cites an initially incomplete application. Very few cases involving mergers actually result in a formal investigation or inquiry, as most cases are cleared after a Phase I review. The inquiry or investigation for a Phase I review is largely informal in the sense that no formal reports are compiled and only final clearances are issued. Lawyers and representatives routinely meet officers of the CCP's mergers department to explain their transactions after filing of formal clearance applications – although such meetings are not mandatory or necessary in each case. In the event the CCP feels the need for a detailed formal investigation or inquiry, the process involves the following steps:

- appointment of inquiry officers by the CCP through a written authorisation;
- gathering of preliminary information by an inquiry team – this information may have come into the possession of the inquiry team as a result of its independent efforts or by virtue of the CCP's general powers to call on undertakings to furnish information on matters that may have an adverse impact on competition;
- interviews with representatives of relevant undertakings. However, this is not a mandatory step, as the CCP interprets the law as not requiring any right of hearing at the investigation or inquiry stage. This view, it is submitted, is consistent with the letter and spirit of the law. However, at times the CCP will of its own accord interview representatives of relevant undertakings; and
- once the inquiry is complete, the inquiry officers will make a recommendation – either for issuance of a show-cause notice and initiation of proceedings or closing the file because of insufficient evidence.

No penalty has been imposed by the CCP since its inception in 2007 on parties to a merger transaction.

The investigation procedure outlined herein would generally only take place if a third party files a formal complaint regarding the merger or if the CCP intends to proceed against merger parties for not notifying a merger that meets the thresholds.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for clearance is whether the merger will result in a substantial lessening of competition by creating or strengthening a dominant position of the undertaking in the relevant market. The term 'relevant market' has been defined by the Act in a way similar to the European jurisdiction with a focus on a product and a geographic market. Price, characteristics and intended uses are the criteria used to determine substitutability when defining the relevant market.

CMCR 2016 also sets out the factors to be considered by the CCP when determining whether there is likely to be substantial lessening of competition. These include but are not limited to:

- actual and potential level of import competition in the market;
- ease of entry into the market, including tariff and regulatory barriers;
- level and trends of concentration and history of collusion in the market;
- degree of countervailing power in the market;
- dynamic characteristics of the market, including growth, innovation and product differentiation;
- nature and extent of vertical integration in the market;
- whether the business or part of the business of a merger party or merger has failed or is likely to fail; and
- whether the merger situation will result in the removal of an effective competitor.

Even if the CCP determines after a Phase II review that a merger substantially lessens competition, it can still allow the merger if it can be shown that:

- the merger contributes substantially to economic efficiencies related to production or distribution of goods or provision of services;
- the said efficiency could not reasonably have been achieved by a less restrictive means of competition;
- in a cost-benefit analysis, the benefits of such efficiency clearly outweigh adverse effects on competition; and
- the undertaking adopted the least anticompetitive option for a failing undertaking's assets when faced with actual or imminent financial failure.

#### 20 | Is there a special substantive test for joint ventures?

There is no special test for joint ventures. The substantive assessment remains pegged to substantial lessening of competition by creating or strengthening a dominant position. In a nutshell, a joint venture would be caught by Pakistani competition law if:

- thresholds specified by CMCR 2016 are met;
- the joint venture results in creation of a new entity by two or more collaborators;
- the new entity is subject to joint control, performing functions independently on a lasting basis; and
- it results in substantial lessening of competition by creating or strengthening a dominant position.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The substantive test expressly focuses on substantial lessening of competition by creating or strengthening a dominant position in the

relevant market. This test, however, is slightly at odds with the rest of the Act, as section 3 of the Act (prohibition against abuse of dominant position) does not prohibit a dominant position per se but only its abuse. When it comes to mergers, a dominant position itself may not be prohibited but the focus is on whether the merger results in a substantial lessening of competition.

However, because its jurisprudential development under this relatively new law is a work in progress, it cannot be said with certainty that the CCP has closed itself off to any theories of harm. Any potential theory of harm that will allow the CCP to evaluate substantial lessening of competition will be used. This includes but is not limited to unilateral effects, coordinated effects, conglomerate effects, vertical foreclosure as well as an evaluation of any likely horizontal effects, boycotts, predatory pricing, likelihood of tie-ins and refusal to deal, etc.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The CCP is largely motivated by public interest and makes significant efforts to be seen as an enforcement organisation or regulator that is receptive and responsive to the concerns of the market – particularly vulnerable market players such as consumers or smaller competitors. However, the focus on public interest has thankfully not been allowed to lead to a situation where some abstract standards have been developed while ignoring the law itself. The review and evaluation still largely focuses on the law and economics involved along with a healthy regard for the public interest.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies play an important role in the review process. This has been commanded by the Act itself and is reflected in the CCP's practice. Even if the CCP determines after a Phase II review that a merger substantially lessens competition it can still allow the merger if it can be shown that:

- the merger contributes substantially to economic efficiencies related to production or distribution of goods or provision of services;
- the said efficiency could not reasonably have been achieved by a less restrictive means of competition;
- in a cost-benefit analysis, the benefits of such efficiency clearly outweigh the adverse effects on competition; and
- the undertaking adopted the least anticompetitive option for a failing undertaking's assets when faced with actual or imminent financial failure.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If after a Phase II review the CCP feels that a merger will substantially lessen competition, it can, after issuance of a notice and hearing the parties, decide to:

- prohibit the merger or unwind it;
- approve it subject to conditions; or
- approve it subject to undertakings regarding agreements that merging parties enter into contracts specified by the CCP.

It is also worth noting that while a Phase I or II review is under way and the CCP feels that there is a strong prima facie case of a substantial lessening of competition in the relevant market along with likelihood of immediate harm, it can also pass interim orders under the Act and CMCR 2016. However, to date this power to pass interim orders has not been exercised in cases involving clearances for mergers.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, the CCP is quite accommodating when it comes to listening to the merging parties about solutions that would allay the regulator's concerns. Divestment undertakings as well as behavioural remedies can be suggested to the CCP to persuade it to grant clearance. However, these are likely to be necessary only after conclusion of a Phase II review where the CCP thinks the merger will substantially lessen competition.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

If, during a Phase I review, the CCP raises concerns about the merger, then the parties or undertakings are free to approach the CCP with any suggestions for divestment. There are no strict conditions or timing issues applicable to a divestment or other remedy. Where a divestment is adopted as a remedy, the CCP is likely to pass an order saying that it shall occur within a specified time (and this may vary from case to case). As long as parties give an undertaking thereafter to comply with the CCP's directions or address its concerns, the clearance is likely to be granted.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

If the CCP feels that foreign-to-foreign mergers will produce effects in Pakistan, then it can require remedies. A recent example of this is the acquisition of Pfizer's nutrition business by Nestlé, which resulted in the CCP demanding an undertaking from Nestlé to the effect that Pfizer's products will continue to be available to consumers in Pakistan for three years. By way of background it is submitted that the CCP's central concern was that a foreign-to-foreign merger should not result in a situation where choices available to consumers in Pakistan are immediately eliminated.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The sample clearance applications (both the short and long form) being used for applications under CMCR 2016 clearly expect parties to inform the CCP in relation to any ancillary restraints. The long form specifically requires parties to set out and justify any ancillary restraints along with an explanation as to why any less restrictive means could not have been adopted. Therefore, as per general practice, if an undertaking (and its lawyers) are detail-oriented and take the care to set out related arrangements and explain how these are linked to the clearance requested, then the clearance decision will cover ancillary restrictions.

As has been the case in the recent past, if any ancillary restrictions or arrangements are part of the merger application, the CCP's merger clearance order becomes conditional upon the merger parties seeking an exemption in accordance with section 5 of the Act.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

When conducting an assessment, the CCP will take a holistic view and will factor in the views of customers and competitors. However, this will not always be done by the CCP and this practice is more likely to be followed where there is some doubt as to whether clearance should be granted after a Phase I review.

A formal complaint can be filed as per the detailed formalities laid down in CMCR 2016 and the CCP's General Enforcement Regulations 2007. A complainant has a right to be heard during the hearing and make formal representation through a lawyer or other experts.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Unless the merger involves large companies with a very public profile, the process is not given and does not receive a lot of publicity. However, each merger clearance is notified on the CCP's website, which is regularly updated.

Both the Act and CMCR 2016 expressly envisage protection of commercial information including business secrets. Any confidential information must be so identified when being provided to the CCP, if the applicant fails to specify any part thereof as confidential, the CCP may treat the application as non-confidential. An explanation as to why the information is confidential is also required.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CCP cooperates with antitrust authorities in the South Asian region as well as globally. However, this cooperation has largely focused on capacity building rather than working together on particular cases.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Dealing with statutory appeal first, if an adverse order is passed by a single member of the CCP, an appeal lies within 30 working days of passing of the order before the Appellate Bench of the CCP. If an order is passed by two or more members of the CCP then the appeal lies within 60 days of communication of the order before the Competition Appellate Tribunal (CAT). Appeals against decisions of the CAT can be filed before the Supreme Court within 60 days of the order.

The CAT is distinct from the CCP. It has only recently become functional again as the federal government has finally appointed new members to it.

As a matter of general practice, the CCP ensures that two or more members pass all orders. This is a reaction to the criticism of the CCP that its members sitting on the Appellate Bench of the CCP hear appeals from decisions made by their colleagues and therefore are likely to be biased.

Judicial review petitions before a High Court can be filed under article 199 of the Constitution of Islamic Republic of Pakistan, 1973. A direct petition can also be made under article 184(3) to the apex court of

the land (ie, the Honourable Supreme Court of Pakistan). In practice, it is usually more convenient and common to first approach one of the High Courts. The constitutionality of the Act is currently under challenge in various High Courts in the country. Undertakings from the sugar, cement and telecoms sectors (among others) have challenged this law. One major argument is that the Federation cannot enact a law such as the Act in exercise of its power to regulate inter-provincial trade and commerce. The other argument relates to the exercise of judicial power by members of the CCP as well as members of the CAT, as they are not a formal part of the judicial system as laid down by Pakistan's Constitution. The petitions are currently pending before the Islamabad and Sindh High Courts. The Lahore High Court initially reserved judgment on the cases argued before it; however, it has now asked the counsel to re-argue the matter.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

There is no limitation period for judicial review. Decisions can take anywhere between a couple of weeks, months or years, depending on the complexity of the case.

Appeals before the Appellate Bench of the CCP have traditionally been decided within two to four months. Appeals before the CAT have generally been decided within three months. The CAT has recently become functional – earlier it did not have the requisite number of members. There is a powerful criticism of the CAT that, because the appointments to it are purely within the domain of the Executive, its existence therefore violates constitutional guarantees of due process, a fair trial and independence of the judiciary.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The CCP has taken the position that as long as a foreign-to-foreign merger is likely to affect competition within Pakistan and the transaction falls within the jurisdictional thresholds for merger clearance, then pre-merger clearance should be obtained. However, the CCP is bound by the requirement of the law that one or both parties should be doing business in Pakistan. In practice, the CCP will only act regarding foreign-to-foreign mergers if merging undertakings have a local presence – whether through branch offices, subsidiaries or operations.

No penalty has ever been imposed because a foreign-to-foreign merger was consummated without first receiving complete clearance from the CCP.

Recently, the CCP approved M/s Alipay (Hong Kong) Holding Limited's (an affiliate of Alibaba Group) acquisition of 45 per cent shareholding in M/s Telenor Microfinance Bank Limited. In 2013, Alipay overtook PayPal as the world's largest mobile payment platform; therefore, the said acquisition will result in the world's largest mobile payment platform's entry into Pakistan.

Further, since January 2018, the CCP has approved 66 mergers, acquisitions and joint ventures, in sectors such as automotive, power generation, information technology, oil & gas, and food. The major transactions, inter alia, include:

- the acquisition of Daraz.com by Alibaba Singapore Holding;
- the acquisition of OMV (Pakistan) Exploration GMBH by Dragon Prime Hong Kong Limited;
- the joint venture between Riaz Bottlers (Private) Limited and Lotte Chilsung Beverages Co Limited;
- the acquisition of shareholding in Total PARCO Marketing Limited by Pak-Arab Refinery Limited; and



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- the acquisition of Marshall Gas (Private) Limited's Liquefied Petroleum Gas plant by Hascol Petroleum Limited.

The current federal government in Pakistan has made clear its agenda regarding the privatisation of state-owned enterprises. The current enforcement concerns of the authorities significantly revolve around the market power that will be created or strengthened as a result of privatisation as large local and foreign entities compete for entry into the aviation, oil and gas, electricity distribution, railway and other sectors. The role of the CCP in clearing acquisitions or mergers as a result of privatisation is significant, but one cannot be sure how well it will perform. There are legitimate fears that the CCP is understaffed and needs to improve its capacity to perform better. The vision of its leadership will also make a big difference.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

None has been made public by the federal government.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 4 October 2018, the current federal cabinet terminated the appointment of CCP chairperson Vadiya Khalil with immediate effect along with the appointments of CCP members, Dr Shahzad Ansar and Dr Mohammad Saleem, on the grounds that the chairperson and the members had been appointed by the former finance minister, Ishaq Dar, in violation of the laid-down procedures. This resulted in great uncertainty regarding how the CCP would be administered after removal of its chairperson and members; including, how the applications and inquiries that were pending before the CCP would be decided. Subsequently, the chairperson and the two members filed a writ petition in the Islamabad High Court (IHC) against their termination, pursuant to which, on 3 November 2018, the IHC granted interim injunctive relief to the aggrieved parties. After the order of the IHC, the CCP chairperson and the two members resumed their duties. However, at the time of this submission, the CCP chairperson and the two members named above

continue to serve on the basis of an injunctive order in their favour and the fate of their appointment will finally be determined once their petitions are decided by Islamabad High Court.

Further, in 2019, the federal government appointed two new female CCP members, namely, Shaista Bano Gilani and Bushra Naz Malik, for a three-year term. Both members have taken charge of their offices. At present, the CCP consists of five members (as stipulated in section 14 Competition Act, 2010) including Chairperson Vadiyya Khalil, Dr Shahzad Ansar and Dr Muhammad Saleem.

# Philippines

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The Philippine Competition Act of 2015 (PCA), which was enacted in July 2015, is the primary law that promotes fair market competition. It provides the guidelines on mergers and acquisitions that are competition-related activities. Its Implementing Rules and Regulations (PCA IRR) were released in June 2016.

The PCA prohibits anticompetitive agreements and abuses of dominant position. More importantly, it requires parties to a merger or acquisition, including a joint venture, that meet the size of party and value of transaction thresholds to notify the Philippine Competition Commission (PCC) prior to the execution of any definitive agreement and to obtain the approval of the PCC prior to the consummation of the transaction.

The Mergers and Acquisitions Office (MAO) of the PCC is responsible for the review and investigation of mergers and acquisitions that could substantially prevent, restrict and lessen competition in the relevant market or in the market for goods or services. The PCC is granted the power to review M&As to maintain market competition and to prevent anticompetitive behavior.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The PCA defines a merger as the joining of two or more entities into an existing entity or to form a new entity. Moreover, an acquisition is defined as the purchase of securities or assets through contract or other means, for the purpose of obtaining control by:

- one entity of the whole or part of another;
- two or more entities over another; or
- one or more entities over one or more entities.

The PCC possesses the power to review mergers and acquisitions having a direct, substantial and reasonably foreseeable effect on trade, industry or commerce in the Philippines. The PCA expressly prohibits merger or acquisition agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services. Nonetheless, an exemption from this prohibition may be granted by the Commission:

- when the parties establish that the concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely result from the merger or acquisition agreement; or
- when a party to the merger or acquisition agreement is faced with actual or imminent financial failure, and the agreement represents the least anticompetitive arrangement among the known alternative uses for the failing entity's assets.

#### 3 | What types of joint ventures are caught?

The PCA IRR includes joint ventures in the definition of the term 'merger'. Thus, the relevant provisions of the PCA that pertain to mergers also find application to joint ventures.

There are two main types of joint ventures in the Philippines: (i) a contractual or unincorporated joint venture where the partnership between the joint venture partners is governed by contract and no legal entity is created; and (ii) an incorporated joint venture where a legal entity that is separate and distinct from the joint venture partners is created and registered with the Philippine Securities and Exchange Commission (SEC).

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The PCA defines 'control' as the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise. Generally, control is presumed to exist when the parent company owns, directly or indirectly, through subsidiaries, more than one-half of the voting power of an entity.

Control also exists even if an entity merely holds minority interest over another entity when:

- there is power over more than one half of the voting rights by virtue of an agreement with investors;
- there is power to direct or govern the financial and operating policies of the entity;
- there is power to appoint or remove the majority of the directors;
- there is power to cast majority votes at board meetings;
- there exist ownership rights over or right to use all or a significant part of the assets of the entity; or
- there exist rights or contracts that confer decisive influence on the decisions of the entity.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The thresholds for compulsory notification are based on revenue or asset value of the ultimate parent entity and the value of the transaction. The PCA IRR, as amended by PCC Advisory 2019-001, effective 1 March 2019, provides that parties to a merger or acquisition are required to provide notification to the PCC when the following tests are satisfied.

### Size of the party test

The aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all

entities that the ultimate parent entity controls, directly or indirectly, exceeds 5.6 billion Philippine pesos.

### Value of the transaction test

The value of the transaction exceeds 2.2 billion Philippine pesos, as determined by the following factors:

- With respect to a proposed merger or acquisition of assets inside and/or outside the Philippines, if:
  - the aggregate value of the assets in the Philippines (or of the acquiring entity in the Philippines) exceeds 2.2 billion Philippine pesos; and
  - the aggregate gross revenues generated in or into the Philippines by the assets located within or outside the Philippines collectively exceed 2.2 billion Philippine pesos.
- With respect to a proposed acquisition of voting shares of a corporation, or of an interest in a non-corporate entity (the 'target'):
  - if the aggregate value of the assets in the Philippines owned by the target including the entities it controls, other than assets that are shares of any of those corporations, exceed 2.2 billion Philippine pesos; or
  - the gross revenues from sales in, into, or from the Philippines of the corporation or non-corporate entity including entities it controls, other than assets that are shares of any of those corporations, exceed 2.2 billion Philippine pesos; and
  - if as a result of the proposed acquisition of the voting shares or interest, the acquiring entity would own at least 35 per cent voting shares or interest except when the acquiring entities already own 35 per cent, in which case the proposed acquisition must result in the acquisition of 50 per cent of the voting shares or interest in the target.
- With respect to a formation of a joint venture, the prospective joint venturers must notify if either:
  - the aggregate value of the assets that will be combined in the Philippines or contributed into the proposed joint venture exceeds 2.2 billion Philippine pesos; or
  - the gross revenues generated in the Philippines by assets to be combined in the Philippines or contributed into the proposed joint venture exceed 2.2 billion Philippine pesos. In determining the assets of the joint venture, all potential and consummated contributions by the prospective joint venturers and any or all kind of credit or obligations by the prospective joint venturers shall be included.

The adjusted thresholds for notification shall not apply to:

- mergers or acquisitions pending review by the Commission;
- notifiable transactions consummated before 1 March 2019; and
- transactions already subject of a decision by the Commission.

In this regard, section 3(f) of the PCA IRR provides that for purposes of calculating notification thresholds:

- the aggregate value of assets in the Philippines shall be as stated in the last regularly prepared balance sheet or the most recent audited financial statements in which those assets are accounted for; and
- the gross revenues from sales of an entity shall be the amount stated on the last regularly prepared annual statement of income and expense of that entity.

Transactions falling below the foregoing thresholds that constitute an anticompetitive agreement or an abuse of market dominance may be investigated by the PCC in a motu proprio investigation. An anticompetitive agreement may be an agreement that is prohibited per se (eg, price fixing, bid rigging) or an agreement with the object or effect of substantially preventing, restricting or lessening competition (eg, limiting

supply, sharing markets). An 'abuse of market dominance', on the other hand, is the act of engaging in conduct that would substantially prevent, restrict or lessen competition, such as predatory pricing, price discrimination and refusal to deal.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory once a transaction breaches the size of the party and value of the transaction tests. The PCA and its implementing rules do not contain exceptions to the compulsory notification requirement. If parties to M&A transactions requiring compulsory notification fail to notify the PCC, the said transactions shall be considered void and the parties shall be sanctioned with an administrative fine.

The PCC has imposed a multi-million peso fine on a Philippine conglomerate that did not comply with the compulsory notification requirement (see *In Re: Udenna Corporation*, PCC Case No. M-2017-001).

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes. The PCA also contemplates foreign-to-foreign mergers with assets in the Philippines or gross revenues generated in or into the Philippines by assets acquired outside the Philippines that exceed the threshold amount.

The test applied by the PCC is the substantially prevents, restricts or lessens competition (SLC test). The PCC will look at the effects on competition over time in the relevant market or markets affected by the merger. A merger gives rise to an SLC when it has a significant effect on competition, and consequently, on the competitive pressure on firms to reduce prices, improve quality, become more efficient or innovative. A merger that gives rise to an SLC is likely to result in an adverse effect on consumers.

In the PCC Decision No. 022-M-039/2018 in the case entitled '*In the Matter of the Proposed Acquisition by Chelsea Logistics Holdings Corporation of Shares in KGLI-NM Holdings, Inc Chelsea Logistics Holdings Corporation, KGLI-NM Holdings, Inc*' with docket No. PCC Case No. M-2018-002, the Commission held that the transaction will result in substantial lessening of competition in the following geographic markets for passenger shipping because:

- the transaction eliminates a competitor that was previously a source of competitive constraint;
- there is a strong likelihood of price increases of a magnitude that adversely affects customers; and
- barriers to entry are high.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

While there are no general limitations to foreign investment in Philippine companies, the Philippine Constitution, the Foreign Investments Act of 1991 (FIA), and numerous special laws contain certain nationality restrictions on the ownership of private lands, operation of public utilities, the conduct of retail trade business and other investment areas and activities. Nonetheless, recent Philippine legislation reflects a gradual relaxation of these nationality restrictions.

The Republic Act No. 10574, which took effect in 2013, enabled foreigners to own 60 per cent of rural banks, which were previously required to be 100 per cent Filipino-owned. Furthermore, Republic Act No. 10881, which lapsed into law in July 2016, removed foreign equity restrictions for adjustment companies, lending companies, financing companies and investment houses. This new law allows 100 per cent foreign ownership over these types of companies.

The following investment areas and activities can now be 100 per cent owned by foreigners by virtue of Executive Order No. 65 (Eleventh Regular Foreign Investment Negative List) which was signed into law on 29 October 2018:

- internet businesses;
- adjustment companies, lending companies, financing companies, and investment houses; and
- wellness centers

Mergers and acquisitions involving regulated industries usually require the endorsement or approval of certain government agencies. Mergers or consolidations of banks, for example, require the prior approval of the Bangko Sentral ng Pilipinas (BSP) and are subject to the guidelines and procedures contained in the BSP's Manual of Regulations for Banks.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Parties to a merger or acquisition that satisfy the thresholds for compulsory notification are required to notify the PCC before the execution of the definitive agreements relating to the transaction or the consummation of the transaction. The failure to comply with this notification requirement shall render the agreement void and shall subject the parties to an administrative fine of 1 to 5 per cent of the value of the transaction. This was applied in *In Re: Udenna Corporation*, PCC Case No. M-2017-001.

#### 10 | Which parties are responsible for filing and are filing fees required?

Rule 4, section 4 of the PCA IRR provides that parties to a proposed merger or acquisition may request a pre-notification consultation with the PCC. To request a pre-notification consultation, the parties must provide the following information in writing:

- the names and business contact information of the entities concerned;
- the type of transaction; and
- the markets covered or lines of businesses by the proposed merger or acquisition.

During such pre-notification consultations, the parties may seek non-binding advice on the specific information that is required to be in the notification.

Under Rule 4, section 2 of the PCA IRR, if notice to the PCC is required for a merger or acquisition, then all acquiring and acquired pre-acquisition ultimate parent entities or any entity authorised by the ultimate parent entity to file notification on its behalf must each submit a Notification Form (the Form) and comply with the procedure set forth in the PCA IRR. The parties shall not consummate the transaction before the expiry of the relevant periods provided in the PCA IRR.

The Revised Rules on Payment of Fees for Notification and Review of Mergers and Acquisitions (PCC Memorandum Circular No. 17-002 issued on 15 June 2017) provides for a two-phased payment scheme: first, 250,000 Philippine pesos upon submission of the notification form, and second, 1 per cent of 1 per cent of the value of the transaction but not less than 1 million Philippine pesos or more than 5 million Philippine pesos, once the application proceeds to a Phase II review.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Under Rule 4, section 5 of the PCA IRR, the waiting period begins after all notifying entities have filed their respective Forms, together with the corresponding certifications and affidavits, and have been notified by the PCC that the Forms are complete. The transaction must be suspended prior to the PCC's clearance of the transaction at the risk of the transaction being voided by the PCC and the imposition of administrative sanctions (see *In Re: Udenna Corporation*, PCC Case No. M-2017-001).

Upon submission of the Form, the PCC shall determine within 15 days whether the Form and other relevant requirements have been completed in accordance with applicable rules or guidelines, and shall inform the parties of other information or documents it may have failed to supply, or issue a notice to the parties that the notification is sufficient for purposes of commencing Phase I review of the merger or acquisition.

The said waiting period shall commence only upon the PCC's determination that the notification has been completed in accordance with applicable rules and guidelines.

Within 30 days from commencing Phase I review, the PCC shall, if necessary, inform the parties of the need for a more comprehensive and detailed analysis of the merger or acquisition under a Phase II review, and request other information or documents that are relevant to its review.

The issuance of the aforesaid request by the PCC has the effect of extending the period within which the agreement may not be consummated for an additional 60 days. The additional 60 day period shall begin on the day after the request for information is received by the parties. However, in no case shall the total period for review by the PCC of the subject agreement exceed 90 days from the time the initial notification by the parties is deemed complete as provided under paragraph (f) of section 5 or Rule 4 of the PCA IRR. Furthermore, should the parties fail to provide the requested information within 15 days from receipt of the said request, the notification shall be deemed expired and the parties must refile their notification. Alternatively, should the parties wish to submit the requested information beyond the 15-day period, the parties may request for an extension of time within which to comply with the request for additional information, in which case, the period for review shall be correspondingly extended.

The PCC, in its discretion, may terminate a waiting period prior to its expiry.

When the above periods have expired and no decision has been promulgated for whatever reason, the merger or acquisition shall be deemed approved and the parties may proceed to implement or consummate it.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the thresholds for compulsory notification are satisfied and the parties implement closing before clearance from the PCC is obtained, the transaction shall be considered void, and the parties shall be subject to an administrative fine of 1 to 5 per cent of the transaction value.

In the case of *In Re: Udenna Corporation*, PCC Case No. M-2017-001, the PCC voided a Philippine conglomerate's acquisition of shares in a foreign corporation that has Philippine subsidiaries when holding substantial assets for non-compliance with the compulsory notification requirement under the PCA. The PCC also imposed a fine of around 20 million Philippine pesos. The PCC held for the purposes of the value of the transaction test that the target corporation's shares in 'entities it

controls are excluded' but the 'assets of the controlled corporations are still included in the valuation'.

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

The same sanctions stated in the previous question are applicable to foreign-to-foreign mergers that are covered by the PCA.

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

The PCA and its implementing rules do not contain provisions permitting closing before clearance in a foreign-to-foreign merger.

**Public takeovers**

**15 | Are there any special merger control rules applicable to public takeover bids?**

The acquisition of at least 35 per cent of the voting shares in a listed company triggers the requirement of a mandatory tender offer. In such a case, the waiting and notification period also applies as the acquirer or offeror is required to file and deliver SEC Form 19-1 to the SEC, the Philippine Stock Exchange (PSE) and the target company, to comply with disclosure requirements to security holders and to publish the terms and conditions of the tender offer in two national newspapers of general circulation. A tender offer shall, unless withdrawn, remain open until the expiry of at least 20 business days from its commencement, provided that an offer should, as much as possible, be completed within 60 business days of the date the intention to make such an offer is publicly announced.

**Documentation**

**16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?**

Rule 4, section 5 of the PCA IRR prescribes a Notification Form (the Form), which must be signed by a general partner of a partnership, an officer or director of a corporation, or in the case of a natural person, the natural person or his or her legal representative, and certified that the contents of the Form are true and accurate of their own personal knowledge, or based on authentic records. The Form is very detailed as it requires thorough disclosure of the nature of the transaction, operations of the parties in the Philippines, and horizontal and vertical relationships.

In addition to the Form, the parties may also notify on the basis of a binding preliminary agreement in any form. Each of the acquired and acquiring entities must submit an affidavit with their Forms, attesting to the fact that a binding preliminary agreement has been executed and that each party has an intention of completing the proposed transaction in good faith.

An entity found to have reported false, misleading or malicious information, data, or document may be penalised by a fine not less than the penalty imposed in the section reported to have been violated by the entity complained of.

**Investigation phases and timetable**

**17 | What are the typical steps and different phases of the investigation?**

There are two phases in the investigation: Phase I review and Phase II review.

Upon submission of the Form, the PCC shall determine within 15 days whether the requirements are complete in accordance with the rules, and shall inform the parties of other documents needed, or issue a notice to the parties that the notification is sufficient for commencing Phase I. The 30-day period shall commence only upon the PCC's determination that the notification has been completed.

If the PCC decides within the 30-day period the need for a more comprehensive and detailed analysis, they may request additional documents, which triggers the Phase II review. The issuance of this request has the effect of extending the period within which the transaction may not be consummated for an additional 60 days. The additional 60-day period shall commence on the day after the request for information has been received by the parties.

However, the total period for review by the PCC of the subject agreement must not exceed 90 days from the time the initial notification by the parties is deemed complete. If the parties fail to provide the requested information within 15 days, the notification shall be deemed expired and the parties must refile their notification. However, the parties may request for an extension of time to comply.

**18 | What is the statutory timetable for clearance? Can it be speeded up?**

In case there is no decision from the PCC after the above-mentioned periods, the transaction shall be considered approved and the parties may proceed to consummate the transaction. Hence, if there is no decision from the PCC within the 30-day period from commencing Phase I review, then the transaction shall be deemed approved.

**SUBSTANTIVE ASSESSMENT**

**Substantive test**

**19 | What is the substantive test for clearance?**

Section 14(b) of the PCA adopts the SLC Test. Under the PCC Merger Review Guidelines, a merger is cleared if it does not have a significant effect on competition, and consequently, on the competitive pressure on firms to reduce prices, improve quality, become more efficient or innovative. The policy of the law is to foster competition which, in turn, leads to greater efficiencies and promotion of consumer welfare.

**20 | Is there a special substantive test for joint ventures?**

None at present, although the PCC is not precluded by law to adopt a special substantive test for joint ventures.

(See *In re: Joint Venture between Robinsons Land Corporation and Ideal Land Limited*, Commission Decision No. 014-M-015/2018).

**Theories of harm**

**21 | What are the 'theories of harm' that the authorities will investigate?**

Under the PCA, the PCC is not restricted to a specific theory of harm in applying the SLC Test. Consistent with Philippine legal principles, the PCC is authorised to utilise all reasonable means in fulfilling its regulatory and enforcement mandate, provided it does not gravely abuse its discretion.

## Non-competition issues

### 22 | To what extent are non-competition issues relevant in the review process?

Public interest issues are very much relevant and material in the review process. The public policies behind competition law include the prevention of monopolies, improvement of industrial efficiencies and promotion of consumer welfare. These are all overriding considerations that will have a great impact in the decision-making process.

Most recently, the PCC assumed jurisdiction to review the sale of business by a potential third telecommunications player to two of the largest and only telecommunications companies in the Philippines, despite an official issuance that certain mergers submitted within a certain deadline were 'deemed approved'. The PCC's decision to assert its jurisdiction is spurred by public clamour bemoaning the low quality of service currently provided by existing telecommunications companies that enjoy a virtual duopoly in the Philippines. The issue is currently pending litigation before the Philippine Supreme Court.

## Economic efficiencies

### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are an important consideration as evidence of significant efficiency gains is used as the basis to secure an exemption from the PCC from the SLC Test (sections 21 and 22, PCA).

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The PCA has plenary powers to interfere with transactions falling within their jurisdiction, in particular:

- all mergers that involve a transaction value greater than the merger notification thresholds must be submitted to the PCC for its prior clearance, otherwise it shall be void (section 17, PCA);
- if determined to be anticompetitive, the PCC may prohibit its implementation unless modified by the parties to the PCC's satisfaction (section 18, PCA);
- issue show cause or cease and desist orders (section 12(f), PCA); and
- non-compliance with the notification and review requirements for mergers may result in the imposition of severe administrative penalties such as:
  - a fine of up to 250 million Philippine pesos; and
  - divestiture, disgorgement of excess profits, corporate reorganisation and other structural remedies (section 12(h), PCA).

In the case of *In the Matter of the Proposed Acquisition by Universal Robina Corporation (URC) of Assets of Central Azucarera Don Pedro Inc (CADPI) and Roxas Holdings Inc (RHI)*, the Commission in its Commission Decision No. 03-M-021/2019 decided to reject Universal Robina Corporation's voluntary commitments in the acquisition of Central Azucarera Don Pedro because these did not sufficiently address the anticompetitive effects arising from the transaction.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, this is provided under section 37 of the PCA, which contains non-adversarial remedies to encourage voluntary compliance, which are as

follows: (i) binding ruling; (ii) show cause order; (iii) consent order; and (iv) monitoring of compliance.

One of the non-adversarial remedies is the rendition of a binding ruling by the PCC. Where no prior complaint or investigation has been initiated, any entity that is in doubt as to whether it is compliant with the PCA, may request the PCC to render a binding ruling. In the event of an adverse binding ruling, the entity shall be given reasonable time, which shall be no more than 90 days, to abide by the ruling without being subject to administrative, civil or criminal action.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Under section 12(h) of the PCA, a divestment or other structural remedy may be resorted to under any of the following conditions:

- there is no equally effective behavioural remedy; or
- where any equally effective behavioural remedy would be more burdensome for the enterprise concerned than the structural remedy.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The PCC issued an interim order in relation to its motu proprio review of the acquisition by Grab Holdings, Inc (Grab) of the assets of Uber BV and Uber Systems Inc (Uber). The PCC's interim order required, among others, Uber to 'maintain independence of its business operations' from Grab pending the PCC's motu proprio review. The PCC also directed the parties to refrain from any conduct allowing transfer of information or technology from one service platform to another, imposing any exclusivity clauses, lock-in periods or termination fees in relation to Uber drivers seeking to transfer to Grab's platform and refrain from any act 'that will prejudice the PCC's power to review the transaction and impose remedies'.

As of this date, the PCC's motu proprio review of the transaction remains pending.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The PCC currently does not have any rules governing the effect of a clearance decision (or the lack thereof) to related arrangements. It is submitted that the PCC has discretion to extend the effect of a clearance decision to related arrangements as required by the circumstances.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

No, under existing rules, customers and competitors are not involved in the review process, which is done entirely ex parte.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The entire review process, including all information submitted to the PCC, is treated as confidential (section 34, PCA).

## Cross-border regulatory cooperation

### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Considering that the PCC is a young competition authority, there is no official policy yet on this matter. However, future cooperation by the PCC with foreign antitrust authorities is highly likely.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Section 39 of the PCA provides for a direct appeal to the Court of Appeals from any decision of the PCC. However, parties have procedural recourses (by way of a petition for certiorari to the Court of Appeals) from any order or directive rendered by the PCC during the course of the review process.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

Considering the usual time frame involved in commercial cases in the Philippines, the usual time frame for appeal or judicial review may range from three to five years. Procedural recourses from interlocutory orders or findings of the PCC or the Court of Appeals account for the prolonging of the time frame.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Based on its 2018 PCC Annual Report: Disrupting Unfair Market Competition:

- There were 95 pre-notification consultations conducted.
- There were 40 notifications received by the PCC.
- 490.84 billion Philippine pesos combined worth of transactions received.
- There were 33 cases of mergers and acquisitions approved.
- 47.74 million Philippine pesos in fines were collected from non-notification and other violations.
- There were five preliminary inquiries commenced and five full administrative investigations commenced.

Here is the list of transactions reviewed by the PCC in 2018:

- M-2017-050 *Phoenix Petroleum Philippines, Inc/Philippine Family Mart CVS, Inc.*
- M-2017-051 *Landbank of the Philippines/Postal Savings Bank, Inc.*
- M-2018-001 *Pact Group Industries (Asia) Pty Ltd/Closure Systems International (Philippines), Inc.*
- M-2018-004 *Markham Resources Corp/Alternergy Mini Hydro Holdings Corp.*
- M-2018-002 *Ayala Land, Inc/Royal Asia Land, Inc.*
- M-2018-005 *Ningbo Joyson Electronics Corp/Takata Corporation.*
- M-2018-003 *SMC Global Power Holdings Corp/Masin AES Pte Ltd/AES Transpower Pte Ltd/AES Philippines, Inc.*
- M-2018-006 *Fullerton Healthcare Corp Ltd/Asalus Corp/Avega Managed Care, Inc/Aventus Medical Care, Inc.*
- M-2018-007 *Ayala Land, Inc/Central Azucarera de Tarlac.*
- M-2018-009 *Bases Conversion Development Authority/MTD Capital Berhad.*



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- M-2018-008 *Robinsons Land Corporation/Shang Properties, Inc.*
- M-2018-011 *Alterpower Specialist, Inc/Enfinity Philippines Renewable Resources Fourth, Inc.*
- M-2018-015 *Robinsons Land Corporation/Ideal Realm Limited.*
- M-2018-014 *City Savings Bank, Inc/Union Properties, Inc./Petnet, Inc.*
- M-2018-013 *Udena Corporation/The Port Fund LP.*
- M-2018-017 *United Technologies Corp/Riveter Merger Sub Corp/Rockwell Collins, Inc.*
- M-2018-016 *Microchip Technology Incorporated/Microsemi Corporation.*
- M-2018-018 *CSP Alpha Holdings Parent Pte Ltd/StarTek, Inc.*
- M-2018-010 *City Savings Bank, Inc/Philippine Resources Savings Banking Corporation.*
- M-2018-019 *Suntrust Properties, Inc/Stalend, Inc.*
- M-2018-020 *Aisin Seiki Co, Ltd/Toyota Autoparts Philippines, Inc.*
- M-2018-022 *Alveo Land Corp/Antel Land Holdings, Inc.*
- M-2018-024 *Robinsons Retail Holdings, Inc/Rustan Supercenters, Inc.*
- M-2018-023 *Century Properties, Inc/Mitsubishi Corporation.*
- M-2018-025 *Citi core Renewable Energy Corporation/Enfinity Philippines Renewable Resources Fourth, Inc.*
- M-2018-026 *AXA SA/XL Group Ltd.*
- M-2018-027 *SYNNEX Corporation/Convergys Corporation.*
- M-2018-029 *Carmelray Property Holdings, Inc/Lopez, Inc/San Ramon Holdings, Inc/CVY Property Holdings, Inc/Juan Miguel V. Yulo/Maria Rosario Y Ng/Ma Cristina Y So/Maria Luisa Y Teehankee/Carmen V Yulo.*
- M-2018-028 *The Walt Disney Company/Twenty-First Century Fox, Inc.*
- M-2018-031 *Macsteel Global SARL BV/MSSA Investments BV.*
- M-2018-030 *Autohub Group Capital Holdings, Inc/Global City Auto Sales, Inc doing business under the name and style of Ford Global City/Ford Manila/Ford Global.*
- M-2018-032 *ORIX Aviation Systems Limited/Avolon Holdings Limited.*

- M-2018-035 *Coca-Cola South Asia Holdings, Inc/Coca-Cola Holdings (Overseas) Limited/Coca-Cola FEMSA Philippines, Inc.*
- M-2018-036 *Salon De Rose, Inc/New Trading Enterprise, Inc/Berovan Marketing, Inc/Mulgrave Corporation BV.*
- M-2018-040 *KEPCO Philippines Holdings, Inc/Solar Philippines Calatagan Corporation.*
- M-2018-038 *AC Education, Inc/iPeople, Inc.*
- M-2018-037 *Freeport Indonesia/PT Indonesia Asahan Aluminum (Persero).*
- M-2018-021 *Universal Robina Corporation/Central Azucarera Don Pedro, Inc.*

**Reform proposals**

35 | Are there current proposals to change the legislation?

None, as the legislation on this matter was enacted in mid-2015.

# Poland

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The basic act regulating merger control in Poland is the Act of 16 February 2007 on competition and consumer protection (the Act). Other major legislation on this issue includes:

- the Regulation of the Council of Ministers of 23 December 2014 concerning the notification of the intention of concentration of undertakings (establishing, inter alia, the official filing form); and
- the Regulation of the Council of Ministers of 23 December 2014 concerning the method of calculation of the turnover of undertakings participating in the concentration.

Although not legally binding, there is another regulatory instrument worth mentioning because of its considerable practical significance, namely the Guidelines on the criteria and procedure of notifying the intention of concentration to the OCCP (the Guidelines), which were issued by the Polish competition authority, the Office for Competition and Consumer Protection (OCCP). The aim of the Guidelines is to help entrepreneurs assess how the OCCP generally understands procedural aspects of the Act. Additionally, the authority also published Clarifications concerning the assessment by the OCCP of the notified concentrations on its website. These Clarifications provide a discussion and explanation of the substantive aspects taken into account in the framework of the assessment of concentrations carried out by the Polish competition authority.

In Poland, the OCCP is the sole authority responsible for the enforcement of competition rules, including merger control.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The following types of transactions are subject to the notification obligation:

- a merger of two or more independent undertakings;
- one or more undertakings to take direct or indirect control over one or more undertakings, whether by acquisition of stocks, shares or other securities, or otherwise;
- several undertakings to create one joint undertaking; and
- acquisition by the undertaking, of a part of another undertaking's property, if the turnover generated by the assets in any of the two financial years preceding the notification exceeded the equivalent of €10 million on Polish territory.

#### 3 | What types of joint ventures are caught?

There were some doubts as to whether the notification requirement should also extend to a situation where one undertaking first creates another undertaking and then disposes its shares to others. The Guidelines and case law (Decision No. DKK-104/10 of 10 November 2010, *PGNiG/Tauron*) confirm that such a scenario requires notification. However, there is no such certainty with regard to the treatment of situations where a company exists on the market for some time and then a new shareholder acquires a minority interest (which does not give control over the company). The Guidelines seem to suggest that such a situation also needs to be notified. However, it is difficult to agree with this approach (it should be mentioned here that the acquisition of a minority interest was removed from the list of concentration types several years ago). It may be thus assumed that a situation where one undertaking creates a joint venture and then transfers it to another party shall be notifiable when this is in fact one functionally linked process of creation of a new undertaking, albeit divided into stages and not a situation where a minority stake in an already running business is acquired.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act defines 'takeover of control' as a situation where an undertaking acquires in any form, whether directly or indirectly, such rights which, whether individually or jointly and taking into account all legal or factual circumstances, allow it to exercise a decisive influence upon another undertaking or other undertakings; in particular, such powers are created by:

- holding directly or indirectly a majority of votes at the shareholders' meeting or general meeting of shareholders, also in the capacity of a pledgee or user, or on the management board of another undertaking, also under agreements with other persons;
- the right to appoint or dismiss a majority of members of the management board or supervisory board of another undertaking, also under agreements with other persons;
- appointing members of one undertaking's management board or supervisory board to form more than half of the members of another undertaking's management board;
- holding, directly or indirectly, a majority of votes in a dependent partnership or at the general meeting of a dependent cooperative, also under agreements with other persons;
- the ownership of all or some of the assets of another undertaking; or
- an agreement for the management of another undertaking or transfer of profit by such undertaking.

It is worth noting that the above is not a close-ended list.

The Act does not provide for an obligation to notify a concentration where the acquisition involved is that of a minority or other interests

that does not result in a takeover of control. Nevertheless, acquisition of control may also take place in case of some factual circumstances that eventually lead to takeover of control (eg, possession of a substantial package of shares, not giving the right to more than 50 per cent of votes in the bodies of another undertaking, but for example to 40 per cent of votes with the significant fragmentation of votes of other partners).

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

An intention of concentration is notifiable where:

- the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of €1 billion; or
- the combined turnover of undertakings participating in the concentration in the territory of Poland in the financial year preceding the year of the notification exceeds the equivalent of €50 million.

The turnover of an undertaking that is jointly controlled by any member from the capital group of a party to the concentration will be attributed to such capital group in proportion to its interest in the jointly controlled undertaking.

In the case of acquisition of control, the turnover mentioned above relates to the turnover generated by the buyer's group as well as to the turnover generated by the target and its subsidiaries. In the case of acquisition of property of another undertaking, the turnover mentioned above relates to the turnover generated by the buyer's group as well as to the turnover generated by the acquired property.

It is also important to point out that in the case of separate concentrations occurring between the same groups of undertakings taking place within a period of two years, the turnover figures of the acquired targets have to be added together. This is meant to prevent undertakings from circumventing the obligation to notify by splitting a larger transaction into smaller parts that would not qualify for the notification if considered separately.

Apart from the aforementioned, there are no other thresholds (eg, related to market shares of the participants). This means that even those transactions that have de minimis impact on competition on the relevant markets are caught by the merger control regime, if only at least one of the thresholds is met. There are, however, exemptions from this general rule (see question 6).

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Under the Act, filing is mandatory when the jurisdictional thresholds are met and no exemptions from the notification obligation apply. The obligation to notify an intention of concentration does not apply in the following cases:

- the turnover generated by the undertaking over which the control is to be taken (the target undertaking and its subsidiaries) in the territory of Poland did not exceed the equivalent of €10 million in any of the two financial years preceding the notification;
- the turnover of none of the undertakings taking part in a merger or founding a joint venture exceeded in the territory of Poland €10 million in each of the two financial years preceding the transaction;
- where control is taken over an undertaking or a group of undertakings belonging to the same capital group and simultaneously a part of the assets of the undertaking or the group of undertakings belonging to the capital group is acquired – if the turnover of the undertaking or undertakings to be taken over and the turnover

generated by the part of assets to be acquired did not exceed in the territory of Poland €10 million in each of the two financial years preceding the transaction;

- a financial institution, the normal activities of which include investing in stocks and shares of other undertakings, for its own account or for the account of others, acquires or takes over, on a temporary basis, stocks and shares with a view to reselling them provided that such resale takes place within one year from the date of the acquisition or taking over, and that:
  - this institution does not exercise the rights arising from these stocks or shares, except from the right to dividend; or
  - the institution exercises these rights solely to prepare the resale of the entirety or part of the undertaking, its assets, or these stocks and shares;
- an undertaking acquires or takes over, on a temporary basis, stocks and shares with a view to securing debts, provided that such undertaking does not exercise the rights arising from these stocks or shares, except from the right to sell;
- the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over or the assets are to be acquired by a competitor or a participant of the capital group to which the competitors of the undertaking to be taken over or whose assets are to be acquired belong; and
- the concentration applies to undertakings participating in the same capital group.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There may be situations where foreign-to-foreign transactions will have to be notified to the OCCP. Under the Act, the notification obligation (even with respect to a transaction to be finalised outside the territory of Poland) exists where a concentration causes or may cause effects in the territory of Poland.

The Act is silent on what criteria are to be taken into account when assessing the effect. According to the Guidelines, it can be presumed that if at least one of the participants of the concentration (in practice, any member of the capital group to which the buyer or the seller belongs) generates any turnover in the territory of Poland, the local effects test is met and such transaction has to be notified to the OCCP.

The broad interpretation of the local 'effect' applied by the Polish competition authority may mean that, in the case of formation of joint ventures especially, many foreign-to-foreign concentrations will formally be caught by the Polish merger control rules. For example, if 'A' and 'B' intend to form a joint venture in the United States, and 'A' and 'B' have joint worldwide turnover in excess of €1 billion, it will be sufficient for the obligation to notify to arise if any of 'A' or 'B', or any entity from the capital group of 'A' or 'B', has any (even insignificant) turnover in Poland.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

No. There are no special rules with respect to foreign investment. However, there are special rules for financial institutions when it comes to calculation of turnover for threshold purposes. Moreover, according to other special legislation, transactions in sectors such as banking may require special approval from regulatory bodies other than the OCCP.

It is worth pointing out that on 30 September 2015 the Act on Control of Certain Investments (ACCI) entered into force. According to the ACCI, the Minister of Energy as well as the Prime Minister becomes another authority empowered to scrutinise mergers and acquisitions in Poland (the Control Body). The ACCI aims to create mechanisms to

protect against hostile takeovers of companies operating in key sectors of the Polish economy. According to the ACCI, prior to the acquisition of shares of strategic companies (including the acquisition of proprietary interests in entities or their enterprises) the purchaser will need to notify the Control Body and get the required approval. The obligation to inform the Control Body is to apply to transactions involving the acquisition of at least a 'material stake' in companies doing business in the sectors that are deemed strategic for the Polish economy (ie, companies operating in the gas, power generation, chemical, petrochemical and defence sectors). Because of an amendment that entered into force on 6 February 2016, the application scope of the ACCI covers also transactions undertaken by firms operating in the production of rhenium and the extraction and processing of metal ores used in the manufacture of explosives, weapons and ammunition as well as products and technologies intended for military or police purposes. Upon the receipt of the notification, the Control Body will assess the impact of a given acquisition on strategic sectors of the Polish economy. The ACCI provides for broad and general criteria for assessment ('the market share of the entity in question'; 'the scale of the business', as well as the transaction's potential to 'upset public order or public security'). The Control Body has 90 days from the receipt of the notification or from the initiation of proceedings in a given case to decide whether or not to object. A decision is preceded by a non-binding recommendation presented to the Control Body by the Consultative Committee, an advisory body that involves representatives of relevant ministries and state authorities. As a rule, an objection made by the Control Body (as well as a transaction undertaken without prior notification) will result in rendering the acquisition null and void or in making it impossible to exercise rights attached to shares (except for the right to sell such shares) and in declaring the invalidity of resolutions adopted by the decision-making bodies of companies.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Act does not provide for a specific deadline as such for the filing of the notification. The 'intention of concentration' has to be notified. It means that the notification has to be submitted before the concentration is implemented (ie, prior to closing). In other words, the parties to a concentration are obliged to refrain from implementing the transaction until (unconditional or conditional) clearance is obtained or a one-month waiting period elapses without the authority making its decision (the 'guillotine effect'). However, it should be added that clearance by the mere passage of time is rather unlikely to occur.

It is worth noting that the Act provides for a worldwide bar on closing.

If an undertaking has implemented a concentration, even if unintentionally, without the OCCP's clearance, the Act allows the OCCP to fine the undertaking by way of a decision, with a fine not to exceed 10 per cent of the turnover earned by the undertaking in the financial year preceding the year in which the fine is imposed.

Moreover, article 108 of the Act authorises fines on persons holding managerial positions or members of managing bodies of such undertakings if the persons or members have not notified an intention of concentration. The fine may be up to 50 times the average monthly remuneration in the business sector in Poland in the last month of the quarter preceding the day of issuance of a decision.

Additionally, the OCCP may revoke its decisions if they were based on misrepresentations for which the undertakings participating in the concentration were responsible or where undertakings did not comply

with the conditions (remedies) specified by the OCCP. Once revoked, the decision may be re-adjudicated by the OCCP on the merits of the case.

If, in cases described above, the concentration is already implemented and restoration of the competition in the market is otherwise impossible, and if the intention to concentrate has not been notified, or if a concentration ban has not been respected, the OCCP may order such measures as division of the merged undertaking, disposal of the undertaking's assets, disposal of stocks or shares conferring control, or dissolution of a jointly controlled company.

Sanctions were imposed, for example, in decision No. DKK-1/07 of 12 July 2007, where the OCCP fined Sobieski Trade 40,000 zlotys for failure to notify. In decision No. DKK-37/09 of 18 June 2009, the OCCP imposed a fine of 70,000 zlotys on Przedsiębiorstwo Państwowe 'Porty Lotnicze' (the national airport operator) and the provincial government of the Subcarpathian Voivodeship, again, for failure to notify. Moreover, in 2012 the OCCP issued two decisions and in 2013 only one decision imposing fines for non-compliance with the obligation to notify the concentration. Among more recent cases, please note two decisions from 2017: in decision No. DKK-86/2017 of 5 June, the grocery wholesaler Bać-Pol SA was fined 527,000 zlotys for failure to notify of the takeover of a portion of assets of another company called Klementynka. The authority initiated proceedings against Bać-Pol after receiving information that one of its subsidiaries implemented a concentration without prior authorisation by the OCCP. In a second case, the consumer eggs producer was obligated to pay 339,000 zlotys for failure to notify of its takeover of a portion of the assets of another company operating in the same relevant market (decision No. DKK-145/2017 of 19 September).

All fined undertakings were Polish-based companies. No penalties on individuals (management board members) were imposed.

Nevertheless, it should be noted that, to the best of our knowledge, there have been no cases so far in Poland where the focus of the OCCP was on actions of the undertaking concerned that could qualify as a 'gun jumping' (ie, a de facto implementation of the concentration prior to clearance). The only cases that have been made public are the cases where the concentration has been consumed (ie, the transaction has been closed or the joint venture has been formed and registered) prior to clearance. Moreover, such fines were imposed on undertakings that have notified a merger already, but their action was taken too late.

#### 10 | Which parties are responsible for filing and are filing fees required?

The intention of concentration should be notified by:

- the merging undertakings jointly;
- an undertaking taking over the control;
- jointly all undertakings participating in the creation of a joint undertaking; or
- an undertaking acquiring some of the assets of another undertaking.

The general rule is that the notification has to be submitted by the undertakings directly participating in the concentration. However, where a dominant undertaking implements a concentration through at least two dependent undertakings, the notification should be submitted by the dominant undertaking. Moreover, if the undertakings directly participating in the concentration include a corporate vehicle established only for the purpose of the transaction and to which the intent of concentration cannot be attributed, the notification can be submitted by the dominant undertaking with respect to such a corporate vehicle. However, in such a case the notifying party has to clearly indicate in the notification that the undertaking taking over control is a corporate vehicle only.

The fee to be paid for an application to initiate proceedings in concentration cases was raised on 1 January 2017 and currently amounts to 15,000 zlotys.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The undertakings whose intention of concentration is to be notified are under an obligation to refrain from implementing the concentration until the OCCP issues its decision or the time limit to issue the decision lapses. For the public transactions exception, see question 15. For the waiting periods, see question 17.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Under Polish merger control regime sanctions, closing before clearance is treated similarly as the failure to notify. As a result, the consequences for both types of infringements are the same (see question 9).

In practice, the OCCP rarely imposes fines for such infringements. In 2010, there was one decision imposing a fine on an undertaking for not notifying the intended concentration. In 2011, there were no cases of this kind. In 2012, there were two decisions and in 2013, only one such decision. In 2014, there was also only one decision of this kind. In 2015 and 2016, there were no cases of this kind. An upward trend can, however, be observed with two decisions in 2017 (2018 statistics are not yet available).

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As mentioned in question 9, in the case of closing the transaction without (or before) the OCCP's clearance, the undertaking in question as well as persons holding managerial positions or members of managing bodies of such undertakings can be fined. The same rule applies equally to Polish and foreign-to-foreign mergers.

Nevertheless, to the best of our knowledge so far, cases where fines for closing transaction without (or before) the OCCP's consent involved purely domestic transactions.

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act provides for a worldwide bar on closing. However, in one of the decisions issued by the OCCP (No. DOK-37/2007 *Olympus Capital Holdings Asia/Arysta Life Science*, 6 April 2007), the competition authority seemed to hold that the concentration may be completed before its clearance, as long as the parties refrain from implementing its Polish aspect that has local effects in Poland. In this decision, the OCCP did not question the rationale for completing the transaction before clearance. The OCCP only pointed out that no relevant evidence was offered to show that the parties refrained from implementing that aspect of the transaction that had local effects in Poland. Because there is only one such decision and the Guidelines suggest that this scenario is unlikely, such solutions will always be associated with risk and need a case-by-case analysis.

### Public takeovers

## 15 | Are there any special merger control rules applicable to public takeover bids?

The same rules and requirements apply. However, the bar on closing will not be considered breached by implementing a public offer to purchase or exchange stocks that has been notified to the OCCP prior to implementation, provided that the buyer does not exercise the voting rights

arising from the acquired stocks or exercises them solely to maintain the full value of its capital investment or to prevent substantial damage that might affect the undertakings participating in the concentration.

### Documentation

## 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The official filing form (the list of information and documents (LID)), as established by way of a regulation of the Council of Ministers, requires rather detailed information regarding the planned transaction to be provided by the notifying party in the notification (even if there are no overlaps between the undertakings concerned). Section 1 of the LID contains questions relating to the undertakings concerned (inter alia, data identifying undertakings involved, authorities authorised to represent them and the subject of the actual activity as well as the detailed description of intended concentration is included); section 2 involves information on the relevant markets and the effects of the transaction on the market.

A detailed market analysis is necessary when the market is affected horizontally or vertically or when the market is affected by a conglomerate concentration.

The LID, as well as the application itself, has to be submitted in Polish. Normally, the application runs to around 35 to 40 pages, plus attachments.

The LID has to be submitted together with certain documents such as inter alia excerpts from relevant commercial registers for the applicants (for undertakings that are obliged to file the notification, see question 10), executed versions of the most relevant transaction documents, the most recent financial statements of the parties concerned and the structure charts of the parties concerned. Documents prepared in foreign languages have to be sworn translated into Polish.

In terms of possible sanctions, under the Act providing untrue data in a transaction notification may result in a financial sanction in the equivalent of up to €50 million. Such fines are rather uncommon in practice. Nevertheless, in 2012 the OCCP imposed on UPC Polska a fine amounting to 775,000 zlotys for providing false information regarding possessing documents for an assessment of the pending merger proceedings (decision No. DKK-6/2012, *UPC Polska/Aster*, 30 January 2012). In short, UPC applied to the OCCP for the consent to acquire Aster. The OCCP addressed the undertaking to complete the notification inter alia with providing information if the company and the to-be-acquired entity possessed any reports, analyses or marketing enquiry concerning the access market to pay TV in Poland. During the proceedings it turned out that UPC concealed the market analysis containing significant information for the examined transaction. The document not revealed by the company confirmed inter alia the OCCP's opinion, stating that the concentration would have a significant impact on local markets of particular cities. This was contrary to the stance of UPC Polska, which claimed during the pending proceedings that the market of pay TV shall be defined on a nationwide level.

There were cases where OCCP imposed fines on the third parties (competitors, clients, suppliers of the parties to the concentration) for not providing information in the course of a market test carried out in a merger control case (such penalties were relatively low and aimed at having a disciplinary effect).

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

In 2015, Poland finally adopted a two-stage merger review procedure – something that has been desired since the first modern competition legislation was adopted in 1990.

The Act currently stipulates that the antimonopoly proceedings in non-problematic concentration cases should be finalised within one month from commencement (first stage review). Complex cases, cases that can cause competition concerns (where there is a risk that a significant impediment to competition might occur) or that require a sector inquiry will enter (by way of a resolution of the OCCP that cannot be appealed) a second stage of the review. This will entail a four-month extension of the process, prolonging the duration of the whole procedure to five months in total.

However, the OCCP is able to stop the clock – in any of the stages – each time it asks questions or requires new data or documents to be provided in the course of the proceedings. The deadline may also be extended if a statement of objections is issued or remedies are being discussed.

The Act does not provide for any measures to speed up the proceedings. Neither are there any fast-track procedures available.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

As indicated in question 17, the Act sets out a two-stage merger review procedure, where the first stage takes up to one month, potentially extendable to five months if the concentration requires an in-depth review in the second stage.

There are no official pre-notification contacts before the formal submission of the notification. However, the Guidelines indicate that it is possible to contact the OCCP before filing.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The OCCP will clear concentrations that do not result in significant impediment to competition in the market; in particular, by the creation or strengthening of a dominant position in the market. This means that, in practice, the Polish competition authority follows the significant impediment to effective competition (SIEC) test.

The Act defines 'dominant position' as the position of the undertaking that allows it to prevent effective competition within a relevant market, thus enabling it to act to a significant degree independently of competitors, contracting parties and consumers. It is assumed that the undertaking holds a dominant position if its market share exceeds 40 per cent.

The OCCP may also issue conditional decisions (in 2011 there were three such decisions issued, in 2012 there was only one, in 2013 there were two such decisions issued, in 2014 there were four conditional clearances issued, in 2015 there was one such case, in 2016 there were two such decisions were issued, in 2017 there was only one conditional clearance – see also question 25) or a decision under article 20.2 of the Act, the latter offering clearance despite significant impediments to competition (there were no such decisions issued during the period 2011–2018).

#### 20 | Is there a special substantive test for joint ventures?

No, there is no special substantive test for joint ventures. As already indicated (see question 3), both full-function and non-full-function joint ventures are caught by the Polish competition law.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

In assessing concentrations, the OCCP focuses mainly on whether the SIEC test is met, especially where a dominant position is created or strengthened. In practice, post-merger market shares, concentration of the market (measured by the Herfindahl-Hirschman Index) and post-merger market structure still play a crucial role in the assessment of concentrations by the OCCP.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The OCCP may clear a concentration that will significantly impede competition in the market, including by the creation or strengthening of a dominant position, in any case where it is justifiable, including especially where the concentration is expected to contribute to economic development or technical progress or may have a positive impact on the national economy.

In decision No. DKK-32/07 of 28 September 2007, the OCCP concluded that even though the concentration could pose a significant risk to the competition at that particular moment, the following reasons should be taken into account: the transaction will contribute to the economic and technological development and will have a positive impact on the national economy as well as other benefits. In another decision of 8 March 2007, No. DOK-29/07, the OCCP pointed out that the concentration could pose a significant risk to competition, but there were arguments for clearance to be given (such as ensuring Poland's energy security). As a result, the OCCP issued unconditional clearance in both cases.

However, it should be stressed that those are exceptions and later decisions (in particular decision No. DKK-1/2011 of 13 January 2011) suggest that the current approach is different and the authority is unwilling to follow the above rationale.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

As such, the Act does not explicitly provide for efficiencies to be a reason to clear a transaction that may otherwise in principle harm competition. However, in some cases the authority took that into account when assessing the transaction. In one of their decisions (decision No. DKK-1/2011 of 13 January 2011 *PGE/Energa*) the OCCP took into account the economic efficiencies in the process of examining the concentration. However, finally the OCCP prohibited this transaction.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The OCCP may, by means of a decision, prohibit implementation of the concentration if it results in a significant impediment to competition in

the market, in particular by the creation or strengthening of a dominant position.

If the decision is not complied with, the OCCP may, if strict conditions are met, apply restorative measures, for example, order a division of the undertaking.

The OCCP may also impose a fine if the transaction is closed despite its veto (see question 12 for the level of fines).

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Under the Act, the OCCP may clear a concentration provided the undertakings concerned fulfil certain conditions (conditional clearance).

These conditions may involve, in particular:

- disposal of all or some of the assets of one or several undertakings;
- divestiture of control over an undertaking or undertakings, in particular by disposing of a block of stocks or shares, or dismissal of one or several persons from the management or supervisory board; or
- granting a competitor exclusive rights.

The decision will determine the time limit for meeting the conditions.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

In case of transactions that are considered to significantly restrict the competition on the relevant market (owing to substantial aggregation of market share or reduction of strong competitors on the market), it is likely for the OCCP to issue conditional decision including commitments. Commitments are intended as a means to ensure that affected markets remain competitive. The Act provides for two types of commitments: behavioural and structural. The OCCP is willing to impose structural rather than behavioural remedies, such as the obligation to permanently dispose of specified assets (eg, decision No. DKK-9/09 of 25 February 2009, decision No. DKK-64/10 of 12 July 2010, decision No. DKK-128/2011, decision No. DKK-70/11 and decision No. DKK-40/2014 of 31 March 2014). Regarding behavioural remedies, in the OCCP's decision No. DKK-49/08 of 19 June 2008, the OCCP gave clearance on condition that the undertaking withdraw from and not initiate any actions designed to acquire any ownership rights in the other undertaking and decision No. DKK-156/2017 of 4 October 2017 where the OCCP gave clearance on condition that the acquirer, within the agreed time period, would sell all the electric energy produced in one of the assets of the acquired company through the commodity exchange. In one of its recent decisions (No. DKK-51/2019 of 25 February 2017) the OCCP combined both structural (divestment of part of the business) and behavioural (certain length of the contracts with the clients, price limits for the certain clients) remedies to allow for the concentration and protect the competitive landscape of the markets concerned.

It should be noted that, in practice, parties submit their proposal of commitments to the OCCP when the latter raises concerns over transaction. Although commitment proposal is subject to the OCCP's revision, the conditional clearance may be issued only if the party consents to the type and scope of commitments. Otherwise, the OCCP issues a prohibition decision. The authority is entitled to determine, at its sole discretion, the type and scope of commitments. Moreover, the addressee of the conditional decision is required to provide the OCCP with information regarding enforcement of commitments. The authority obliges the acquiring party to submit such information in a period of time prescribed in the commitment decision.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To the best of our knowledge, there is no such track record. However, in principle, remedies apply also to foreign-to-foreign mergers.

In decision No. DOK-36/2004 of 18 May 2004, the OCCP gave clearance on condition that an undertaking based in France shall dispose of its assets, including those located in France, to a third party, which proves that the remedies may also involve assets located outside Poland.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The matter of ancillary restrictions is not regulated in the Act. However, the Guidelines Regarding the Assessment of Concentration clearly state that ancillary restraints are not the subject of examination or assessment during the concentration proceedings. Therefore, the clearance of the OCCP does not extend to the anticompetitive contractual clauses accompanying the concentration. In practice, during the concentration procedure, the OCCP may inform the notifying undertakings that the contractual provisions accompanying the concentration raise doubts as to their conformity with the ban on anticompetitive agreements and therefore, if the undertakings refuse to change them, it may result in instigation of the antimonopoly proceedings to assess whether the anticompetitive arrangement infringes Polish competition law. It means that, in principle, the OCCP does not make the clearance for concentration dependant on the previous amendment of ancillary restraints. To sum up, although the Guidelines are not legally binding on undertakings, in practice the OCCP's decisions do not automatically cover ancillary restrictions (that are directly related to, and necessary for, the implementation of the concentration). Therefore, caution and a case-by-case approach may be necessary while dealing with ancillary restraints in Poland.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Customers and competitors are not parties to the proceedings. That means that they do not have access to files, nor can they appeal against the decision. However, third parties may at their own initiative file comments, or they may be asked by the OCCP to file input regarding important aspects of the case.

The OCCP keeps a register of all notified concentrations, which may be helpful for third parties. It is available on the authority's website.

When it comes to complicated transactions, the OCCP will in principle organise a market test and send questionnaires to competitors, clients as well as suppliers, allowing them to take a position.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The fact that a notification has been submitted, the date of submission, the notifying party and the current status of the proceedings are available at the OCCP's website.

During antimonopoly proceedings, undertakings are obliged to disclose all information available, including one that may involve

business secrets. The OCCP may, on an ex officio basis or on application of the undertaking concerned, limit access to some information for other parties (if there is more than one party to the proceedings). In such a case, the undertaking should file all documents in two versions, one confidential and the other non-confidential. The latter is available for all parties. In March 2017, the OCCP published guidelines providing further clarifications on what conditions the undertaking should meet under, to successfully apply for limitations on other parties' access to the case files (including merger control proceedings) on the grounds of business secrets protection.

It is also worth mentioning that since January 2015, the notifying party is obligated to submit a brief (up to 500 words) description of the intended concentration. This description is posted on the OCCP's website immediately after notification and should therefore be drafted in such a way that it does not contain secret information.

Furthermore, in case of imposing conditions on an undertaking, the OCCP on application of the undertaking concerned does not disclose deadlines for fulfilling the imposed conditions. The obligation in question is valid until the fulfilment of these conditions, but not later than the expiry of the deadline for their fulfilment. Moreover, in case of the above-mentioned application, the OCCP does not involve such deadlines in the publicly available version of the decision. The amendment in question is aimed at protecting commercial interests of the undertakings concerned.

Notwithstanding that, there is a general obligation on the OCCP employees to protect business secrets. This may mean having to mark information for treatment as a business secret even if there is only one party to the proceeding. Additionally, when the OCCP prepares the statement of reasons for its decision, it shall not disclose information marked as a business secret.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The OCCP is a member of numerous international working groups (eg, the International Competition Network), the most important of which being those involving the competition authorities from other EU member states. The officials from the Polish competition authority attend meetings of the Advisory Committee established by Regulation 139/2004. This Regulation provides for detailed rules of cooperation between member states and the Commission in concentration cases.

There are currently three binding bilateral agreements between the OCCP and its Ukrainian, Russian and Hungarian counterparts.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

An appeal arises from a decision of the OCCP to the Court of Competition and Consumer Protection. The appeal must be lodged within one month of the date on which the decision is served (owing to amendments, the time limit to lodge an appeal has been extended from 14 days to one month). Upon appeal, the OCCP should, without delay but not later than within three months of the date of filing the appeal, transmit the appealed decision to the court together with the record of proceedings. Where the OCCP considers the appeal to be justified, it may repeal or amend the decision, whether in whole or in part, without transmitting the record to the court. Any such repeal or amendment must be notified to the party concerned without delay by sending it a new decision; such a new decision is also open for appeal. Where justified, prior to transmitting an appeal to the court or repealing or amending his or her decision,

the OCCP may also perform additional activities to clarify objections presented in the appeal.

To the best of our knowledge, widely recognised in Poland, one of the merger appeal cases – a prohibition decision in the energy sector *PGE/Energa* case (Decision No. DKK-1/2011) – was upheld by the court of consumer and competition protection. The second case, the OCCP's prohibition for the takeover of Merlin by NFI Empik (Decision No. DKK-12/2011) – intended concentration on the online sale of non-specialised books and music CDs – was withdrawn by the undertaking that lodged the appeal a few days before the court hearing.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

The usual time frame for judicial review (in the first instance) is one to two years. The whole appeal process (the first and second instance and cassation to the Supreme Court) may take up to five years.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

OCCP activities in numbers – 2017		Number	
New concentration control proceedings		228	
Issued decisions			
Concentration approval		205	
Conditional approval		1	
Fine for failure to report concentration		3	
Fine for failure to provide information		1	
Other data			
Discontinuance of proceedings		2	
Return of the notification of the intended concentration to the applicant		13	
Proceedings moved to the 2nd stage		11	
Average time of proceedings conducted in the 1st stage		33 days*	
Average proceedings period (2nd stage)		196 days†	
Cases are given an opinion in terms of the impact of concentration on the Polish market in connection with proceedings before the EC		346	
New explanatory proceedings‡		7	
Concentration approvals in years 2015–2017			
	2015	2016	2017
Concentration approvals	218	194	205
Conditional approvals	1	2	1

\* The actual case settlement period, taking into account the dates subject to exclusion under article 96, section 2 of the ACCP.

† The actual case settlement period, taking into account the dates subject to exclusion under article 96a, section 8 of the ACCP.

‡ It pertains to the level of concentration in the economy and determination of the obligation to report a concentration.

Source: OCCP (there are no statistics for 2018 available).

**Reform proposals****35 | Are there current proposals to change the legislation?**

All changes to the merger control regime in Poland have been covered by the amendments to the Act that came into force on 18 January 2015.

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# Portugal

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Merger control is governed by Law No. 19/2012, of 8 May 2012 (the Act), which enacted the current Portuguese competition legal regime superseding the previous regime enacted by Law No. 18/2003 of 11 June 2003, as amended (the former Competition Act).

Decree-Law No. 125/2014, of 18 August 2014, adopted and approved the current statutes of the Competition Authority (the Competition Authority or the Authority) superseding Decree-Law No. 10/2003 of 18 January 2003, which created the Authority and approved its former statutes.

The Competition Authority is entrusted with the mission of implementing competition rules, including those on merger control. It is a public entity endowed with administrative and financial autonomy, management autonomy and organic, functional and technical independence. It has been granted statutory independence for the performance of its activities, without prejudice to certain acts that are subject to ministerial approval (eg, the budget, the multi-annual plan and the management report and the accounts, including the balance sheet). The member of government in charge of economic affairs (currently the minister of economy) may also be called to intervene in merger control proceedings through an extraordinary appeal (see question 22).

Without prejudice to the competence of the government as regards competition policy, the members of the Board of the Competition Authority shall be heard by the relevant parliamentary committee, whenever they are requested for such purposes, to provide information or clarification on their activities and on competition policy matters.

The Code of Administrative Procedure applies on a subsidiary basis to the procedure to be followed in the area of mergers.

The Code of Procedure in Administrative Courts applies on a subsidiary basis to the judicial review of the Competition Authority's administrative decisions, including merger control.

The General Regime on Quasi-criminal Minor Offences (enacted by Decree-Law No. 433/82 of 27 October 1982) applies on a subsidiary basis to the sanctioning procedure and decisions, and to their judicial review.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Portuguese competition law applies to mergers that occur in Portuguese territory or that may have an effect within it. A concentration is deemed to exist when a lasting change of control over the whole or part of an undertaking occurs, as a result of the following situations:

- two or more previously independent undertakings or parts thereof merge;

- one or more persons or undertakings who already have control of at least one undertaking acquire control, directly or indirectly, of the whole or parts of the capital stock or of assets of one or several other undertakings; or
- two or more persons or undertakings create a joint venture that is intended to perform on a lasting basis the functions of an autonomous economic entity.

However, a concentration is deemed not to exist in case of an acquisition of shareholdings or assets by an insolvency receiver in the framework of an insolvency procedure; the acquisition of a shareholding merely as a guarantee; or the acquisition by credit institutions, financial companies or insurance companies of shareholdings in undertakings with a corporate object different from that of any of these three types of companies, when the acquisition is made with a mere temporary nature and for resale purposes. This is provided that such acquisition is not made on a lasting basis, the voting rights associated with the acquired shareholdings are not exercised with the purpose of determining the competitive behaviour of the concerned undertakings or are solely exercised with the purpose of preparing the total or partial transfer of such undertakings, the assets thereof or the acquired shareholdings, and further provided that such transfer occurs within one year from the date of acquisition (which may be extended by the Competition Authority if the acquirers show that the transfer was not possible within such period because of reasons worthy of consideration).

#### 3 | What types of joint ventures are caught?

As stated above, merger control provisions apply to joint ventures that are intended to perform on a lasting basis the functions of an autonomous economic entity (full-function joint ventures).

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Under the Act, 'control' is any act of whatever form that confers the ability to exert on a lasting basis, separately or jointly, a decisive influence, in the given legal and factual circumstances, on the activities of an undertaking. In particular, it is the case of the acquisition of the whole or part of the capital, the acquisition of ownership or of the right to use or enjoy the whole or part of the assets of an undertaking, or the acquisition of rights or the conclusion of contracts that confer a decisive influence on the composition or on the decisions of the corporate bodies of an undertaking. So far, nothing has been provided for outside the above boundaries.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Concentrations are subject to prior notification if one of the following conditions occurs:

- as a result thereof, a share equal to or higher than 50 per cent of the national market for a particular good or service or for a substantial part of it is acquired, created or reinforced;
- as a result thereof, a share equal to or higher than 30 per cent and lower than 50 per cent of the national market for a particular good or service or for a substantial part of it is acquired, created or reinforced, provided that in the preceding financial year the individual turnover in Portugal, net of directly related taxes, of at least two undertakings taking part in the concentration exceeds €5 million; and
- in the preceding financial year, the group of undertakings taking part in the concentration have recorded in Portugal a turnover exceeding €100 million, net of directly related taxes, provided that the individual turnover in Portugal of at least two of these undertakings exceeds €5 million.

In addition, two or more concentrations made within a period of two years among the same individuals or legal entities, which considered individually would not be subject to prior notification, are deemed to be a sole concentration subject to such prior notification when the set of concentrations reaches the turnover figures set out above.

Several rules on the calculation of both market share and turnover are established in the Act.

Only concentrations that meet one of the above conditions and that are therefore subject to prior notification may be investigated under the merger control rules. Concentrations that do not meet any of such conditions may, nevertheless, be investigated as restrictive practices.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification to the Competition Authority is mandatory where the statutory thresholds are met. No exceptions are admitted.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

As stated above, the Act applies to mergers that occur in Portuguese territory or that have or may have an effect within it. Accordingly, foreign-to-foreign mergers that have or may have effects within the Portuguese territory (ie, those where the statutory thresholds are met) are subject to the Act.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act is applicable to all economic activities, be they permanent or occasional, in the private, public and cooperative sectors. There are no provisions in the Act relating to specific sectors, other than the indication that the Competition Authority's powers over concentrations in regulated sectors are exercised in cooperation with the corresponding regulatory authorities, from which the Authority, prior to the adoption of a decision within a merger control procedure in the corresponding sector, shall request the position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers. In the cases of concentrations in the media sector (newspaper, news, television

or radio companies), a negative opinion of the media regulator (ERC) is binding upon the Authority to the extent that it is grounded on risks to the freedom of expression and to the plurality of opinions.

Provisions influencing, directly or indirectly, mergers in specific sectors may also be found in the concerned area's legislation.

With reference to companies, which, by law, are in charge of the management of services of general economic interest, or companies that have the nature of a legal monopoly, they are subject to the provisions of the Act to the extent that the application of such rules does not constitute an obstacle to the fulfilment of the particular mission with which they have been entrusted.

In other contexts too, merger operations must comply with the relevant provisions of the Commercial Companies Code and, as far as the securities market is concerned, with the applicable rules of the Securities Code.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations must be notified after the conclusion of the corresponding agreement and before they are carried out or, whenever relevant, after the date of disclosure of the preliminary announcement of a public takeover bid or of an exchange offer or the date of disclosure of the announcement of the acquisition of a controlling shareholding in a listed company, or, in the case of a public procurement procedure, after the definitive award of the contract and before the closing of the transaction. In these latter cases, the awarding public entity shall, in the public procurement programme, set the rules regarding the interplay between the public procurement procedure and the merger control regime established in the Act.

Furthermore, when the undertakings taking part in the concentration show to the Competition Authority a serious intent of concluding an agreement or, in the case of a public takeover bid or of an exchange offer, the undertakings show the public intent to carry out such bid or offer, the concentration may be notified to the Competition Authority before the above deadlines.

Under the Act, projected concentrations may be the object of pre-notification evaluation by the Authority, which shall be carried out in accordance with the guidelines adopted by the Authority on 27 December 2012.

Implementation of a concentration that is subject to prior notification without fulfilling such requirement may give rise to a sanctioning procedure launched by the Authority, which shall be subject to the opportunity principle set out in the Act, pursuant to which the Authority may, on public interest grounds, grant different degrees of priority in respect of the matters it is called to assess.

The said implementation without prior notification is punishable with fines, which, for each of the concerned undertakings, cannot exceed 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. In cases where under the Act individuals (eg, directors) are held responsible for the infringement, the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, the Competition Authority may decide to impose periodic penalty payments, not exceeding 5 per cent of the average daily turnover in the year immediately preceding that of the Competition Authority's decision, per day of delay, counted from the date the decision is notified. Furthermore, an ex officio merger control procedure may be initiated by the Competition Authority. This ex officio procedure has been

initiated by the Authority in the case of the acquisition of the Hospital of São Gonçalo de Lagos by the HPA Group, a transaction implemented by the end of 2017 that albeit subject to mandatory prior notification (see question 5) has not been notified to the Authority, which the acquirer did only after the ex officio procedure was initiated.

The above-mentioned sanctions are, in principle, applied in practice, as shown, notably, in two decisions, one of 26 June 2014 and the other of 27 December 2017.

In the first decision, the Authority imposed fines of approximately €6,900 and approximately €112,000 on the National Pharmacies Association (ANF) and on Farminveste, respectively, for failure to notify the acquisition of the control over Consiste and Glintt, a transaction where the statutory thresholds for mandatory notification (see question 5) were exceeded. No fine was imposed on a third concerned undertaking, Farminveste 3, as it had no revenues in 2013. The fines imposed resulted from a settlement proposal submitted by ANF and Farminveste, which the Authority accepted.

In the latter decision, the Authority imposed a fine of €38,500 to two companies of the Vallis group, for failure to notify the acquisition of the exclusive control over a network of dental clinics a transaction where the statutory thresholds for mandatory notification (see question 5) were also exceeded. Also in this case, the fines imposed resulted from a settlement proposal submitted by the two concerned companies, which the Authority accepted.

## 10 | Which parties are responsible for filing and are filing fees required?

In the case of full mergers, creation of joint ventures or the establishment of common control over the whole or part of one or several undertakings, notification must be made by the group of undertakings jointly, through a common representative. In other cases, notification is filed by the undertaking (or persons) intending to acquire control of the whole or part of one or more undertakings.

Pursuant to the Act, a filing fee shall be due for the assessment of concentrations subject to prior notification. In addition, a notification shall only be effective if filed together with the document that confirms the payment of the due fee.

As regards filing fees, according to Regulation No. 1/E/2003 of 3 July 2003, of the Competition Authority (which having been adopted pursuant to the former Competition Act has not been repealed or replaced), the basic fee payable for the appraisal of concentrations has been established in the following amounts:

- €7,500, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, is equal to or less than €150 million;
- €15,000, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, exceeds €150 million and is equal to or less than €300 million; and
- €25,000, when the previous financial year's combined turnover in Portugal for the companies involved in the concentration, calculated according to the relevant provisions of the Act, exceeds €300 million.

The aforementioned fees shall be doubled when the Competition Authority decides to initiate proceedings in the following cases:

- concentrations of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified;
- concentrations for which the express or tacit decision of non-opposition was grounded on information provided by the participants

in the concentration that was false or inaccurate with regard to essential elements for the decision; and

- concentrations in which there has been total or partial disregard of the obligations or conditions imposed at the time of the decision of non-opposition.

Also, if the Competition Authority, during the first phase of the merger control procedure, considers that the transaction is likely to affect competition and decides to proceed with an in-depth investigation (see questions 16 and 18), a further fee of 50 per cent of the basic fee shall be payable.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period for a Phase I decision is 30 working days from the date on which the notification is effective. This deadline may be suspended if requests for additional information are made by the Authority. It may also be suspended for 20 working days if the notifying party offers commitments. Prior hearing of the notifying party and of interested third parties that have submitted observations also suspends the deadline (see question 17).

When a Phase II in-depth investigation takes place, it must be completed within a maximum of 90 working days from the effective date of the notification. This deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for up to 20 working days upon request of the notifying party or with this latter's agreement. Prior hearing of the notifying party and of the interested third parties that have submitted observations, which must take place no later than 75 working days from the effective date of the notification, also suspends the deadline (see question 17).

The Act prohibits the implementation of concentrations subject to prior notification before this latter is filed. Furthermore, until tacit or express clearance is granted, a concentration subject to prior notification shall not be put into effect. However, this does not prevent the implementation of a public takeover bid to purchase or an exchange offer that has been duly notified to the Competition Authority, provided that the acquirer does not exercise the voting rights attached to the securities in question. Upon reasoned request from the participant, undertakings submitted before or after the notification of the obligations of not putting into effect a concentration or of not exercising voting rights may, in exceptional cases, be subject to a derogation granted by the Competition Authority, which may attach conditions or obligations to such derogation to ensure effective competition. Legal transactions carried out in breach of the prior notification or suspension obligations are ineffective.

In addition, and without prejudice to the applicable sanctions, after the notification of a concentration implemented in breach of the above obligations and before a decision is adopted by the Competition Authority, the individuals or legal entities that acquired the control must immediately suspend the corresponding voting rights and the management body shall not perform any act outside the normal course of business, the transfer of shareholdings or assets of the acquired undertaking being prohibited. Upon reasoned request from the concerned individuals or legal entities, these obligations may, in exceptional cases, be subject to a derogation granted by the Competition Authority, which may attach conditions or obligations to such derogation to ensure effective competition.

Furthermore, the Competition Authority may adopt measures it considers necessary or adequate to restore the situation existing prior to the breach, notably divestment.

## Pre-clearance closing

### 12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As stated above, until tacit or express clearance is granted, a concentration subject to prior notification shall not be (partially or totally) put into effect and legal transactions carried out in breach of such suspension obligation are ineffective. Furthermore, the violation of such suspension obligation is punishable with fines, which, for each of the concerned undertakings, cannot exceed 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Competition Authority. So far, the Authority's decision record does not include any case concerning the specific violation of the suspension obligation (all cases refer to implementation of concentrations that were not notified albeit subject to mandatory prior notification; see question 9). However, this should not allow for the conclusion that the Authority shall not investigate and punish any such violation.

### 13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As stated in question 12, so far the Authority's public record of decisions does not include any case concerning the violation of the suspension obligation. As also stated, this should not allow for the conclusion that the Authority shall not investigate and punish any such violation, including in cases of foreign-to-foreign mergers.

### 14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The law does not specifically address this situation; solutions must therefore be found on a case-by-case basis, and would not differ from those applicable to local mergers.

## Public takeovers

### 15 Are there any special merger control rules applicable to public takeover bids?

See questions 9 and 11.

There is no other reference in the merger control rules to public bids specifically. Such bids are, in any event, subject to other rules, notably those provided for in the Securities Code and the Commercial Companies Code.

## Documentation

### 16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Notifications must, in principle, be filed according to a 'Regular Notification Form' that has been adopted by the Competition Authority as an attachment to its Regulation No. 60/2013 of 14 February 2013.

Pursuant to said Regulation, the following information must, notably, be provided in a notification:

- a summary of the transaction, which shall be used in the publication referred to in question 30;
- the identity of the parties including the indication of their activities (and, in the case of the notifying party, of the activities of the entities with which it has interdependence links), the indication of their turnovers for the last three years and the submission of their individual and consolidated accounts and reports;

- the indication of other competition authorities to which the transaction is being notified;
- the indication of the activities subject to sectoral regulation;
- the nature (merger, acquisition of exclusive or joint control or joint venture) and the type (horizontal, vertical or conglomerate) of the concentration;
- a description of the concentration, which shall include the submission of the relevant contractual, public bid or public tender documents (as applicable), its economic and financial structure, the estimated timing and required acts, the existing financial support, if any, and the submission of reports, studies or other documents prepared for the purposes of assessment of the notified transaction;
- the control structure of the participant undertakings, including:
  - a list of the undertakings that control, or are controlled by, the participants or are part of the participants' group of undertakings;
  - the turnover in Portugal of such undertakings;
  - the identity of the members of their boards of directors;
  - copies of the articles of association;
  - copies of shareholders' agreements, when relevant for the concentration; and
  - if the transaction will create a joint venture, a detailed description of the decision-making rules and of the demonstration that it shall perform on a lasting basis the functions of an autonomous economic entity;
- the personal and financial connections of the participant undertakings (list of undertakings active in the relevant markets in which the directors of the participants hold similar positions or in which the participants hold a minority shareholding);
- a reasoned identification of the relevant product and geographical markets;
- identification of the relevant product and geographically related markets with indication of the estimated market shares of the participant undertakings and of the five major competitors in the past three years in each of such related markets;
- information on the relevant markets; notably, their size in value and in quantity in the last three years and the description of facts that influence the entry in and the exit from the relevant markets;
- the offer structure in the relevant markets (including an indication of the participants' turnovers and market shares in the past three years and of the five major competitors and estimated market shares in the same period);
- the demand structure in the relevant markets by indicating, notably, the consumers' or end users' preferences as to certain products or brands, after-sales services, network effects and consumption habits;
- information on the participants, which must include the indication of the 10 major suppliers and the 10 major clients; and
- other information that the participants may deem relevant, including the reasons why they consider that the notified transaction should be cleared.

The aforementioned Regulation No. 60/2013 covers in a very detailed manner not only the above information but also other information that may be deemed relevant for the review procedure.

To preserve confidentiality, notifying parties may identify in a reasoned manner the information to be considered confidential and file non-confidential versions of the notification.

Regulation No. 60/2013 also includes a Simplified Notification Form that requires a lower level of information to be provided within each of the above categories of data, as listed in detail in the regulation. The Simplified Notification Form is to be used in concentrations that, on a preliminary assessment, do not create significant impediments

to competition, in accordance with the following criteria established in Regulation No. 60/2013:

- none of the parties to the concentration performs economic activities in either the same relevant geographic or product markets (no horizontal overlap) or in markets that are located upstream or downstream in the production or commercialisation process (no vertical effects), or in neighbouring markets (no conglomerate relationships), in which operate any other parties to the concentration. This criterion also applies to situations of change from joint to exclusive control, in which prior to concentration the party acquiring exclusive control is not active outside the joint venture in markets where this latter is present or in upstream or downstream vertically related markets, or in neighbouring markets. It further applies to situations of change from exclusive to joint control, in which prior to concentration the undertakings acquiring the joint control (other than the undertaking that had exclusive control) are not active outside the joint venture in markets where this latter is present or in upstream or downstream vertically related markets, or in neighbouring markets;
- when the parties to the concentration are engaged in activities in the same relevant geographic or product markets (horizontal overlap) provided that within the geographical scope of the market, as defined by the notifying parties, and in the national territory their combined market share does not exceed 15 per cent; or their combined market share exceeds 15 per cent, but is lower than or equal to 25 per cent, and the corresponding increase of market share does not exceed 2 per cent;
- when the parties are engaged in activities in markets vertically related, provided that the individual or combined market shares at any level of the production or commercialisation process (upstream or downstream) within the geographical scope of the markets, as defined by the notifying parties and in the national territory do not exceed 25 per cent; and
- when the parties to the concentration are engaged in activities in neighbouring markets, provided that the individual or combined market shares in any of these markets, within the geographical scope of the markets, as defined by the notifying parties, and in the national territory does not exceed 25 per cent.

If the notification is incomplete or includes inaccurate data, the Authority shall, within seven working days of the filing, invite the notifying party to complete the notification. In such a case, the notification becomes effective only on the date the missing elements are filed (see question 17).

In addition, in the cases where the concentration was cleared on the basis of false information provided by the concerned undertakings that was essential to the decision, the Authority shall revoke such clearance decision and may also adopt measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment (see question 24).

Furthermore, the provision of false or inaccurate information in response to an Authority's request for information in merger control proceedings is punishable with fines, which, for each of the concerned undertakings, cannot exceed 1 per cent of the corresponding turnover in the year immediately preceding that of the decision adopted by the Competition Authority. In cases where, under the Act, individuals (eg, directors) are held responsible for the infringement, the applicable fine ranges between 10 and 50 'account units' (currently an 'account unit' corresponds to €102).

## Investigation phases and timetable

### 17 What are the typical steps and different phases of the investigation?

The timetable for the merger clearance procedure is as follows:

- if the notification is complete, it becomes effective on the date it is filed together with the document that confirms the payment of the due filing fee. If the notification is incomplete or includes inaccurate data, the Authority, within seven working days, invites the notifying party to complete the notification and the notification becomes effective on the date the missing elements are filed. The notifying party may at any time withdraw the notification or waive its rights or legitimate interests;
- within five working days of the date on which it is effective, the Competition Authority shall publish the essential elements of the notification in two national newspapers, at the expense of the notifying party, so that any interested third parties may submit their observations within the prescribed time, which may not be less than 10 working days; and
- within 30 working days of the date on which the notification is effective, the Competition Authority shall complete the investigation and shall accordingly decide either:
  - the concentration is not subject to prior notification;
  - not to oppose the concentration, with or without conditions or obligations attached thereto; or
  - to initiate an in-depth investigation when it considers that the concentration in question is likely to create significant impediments to competition in the Portuguese market or in a substantial part of it.

The above 30-working-days deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for 20 working days if the notifying party offers commitments. Prior hearing of the notifying party and of interested third parties that have submitted observations also suspends the deadline.

The lack of a decision within the period of 30 working days referred to above (plus suspensions) shall be considered as a decision of non-opposition to the concentration.

This initial 30-day period may be shortened under the simplified decision procedure, introduced on 24 July 2007. This procedure, which currently is merely an internal guideline, is applied on a case-by-case basis depending on the specifics of each transaction. It may apply, in particular, to transactions that do not result in a significant change in the competitive structure of the market (for example, because they only consist of a transfer of a market share, as opposed to an increase).

If the Competition Authority decides to initiate an in-depth investigation, this must be completed within a maximum of 90 working days of the effective date of the notification. This deadline may be suspended if requests for additional information are made by the Competition Authority. It may also be suspended for up to 20 working days upon request of the notifying party or with this latter's agreement. Prior hearing of the notifying party and of the interested third parties that have submitted observations, which must take place no later than 75 working days from the effective date of the notification, also suspends the deadline.

Until the end of this period, the Competition Authority must either authorise the concentration, with or without conditions or obligations attached thereto, or prohibit the concentration if it considers that the concentration, as initially notified or following the amendments made by the notifying party, is likely to create significant impediments to competition in the Portuguese market or in a substantial part of it. In this latter case, the Competition Authority shall prescribe appropriate measures should the concentration have already been implemented. The lack of

a decision within the 90-working-day period referred to above (plus suspensions) shall also be considered as a decision of non-opposition to the concentration.

In the case of concentrations that occurred in less than five years of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified, the procedures initiated ex officio by the Competition Authority shall be subject to the above time limits.

The above delays may, to a certain extent, be accelerated if, during a pre-notification assessment (see question 9), all the required data and all relevant competition issues are discussed and clarified with the Authority, thereby avoiding future suspensions and allowing for a more swift response by the Authority. Typically, non-complex merger control proceedings may take approximately one month.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 17.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

Concentrations falling within the scope of the Act are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it, in particular if such impediments result in the creation or strengthening of a dominant position. Pursuant to the Act, notified concentrations shall be appraised to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market or in a substantial part of it, in the interests of users and consumers.

The following shall notably be taken into account:

- the structure of the relevant markets and the existence or absence of competition from undertakings established in such markets or in distinct markets;
- the position of undertakings participating in the relevant markets and their economic and financial power, in comparison with their main competitors;
- the potential competition and the existence, in law or in fact, of entry barriers to the market;
- the opportunities for choosing suppliers and users;
- the access of the different undertakings to suppliers and markets;
- the structure of existing distribution networks;
- supply and demand trends for the products and services in question;
- special or exclusive rights granted by law or attached to the nature of the products traded or services provided;
- the control of essential facilities by the undertakings in question and the access opportunities to such facilities offered to competing undertakings;
- technical and economic progress to the extent that it does not create an obstacle to competition and as long as the concentration provides efficiency gains to end users and consumers; and
- the contribution that the concentration makes to the international competitiveness of the Portuguese economy.

Failing firm defence and other special circumstances may be taken into account in terms similar to those applied by the European Commission in the assessment of concentrations under Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). As regards the failing firm defence, in its Guidelines on the Economic Analysis of Concentration

Operations the Authority specifically considers that it may be used as a potential argument to be taken into account in the appraisal of a concentration, provided that the alleged firm whose insolvency is imminent is indeed in financial difficulties and alternative scenarios with a less serious impact on competition may be excluded.

#### 20 | Is there a special substantive test for joint ventures?

Joint ventures, which have as their object or effect the coordination of competitive behaviour between the undertakings that remain independent, shall – as regards those coordination aspects – be assessed under the provisions of the Act governing prohibited agreements and practices.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

As stated above (see question 19), concentrations are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it. In the above-mentioned Guidelines on the Economic Analysis of Concentration Operations (see question 19) the Authority addresses various aspects it considers in the assessment of a concentration, which include market dominance (market shares, levels of concentration), unilateral effects, coordinated effects, conglomerate effects, common ownership concerns (including going from joint control to exclusive control) and market foreclosure.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The former Competition Act had already eliminated the possibilities contemplated in the previous competition regime of special justification criteria for the approval of concentrations, which inevitably gave room to the application of non-competition criteria and even to possible industrial policy considerations.

Since then, a more rigorous and competition-oriented system of merger control has been in place.

Nevertheless, the statutes of the Competition Authority, adopted and approved by the above-mentioned Decree-Law No. 125/2014, have, in very debatable terms, maintained one possibility, already contemplated in the Competition Authority's former statutes, of application of non-competition criteria, which despite its exceptional nature, may bring about some distortions to the system.

In fact, prohibition decisions adopted by the Competition Authority may be appealed by the notifying parties to the member of the government responsible for the economy (extraordinary appeal), who in turn may, with a duly reasoned decision, authorise the concentration at stake, whenever the resulting benefits to fundamental strategic interests of the national economy are deemed to exceed the inherent disadvantages for competition. The ministerial decision that authorises a concentration, under the extraordinary appeal regime, may contain conditions and obligations that minimise its negative impact on competition. The extraordinary appeal has been used in *Brisa/AEA* (Case 22/2005). The terms of the ministerial decision adopted in this case do not remove the concerns that the procedure may raise. In fact, the overall broadness of the vocabulary and grounds of the decision may have set a precedent and an incentive that may be invoked too often whenever the Authority issues a prohibition decision.

## Economic efficiencies

### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Besides the basic substantive test, the main criteria for the appraisal of concentrations essentially follow the structure established at EU level. Accordingly, pursuant to the Act, notified concentrations shall be appraised to determine their effects on the competition structure, having regard to the need to preserve and develop effective competition in the Portuguese market or in a substantial part of it, in the interests of users and consumers. As stated above, in the assessment of concentrations the Authority takes into account a number of aspects, including the technical and economic progress where the concentration provides efficiency gains to end users and consumers (see question 19). In the above-mentioned Authority's Guidelines on the Economic Analysis of Concentration Operations, the Authority also addresses efficiencies referring notably that it will only consider efficiencies with a high likelihood of being implemented, efficiencies that are specific to the concentration and verifiable efficiencies. According to these guidelines, it is up to the concerned undertakings to allege and demonstrate possible efficiencies, in a timely fashion, that may be associated with a concentration.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority may prohibit or interfere as follows:

- Prohibit a concentration. If the transaction has already been carried out, appropriate measures to re-establish effective competition may be ordered, including divestment.
- Approve a concentration, subject to conditions and obligations.
- Begin proceedings on its own initiative in the case of concentrations that occurred in less than five years of which the Competition Authority becomes aware and that, though subject to mandatory notification, have not been notified, adopting measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment.
- Revoke its decisions in the cases where the concentration is put into effect in breach of the conditions or obligations attached to the clearance decision or when a decision not to oppose a concentration was based on false information, provided by the concerned undertakings, that was essential to the decision. In these cases, the Authority may also adopt measures necessary or adequate to re-establish, to the extent possible, the situation existing prior to the concentration, notably divestment.
- Following a sanctioning procedure (subject to the opportunity principle; see question 9), impose fines of up to 10 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority where undertakings fail to give prior notification of concentrations under the Competition Act, execute concentrations that had been suspended or prohibited by the Competition Authority, or do not comply with the conditions or obligations imposed.
- Following the aforementioned sanctioning procedure, impose fines of up to 1 per cent of the turnover in the year immediately preceding that of the final decision adopted by the Competition Authority where undertakings refuse to provide or provide false information.
- Following the aforementioned sanctioning procedure, impose periodic penalty payments of up to 5 per cent of the average daily

turnover in the year immediately preceding that of the Competition Authority's decision, per day of delay counted from the date the decision is notified, where the undertakings:

- do not comply with a Competition Authority decision that imposed a sanction or ordered the adoption of certain measures; or
- fail to give prior notification of concentrations under the Competition Act.

Legal transactions relating to a concentration are null and void if they put into effect operations condemned by an order that prohibited the concentration, if they breach the conditions and obligation attached to a clearance decision or if they disregard measures imposed to re-establish effective competition.

### Remedies and conditions

### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The notifying party may, at any time during the merger control proceedings, offer commitments to preserve effective competition, in which case the review period is suspended (see question 17). Such commitments may include divestment or other structural or behavioural remedies. During the suspension, the Authority may request information it deems necessary to assess the commitments offered. Moreover, the authorisation of a concentration may be subject to conditions or obligations designed to maintain effective competition. Furthermore, if a prohibited transaction has already gone ahead, the Competition Authority may impose appropriate measures to ensure effective competition such as divestment, or the relinquishing of corporate control.

### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

As stated above (see question 25), at any time during the merger control proceedings, the notifying party may offer commitments, including divestment and other structural or behavioural remedies to preserve effective competition. For this purpose, the Authority issued on 28 July 2011 the Guidelines on the Adoption of Commitments in Merger Control, which address the selection, design, execution and monitoring of commitments in merger control proceedings. While the Authority expresses in these guidelines its preference for structural remedies, such preference is not so clearly reflected in the existing case law. In fact, both structural and behavioural remedies have been implemented (see, notably, *Sonaecom/PT*, Case 8/2006; *BGP/BPI*, Case 15/2006; *Arena Atlântida/Pavilhão Atlântico\*Atlântico, SA*, Case 38/2012; *Kento\*Unitel\*Sonaecom/ZON\*Optimus*, Case 5/2013; *Rubis/Repsol Assets*, Case 39/2017). Behavioural remedies and the corresponding supervision obligations were applied for periods ranging from two to five years (see *Unibetão/Sicóbetão*, Case 30/2005; *TAP/PGA*, Case 57/2006; *Sonae Distribuição/Carrefour*, Case 51/2007; *Pingo Doce/Plus*, Case 01/2008; and *TRPN/Internorte*, Case 49/2010).

Furthermore, as also mentioned above (see question 24), the Authority may adopt measures, notably divestment, necessary or adequate to re-establish effective competition, in case a prohibited concentration was already put in effect (see *TAP/SPdH*, Case 12/2009), in case of ex officio proceedings initiated by the Authority in respect of concentrations that occurred in less than five years, of which the Authority becomes aware and though subject to mandatory notification have not been notified, and in case of revocation, by the Authority, of clearance decisions.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Two cases may be mentioned where remedies were applied in foreign-to-foreign mergers.

In the *Dreger Medical/Hillenbrand* merger (Case 44/2003), the Competition Authority imposed the following conditions:

- the keeping of a second distribution channel in a non-exclusive regime for a period of three years;
- the keeping of non-discriminatory conditions for a period of three years;
- keeping the product available as long as there was demand for a period of three years;
- refraining from directly selling products in Portugal for three years; and
- keeping spare parts available for seven years after the production of the last device.

In *SC Johnson/Sara Lee's Insecticide Business* (Case 25/2010), the clearance decision was subject to SC Johnson divesting a number of assets previously controlled by Sara Lee related to certain insecticide businesses.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Under the Act, restrictive provisions directly related and necessary to the implementation of the concentration are presumed to be also covered, within certain terms, by the decision clearing such concentration.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

In the absence of a required notification, the Competition Authority may initiate proceedings ex officio, on the basis of information on the transaction it has obtained, which may include facts brought to its attention by third parties.

In addition, all holders of rights or legally protected interests that may be affected by the concentration who submit to the Authority their observations on the notified transaction are eligible to intervene in the concerned merger control proceedings. For these purposes, the Competition Authority publishes the essential elements of a notification in two national newspapers, at the expense of the notifying party, fixing a deadline, which may not be less than 10 working days, for submission of observations. Before the adoption of final decisions by the Competition Authority, any interested parties that have submitted observations shall be heard by the Competition Authority.

Furthermore, during the investigation the Authority may request from any private or public entities the information it may deem necessary for the decision.

As stated above (see question 8), the Competition Authority's powers over concentrations in regulated sectors are exercised in cooperation with the corresponding regulatory authorities, from which the Authority, prior to the adoption of a decision within a merger control procedure in the corresponding sector, shall request the position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers. As also stated (see question 8), in the cases of concentrations in the media sector a negative opinion

of the ERC is binding upon the Authority to the extent that it is grounded on risks to the freedom of expression and to the plurality of opinions.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As stated above, within five working days from the date the notification becomes effective, the Competition Authority shall publish the essential elements thereof in two national newspapers, at the expense of the notifying parties, so that any interested third parties may submit their observations within the prescribed time, which may not be less than 10 working days. The notifying party may request that parts of the information provided are kept confidential. To preserve confidentiality, the notifying party may file non-confidential versions of the notification or of any further information provided during the procedure.

Under the Act, confidentiality of commercial information provided by third parties within the merger control proceedings may also be protected.

As of 30 December 2009, the Competition Authority allows external access to its merger database, which may be accessed through the Competition Authority's website and provides information on all concentration cases that have been notified and decided by the Competition Authority since its creation in January 2003. Besides giving access to non-confidential versions of the decisions adopted since the Competition Authority's creation, the merger database also provides other data relating to the procedure, including relevant dates, a description of the undertakings involved and the economic activities in question in the operation.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

According to its statutes, the Competition Authority is responsible notably for keeping contacts with other countries' competition authorities and establishing cooperative links with such authorities, as well as with EU and international authorities, carrying out the tasks conferred upon member states' administrative authorities by EU law in the field of competition, and representing the Portuguese state in the European Union or international institutions in competition matters.

As regards the merger control area, the above responsibilities indicate that the Competition Authority is expected to maintain informal contacts with other competition authorities in multi-jurisdiction filings. However, no formal agreements with other competition authorities regarding merger control are publicly known. Nevertheless, at a multilateral level, the Competition Authority participates in various fora and groups, notably the European Competition Network and the International Competition Network.

The notification form includes, as mandatory information, the indication of the other member states' competition authorities with which the notifications are also being filed.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (Specialised Court), which was established in the town of Santarém as of 30 March 2012. The Specialised Court is now the exclusive first

instance for review of all the decisions adopted by the Competition Authority.

Therefore, decisions of the Competition Authority adopted in merger control proceedings, as well as decisions of the member of government responsible for the economy within the 'extraordinary appeal' proceedings referred to above (see question 22), may be appealed to the new Specialised Court. This court's rulings are subject to review by the Appellate Court of Lisbon, the decisions of which, though limited to matters of law, may be appealed to the Supreme Court of Justice. Appeals of the decisions in question that exclusively involve matters of law are filed directly with the Supreme Court of Justice.

The decisions of the Competition Authority adopted in proceedings initiated regarding infringements of merger control rules (under the Act, these infringements constitute quasi-criminal minor offences) may also be appealed to the Specialised Court. The decisions of this court may be appealed to the Appellate Court of Lisbon, as a court of last resort, if they:

- apply a fine higher than €249.40;
- impose ancillary sanctions;
- acquit the defendant or close the case in situations where either the Competition Authority has imposed a fine higher than €249.40 or such fine has been claimed by the public prosecutor's office; or
- reject the appeal of the Competition Authority's decision.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

As regards judicial review, it is not possible to establish a typical time frame until a final decision is adopted, as this depends on factors such as the relevant courts' workload and the complexity of the case under review. However, in general terms, one may expect that judicial proceedings, including appeals, might take many months or even years before they come to an end.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2018, 48 merger control cases were concluded by the Competition Authority, with the following outcomes:

- 44 clearance decisions without conditions or obligations attached;
- one clearance decision with conditions or obligations attached;
- two decisions where it was found that the notified transaction was not subject to prior notification; and
- one decision closing the proceedings following the withdrawal of the corresponding notification.

By 27 May 2019, 18 merger control cases had been concluded by the Competition Authority, with the following outcomes:

- 14 clearance decisions without conditions or obligations attached;
- three decisions where it was found that the notified transaction was not subject to prior notification; and
- one decision closing the proceedings following the withdrawal of the corresponding notification.
- 

Competition in specific sectors, such as telecommunications, energy, oil and ports' operations, continues to be a cause for concern of the Competition Authority.

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### Reform proposals

#### 35 | Are there current proposals to change the legislation?

Following a long-awaited reform of the competition regime, Law No. 19/2012, of 8 May 2012, enacted the Act superseding the previous regime enacted by Law No. 18/2003 of 11 June 2003 (see question 1). Pursuant to the Act, the current regime should be reviewed in accordance with the evolution of the EU competition law regime.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There are no important legislative or policy developments to highlight in respect of 2018 and 2019 up to the time of this writing.

As regards case decisions, one case may be highlighted as having relevant merger control issues involved. The case concerned the acquisition by Rubis II Distribuição Portugal, SA (Rubis), a subsidiary of the French company Rubis SCA, of the liquified petroleum gas (LPG) business of Repsol in the Portuguese archipelagos of Madeira and Azores, a transaction notified on 28 September 2017.

On 22 January 2018, the Competition Authority has decided to initiate a Phase II in-depth investigation because it has considered that the transaction raised serious competition concerns.

The identified concerns were notably owing to the fact that the markets at issue showed a highly concentrated offer, which would be further negatively impacted by the fact that in the majority of the islands of Madeira and Azores, the number of competitors could decrease from three to two. The Competition Authority has further identified strong entry barriers to new operators at the level of the storage infrastructures, the transport of LPG from the Portuguese mainland to the Madeira and Azores archipelagos, the existing distribution agreements, the entry and switching costs and the limited size of the concerned markets.

Rubis offered a first package of commitments that the Competition Authority has found to be insufficient and inadequate as to their nature and perimeter, considering that they could not overcome the identified competition law concerns.

Rubis then offered a second package of commitments that included structural remedies, notably the transfer to the Bensaude Group (a

group based in Azores and active in various sectors such as distribution, energy, sea transport and logistics, tourism and services) of the Rubis business of piped LPG and LPG in cylinders in the Madeira Islands and the transfer to the Bensaude Group of either the Rubis' or the Repsol's business of gas in cylinders in the Azores islands.

The Competition Authority has found that the above second package of commitments was sufficient and adequate notably because they included the divestiture of part of the concerned businesses in favour of a third operator, thereby permitting that an offer similar to that existing prior to the concentration is kept. Thus, on 27 September 2018 the Competition Authority cleared the transaction subject to the conditions and obligations imposed to ensure the fulfilment of the commitments offered.

# Romania

Maria Maxim

Wolf Theiss

## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Merger control, as well as the other main areas of competition law, is governed primarily by the Competition Law 21/1996 (the Competition Law), as republished and amended. The provisions of the Competition Law are further completed by the provisions of the Regulation on Economic Concentrations (the Merger Regulation) approved by RCC Order No. 431/2017, as well as the provisions of the Guidelines on the concepts of concentration, concerned undertaking, full-function joint ventures and calculation of turnover, approved by RCC Order No. 386/2010 (the Guidelines). Ancillary restraints are covered by the Guidelines regarding ancillary restraints approved by RCC Order No. 387/2010 (the Ancillary Restraints Guidelines). Remedies are covered by the Guidelines on remedies in the merger sector, approved by RCC Order No. 688/2010 and the relevant market by the Guidelines on the definition of the relevant market approved by RCC Order No. 388/2010. Finally, on 8 June 2017, Emergency Government Ordinance 39/2017 (EGO 39) entered into force, transposing the EU Damages Directive (2014/104/EU) into Romanian law, which mainly aims at facilitating private enforcement of claims before national courts for damages suffered from competition law infringements.

The authority in charge of enforcing the merger control rules in Romania is the Romanian Competition Council (RCC). Furthermore, the approval of the Superior Council for National Defence (SCND) is required in the case of mergers that take place in sectors that may impact national security.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

A merger is defined, for the purposes of the Competition Law, as being a transaction that results in a change of control over an undertaking or undertakings, or parts of an undertaking or undertakings on a lasting basis.

As such, there are two types of mergers:

- a merger between previously independent undertakings or parts of undertakings; and
- the acquisition of control over one or more undertakings or parts of one or more undertakings by one or more natural persons already controlling at least one undertaking or by one of more undertakings.

#### 3 | What types of joint ventures are caught?

The creation of a joint venture may amount to a merger, provided that the joint venture is a full-function joint venture (ie, an undertaking that

carries out its activity on a lasting basis and that performs all functions of an autonomous economic entity).

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is defined by article 9(6) of the Competition Law as the possibility of exercising decisive influence on an undertaking. Control may arise on the basis of rights, contracts or any other elements that, either separately or taken together, and taking into account the legal or factual considerations involved, allow a party to exercise a decisive influence over the behaviour of an undertaking, in particular through:

- ownership or rights to use over all or part of the assets of an undertaking; or
- rights or contracts conferring a decisive influence over the structure of an undertaking, the voting process or the decision-making process of the management bodies of an undertaking.

The acquisition of a minority shareholding may amount to a notifiable concentration if – and only if – it is considered to amount to an acquisition of control, in particular through the existence of veto rights concerning certain strategic decisions of the respective undertaking.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions are applicable to concentrations where the undertakings concerned generated combined worldwide turnover exceeding the equivalent of €10 million in the previous financial year and each of at least two of the undertakings concerned achieved Romanian turnover exceeding the equivalent of €4 million in the previous financial year.

The RCC will not investigate any economic concentration that does not meet the said requirements. To avoid any potential risks, the parties to a merger that falls below the thresholds are advised to notify the RCC and, if the case may be, the SCND for the merger.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory and there are no exceptions.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are subject to merger control by the RCC, whenever the turnover thresholds defined under question 5 above

are met. The lack of local effect, while not removing the requirement for notification, may lead to the concentration being assessed under the simplified procedure.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Concentrations in certain sectors, such as the financial sector, media sector, energy sector and telecoms sector, may be subject to a notification obligation to the sector regulator. There are no specific rules on foreign investment.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Economic concentrations that meet the turnover thresholds mentioned above must be notified to the RCC. The notification may be submitted following the entry into a binding agreement concerning the transaction (for example, share or asset purchase agreement, but even a letter of intent, memorandum of understanding etc, outlining the main points of the transaction, such as the parties, the object or the price) or, in case of an acquisition of control over traded companies, following the announcement of the public bid or the acquisition of a controlling interest.

There is no specific deadline for filing, as the Competition Law states that it must be made before implementing the transaction and, consequently, there are no sanctions for late filing. For sanctions regarding implementation before clearance, see question 12.

## 10 | Which parties are responsible for filing and are filing fees required?

The notification must be filed by the party or parties acquiring control. Should the transaction involve a merger or the creation of a full-function joint venture, the parties will file the notification.

An initial filing fee of approximately €1,100 is payable prior to the submission of the notification, and proof of payment must be submitted to the RCC together with the notification. An additional fee between €10,000 and €25,000, for Phase I or between €25,001 and €50,000 for Phase II, depending on the turnover of the target, is payable within 30 days after the RCC issues a clearance decision.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

An economic concentration that meets the thresholds outlined above cannot be implemented prior to clearance (standstill obligation). The RCC may, in particularly justified cases, upon request of the parties, grant a derogation from standstill obligation.

### Pre-notification

According to the Merger Regulation, parties are advised to initiate pre-notification contacts with the RCC at least two weeks prior to the submission of the notification. While not mandatory, such informal discussions are useful to clarify certain aspects of the concentration with a view to expediting the process.

### Completeness of filing

Within seven days of the filing, the RCC will inform the parties whether the notification meets the formal requirements.

### Effective date

The notification shall become effective on the date of registration at the RCC. Where the notification is incomplete in any material respect, the RCC has 20 days from filing to request the parties to complete the notification. The deadline for submitting information is up to 15 days as of receiving the request. There may be several requests for information before a notification is effective.

The RCC can declare a notification effective either in an express manner – official letter – or tacitly, by not requesting additional information within the 20-day period. In practice the effective date is always confirmed in writing.

### Phase I proceedings

The RCC has 45 days from the effective date to either:

- issue a letter if the concentration notified does not fall within the scope of the law;
- issue a clearance decision authorising the merger if the transaction raises no competitive concerns or if those concerns have been removed through the commitments put forth by the parties; or
- launch a Phase II investigation if the transaction raises competitive concerns and those concerns have not been removed through the commitments put forth by the parties.

In accordance with the yearly report of the RCC, in 2018 the average duration of a Phase I merger notification, from filing to clearance, was approximately two months.

### Phase II proceedings

Following the launch of a Phase II investigation, the RCC has five months from the effective date to:

- issue an unconditional authorisation decision;
- issue a conditional authorisation decision, subject to commitments; or
- issue a negative decision, prohibiting the merger.

Both the 45-day period and the five-month period mentioned above are mandatory and cannot be extended. Should the RCC fail to issue a decision within the said deadlines, the transaction will be deemed tacitly approved and closing is allowed.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As a general rule, breaching the standstill obligation may result in a fine ranging from 0.5 to 10 per cent of the total turnover obtained in the previous financial year or, if the sanctioned company did not generate turnover in the previous year, of the last turnover registered by the company. In the event that the offending company is a non-resident entity, the turnover on the basis of which the fines are assessed is replaced with the sum of the following:

- turnover achieved by each of the companies registered in Romania and controlled by the infringing party;
- turnover derived in Romania by each of the non-resident companies controlled by the infringing party; and
- any turnover obtained in Romania by the infringing party and accounted for in its financial statements.

Newly established companies that have yet to register turnover may be sanctioned with fines between approximately €3,300 and €550,000. In addition to the fines, the RCC may order, following the examination of the transaction, any interim measures aimed at restoring and maintaining the conditions of effective competition in the relevant market.

In practice, the RCC does sanction companies for failure to comply with the standstill obligation. In 2018, 0.4 per cent of the total amount of fines imposed by RRC was related to unlawful completion of concentrations prior to receipt of the required Romanian merger clearance (approximately €468,000).

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

The sanctions for implementing the merger before receiving clearance from the RCC are also applicable in foreign-to-foreign mergers.

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

While the Competition Law does not expressly provide for carveout solutions, there are two potential solutions to the problem outlined above, as follows.

The RCC may, in particularly justified cases, upon request of the parties, permit certain limited actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period. Whenever such occasional requests arise, the RCC will assess them on the merits and, provided that the requests are justified, prior implementation will be granted; as such, in 2015, in relation to a merger in the banking sector, the RCC allowed the acquirer to implement the concentration prior to obtaining clearance and to offer the retail customers of the target, which had entered into mortgage agreements based on loans in Swiss francs, certain customised solutions.

Otherwise, the Competition Law prohibits the implementation of the merger, rather than the corporate closing of the merger. Prohibited implementation measures of the buyer include, inter alia, the following:

- exercising voting rights in respect of the strategic business decisions of the target;
- changing the scope of the business or the commercial name of the target undertaking;
- causing the market entry or exit of the target;
- restructuring, dissolution or spin-off of the target;
- selling assets of the target;
- lay-off of employees of the target;
- initiating the conclusion or termination of long-term or other important agreements between the target undertaking and third parties; and
- listing of the target undertaking on a stock exchange market.

In conclusion, it is conceivable that the acquirer could close the transaction prior to receiving approval from the RCC, provided that it refrains from undertaking any implementation measures until clearance is received. As this measure is not tested in practice, prior notification of the RCC would be advisable.

### Public takeovers

**15 | Are there any special merger control rules applicable to public takeover bids?**

The merger filing in connection to a public bid must be submitted following the announcement of the public bid. Furthermore, the public takeover bid may take place and the securities may be acquired provided that the acquirer does not exercise its voting rights before the clearance decision or before it receives a special derogation from the RCC.

### Documentation

**16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?**

The standard notification form and simplified notification form are provided as an Annex to the Merger Regulation and are similar to the forms applied by the European Commission (EC).

Inter alia, the following needs to be provided:

- information on the parties to the concentration (e.g., names, registered seats, excerpts from the commercial register, nature of the business, ownership and control; description of the undertakings' business; annual financial reports for the preceding business year);
- power of attorney;
- description of the intended concentration;
- certified copies or originals of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- market shares held by the undertakings concerned in the relevant markets;
- information on main competitors and their market shares in the relevant markets;
- information regarding the top five suppliers and customers of the undertakings concerned;
- description of the distribution and retail networks in the relevant markets, relevance of research and development;
- economic rationale of the concentration;
- description of the benefits expected to result from the concentration for consumers; and
- (if available) copies of analyses, reports or studies related to the relevant markets.

Supplying inaccurate, incomplete or misleading information in the filing process, intentionally or not, may result in a fine ranging from 0.1 to 1 per cent of the total turnover obtained in the previous financial year.

The Competition Law also envisages the possibility of submitting a simplified notification in certain cases that usually do not give rise to competition law concerns, as follows:

- when parties acquire joint control over an undertaking that does not carry out any business in Romania or has only an insignificant business in Romania (ie, has a turnover below the €4 million threshold);
- transactions where there is no horizontal overlap or parties are active on non-related markets;
- transactions where the horizontal overlap is limited (aggregate market share of less than 20 per cent) and neither party operating on an upstream or downstream market to another party has a market share exceeding 30 per cent; or
- when one of the parties holding joint control over an undertaking acquires sole control over the respective undertaking.

The RCC may, at any time, move from a simplified notification to a full-form notification.

### Investigation phases and timetable

**17 | What are the typical steps and different phases of the investigation?**

See question 11. As a matter of principle, the vast majority of the concentrations are cleared in Phase I.

## 18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 11.

### SUBSTANTIVE ASSESSMENT

#### Substantive test

## 19 | What is the substantive test for clearance?

The substantive test applied by the RCC in merger control proceedings is the same test applied by the EC (ie, whether a concentration leads to a significant impediment to effective competition on the Romanian market or a substantial part thereof, in particular through the creation or strengthening of a dominant position). The failing firm defence may be invoked in front of the RCC, but we are not aware of any cases where it has been successfully invoked.

## 20 | Is there a special substantive test for joint ventures?

There is no special test for joint ventures. Having said that, if the RCC finds that the effect or object of a full-function joint venture is not the creation of an autonomous economic entity performing on a lasting basis, but the coordination of the competitive behaviour of undertakings that remain independent, such coordination will be assessed in the context of anticompetitive agreements.

#### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

The RCC will evaluate all mergers to determine whether or not they are compatible with a normal competitive environment. Within this evaluation, the RCC will take into account the following:

- the need to protect, maintain and develop effective competition on the relevant market;
- the market position of the parties and their competitors, both actual and potential, as well as their economic and financial power;
- alternatives available to suppliers and users and their access to supply sources or markets;
- any barriers, legal or otherwise, to entry into the market;
- the development of offer and demand for the relevant goods and services;
- the interests of the intermediary customers and consumers; and
- technical and economic progress, insofar as it benefits the consumer and is not an impediment to competition.

#### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

While the main factor taken into account in the assessment of a merger is the effect on competition of the said merger, non-competition issues may also be taken into account – see, for example, question 14, when the implementing measures prior to clearance were mainly for the benefit of consumers.

#### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

While economic efficiencies are not expressly provided for in the Merger Regulation, it is arguable that the last point mentioned under question

21 refers to efficiencies. In practice, the RCC uses the approach taken in the EC guidelines when confronted with a case where the aggregate market shares come close to 40 per cent and looks at reduction of costs and prices, increase in innovation or improvement of supply when assessing efficiencies.

### REMEDIES AND ANCILLARY RESTRAINTS

#### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Other than the RCC, only the SCND can prohibit a merger based on national security concerns.

#### Remedies and conditions

## 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If, during their analysis, the RCC representatives identify any competition concerns raised by the transaction, they may bring up the question of commitments. The parties are free to offer both behavioural and structural remedies, with structural remedies being preferred. According to the applicable regulations, the commitments proposed have to be sufficient to remove the competition concerns and contain sufficient information and data to allow an evaluation of their effectiveness (market test) to be carried out by the RCC. The parties are free to initiate preliminary contacts with the RCC before formally transmitting their proposed commitments to better understand the competition concerns raised by the transaction as well as to discuss the envisaged commitments.

Possible remedies encompass one or more of the following:

- divestments;
- termination or amendment of existing exclusive agreements;
- granting access to necessary infrastructure, networks or key technologies by way of licence agreements or otherwise; and
- behavioural remedies such as price-reporting obligations and mechanisms designed to prevent customer discrimination.

The RCC, for example, imposed structural remedies in a case concerning the acquisition of a retail chain by a competitor, obliging the acquirer to divest two stores operated in a certain geographical area. In a separate transaction concerning the same market, the RCC imposed behavioural remedies and required the acquirer to refrain from increasing prices charged in a particular store above the prices charged in other stores, which were located in a more competitive geographical market.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Remedy proposals may be submitted in both phases of a merger control proceeding.

In Phase I, remedies should be submitted before the notification becomes effective or, at the latest, within two weeks of the effective date.

In Phase II, remedies should be submitted within 30 days after the opening of the Phase II proceedings. In exceptional circumstances, the parties may request an extension up to 15 days to find an acceptable solution.

Should the remedies be accepted, the RCC will issue a conditional clearance decision expressly stating the commitments and the time frame for implementation.

Failure to properly implement the commitments may result in the revocation of the decision by which to restore the situation prior to the

implementation of the merger or the levying of a fine between 0.5 and 10 per cent of the total turnover.

**27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?**

The RCC has required remedies in foreign-to-foreign transactions.

**Ancillary restrictions**

**28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?**

As a matter of principle, in accordance with the Merger Regulation, a clearance decision covers the related ancillary restraints. Having said that, the parties will carry out an individual assessment as to what amounts to an ancillary restraint, taking into account the Ancillary Restraint Guidelines.

In practice, the RCC will usually inform the parties as to the existence of any restrictions that, *prima facie*, do not qualify as ancillary restraints.

**INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES**

**Third-party involvement and rights**

**29 | Are customers and competitors involved in the review process and what rights do complainants have?**

As a matter of practice, the RCC will publish a short press release on its website stating that they are currently analysing or investigating a merger and anyone interested is free to submit observations. In particular, in cases that raise competition concerns, the RCC may actively request the opinion of the competitors, clients, suppliers or other relevant authorities, such as the sector regulators, regarding the merger.

Furthermore, should the parties propose commitments and those are accepted by the RCC, these are published on the RCC website and all interested parties can submit observations within a set time frame.

**Publicity and confidentiality**

**30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?**

The RCC and its representatives are under an obligation not to disclose business secrets; namely, information that is defined as a business secret by law or by the undertakings concerned. Business secrets, *inter alia*, encompass any business information that has actual or potential economic and market value, and the disclosure of which could seriously harm the interests of undertakings concerned.

To ensure the effective protection of commercial information, it is advisable to mark such information as confidential in all documents sent to the RCC. The RCC will publish a non-confidential version of the clearance decision on its website. Also, other documents published by the RCC (ie, press releases, proposals for commitments) do not contain any business secrets or other confidential information.

**Cross-border regulatory cooperation**

**31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?**

The RCC is a member of the International Competition Network and the European Competition Network and can therefore request documents and information from other national authorities regarding

merger cases. In addition, the RCC may provide confidential information to other competition authorities in merger cases that are notifiable in more member states based on the Waiver Form, annex to the Merger Regulation.

The RCC, as a national competition authority of an EU member state, has all the rights and obligations pursuant to the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation). The RCC has an active contribution and cooperation role within the European Competition Network, in the form of informal and formal exchange of information between national competition authorities depending on the merger cases at issue.

**JUDICIAL REVIEW**

**Available avenues**

**32 | What are the opportunities for appeal or judicial review?**

All RCC decisions, including those in merger cases, can be challenged in front of the Bucharest Court of Appeals within 30 days of being served. The judgment of the Bucharest Court of Appeal can be further challenged by means of a final appeal before the High Court of Cassation and Justice.

To the best of our knowledge, there have been no recent cases challenging a merger decision of the RCC.

**Time frame**

**33 | What is the usual time frame for appeal or judicial review?**

The actual duration of the judicial proceedings can vary significantly depending on the complexity of the case and the procedural steps employed (ie, naming an expert, requesting the intervention of the EC as an *amicus curiae* and requesting that a preliminary ruling procedure in front of the European Court of Justice is initiated). Usually, the appeal proceedings in front of the Bucharest Court of Appeals last between three and nine months from the first hearing, while the proceedings before the High Court of Cassation and Justice last between three and six months from the first hearing. However, because of the high number of cases pending in front of the High Court of Cassation and Justice, the first hearing may take place only 12 to 18 months after filing the appeal.

**ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS**

**Enforcement record**

**34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

The number of merger cases in Romania has seen a steady increase, from around 45 cases per year between 2011 and 2015 to 62 cases in 2016 and 60 cases in 2017, as a direct result of the encouraging economic growth experienced by Romania. Similar to other years, the vast majority of the cases were cleared unconditionally in Phase I, with a few cases being cleared subject to commitments. There has been a significant drop in standard procedure clearances of approximately 30 per cent compared to 2012; conversely, simplified procedure clearances have seen an increase of roughly 35 per cent compared to 2012. In 2018, the RCC cleared 57 mergers, only two of which were cleared subject to conditions and obligations.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

The Competition Law was last updated in April 2019 by the Government Ordinance No. 25/2019 regarding the protection of know-how and the undisclosed information that is considered as business secrets against the acts of illegitimate possession, utilisation and disclosure, and for the amendments of several laws. The amended version of the Merger Regulation, adopted in September 2017, has not been changed or updated.

Romania has implemented Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union. On 8 June 2017, Emergency Government Ordinance 39/2017 (EGO 39) entered into force and brought a number of important changes to the Romanian Competition law. The EGO 39 introduces a number of other changes including, inter alia: (i) a specific obligation incumbent upon modern retailers to provide (upon request) information to the Competition Council regarding their resale prices; and (ii) additional powers for the RCC when carrying out dawn raids. Broadly, the EGO 39 assumed all the provisions enacted by the Damage Directive.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

As mentioned above, Emergency Government Ordinance 39/2017 (EGO 39) entered into force and brought a number of important changes to Romanian Competition law. The EGO transposes the EU Damages Directive (2014/104/EU) into Romanian law and introduces a number of changes into Romanian competition law, including a specific obligation incumbent upon modern retailers to provide (upon request) information to the Competition Council regarding their resale prices, as well as additional powers for the RCC when carrying out dawn raids.

As regards merger control, we are not aware of any cases, judgments or legislative developments in the past year.

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# Russia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The Russian Law on Protection of Competition (LPC) entered into force in October 2006. The latest major amendments to the LPC relating to the merger control rules came into effect on 7 January 2017. The LPC governs, inter alia, merger control in commodity and financial markets and applies to the transactions in which the targets are Russian entities or foreign entities operating in Russia (including those that do not have physical presence there).

The Russian merger control provisions are enforced by the Federal Antimonopoly Service (FAS) and a large network of its local agencies established in 83 Russian regions. The FAS is subdivided into several divisions, each of which deals with a specific economic sector. More detailed information on the structure and powers of the FAS can be found on its website, [www.fas.gov.ru](http://www.fas.gov.ru).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The LPC sets out a comprehensive list of events constituting economic concentration and falling within the control of the FAS. The most important events triggering merger control are:

- the acquisition of (direct or indirect) rights to determine the business activities of a Russian company by one or several enterprises (through shareholdings, agreements, voting arrangements, rights, etc);
- the acquisition of certain blocks of shares in another company, resulting in the acquirer and its group holding in total over 25, 50 or 75 per cent of voting shares in a Russian joint-stock company or over 33.3, 50 or 66.6 per cent of the shares in a Russian limited liability company;
- the incorporation of a company by contribution of assets of or shares in a Russian company;
- the consolidation of two or more companies resulting in the formation of a new company and the end of the corporate existence of the consolidated companies; or the merger of one company into another resulting in the former no longer having separate corporate existence;
- the acquisition of more than 20 per cent of fixed production (subject to certain exceptions) or intangible assets located in the territory of Russia from another company;
- the acquisition of certain blocks of shares, resulting in the acquirer and its group holding in total over 50 per cent of voting shares in a foreign company if its Russian turnover in the preceding year exceeded 1 billion roubles;

- the acquisition of (direct or indirect) rights to determine the business activities of a foreign company (through shareholdings, agreements, voting arrangements, rights, etc) if its Russian turnover in the preceding year exceeded 1 billion roubles; and
- entry into agreements between competitors providing for their joint activities in the territory of Russia.

Internal restructurings in which an intra-group transfer is made to a transferee in which the transferor directly or indirectly holds more than 50 per cent of voting shares or that directly or indirectly holds more than 50 per cent of voting shares in the transferor are exempt from the filing requirements. However, certain intra-group mergers are still subject to the prior approval requirement, but may alternatively be subject to post-completion notification if, prior to completion, a list of group members is disclosed to the FAS in a special format (see question 16). It should be noted that the FAS will make the structure of the group publicly available on its official website.

#### 3 | What types of joint ventures are caught?

Joint ventures are subject to the general rules set out above. There are no specific rules on full-function and non-full-function joint ventures. The amendments to the LPC known as the Fourth Antimonopoly Package, which came into effect on 5 January 2016, introduced new rules with respect to agreements on joint activities between competitors in the territory of Russia. Entry into such agreements is now subject to mandatory merger control filing if the parties' groups' assets or turnover exceed certain thresholds (see question 5). A joint venture agreement may be either a 'concentrative' (or corporate) joint venture or 'cooperative' joint venture.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The LPC contains a definition of 'control' for the purposes of certain clauses of the LPC, including for disclosure of the group of the acquirer and the target in a merger control filing. 'Control' means the ability of an individual or a legal entity to determine, directly or indirectly, the decisions to be taken by another legal entity (including the ability to determine the terms of conduct of business by another legal entity), through holding more than 50 per cent of the voting shares in such legal entity; or acting as an executive body of such legal entity.

Under Russian merger control provisions, acquisition of interests less than control are caught. Even an acquisition resulting in a holding of more than 25 per cent in a joint-stock company or an acquisition of more than 20 per cent of the fixed production (subject to certain exceptions) or intangible assets of another legal entity constitutes economic concentration under the LPC.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Pre-approval of an acquisition is required if:

- the aggregate book value on a worldwide basis of all companies within the acquirer's group and the target's group exceeds 7 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group exceeds 400 million roubles; or
- the aggregate turnover on a worldwide basis of all companies within the acquirer's group and the target's group exceeds 10 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group exceeds 400 million roubles; and
- for joint venture agreements between competitors: the aggregate book value on a worldwide basis of all parties (and their groups) exceeds 7 billion roubles or their aggregate turnover on a worldwide basis exceeds 10 billion roubles for the calendar year preceding the entry into joint venture agreement.

Different thresholds apply to transactions with financial entities as targets.

If the thresholds for a notification are not met, the transaction is not subject to merger control.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory. There are no exceptions.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Under the LPC, foreign mergers are subject to Russian merger control if they have or may have an impact on competition in the Russian Federation. The acquisition of shares, resulting in the acquirer and its group holding directly or indirectly in total over 50 per cent of voting shares in, or of rights to determine the business activities (through shareholdings, agreements, voting arrangements, rights, etc) of a foreign company is caught by Russian merger control rules if the target's Russian turnover in the preceding year exceeded 1 billion roubles.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

For transactions in which financial organisations and natural monopolies are targets, special rules apply.

The LPC defines 'financial organisations' as banks, legal entities carrying out transactions or providing services in the securities market, insurance services or other services of a financial nature under an appropriate licence, non-government pension funds and their managing companies, managing companies of share investment trusts, leasing companies, credit consumer unions and other organisations, and individual entrepreneurs carrying out operations and transactions in the financial services market.

Companies providing, inter alia, the following services are deemed 'natural monopoly entities': gas and oil pipeline distribution, electricity transmission, rail transport, services provided at transport terminals (including sea ports and airports) and public electronic and postal communications and telecommunications providers. Law No. 147-FZ of 17 August 1995 on Natural Monopolies, in addition to the LPC, governs Russian merger control with respect to transactions involving natural

monopolies. It is noteworthy that recent amendments to the relevant legislation abolished the requirement to submit post-closing notifications of share transactions involving natural monopolies under Law No. 147-FZ.

Federal Law No. 57-FZ on the Procedure for Making Foreign Investments in Business Entities with Strategic Value for the Defence of the Country and Security of the State (the Strategic Investments Law) became effective in May 2008. Under this law, the state shall exercise prior control over any transaction relating to the acquisition by foreign investors of Russian companies engaged in businesses that have strategic political interest for Russia and are active in the sectors listed in this law, namely, weaponry and military, nuclear, aviation, space exploration, explosives, etc. The Strategic Investments Law has been amended several times since its enactment. The most recent amendments came into force in June 2018 and introduced new rules on disclosure of information on controlling parties, beneficiaries and beneficial owners of foreign investors. This increased the administrative burden on foreign investors.

Furthermore, in accordance with Federal Law No. 160-FZ of 9 July 1999 on Foreign Investments in the Russian Federation (the Foreign Investments Law) if a company owned or controlled by a foreign state or international organisation intends to acquire, directly or indirectly a stake in a Russian company (including any company – not necessarily a 'strategic' one) that exceeds 25 per cent, or an ability to block, on any grounds, corporate decisions, such foreign company must make a filing under the procedure set out in the Strategic Investments Law. The amendments to the Foreign Investments Law, which came into effect in July 2017, introduced a new rule according to which the Chairman of the Government Commission for Control over Foreign Investments in the Russian Federation can now decide that any transaction to be entered into by a foreign investor in relation to any Russian entity (ie, including 'non-strategic' entities) requires, in order 'to ensure defence of the country and the security of the state', prior approval of the Government Commission and, accordingly, submission of a separate filing. Such decision would be made 'with the view of securing national defence and security of the state' and would be based on the opinions of the government authorities, including the authorities supervising the sectors in which the entity concerned operates.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no legal deadlines for a pre-completion filing. Merger control clearance must be obtained before completion and the filing must be made well in advance of the envisaged completion date. The FAS's clearance decision is valid for one year from its issue.

Failure to submit a required pre-completion filing can be penalised by fines on legal entities and on managers. These penalties are regularly applied.

In addition, the FAS may apply to a court to invalidate, in full or in part, agreements and other transactions for which its prior authorisation was required but has not been obtained, or to liquidate a company if it was incorporated without prior approval, provided that the relevant transaction or incorporation results in limitation of competition. These penalties are applied rarely.

## 10 | Which parties are responsible for filing and are filing fees required?

Pre-completion notifications should be filed with the FAS by the acquirer of the shares, rights or assets. In the case of incorporation, a filing should be submitted by all parties that take decisions on incorporation. In the case of a joint venture agreement, a filing should be submitted by the parties to the agreement. The administrative liability for failure to submit a filing is borne by the party responsible for the filing. Pre-completion filings are subject to a fee of 35,000 roubles per filing.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The FAS is obliged to consider pre-completion filings within 30 days of the filing date. However, if the FAS determines that further disclosure, documents or information is needed or that the transaction may result in limitation of competition, the FAS may extend the term of review by up to another two months. In the latter case, the FAS will publish information on the transaction on its website and invite interested parties to file submissions on the impact of the transaction on the Russian market. Moreover, the FAS may return the filing as incomplete and in this case the review period will start anew as soon as the full set of documents is submitted.

In the event of a possible impact on competition, the FAS may also delay clearance until the parties perform certain actions. The FAS will then set a term for performance of such actions, which may not exceed nine months.

If a transaction is also subject to prior approval in accordance with the Strategic Investments Law or the Foreign Investments Law (see question 8) the antimonopoly clearance will not be issued until the 'strategic' or 'foreign investments' clearance is granted. The 'strategic' process, by statute, may take up to six months but, in practice, may take longer. There is no statutory deadline for the 'foreign investments' process (ie, where the Russian target is not a 'strategic' entity), but in practice it takes usually one to two months to obtain clearance (which is in fact a FAS letter to the effect that 'strategic' clearance is not required).

In pre-completion filings, implementation of the transaction should be suspended until clearance, regardless of whether the statutory waiting period has expired.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Completion of transactions and integrating the activities of the merging businesses (if such integration results in the acquirer actually beginning to control the target, eg, by way of giving binding instructions to it) before clearance may result in fines and invalidation of the transaction, as in the case of a failure to file (see question 9).

In a recent merger control review, the FAS concluded that the transaction notified also required prior consent under the Strategic Investment Law and extended the review period until receipt by the notifying party of such consent. The notifying party apparently disagreed with the FAS and closed the transaction without applying for consent and, accordingly, before merger control clearance was issued. The FAS viewed such closing as 'conscious disrespect' for Russian law, imposed a fine and brought court proceedings seeking to deprive the acquirer of the voting rights at the meeting of shareholders of the Russian target, which is the regular procedure in case of non-compliance with the Strategic Investment Law. The FAS decision was upheld by courts at two instances.

## 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

We are not aware of any sanctions applied for closing before clearance in foreign-to-foreign mergers. However, it can reasonably be assumed that the FAS would apply sanctions in such cases. There are cases involving deals between foreign and Russian legal entities, where the FAS applied sanctions for closing before clearance and the courts upheld the FAS decisions. By way of example, in one case the company made a pre-completion filing two months after the transaction had been completed. The FAS discovered this violation during the review of the filing and applied administrative sanctions.

Sanctions for failure to submit a pre-completion filing may even be applied on formal grounds in circumstances where the parties make a filing, obtain FAS clearance and then change the structure of the transaction with the actual result remaining unchanged. For example, in one case a foreign legal entity applied for FAS consent to the acquisition of the shares in, or direct control over, Russian legal entities and obtained clearance. Subsequently, control over these Russian entities was obtained indirectly by way of acquisition of direct control over a 100 per cent parent company (a foreign entity) of the Russian legal entities. In this case the FAS applied sanctions for closing without clearance and the courts upheld the FAS's decision.

There have been several cases in which foreign-to-foreign transactions were invalidated by courts or other sanctions were applied on the grounds of non-compliance with the requirement to obtain consent pursuant to the Strategic Investments Law (see question 8).

## 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Hold-separate arrangements are not provided for by the LPC and have rarely been used where Russian issues held up a larger foreign-to-foreign transaction. In principle, such arrangements are only possible with regard to the acquisition of the rights to determine the business activities of a company, but even for those transactions they are not a 100 per cent 'clean' solution.

### Public takeovers

## 15 | Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules and notably no exemption from the prohibition on completing the transaction before clearance.

### Documentation

## 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The LPC lists the documents and information that must be collected for the filing. These include agreements or other documents relating to the transaction, corporate documents of the acquiring party and the target, information on the business activities of the parties and the target with exact production and sales figures for the past two years, information on the companies of the acquirer's and the target's groups and also on the ultimate beneficiaries of the groups. Failure to provide all documents and information required under the LPC may result in the FAS rejecting the application as incomplete.

The information and documents included in the filing must be accurate and complete. Provision of false information may be sanctioned by fines on both legal entities and managers and, more generally, serve as a ground for refusing clearance. In practice, incomplete information

is qualified by the FAS as false information, and the provision of incomplete information therefore entails the risk of the same sanctions as those for submission of false information.

Documents issued abroad must carry an apostille (if the country where a document is issued is a party to the 1961 Hague Convention on Apostille) or be legalised. They need to be translated into Russian and the translator's signature must be certified by a Russian notary.

The nature of the filing is rather technical. The waiting period begins after the filing has been submitted to the FAS.

There are specific procedures for filing of certain intra-group transfers. In particular, a post-completion filing is permitted if one of the group entities files a list of its group members with the FAS no later than one month before completion. The list should specify the reasons for inclusion in the group for each of the group members. Within 14 days of receipt of this list, the FAS informs the applicant either that it accepts the submitted list or that the list does not comply with the statutory requirements. The list as filed is published on the FAS website.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

After submission of the filing, the FAS must decide within 30 days whether to clear the merger or, if the transaction raises competition concerns, whether to enter into a second-stage investigation or impose conditions for clearing the transaction. The second-stage decision must be rendered within a further two months. If clearance is delayed until the parties perform certain actions, the deadline for such actions must not be longer than nine months.

Cases that raise no competition concerns and filings in relation to which are complete and meet all requirements (such as, for example, formalisation of documents) are typically cleared within 30 days of the filing date. At the same time, the timing of the review process is not always predictable, as the FAS has a broad discretion in determining whether the deal gives rise to concerns and, accordingly, whether to extend the review period. If the FAS requires additional information or clarifications, it typically issues a formal written request, which may result in an extension of the review period, and from that perspective it is advisable to try to avoid them, by making the filing as complete as possible and trying to pre-empt the FAS's queries.

There are no legal means to speed up clearance.

Pre-notification consultations with the authority are not required but are possible. The notifying party may inform the FAS of the proposed transaction prior to submission of the filing, provide the authority with the relevant documents and information and suggest remedies for discussion. Such pre-notification contacts do not influence the timing or procedure of the review of the formal filing and the authority is not bound by the results of such pre-notification discussions. That said, when taking the decision in relation to the deal after it is formally filed, the authority is obliged to take into account the materials disclosed in the course of such pre-notification consultations. As a practical matter, such pre-notification contacts are recommendable in cases that may give rise to competition concerns.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

Upon filing, the set of documents and information as filed is forwarded to the department of the FAS dealing with the relevant market sector.

The FAS will review the relevant market shares of the parties to the transaction (including the target market share) and investigate whether the transaction will influence competition in the Russian market. The FAS officials may use, apart from the filed documents, any sources

of information, such as statistics from the databases of the Russian Statistics Committee and the Russian Customs Service, their own databases, and information from the internet and press, etc. They may also request additional information directly from the parties, competitors or other companies and individuals concerned.

If the transaction does not limit competition in the Russian market, the FAS is supposed to issue clearance within 30 days of receipt of the filing.

If competition concerns are identified, within 30 days the FAS either issues a prohibition order or informs the applicant in writing that the review period will be extended for up to two months (second-stage investigation) or that clearance can only be provided after the parties have fulfilled certain conditions. After the second stage, the FAS will issue either a prohibition or a clearance decision (conditional or unconditional).

The FAS usually meets the deadlines. That said, the timing of the review process is not always predictable as the FAS has broad discretion in determining whether the deal requires further analysis and, accordingly, whether to extend the review period. As a practical matter, in the absence of substantive issues an extension is unusual.

### SUBSTANTIVE ASSESSMENT

#### Substantive test

#### 19 | What is the substantive test for clearance?

A merger must be prohibited or made conditional by the FAS if it leads to the creation or strengthening of a dominant position in the relevant Russian market sector or otherwise leads to a limitation of competition in the Russian market.

Dominance is defined in the LPC as the position of one or several companies or groups in the market for a specific product or service that allows it or them to seriously influence the terms of trade of such product or service or to impede other companies' access to this market sector. If a company holds less than 35 per cent of the market, it may not be found dominant, except in case of collective dominance or if an industry-specific dominance threshold applies. Such industry-specific thresholds may be set by the federal laws regulating particular industries; for example, in wholesale and retail electricity markets an electricity generation company holding a market share of 20 per cent or above is deemed dominant. As a general rule, companies are deemed dominant if their market share is over 50 per cent. For companies with 35 to 50 per cent market share, additional criteria, such as competitive structure of the market and barriers to entry, are used to determine whether a company is dominant. Financial organisations are subject to a special dominance test.

The LPC does not provide for any special circumstances that would require, permit or encourage the FAS to qualify a 'problematic' merger as acceptable. That said, the parties are allowed to submit efficiency arguments to try to convince the FAS that the merger is permissible despite a dominance issue or any other potentially anticompetitive effects of the transaction (see question 23).

#### 20 | Is there a special substantive test for joint ventures?

The general merger control rules apply to joint ventures. Also, the Fourth Antimonopoly Package introduced a special merger control regime for joint venture agreements between competitors. The amendments provide for a mandatory pre-transaction clearance for agreements between competitors providing for their joint activities in the territory of Russia (see question 5 for thresholds). If the thresholds are not met, the application can still be submitted on a voluntary basis.

## Theories of harm

### 21 | What are the 'theories of harm' that the authorities will investigate?

The FAS investigates whether the transaction may lead to limitation of competition in the Russian market, signs of which may be:

- a reduction in the number of companies in the relevant market sector that do not belong to the same group;
- an increase or decrease in the price for a product or a service that is not because of market forces;
- the abandonment of independent action in the market by companies not belonging to the same group;
- the determination of the conditions of trade in a product or service in the market by companies not belonging to the same group through agreements or concerted practice; or
- other circumstances that allow a company or several companies to unilaterally influence trade in a commodity or service in the market.

Creating or strengthening dominance is also considered harmful to the market (see question 19).

## Non-competition issues

### 22 | To what extent are non-competition issues relevant in the review process?

Generally, the legal test for clearance is competition-related. However, the FAS may also refuse clearance if it finds out that information provided in the filing that has significance for the FAS decision is false or insufficient (eg, the ultimate owners or beneficiaries of the acquirer's or target's groups were not disclosed).

Clearance may also be delayed if the filed documents do not comply with the mandatory rules of Russian law.

Also, political considerations may have an impact on the review process. Some transactions relating to certain 'sensitive' sectors (military, aircraft industry, energy, insurance, etc) have given rise to political rather than competition-related decisions in the past, with clearance denied or made conditional on behavioural commitments, or the approval process taking much longer than usual.

Furthermore, public interest seems to be taking on increased importance in the review process. By way of example, in a recent *Bayer/Monsanto* case the FAS came to the conclusion that the transaction might have negative impact on the Russian agricultural technologies market and required that Bayer should transfer certain of its technologies to Russian companies and give them access to certain of its digital solutions so that the Russian companies could compete with foreign companies on equal terms.

There are no formal tests for assessing whether or not a deal gives rise to political or public interest concerns, so in practice assessment is made by the FAS in cooperation with other government authorities, including those supervising the relevant markets.

## Economic efficiencies

### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The task of the FAS is to find a compromise between protection of competition and economic development in Russia. The FAS takes the economic efficiency of the transaction into account and may give clearance even if the transaction results in limitation of competition, provided that the parties perform certain actions aimed at mitigating or eliminating the negative effects and achieving positive effects, including, for example, actions aimed at improvement of the local production or distribution processes.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The FAS is authorised to either prohibit a transaction that has an adverse effect on competition or to require the parties to fulfil certain conditions before a clearance is issued or before completion of the transaction. In such cases, the FAS issues binding orders aimed at protecting competition (eg, divestiture or conclusion, amendment or termination of agreements). If a transaction that leads to limitation of competition in the Russian market is closed without FAS approval, the FAS can challenge the transaction in court. The FAS has recently become more active in combating anticompetitive behaviour.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The FAS may delay clearance of the transaction until the parties perform certain actions aimed at protection of competition (eg, grant access to important assets or information, provide third parties with industrial property rights, divest assets or claims to third parties or restructure their respective groups – that is, divest company shares).

Also, the FAS may make clearance of the transaction conditional on the parties' compliance with certain requirements, such as amending or entering into contracts; carrying out specific economic, technical or information measures to prevent creation of discriminatory conditions in the market; granting access to assets or information; and divesting assets or, on the contrary, not transferring any important assets, as well as notifying the FAS of the intention to carry out particular actions.

If a transaction is likely to lead to distortion of competition in Russia, it is advisable to discuss with high-level FAS officials how to remedy such effects. The parties may propose certain undertakings to mitigate the effect of the transaction on competition.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The basic condition for a divestment or another remedy is mitigation of the negative effects of the transaction by encouraging competition in the market.

The FAS usually sets a term within which the relevant remedy should be implemented, or the term during which the remedy should be maintained. Where the FAS delays clearance until performance of the remedies by the parties, this term may not exceed nine months.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The remedies required in foreign-to-foreign mergers could be the same as in Russian local mergers (see question 24). In the past, the FAS has usually applied remedies in Russian-to-Russian or Russian-to-foreign transactions rather than in foreign-to-foreign mergers.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Related arrangements are covered to the extent that full information on these arrangements has been provided to the FAS and that such arrangements are not subject to approval themselves. If the transaction

involves several arrangements that each require clearance, the FAS consent in relation to such arrangements should be sought either in one filing or in separate filings, depending on the subject matter of each particular arrangement.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

During the review process, the FAS may invite customers and competitors to give their opinion on the contemplated transaction. Applications for clearance should contain information on all customers that buy over 5 per cent of the production or sales volume of the relevant party and all sellers supplying over 5 per cent of its purchases or consumption volume.

If the FAS suspects a competition issue, it may extend the review for up to two months (second-stage investigation) with a simultaneous publication on its website, so that any interested parties can provide information on the effects on competition of the transaction. Moreover, as a matter of law the FAS must publish information on all filings submitted to it on its website (except where the Government of the Russian Federation determines that the FAS has the right not to publish information on any particular transaction) so that any interested third parties can provide comments on the possible impact of the transaction on competition. The analysis of information posted on the FAS's website shows, however, that such publications are very rare.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Commercial information, including business secrets, cannot be withheld in a filing. The FAS has the right to demand it from the parties and extend the review period if it is not provided promptly.

The FAS is under an obligation not to disclose commercial secrets (provided that they are designated as such) contained in filings. FAS officials are criminally liable for unauthorised disclosure, and the damage done by such disclosure is to be compensated from the Russian federal budget. However, the information required for filings sometimes does not meet the criteria of commercial secrets as provided for by Russian law and thus remains unprotected.

Under the LPC, general information on the transaction notified to the FAS is public and the FAS must publish information on all filings submitted to it on its website (see question 29). Also, until recently, the FAS information policy required it to publish on its website all decisions (including binding orders, if any) issued upon review of the filings. However, it follows from the recent changes to the FAS information policy that such decisions and binding orders are no longer public and as a result the FAS does not publish them now. The changes to the information policy did not impact the rules on disclosure of group-related information, under which the FAS may publish a list of the companies of the group for the purposes of a post-completion notification (see question 16).

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The FAS cooperates with antitrust authorities of the former socialist countries (Bulgaria, the Czech Republic, Hungary, Poland, Romania

and Slovakia), Commonwealth of Independent States countries, some EU member states (Austria, Finland, France, Greece, Italy and Sweden), Asian states (China and Korea), the United States and South American states (Argentina and Bolivia).

Cooperation between Russia and the European Union with regard to competition was established by the 1994 Partnership and Cooperation Agreement. In 2003, the FAS proposed to the Russian government to enter into a positive comity agreement with the European Union.

Finally, Russia, represented by the FAS, cooperates with antitrust authorities of other countries in the International Competition Network, the Organisation for Economic Cooperation and Development and the United Nations Conference on Trade and Development, of which Russia is a member.

According to publicly available information, the FAS has recently become more active in contacting antitrust authorities of other countries in the context of merger control procedures.

We are aware of several cases where the FAS contacted antitrust authorities in other countries (India, China, Germany, Kazakhstan, Republic of Korea, Mexico, South Africa and the United States) during the review of large foreign-to-foreign mergers to discuss the influence of the relevant transactions on competition in the respective jurisdictions.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Decisions of the FAS may be challenged within three months of their issue before Russian courts in a civil law procedure. The parties concerned may challenge FAS decisions denying clearance or granting conditional clearance, or the lack of decision within the legal waiting period.

The majority of FAS rejection decisions are issued on the grounds of incompleteness of information provided in the filing (such as information on the ultimate beneficiaries). Some of those rejection decisions have been challenged in courts. Court practice is inconsistent – some court decisions uphold the FAS's formal position and some overrule them on the grounds that the FAS's requests contain excessive requirements that, from the courts' perspective, are irrelevant for the purposes of merger control.

Where rejection decisions are issued on the ground that the transactions notified would have anticompetitive effects, the decisions may not necessarily be final and may be reconsidered by the FAS if the applicant submits a new filing in which it substantiates why the deal is permissible. Recent cases show that the parties, having received a rejection decision from the FAS, could be better off if they first resubmitted the filing to the FAS instead of challenging the FAS's decision in court. By way of example, the FAS initially blocked the proposed acquisition by Elutek Beteiligungs GmbH of control of 11 Alutech Russian subsidiaries located in various cities and regions of Russia on the ground that the acquisition would result in Elutek becoming dominant in certain regions of Russia. However, subsequently, Elutek submitted a new filing in relation to the same transaction, in which it provided evidence that the deal is permissible under the LPC, and upon review of that filing the FAS ultimately cleared the transaction subject to behavioural remedies.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

The Russian judicial process takes up to three months in the court of the first instance, and up to two months at each of the two further review levels – the court of appeal and the court of cassation. A further appeal may be filed with the Collegium of the Supreme Court of Russia in charge of considering commercial disputes, which only accepts the

cases for consideration in exceptional circumstances (ie, if there are severe violations of substantive or procedural law). The Collegium's resolution could finally be referred to the Presidium of the Supreme Court within three months of the date of the resolution. The judicial process at the Collegium and Presidium of the Supreme Court could take up to three months. So, it could take more than a year to overturn a decision of the FAS.

If the claimant or another participant in the court action is a foreign company, judicial review may become a very lengthy process. If the foreign participant is incorporated (located) in a country that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), the Russian court may need to serve judicial documents on such company through a special authority in the country of such company's incorporation (location), which will lead to delay at each level of review for up to half a year.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The FAS does not publish its enforcement record with regard to mergers. That said, according to the FAS's officials, the changes to merger control rules that have been gradually introduced since the LPC came into effect in 2006 resulted in a significant reduction of merger control filings submitted to the FAS.

The FAS aims to further transform merger control in Russia from a formal procedure into actual control by enabling it to have a better focus on mergers of particular interest to it by reducing the total number of filings.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The LPC is an evolving statute. Following the Fourth Antimonopoly Package, which came into effect in January 2016, further amendments were introduced in July 2016 and January 2017. However, such amendments to the LPC did not cover all open issues in Russian antimonopoly legislation. Over the past years, several complex global transactions reviewed by the FAS, including the *Bayer/Monsanto* transaction, revealed a number of problem areas in the merger control rules that require changes to the legislation, especially in high-technology sectors. The FAS took the relevant experience into account in the course of preparation of a new set of amendments to the LPC, called the Fifth 'Digital' Antimonopoly Package. Some of the proposed changes relate to merger control procedure. More specifically, the proposed amendments provide that the authority will have the right to extend the review period for up to three years (such extensions, however, will be subject to approval by the Russian government and may be applied in relation to multijurisdictional cross-border transactions only). Furthermore, as part of the new merger control rules the FAS will have to prepare a report setting out the details of the assessment and send it to the parties before issuance of the final decision, so that the parties can submit additional evidence that the notified transaction is permissible. The parties will also have the right to offer remedies to the authority in course of the review of the filing. Also, it is expected that a new notification threshold will be introduced, which will be based on the value of the proposed transaction: namely, if the value of the proposed transaction exceeds 7 billion roubles, the transaction will require clearance even if the relevant asset or turnover thresholds are not met. Furthermore, the proposed changes envisage introduction of an institute of independent trustees that will control and monitor implementation of remedies imposed.



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The amendments are yet to be approved by the Russian government and the State Duma. According to the Head of the FAS, they are expected to be adopted and to come into force in 2020.

# Saudi Arabia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Saudi Arabia recently adopted and published a new Competition Law that will come into effect 180 days from its publication in the Official Gazette. The New Competition Law, along with its Implementing Regulations – expected to be issued in the second half of 2019 – will come into force as of October 2019. Until then, the provisions of the current Competition Law (the Current Law) still apply. This chapter covers both the current and new aspects of the Competition Law.

The current Competition Law became effective in 2005 and is accompanied by implementing regulations issued by the Competition Council under Resolution No. 126 dated 4/9/1435H (1 July 2014) (the Current Regulations). Both instruments deal with merger control as well as other aspects of competition law. The Council has also issued a number of guidance rules in support of the Law and the Regulations. Most significant of these are the Rules Governing Economic Concentration (the Rules), which contain guidance on the procedural aspects of the merger control regime. In addition, the following guidance rules are available:

- rules governing the pleading procedures before the Council;
- rules governing the work of the judicial investigation officers;
- rules governing exceptions and exemptions; and
- rules governing dominant positions.

In June 2015, the Council issued a set of competition law guidelines, taking into account principles of international best practice. The guidelines have the stated aim of raising awareness and encouraging competition compliance across the Saudi economy and include:

- guidance for businesses on how to comply with Saudi competition law;
- guidance on information exchange between competitors; and
- guidance relating to government sectors and public procurement.

These guidelines are not legally binding and may be further amended by the Council.

The Council is responsible for the enforcement of the Law and the Regulations. The Council's duties are set out in the Law and include the following:

- approving economic concentrations;
- ordering investigations into complaints and practices in violation of provisions of the Law and prosecution of such practices;
- approving the initiation of criminal proceedings against those in violation of the Law; and
- proposing draft competition legislation in response to developments in the market and proposing amendments to the Law.

In October 2017, the name of the Competition Council was changed to the General Authority for Competition (the Authority) and it was given its new organisational statute. The New Competition Law is enforced by the Authority, which is governed by a Board (the Board) consisting of representatives from the Ministry of Finance, the Ministry of Economy and Planning, the Ministry of Trade and Investment, the Ministry of Energy, Industry and Mineral Wealth, as well as four other experts. The Board has a Chairman appointed by virtue of Royal Decree.

The New Competition Law was published on 29 March 2019 and will replace the Current Law in October 2019. Its overall objective is similar to that of the Current Law, with more emphasis on the protection of consumer welfare, and on medium and small businesses to ensure their continuity in a fair and competitive market environment. In comparison to the Current Law, the New Competition Law seeks to enhance market competition by adopting a more liberalised approach to market regulation. The most prominent changes include:

- acceptance of settlements with infringing businesses in accordance with the Authority's set criteria, controls and mechanisms to compensate injured parties;
- greater flexibility with respect to the types of sanctions that the Authority can impose on violating businesses;
- potential exemptions for businesses that report infringements;
- potential exemptions based on benefits to consumers;
- the New Competition Law specifically captures transactions occurring outside of Saudi Arabia that have an impact on fair competition in the Saudi Arabian market; and
- introduction of turnover-based merger control thresholds, procedure and substance to be set by the Board.

Details will be determined by the Implementing Regulations (the New Regulations). In addition, the Board is expected to issue further guidelines to clarify the visions of the Authority in its consideration and treatment of the New Competition Law regime.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Saudi merger control regime applies to economic concentrations as defined by the Current Law and the Current Regulations.

An economic concentration is created by full or partial transfer of ownership (including beneficial ownership) of an entity's assets, rights, shares, interests or obligations to another entity operating in the Saudi market (an establishment), thereby creating 'dominance by way of merger, takeover, acquisition, or combining two or more managements into one joint management or any other means that lead to a state of economic concentration'.

The definition of 'economic concentration' set out in the Current Law and the Current Regulations is sufficiently broad to capture almost every type of transaction that would ultimately result in an

economic concentration in Saudi Arabia, be it mergers, acquisitions or takeovers.

The New Competition Law maintains the same definition of 'economic concentration' but adds a turnover-based threshold to be determined by the New Regulations.

### 3 | What types of joint ventures are caught?

The definition of economic concentration under the Current Law and the Current Regulations, which covers any transaction combining the management of two or more entities into one joint management (see question 2), is widely drafted and may therefore apply to a broad range of joint ventures. However, it is not clear from the legislation to what extent the Saudi merger control regime may follow the EU law distinction between 'full function' joint ventures (that are notifiable) and 'non-full function' joint ventures (that fall to be assessed under the provisions relating to restrictive agreements). The New Regulations may provide further insight on the type of joint ventures that are treated as restrictive agreements.

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The existence of an economic concentration does not depend on the criterion of control, therefore there is no definition of control in the Current Law or the Current Regulations. Minority interests may be caught under the regime, as a concentration may arise where there is a partial transfer of ownership rights and no minimum level is specified for such partial transfers. Other interests, namely usufruct, are also caught (see question 2).

The same arrangement exists in the New Competition Law, but a new criterion may be set by the Board in the New Regulations.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control regime applies to transactions that result in a dominant position by an establishment.

Dominance is determined by reference to a 40 per cent market share threshold in Saudi Arabia (based on sales) held throughout a 12-month period or an ability to influence the prevailing market price of a specific commodity, product or service. This latter part of the test means that, in theory, dominance may be found at a market share below 40 per cent, thereby triggering a notification obligation below this threshold. Further, it is unclear whether the market share threshold may be met by one party alone, or whether an overlap between the parties is required.

As competition law and practice in Saudi Arabia is still relatively new, there is often little or no precedent relating to market definition on which dominance should be assessed. Companies may, therefore, need to be guided in their assessment by precedents in other jurisdictions, specifically, the European Union. While to date it is not clear to what extent the Authority would choose to follow such precedents in conducting its own assessment, it is noteworthy that Saudi Arabia has recently joined the International Competition Network, fostering cooperation between member agencies in establishing and applying international competition law principles.

Going forward, the threshold for notification will change as the New Competition Law provides that reaching a dominant position, or economic concentration, will depend on both parties reaching an annual turnover exceeding an amount to be determined by the New Regulations.

It is possible for the Authority to grant exemptions to mergers that result in economic concentration if such exemption would lead to better market performance and provide benefits to consumers that outweighs the restriction. The New Regulations will provide further details on the threshold for notification and merger exemption.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory and must occur prior to completion of a prospective transaction that would create an economic concentration in Saudi Arabia. The law currently exempts fully stated-owned entities from the scope of its application. Further, any establishment that deals with government-owned entities may submit an application to be exempted in case of meeting the required conditions. The New Competition Law, however, provides that government-owned establishments and companies will be excluded only if they were solely authorised by the government to provide services or commodities in a particular area.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Current Law and the Current Regulations apply to all entities operating in Saudi markets as well as to activity that takes place abroad and leads to consequences contrary to fair competition within Saudi Arabia, although this is not specifically set out in the Current Law and Regulations.

Foreign-to-foreign mergers must therefore be notified in Saudi Arabia where the jurisdictional threshold is met, regardless of the location or nationality of the parties, subject to the local effects test (ie, the parties must operate in Saudi markets or engage in activity abroad that has harmful effects on competition in Saudi Arabia). The New Competition Law now expressly captures foreign-to-foreign mergers.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes. Foreign investment is not permitted in a number of sectors, which are specified in a list maintained by the Saudi Arabian General Investment Authority (SAGIA). In the most recent version of the list, the relevant sectors include:

- oil exploration, drilling and production;
- manufacturing of military equipment, devices and uniforms;
- manufacturing of civilian explosives;
- catering to military personnel;
- security and detective services;
- tourist orientation and guidance services related to Hajj and Umrah;
- real estate investment in certain regions of Saudi Arabia;
- printing and publishing (subject to a number of exceptions);
- commission agents;
- services provided by midwives, nurses, physical therapy services and certain quasi-doctoral services;
- fisheries; and
- poison centres, blood banks and quarantine.

In addition, SAGIA requires a minimum Saudi participation in entities that operate within certain sectors (eg, retail and wholesale trade, where SAGIA requires a minimum of 25 per cent Saudi participation in the relevant entity). While SAGIA issued a statement in September 2015 saying that it would permit 100 per cent foreign ownership of entities engaged in retail and wholesale trade, this has yet to be implemented.

For other sectors, non-Gulf Cooperation Council (GCC) countries (Saudi Arabia, Bahrain, Kuwait, Oman, Qatar and the United Arab

Emirates) must apply for and obtain a foreign investment licence from SAGIA. Foreign investments will be pursuant to the Saudi Arabian Companies Regulations and the Foreign Investment Regulations, and are overseen and regulated by SAGIA.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Currently, transactions resulting in an economic concentration must be notified to the Authority at least 60 days prior to their effective date (although in practice the Authority has up to 90 days to approve or deny approval for a filing).

Any violation of the provisions of the Current Law, which would include a failure to file, can be subject to a fine of up to 10 per cent of sales, not exceeding 10 million Saudi riyals, to be multiplied in the case of recurrence. The fines that may be imposed under the Current Law are without prejudice to any other penalties that may be applicable under any other laws.

The Authority may also take one or more of the following actions where a violation of the Current Law has been established:

- order the infringing establishment to cease the infringement immediately;
- require the infringing establishment to dispose of assets, shares or proprietary rights, or to undertake any other action to remove the effects of the infringement (this provision is drafted widely and, arguably, could be interpreted by the Authority as giving it the power to order the unwinding of the transaction);
- compel the infringing company to pay a daily fine of not less than 1,000 Saudi riyals and not exceeding 10,000 Saudi riyals until the infringement has ceased;
- order the infringing establishment to return (to the government) all gains made from the violation; and
- if the violation continues following imposition of a fine and order to end violation, order a temporary cessation of operations for a period of up to one month or permanently withdraw governmental licences (such as foreign investment, industrial or sector specific licences) required to operate.

The Law also establishes a right of action before the competent courts for natural or legal persons who suffer harm as a result of a violation of the Law.

To date, although there are no public records of the Authority imposing a fine for failure to file, the Authority is known to be investigating an alleged violation in this respect – including seeking to make full use of the above available sanctions.

Going forward, the time frame for notification prior to completion of an economic concentration transaction has been set at 90 days upon entry into force of the New Competition Law. The same penalties for failure to notify the Authority are maintained in the New Competition Law, with the addition of a further option for the Authority to replace the previously mentioned penalties by imposing a fine not exceeding three times the profits made by a violating entity. However, under the New Competition Law, the Authority no longer has the authority to permanently withdraw a government licence.

#### 10 | Which parties are responsible for filing and are filing fees required?

Currently, notification must be made by the entity that will be acquiring or increasing its economic concentration.

In the case of an acquisition involving a single acquirer, the acquirer alone must notify, while in the case of a merger that creates a new undertaking, or an acquisition by one or more parties, both (or all) parties will have an obligation to notify.

A filing fee of 1,000 Saudi riyals is required.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Economic concentrations must not be implemented before one of the following has occurred:

- the notifying party has received approval in writing from the Authority;
- 60 days have expired since notification, without the notifying party having been informed by the Authority in writing that the concentration is under review or has been blocked; or
- 90 days have expired since notification, without the notifying party having received written approval or rejection of the concentration from the Authority.

Neither the Current Law nor the Current Regulations provide for any exceptions to the suspension obligation.

The New Competition Law increases the waiting period for notification by the Authority to 90 days.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There are a number of possible sanctions for violations of the provisions of the Current Law, which would include closing before clearance. The possible sanctions are outlined in question 9.

As mentioned above, the penalties under the Current Law and the Current Regulations are applied (at least in theory) to parties that close a transaction before clearance is obtained from the Authority or where time periods imposed by the Law or the Authority are not observed.

While there has been no published decision to date where the Authority has imposed any sanction for failing to notify, the Authority has been known to investigate possible failures to notify.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The Current Law and the Current Regulations do not distinguish between a merger involving local or foreign entities. As noted in question 12, to date, there have been no examples of fines being imposed, and the instances where the Authority is investigating possible failures to notify are in relation to transactions involving Saudi entities. However, while there is no practical guidance available as to whether the Authority would apply sanctions in foreign-to-foreign transactions, this possibility cannot be excluded where the filing thresholds are met and the transaction has effects in Saudi Arabia.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Current Law and the Current Regulations do not distinguish between a merger involving local or foreign entities. A transaction that is notifiable should therefore not be closed prior to one of the events listed in question 11 occurring. Alternatively, the relevant business entity in Saudi Arabia could be subject to a different set of documentation that has as a condition precedent the obtaining of the Authority's clearance.

In theory, hold-separate arrangements may be a solution; however, such arrangements have not yet been tested with the Authority.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

The Merger and Acquisition Regulations issued by the Saudi Capital Markets Authority (the M&A Regulations) require that, where a public offer for shares would, if completed, be subject to the Law, the offeree company and the offeror must, inter alia, notify the Authority pursuant to the applicable provisions of the Law.

The M&A Regulations further provide that an offer that is subject to the Law must contain a condition that the offer will lapse if the Authority notifies the offeror or the offeree company in writing that it objects to the deal or has placed it under study and review as specified in the Law.

The M&A Regulations apply to publicly listed companies in Saudi Arabia and contain additional merger control provisions that apply to such transactions.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The filing must be made using the forms published by the Authority. A separate form must be completed for each merging entity.

The notification must include, for example, information on the relevant markets, the value of the notifying party's (or parties') sales in those markets, positive effects of the concentration on the market, and competitive dynamics in the market. Supporting documentation, namely the transaction agreement and the constitutional documents and financial statements of the notifying and target entities, must also be provided. The notification forms, as well as all supporting documentation, must be submitted in Arabic.

The Current Law and the Current Regulations do not contemplate derogations from the amount of information to be provided.

Going forward, however, the New Regulations will specify the procedures to be followed for notification of economic concentration, including the content, information and documents required under the New Competition Law regime.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

Upon notification, the Authority will verify whether all the necessary information has been provided. If the notification is complete, the Authority will notify the relevant party (or parties) and the time frame shall run from the date of the Authority's notice. If not, the relevant party or parties shall be informed of the missing information that must be provided.

Once a complete notification has been received, the Authority has 60 days within which to review the transaction and notify the notifying party (or parties) of its decision. The Authority may extend this period by 30 days, provided that the notifying parties are informed of the extension prior to the expiry of the 60-day period (see question 11).

The length of time to obtain a decision from the Authority is determined on a case-by-case basis. The Authority has rendered decisions in as few as seven days and as long as 60 days.

The New Competition Law extends the time period within which the Authority will review and notify the notifying party to 90 days. The New Regulations will specify further details on the mechanism of review and notification by the Authority's decision.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The Authority may request additional information during the investigation. Such requests must be in writing and must specify the required documents or information. The parties must provide the documents or information within 15 days of the Authority's request.

The Law and Regulations give the Authority wide discretion in terms of what additional information (if any) it may request.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for clearance is contained in the Rules and provides that the Authority shall prohibit or grant conditional clearance to a transaction where the Authority considers that it will lessen competition in Saudi Arabia.

No guidance is currently available on how the substantive test for clearance interacts with the jurisdictional test. The latter requires the creation or strengthening of a dominant position (see questions 2 and 5), which would appear to entail by definition a lessening of competition. However, in practice, not all mergers that have to be notified under the jurisdictional test would automatically be prohibited or cleared only with conditions under the substantive test. It is thus unclear in what circumstances a merger that meets the jurisdictional test of dominance will be cleared under the substantive test.

In determining whether a notified transaction will lead to a lessening of competition, the Authority will examine the following factors, which are set out in the Rules:

- the level of competition in the market;
- the prospect of new entry into the market;
- the effect on the commodity or product price;
- the existence of any regulatory or other barriers to entry;
- the level and historical trends of anticompetitive conduct in the market;
- the likelihood that the transaction would give the merged entity market power;
- the dynamic characteristics of the market including growth and innovation; and
- any opinions received as part of the public consultation process.

The Authority's review will also take account of some more general factors, namely:

- the need to maintain and promote effective competition between persons producing or distributing commodities or products and services in the market;
- promoting the interests of consumers, purchasers and other users in particular with regard to the quality, price and variety of commodities and services; and
- promoting the reduction of costs and development of new commodities and facilitating new entry.

Finally, where the Authority considers that the transaction is likely to substantially prevent or lessen competition, it will consider public interest justifications (see question 22) and pro-competitive efficiencies (see question 23).

With respect to the New Competition Law regime, the New Regulations, along with further guidance rules from the Authority, will determine the substantive test for clearance.

## 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. The Authority may, however, assess possible coordination between parents, which remain independent under the provisions on coordination set out in article 4 of the Law.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The factors set out in the Rules for the consideration of economic concentration (see question 19) suggest that the Authority's review will entail an economic analysis based on the effects of the merger on competition and will look beyond the market shares of the merging entities.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The Rules specifically require the Authority to consider whether the concentration can be justified by public interest, as well as economic efficiencies, where it appears from other factors that the concentration is likely to substantially prevent or lessen competition (see question 19). The Rules do not specifically identify what constitutes a 'public interest' for these purposes.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Authority is required to consider economic efficiencies where it appears from other factors that the concentration is likely to substantially prevent or lessen competition (see question 19). In such cases, the Authority shall determine whether the concentration is likely to result in any technological efficiency or other pro-competitive gain that will be greater than the effects of any prevention or lessening of competition.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Authority may exercise a number of powers to prohibit or otherwise interfere with a transaction where it considers that the transaction will lessen competition in Saudi Arabia. Such powers include:

- declaring the transaction unlawful;
- prohibiting the acquisition by any of the parties of the whole or part of an undertaking or the assets of the undertaking;
- requiring any person to effect the dissolution of any organisation, whether incorporated or not, or the termination of any association (ie, partnership) where the person concerned is a party to an economic concentration;
- approving the transaction subject to restrictions with regard to the manner in which any party to the concentration carries on business; and
- generally making such provisions as are necessary to terminate or prevent the transaction or to alleviate its anticompetitive effects.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The Authority may adopt a clearance decision subject to structural conditions, namely the dissolution of an organisation or the termination of an association, or behavioural conditions, namely restrictions with regard to the manner in which any party to the concentration carries on business (see question 24).

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Neither the Current Law nor the Current Regulations specify conditions or the timing relating to remedies.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

None, based on publicly available information.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is no specific guidance as to whether a clearance decision would cover ancillary restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Current Regulations allow any concerned party to raise an objection to the proposed concentration at the outset of the process (it is not specified who is a concerned party for these purposes). Any objection must be in writing, identify the name and address of the concerned party, and be made no later than 15 days following the announcement by the Authority of the concentration. The Authority will deal with all communications in strict confidence.

In addition, natural or legal persons who suffer harm as a result of an infringement of the merger control provisions in the Current Law have a right of action before the competent courts (see question 9).

A similar arrangement is provided under the New Competition Law with a firmer confirmation of the right of natural or legal persons to be compensated for damage or harm suffered as a result of anticompetitive activities in the market. In addition, the New Competition Law introduces provisions relating to the power of the Authority to summon official judicial officers to investigate, search and gather evidence in respect of complaints relating to establishments in violation of the law. The New Competition Law goes further by imposing a fine not exceeding 5 per cent of annual turnover, or 5 million Saudi riyals, on establishments that hinder or prevent judicial investigation officers from carrying out their official investigation duties.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Authority publishes a summary of the notification in the local media at the outset of the process.

Commercial information will normally be protected from disclosure through the confidentiality obligations to which the Authority is subject under the Law. Specifically, the Law requires the Authority's members and employees to maintain the confidentiality of information and documents that are obtained from firms and prohibits them from providing such information to any other party without the approval of the Authority.

The Law and Regulations do not provide details on the situations in which the Authority would approve of sharing information that is confidential to one party with another party.

The Law also provides, on the other hand, that a firm may not conceal information from the Authority on the pretext of confidentiality or for any other reason.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

No guidance on the extent to which the Authority will cooperate with antitrust authorities in other jurisdictions is currently provided in the regulations or legislation. It is of note, however, that a notifying party is required to inform the Authority in the notification form whether the concentration or a related concentration has been or will be notified to any foreign competition authorities.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Decisions of the Authority can be appealed to the Administrative Court within 15 days from notification of the decision (reduced from 60 days prior to the 2014 amendments to the Competition Law).

Decisions relating to fines or the temporary suspension of business are, in principle, effective and enforceable upon issuance (rather than on the determination of any appeal), unless the Administrative Court issues a freezing order in respect of the Authority's decision.

Details of appeals or judicial review under the New Competition Law regime will be provided in the New Regulations.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

See question 32.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Based on publicly available information, there has not been any enforcement action taken by the Authority in the context of foreign-to-foreign mergers. While, as noted in question 12, the Authority has enquired about possible failures to notify transactions, these have, so far, related only to deals taking place in Saudi Arabia. Similarly, the majority of transactions reported, which have been either approved or are currently still under review by the Authority, also appear to relate to Saudi entities.

Nonetheless, there are some foreign transactions reported by the Authority, including:

- Marriott International's acquisition of Starwood Hotel and Resorts;
- Nestlé SA's acquisition of Pfizer Nutrition;
- General Electric's acquisition of Alstom Power and its merger with Baker Hughes; and



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- the acquisition by Unilever of the Camay and Zest soap brands from Procter & Gamble.

In July 2014, the Authority issued its first prohibition decision, in relation to Saudi Vitriified Clay Pipe Co's (SVCP) proposed acquisition of Ceramic Pipes Co (Al Khazif for Pipes Co). Details of the prohibition decision have not been published. However, the transaction related to Saudi entities.

There is no explicitly stated specific enforcement concern of the Council at this time. However, the Authority is investigating at least one known case of failure to notify. This relates to a local deal.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

Yes, the New Competition Law, which will enter into force in October 2019, is the new legislation that will replace the Current Law.

Separately, the GCC is currently considering draft legislation that would create a 'unified competition law' applicable to all GCC countries.

# Serbia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Since 1 November 2009, the Serbian merger control regime has been governed by the Law on the Protection of Competition (LPC). It replaced the Competition Act 2005 (CPL). The LPC introduced some changes. In essence, however, it maintained the competition law framework established under the CPL. Since its entry into force, the LPC was further amended and its current version has been applicable since 8 November 2013. In addition to the LPC, the Serbian government has passed two regulations regarding merger control aspects: the Regulation on the Form and Manner of Filing a Notification of a Concentration (newly adopted version applicable since 2 February 2016) and the Regulation on the Criteria for Determining the Relevant Market.

The relevant authority for merger control (and competition law in general) is the Commission for the Protection of Competition (the Commission), which is competent for reviewing notifications and issuing decisions on notified concentrations. The Commission was established on 12 April 2006 and reports on its activities to the Serbian parliament. The Commission consists of the Council and the Technical Service. The Council consists of the president of the Commission as a separate body and four members who are each appointed for a term of five years (renewable for an additional five-year term) by the Serbian parliament.

More information on the Commission may be found on its website, [www.kzk.org.rs](http://www.kzk.org.rs).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The LPC defines the following as concentrations:

- mergers and amalgamations of undertakings within the meaning of company law;
- the direct or indirect acquisition of control over all or part of an undertaking by one or more undertakings; and
- the creation of a full-function joint venture.

The temporary acquisition of shares or a participating interest by banking, insurance or other financial institutions for the purpose of resale does not qualify as a concentration, provided that the resale occurs within 12 months from the date of the acquisition and that, during that period, the ownership status has not been used to influence the undertaking's market behaviour. Also, the acquisition of control by a bankruptcy administrator in the course of bankruptcy proceedings is not deemed to be a concentration (however, with regard to bankruptcy proceedings, see also question 8). In addition, the acquisition of shares or a participating interest in an undertaking by a company for the management of investment funds or an investment fund does not qualify as a

concentration, provided that the ownership status has not been used to influence the undertaking's market behaviour and provided that this status is only used to maintain the value of the investment.

The Commission will prohibit concentrations if they significantly restrict, distort or limit competition on the Serbian market, in particular where such restriction, distortion or limitation of competition results from the creation or strengthening of a dominant position.

#### 3 | What types of joint ventures are caught?

The LPC distinguishes between full-function joint ventures and cooperative joint ventures. The creation by at least two independent undertakings of a joint venture that will perform on a lasting basis all the functions of an independent business entity is deemed to be a concentration. On the other hand, the creation of a joint venture aiming at coordinating the market activities of two or more undertakings that maintain their legal autonomy does not constitute a concentration within the meaning of the LPC. The latter may be subject to provisions on restrictive agreements.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The LPC (article 5(2)) defines control as the ability to exert decisive influence on an undertaking's business activities, in particular on the basis of:

- shareholders' rights (corporate governance on the basis of company law);
- the ownership of or other proprietary rights to use all or part of the assets of an undertaking;
- contractual rights, covenants or securities; or
- claims, means of securing claims, or de facto due to existing business practice determined by the controlling undertaking.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Commission must be notified of a concentration when in the business year preceding the concentration:

- the combined worldwide turnover of the undertakings concerned exceeded €100 million and the turnover of at least one undertaking concerned exceeded €10 million in Serbia; or
- the combined turnover of the undertakings concerned exceeded €20 million in Serbia and the turnover of each of at least two undertakings concerned exceeded €1 million in Serbia.

In addition, the LPC provides for a filing obligation in the case of certain public takeover bids even where the above thresholds are not met.

This provision generally relates to joint-stock companies, the shares of which are traded on a Serbian stock exchange. Under certain conditions (see question 11), public takeover bids may be implemented prior to clearance.

Further, the LPC introduced the possibility of opening an ex officio investigation into concentrations where, even when the turnover thresholds set out above are not met, the undertakings concerned have a market share in Serbia of at least 40 per cent. However, there is no Commission practice yet in this regard.

The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between the undertakings affected by the concentration (thus, intra-group or mutual transactions are not taken into account).

In the case of undertakings providing financial services, insurance companies and companies engaged in the reinsurance business, the turnover is to be calculated as follows:

- for credit institutions and other financial institutions, as the sum of the following income items, after deducting value-added tax and other taxes directly related to those items:
  - interest income and similar income;
  - income from securities (ie, income from shares and other variable yield securities; income from participating interests; or income from shares in affiliated undertakings); commissions receivable;
  - net profit on financial operations; and
  - other operating income; and
- for insurance companies and undertakings engaged in the reinsurance business, as the sum of gross premiums (all amounts received and receivable) with respect to insurance and reinsurance contracts issued by or on behalf of the insurance undertaking, after deducting the taxes charged by reference to the amounts of the individual premiums or total volume of such premiums.

Two or more business transactions between the same undertakings concerned within the last two years are deemed to constitute one single concentration that occurred on the date of the occurrence of the last transaction.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the jurisdictional thresholds are met, the filing of a notification with the Commission is mandatory.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are subject to Serbian merger control if the turnover of the parties to the concentration exceeds the jurisdictional thresholds set out above. To date, the Commission's practice has not developed a de minimis or effects-based exemption. In the past few years, most of the cleared concentrations have been foreign-to-foreign mergers. The nexus test is equally not yet developed.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The most important rules in this context are as follows:

### Banking

In addition to scrutiny by the Commission, the acquisition of a qualified shareholding (ie, 5, 20, 33 and more than 50 per cent) in a Serbian bank and the acquisition of control over a company active in the financial

sector or the establishment of such company by a Serbian bank are subject to prior approval by the National Bank of Serbia.

The Commission and the National Bank of Serbia signed a Protocol on Cooperation in Antitrust Matters in the Financial Sector on 11 February 2008. In the Protocol, the two institutions undertook to exchange information and operate jointly and in a harmonised manner in the event of a violation of competition in the financial sector. In 2015, changes to the Banking Law were adopted; making it clear that the Commission (and not the National Bank of Serbia) is competent to review anticompetitive aspects of concentrations in the financial sector.

### Insurance

All corporate transformations of insurance companies (including mergers) must also be approved by the National Bank of Serbia.

There are similar rules for investment funds, voluntary pension funds, the telecommunications industry and the media sector.

### Public takeover bids

The LPC provides for a filing obligation in the case of a public takeover bid even where the jurisdictional thresholds are not met. The provision generally relates to the (direct or indirect) acquisition of control over open joint stock companies, the shares of which are traded on the Serbian stock exchange (exceptionally also closed joint stock companies can be caught). With regard to the application of the suspension obligation, see question 11.

On 11 November 2009, the Commission issued a statement on the filing deadline for notifications in case of public takeover bids. The statement had been requested by the Serbian Securities Commission because of the unclear wording of the LPC. The LPC provides that the notification must be filed within 15 days of the announcement of the public takeover bid or its closing (whichever occurs first). The confusion occurred because of the fact that an undertaking launching a takeover bid does not know the exact percentage of the shareholding it will have acquired until the bid is closed (and, respectively whether such shareholding will confer control to the bidder once the bid is closed). The Commission clarified that in such situation the notification will be deemed timely even if submitted within 15 days of the date of the closing of the bid. Another point raised with the Commission with respect to public takeover bids was the question of whether a notification is always required when a public takeover bid is – by law – required in Serbia. On 16 December 2009, the Commission stated that if there is no change of control, there is no filing obligation (irrespective of the fact that a public takeover bid is required in Serbia).

It remains to be seen how the above rules will affect foreign-to-foreign transactions. The Serbian Securities Commission stated that a public takeover bid in Serbia would be required, under certain conditions, if a change of control occurs in a foreign undertaking (that controls a Serbian joint stock company) (ie, there is an indirect change of control over a Serbian undertaking). Thus, in such cases, an argument can be made that a notification to the Commission would also be required in Serbia (regardless of whether jurisdictional thresholds are met). The Commission has not opined on this issue to date. However, the Serbian takeover legislation has been amended in the meantime to support the aforementioned interpretation of the Serbian Securities Commission.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The LPC provides that a merger notification has to be submitted to the Commission within a period no later than 15 days after the signing of

the relevant agreement, the announcement of a public offering, the announcement of the start or end date of a public takeover bid, or the acquisition of control (whichever of these triggering events occurs first).

The filing may already be submitted at the time at which the parties have a serious intention to conclude the relevant agreement; that is, they sign a letter of intent, or announce their intention to make a public offer for the purchase of shares in an undertaking.

Late filing may lead to the imposition of a fine by the Commission on the notifying party in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of that undertaking). The deadline for payment of such procedural penalty is set out in the Commission's decision imposing such penalty and cannot be less than one month or more than three months following the delivery of the decision.

With regard to the sanctions for closing before clearance, see question 12.

## 10 Which parties are responsible for filing and are filing fees required?

Article 63(3) of the LPC provides that the notification has to be submitted by the person or undertaking acquiring control of all or part of one or more undertakings. In all other cases, the undertakings concerned must jointly submit the notification of a concentration.

The filing fees are determined by a specific tariff (which has been revised as of 14 July 2011), and amount to the following:

- for an expedited procedure (Phase I), the fee is calculated at 0.03 per cent of the combined turnover of all undertakings concerned for the preceding year, but is capped at €25,000; and
- for the regular procedure (Phase II), the fee is calculated at 0.07 per cent of the combined turnover of all undertakings concerned for the preceding year, but is capped at €50,000.

The filing fee for Phase I has to be paid within three days of submission of the merger notification. The filing fee for Phase II (ie, up to additional €25,000) must be paid after the Commission has decided to open Phase II.

## 11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The LPC provides that the intended concentration must not be implemented until the Commission issues a decision authorising the transaction or until the expiry of the waiting period.

The duration of the waiting period depends on whether Phase I or Phase II proceedings are applied.

The Commission decides in Phase I proceedings if the concentration will not prevent, restrict or distort competition on the market, especially by creating or strengthening a dominant market position. The Commission then must issue its decision within one month of the submission of the notification. After expiry of this period, it is presumed by law that the concentration has received approval.

In cases that may raise competition concerns, the Commission may initiate Phase II proceedings within one month of submission of the complete notification. The Commission must then issue a decision within four months of initiating such proceedings. Again, after expiry of this period, it is presumed by law that the concentration has received approval.

The suspension obligation does not prevent the implementation of a takeover bid of which the competent authority has been notified in accordance with the regulations on public takeovers or on privatisation. This applies only under the condition that the filing was submitted on time, and that the acquirer does not exercise its voting rights, or does so

only to maintain the full value of the investment and based on an explicit written approval of the Commission.

We are not aware that the Commission's approach to the suspension obligation has changed as a consequence of the economic crisis.

## Pre-clearance closing

### 12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

In the case of closing before clearance, the Commission may require the undertakings concerned to:

- dissolve the concentration, sell shares, terminate a contract or take other measures necessary to re-establish the same status that existed before the implementation of the concentration (the measure of de-concentration); and
- impose a fine of up to 10 per cent of the total annual turnover of the responsible undertaking generated in the territory of Serbia in the preceding financial year (the protective measure). The deadline for payment of the fine is set out in the Commission's decision imposing this fine and cannot be less than three months or more than one year following the delivery of the decision. Fines may not be imposed after the expiry of five years following the prohibited implementation of the concentration. Because this five-year period restarts with each Commission's action directed at discovering the breach, the Commission ultimately loses the right to prosecute the infringement after the expiry of an overall period of 10 years. Once the Commission's decision imposing the fine becomes enforceable or final, it may only be enforced within five years.

We are not aware that the above measure of de-concentration has so far been applied in practice. However, there are indications that the Commission's willingness to investigate and sanction infringements of the standstill obligation may be increasing. In April 2013, the Commission opened an investigation against a Serbian company for failure to file (the investigation was based on an anonymous hint and information the Commission extracted from the publicly accessible corporate registry). In the course of that proceeding, the company having infringed the filing obligation submitted the outstanding notification and the Commission cleared the transaction in July 2013. The acquirer was not fined for late filing or for failure to file. However, the Commission, before clearing the case, opened Phase II proceedings and thus the acquirer was required to pay the higher Phase II fees amounting to €50,000 (instead of only €25,000 for Phase I). The Commission applied the same (punitive) approach in at least three other cases in the course of 2014 (all involving unreported acquisitions by a major Serbian telecommunications operator). Further, in 2014, the Commission opened investigative proceedings against a Russian company for failure to file its acquisition of a 50 per cent share in a Serbian company running one of the oldest Serbian daily newspapers. In the course of the proceedings, the Commission adopted a procedural measure forbidding any disposal of the disputed shareholding until all the relevant facts were established. The Russian company was also required to notify the transaction and, in 2015, the Commission imposed on the Russian company a procedural fine of €143,500 for failure to provide certain information during the merger control proceedings. That was the first time a fine had been imposed by the Commission on a foreign undertaking. In early 2016, after several public invitations to undertakings to comply with their local notification obligations, the Commission opened investigative proceedings against a local bank for its failure to notify the acquisition of certain real estate property (business premises) in Serbia. These proceedings were stopped in early 2017 owing to the Commission's finding that no concentration in fact occurred. In late 2016, the Commission opened

investigative proceedings against a local software developer for not reporting its acquisition of sole control in a local computer retailer (the software developer had previously reported its acquisition of joint control in the latter). The company was eventually fined in 2017 with a fine amounting to 0.25 per cent of its turnover generated in Serbia in the preceding year (ie, approximately €56,000).

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

The sanctions for closing before clearance (see question 12) are also applicable in case of foreign-to-foreign mergers. However, we are not aware of any cases where the Commission has applied these sanctions to such mergers since the introduction of the LPC in November 2009. Still under the provisions of the CPL, only one case has been reported where misdemeanour proceedings were initiated against a Croatian company in connection with a foreign-to-foreign merger (see question 34).

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

There have been indications in practice that in certain instances the Commission may find local 'hold-separate' arrangements acceptable to permit the implementation of foreign-to-foreign mergers outside Serbia before clearance in Serbia. However, such arrangements have not been tested formally with the Commission and the Commission has not issued a written opinion in this regard.

**Public takeovers**

**15 | Are there any special merger control rules applicable to public takeover bids?**

See question 8.

**Documentation**

**16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?**

On 2 February 2016, a new Regulation on the Form and Manner of Filing a Notification of a Concentration (the Filing Regulation) entered into force. The new Filing Regulation determines the information to be submitted in a merger filing and, for the first time, distinguished between a short and long-form filing.

A short-form notification is sufficient where the undertakings concerned have no overlapping activities in Serbia or where the competitive impact of the transaction would be small (ie, where the combined market share of the undertakings concerned in a horizontal merger is below 20 per cent, and where the individual or combined market shares of the undertakings concerned in a product market which is upstream or downstream of a product market in which any other undertaking concerned is engaged (vertical relationships) is below 30 per cent; or where the combined market share of the undertakings concerned in a horizontal merger is below 40 per cent, and the change (delta) of the Herfindahl–Hirschman Index (HHI) is below 150). Concentrations concerning changes from joint to sole control will also benefit from a short-form notification. However, even in all these cases, the Commission can ask for a long-form notification under certain conditions (one of such conditions being that a relevant market is a highly concentrated one (ie, where HHI is equal or above 2,000) and the HHI  $\Delta$  is equal or above 150). Where the notifying party wishes the authority to review and assess restrictions that are directly related and necessary

to the transaction (otherwise known as ancillary restraints), it will need to submit a long-form notification.

Short-form filings must in principle provide certain basic information about the business activities of the undertakings concerned, their representatives, revenues and local Serbian activities, as well as their suppliers and customers. Furthermore, the transaction structure must be explained (including the expected deadline for its closing) as well as the markets concerned and the competitive situation therein. To the extent possible, the market and business information provided should also be supported by documentation; apart from that, the authority expects to receive at least the following formal supporting documents: power of attorney, certificates of incorporation and annual reports of the undertakings concerned, and a copy of the transaction documents. Except for the power of attorney (which must be provided as original and addition must also be legalised), simple copies are sufficient (instead of originals).

If a long-form notification is required, the level of detail to be provided with respect to the relevant market increases significantly. In particular, market data must be provided for the last three completed business years (instead of only for the last year prior to the transaction).

The Commission has the right to require additional information and documents. If the notifying party is not able to submit some of the documents or information required, it should provide a brief explanation as to why a particular document or piece of information is not available.

Providing wrong information or ignoring the Commission's requests for information may lead to fines in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of the undertaking).

The notification and all documents attached need to be submitted in the Serbian language.

**Investigation phases and timetable**

**17 | What are the typical steps and different phases of the investigation?**

The concentration must not be implemented until the Commission issues its decision authorising the transaction or until the expiry of the waiting period. In Phase I proceedings, the Commission decides within one month of the submission of a complete merger notification. In Phase II proceedings, the Commission has to issue a decision within four months of initiating such proceedings. If the Commission does not decide within these waiting periods, the concentration is deemed to be approved (see question 11). In our experience, the Commission typically decides within the given deadlines.

The LPC does not provide the possibility for the parties to obtain a waiver or to apply for expedited proceedings.

**18 | What is the statutory timetable for clearance? Can it be speeded up?**

The Commission may apply Phase I proceedings if an accurate assessment of the case may be undertaken already based on the submitted evidence or if the assessment can be based on facts already known to the Commission, and it may be reasonably assumed that the concentration is likely not to impede effective competition, mainly by not creating or strengthening a dominant position in the market.

In more complex cases that do not satisfy these criteria, the Commission may initiate Phase II proceedings. Apart from the four-month deadline for decision-making, the procedural setup of such in-depth investigations is largely unregulated and thus subject to the Commission's discretion.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The Commission determines in its assessment whether the notified concentration will lead to a significant prevention, restriction or distortion of effective competition; in particular, whether it will result in the creation or strengthening of a dominant position in the relevant market.

The LPC provides the following general criteria for the assessment as to whether a concentration prevents, restricts or distorts competition:

- the structure of the relevant market;
- actual and potential competitors;
- the market position of the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users in the relevant market;
- legal and other barriers to entry on the relevant market;
- the domestic and international competitiveness of the undertakings concerned;
- supply and demand trends for the relevant goods or services (or both);
- the development of technical and economic progress; and
- the interests of the intermediate and ultimate consumers.

In the proceedings, the Commission will assess the effect that the intended concentration is likely to have (even if the 'failing firm' defence is pleaded with respect to the target). In practice, the Commission often relies on criteria developed by the European Commission.

#### 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures, but the Commission would assess whether the establishment of the joint venture is likely to trigger 'spillover' effects on the competitive behaviour of the parent companies.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

See question 19. The theory of harm applied by the Commission is in general very much in line with the approach under EU competition law. In addition to a test of dominance (over 40 per cent market share), the Commission will consider anticompetitive effects that could potentially arise out of a concentration (eg, loss of current and potential competition, unilateral effects resulting from horizontal mergers, joint dominance, conglomerate effects, vertical effects).

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The LPC exempts companies performing activities in the public interest as well as official monetary institutions if the application of the LPC could prevent them from performing activities in the public interest (ie, from performing entrusted affairs).

According to its 2009 Report, the Commission rejected a merger notification regarding the acquisition of 51 per cent of the shares in the public Serbian petroleum company NIS owing to a lack of jurisdiction. The Commission took the view that the Law on Confirming the Agreement in the Oil and Gas Sector (Official Gazette of the Republic of Serbia – International Agreements, No. 83/2008), which required the

Republic of Serbia to sell 51 per cent of the shares in NIS to the acquirer, constituted a *lex specialis* and that therefore it did not have jurisdiction to assess this concentration.

We are not aware that the Commission's approach has been affected by the economic crisis.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Commission will, to some extent, take into account economic efficiencies in assessing whether a concentration prevents, restricts or distorts competition. However, as the Commission is a relatively new institution, there is hardly any precedent in the merger control sector on the Commission's approach in this respect.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission is competent (*inter alia*) to issue a clearance decision, a conditional clearance decision or to prohibit the concentration.

The Commission will prohibit the concentration if the conditions for approval (see questions 19 and 21) are not fulfilled. If the Commission understands (following a first assessment of the case) that the notified concentration may not fulfil the conditions for approval, it will inform the notifying party about the relevant facts, evidence and other elements on which this assessment is based. The notifying party may then present its view before the Commission and propose modifications (conditions and obligations) to meet the requirements for approval within a given time frame set by the Commission. If the Commission, after the modification of the notification, concludes that the concentration no longer raises serious doubts, it shall issue a conditional clearance decision providing conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they entered into with the Commission to approve the concentration. Such commitments are binding for the parties and, in the case of a breach, the Commission may repeat the proceedings.

As regards ancillary restraints, these are for the first time now specifically addressed in the new Filing Regulation, which became applicable in February 2016 (see question 16). The Filing Regulation makes clear that the notifying party needs to submit a long-form notification if it wishes the Commission to review and assess restraints that are directly related and necessary to the transaction. For the time being, there is no further guidance available on how the Commission will assess them.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The LPC provides for the undertakings concerned the possibility to propose conditions and obligations to remedy competition concerns (see question 24). However, the LPC does not specify the type of remedies acceptable to receive merger clearance. Hence, they have to be negotiated in the course of the proceedings on an individual basis.

In 2009, the Commission issued two conditional clearance decisions. In the first case, the acquirer was ordered to maintain certain current lease agreements of which the target company was the lessor and to annually report on the status of those agreements for the next three consecutive years. In the second case (a foreign-to-foreign transaction in the aviation business) the undertakings concerned were

obliged to maintain an existing code-share agreement for a certain flight route to or from Belgrade and to abstain from increasing the ticket price on that flight route for a certain period of time without prior approval from the Commission. We are not aware that any conditional clearance decisions have been issued by the Commission in 2010. In 2011, after exhaustive negotiations, the Commission prohibited the implementation of a concentration in the sugar sector, as it found that the remedies proposed were insufficient to compensate for the distorting effects caused by the concentration. However, this decision was overturned on appeal by the Administrative Court and the Commission conditionally approved the concentration ultimately in early 2013 (the commitments, inter alia, included the divestment of a part of the target's business in Serbia to an unrelated, financially sane buyer with experience in the sugar business).

In 2012, the Commission issued conditional clearance decisions in the context of the acquisition of a bankrupt company in the retail sector and with regard to a merger relating to the sector of e-prepaid top-up cards and services for mobile phones. In 2013 the Commission cleared a concentration between two retail chains prescribing structural and behavioural remedies. In 2014, two more conditional clearances were issued, one in the cement sector (with one undertaking committing to divest all of its Serbian business operations) and one in the airline industry (where the commitments of the undertakings concerned included, among others, an obligation to release certain daily slots in relevant airports to one or more new interested market entrants). The Commission issued no conditional clearance decisions in 2015, but issued one decision subject to conditions, in the sugar industry, in 2016 and one, in the telecommunications sector, in 2017. In the 2016 conditional clearance decision, the acquirer committed to various reporting remedies as well as to offer for sale the underperforming sugar factories prior to any business decision to permanently close such factories. The conditional clearance decision of 2017 combined a divestiture commitment and behavioural remedies. The incumbent telecommunication services operator committed to divest a part of its network infrastructure in the territory of the city of Belgrade, where overlapping activities were found to exist. This was combined with reporting commitments as well as the commitment by the acquirer to offer an alternative solution to the current service users of the target company when entering into an agreement with them. In 2018, one further conditional clearance followed in the yeast sector that subjected the undertakings concerned mostly to reporting obligations. The overall number of conditional clearances issued since the Commission was first set up in 2006 is fewer than 20.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

As there are no specific provisions in the LPC that identify the type of remedies acceptable and the practice of the Commission in this regard is scarce, much is left to the discretion of the Commission. The 2014 conditional clearance cases (see question 25) were interesting in the sense that the commitment processes (including the timing issues related thereto) followed the procedural steps and formalities applicable under the EU regulatory framework. This may have been a consequence of the fact that the undertakings concerned had to coordinate their commitment process before the Commission with the respective case pending before the European Commission. For future cases and to improve legal certainty, guidelines by the Serbian Commission on the procedural steps to follow and on the formalities and provisional timing of the proposed remedies or commitments would be welcomed.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

See questions 25 and 26.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Where the notifying party wishes the authority to review and assess restrictions that are directly related and necessary to the transaction (otherwise known as ancillary restraints), it will need to submit a long-form notification. For details, see questions 16 and 24.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

In Phase I proceedings, customers and competitors are typically not involved in the review process.

In Phase II proceedings, the Commission may require information and data from the undertakings concerned, competitors, customers, complainants, public bodies and organisations (eg, communal authorities, statisticians, tax authorities). Also, third parties can submit observations to the Commission.

The LPC explicitly defines who is not considered to be a party in the proceedings:

- providers of information and data;
- experts and organisations whose analysis is used in the procedure; and
- other public entities and organisations cooperating with the Commission in the proceedings.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

In line with the LPC, the Commission publishes in the Official Gazette and on the website of the Commission ([www.kzk.org.rs](http://www.kzk.org.rs)) general information about decisions made on the infringement of competition (eg, the infringement of the filing or standstill obligation) and orders to initiate ex officio proceedings. Notice on the submission of a merger filing is not published.

In recent years, the Commission has gradually developed its approach regarding the publication of decisions. In a first step, in early 2012 the Commission started making public the operational part of its decisions (and in some exceptional cases even whole decisions). In mid-2013, the Commission began publishing complete non-confidential versions of its decisions (ie, entire decisions with confidential data redacted). Information is redacted from the decision only following the party's well-founded request accompanied by a reasonable explanation as to why confidentiality is of utmost importance (instead of simply stating that it considers the case and related information to be confidential).

Only the parties to the proceedings may request access to the file. Third parties that may have an interest in monitoring the procedure receive only general information on the course of the proceedings.

A party that provided information to the Commission may request from the Commission that it protects its source of information or the information itself, provided that there is a justified reason to believe

that the disclosure of the source or the information itself may cause substantial damages. The president of the Commission is competent to issue the respective order on the protection of the source or the protection of information.

Merger filings also receive some publicity from the Commission's annual report on its activities for the preceding year.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission generally cooperates with antitrust authorities in other jurisdictions, in particular with those from the region (ie, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Montenegro, Romania and Slovenia). In June 2010, it concluded a memorandum of understanding with the Austrian competition authority that, inter alia, refers to the exchange of case-related information. In 2011 and 2012, the international cooperation has been further increased (eg, in 2012, cooperation agreements were signed with the competition authorities of Kazakhstan, Romania and Russia; in 2013, cooperation agreements were signed with Slovenia and Croatia). Most recently, cooperation agreements were signed with the competition authorities of Belarus and Turkey.

In addition, the Commission cooperates with a number of international organisations that are (to some extent also) involved in antitrust matters. Such organisations include the International Competition Network, the Organisation for Economic Cooperation and Development, the Secretariat of the United Nations Conference for Trade and Development and the Network for the Protection of Competition in South Eastern Europe. In September 2013, the Commission also became a member of the Merger Working Group.

Within the framework of Serbia's Stabilisation and Association Agreement, the Commission also cooperates on a regular basis with the European Commission and the Delegation of the European Union to Belgrade.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Against the final decision of the Commission, a legal action may be filed with the Administrative Court (which became operational in 2010). For a recent example of judicial review see, for example, the successful appeal submitted in a case relating to the sugar industry (see question 25).

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

The legal action has to be filed within 30 days of the date the decision was submitted to the party concerned. The Administrative Court shall then decide at the latest within a period of three months. However, the law does not provide for a sanction if the court fails to issue its decision within this period. In practice, judicial review may take several months, depending on the complexity of the case.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2008, according to publicly available information, the Commission (still under the provisions of the CPL) initiated with regard to a

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foreign-to-foreign merger misdemeanour proceedings against a Croatian company (and a responsible person within such company) with a misdemeanour court for implementing a concentration without obtaining the Commission's prior approval. When the misdemeanour court rejected the Commission's request, it filed an appeal, the outcome of which has not been published. Further details of this case have not been made public. In 2017, the Commission imposed its first fine for failure to notify (see question 12). In general, enforcement activities of the Commission are increasing.

One of the current concerns of the Commission is the possibility of enforcing the sanctions specified in question 12 in the event of a foreign-to-foreign merger (ie, in situations where the undertakings concerned, although they do not have a registered entity in Serbia, realise income on the basis of their product sales in this market, thus meeting the turnover thresholds set out in question 5).

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

Following the remarks and recommendations of the European Commission expressed in its 2012 Progress Report for Serbia, the LPC was amended in late 2013. Furthermore, a new Filing Regulation started to apply in February 2016 (see question 16). In 2018, a new set of amendments to the LPC has been prepared by the working group within the Serbian government, which currently continues to be subject to public debate (see question 36). The Commission is also expected to provide guidance on frequently asked questions in the merger control sector.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The working group set up within the Serbian government to prepare a new Competition Protection Law has circulated the first proposal of the new law for comments by the public in 2018. The proposal was updated and circulated for an additional round of comments in early 2019. On the one hand, the proposal attempts to consolidate into existing rules the Commission's practices of the past 14 years and, on the other, to

reconcile the procedural aspects of the Commission's work with the recently enacted Law on Administrative Proceedings.

As regards merger control, it is proposed that the jurisdictional thresholds for notifiable concentrations are increased (something that has long been lobbied for by industry representatives) as well as to introduce a mandatory filing obligation regarding acquisitions leading to shares of more than 40 per cent in a product market in Serbia (ie, regardless of whether the turnover thresholds are met). The existing exceptions from the notion of a 'concentration' are restricted insofar as, for example, acquisitions by investment funds can no longer benefit from this exception. The time limits for the submission of the notification and for deciding on the case are prolonged. Furthermore, the procedure for requesting a derogation from the suspension obligation (eg, in cases of public takeovers or privatisations) shall be facilitated.

In early 2019, the Serbian Commission also initiated two Phase II merger control proceedings: one in the sector of retailing of home appliances and the other in the telecommunications sector. These proceedings are still ongoing.

# Singapore

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Singapore Competition Act (Cap 50B) (the Competition Act), which was passed in October 2004. The Competition Act is administered and enforced by the Competition and Consumer Commission of Singapore (formerly known as the Competition Commission of Singapore) (the Commission), which was established as a statutory body under the Competition Act, and is under the purview of the Ministry of Trade and Industry. The Commission has powers to investigate and impose sanctions. The Competition Act, with some exceptions (set out in its Third and Fourth Schedules), applies generally to prohibit:

- anticompetitive agreements (section 34 prohibition);
- the abuse of a dominant position (section 47 prohibition); and
- mergers and acquisitions that substantially, or may be expected to substantially, lessen competition within any market in Singapore (section 54 prohibition).

The Competition Act was implemented in three phases. On 1 January 2005, the provisions establishing the Commission came into force. The provisions on anticompetitive agreements, decisions and practices, abuse of dominance, enforcement, appeal processes, and other miscellaneous areas under the Competition Act came into force on 1 January 2006. The provisions relating to mergers and acquisitions came into force on 1 July 2007. On 1 November 2016, the Commission released revised versions of its guidelines. Particularly in respect of mergers, the Commission issued the CCCS Guidelines on the Substantive Assessment of Mergers 2016, which took effect on 1 December 2016.

In addition to enforcing the Competition Act, with effect from 1 April 2018, the Commission took over the role as the government agency responsible for administering and enforcing the Consumer Protection (Fair Trading) Act (Cap 52A) (the CPFTA). The CPFTA sets out provisions for the protection of consumers against unfair practices, and gives consumers certain statutory rights in respect of goods that do not conform to contract, and related matters. The Commission will assume investigative and enforcement powers to take timely action against recalcitrant retailers. For example, the Commission's investigative powers include the power to require documents, articles or information, the power to enter premises with and without warrant, and the power to examine and secure the attendance of any person who appears to be acquainted with any of the facts or circumstances relevant to an investigation.

Laws against anticompetitive behaviour in respect of particular industry sectors such as telecommunications, media, post, gas and electricity can be found in certain statutes that regulate such sectors, and are enforced by industry-specific regulators. These industry sectors are carved out from the Competition Act. On cross-sectoral competition

matters, the Commission will work with the relevant sectoral regulator to determine which entity is best placed to handle the case in accordance with the legal powers given to each. The Commission and the sector-specific regulators will cooperate and coordinate closely to prevent double jeopardy and to minimise the regulatory burden in dealing with the case. The lead will be taken by the agency best placed in terms of the ability to investigate the alleged anticompetitive conduct and impose any necessary remedies.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Subject to certain exclusions and exemptions, mergers and anticipated mergers that result, or may be expected to result, in a substantial lessening of competition within any market in Singapore will be caught.

Under section 54(2) of the Competition Act, a merger is regarded as occurring for the purpose of the Competition Act if:

- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

Section 54(7) of the Competition Act provides that a merger shall not be deemed to occur if:

- the person acquiring control is a receiver or liquidator acting as such or is an underwriter acting as such;
- all the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
- control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or
- control is acquired by an undertaking, the normal activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others under the circumstances set out in section 54(9) of the Competition Act.

For the definition of 'control', please refer to question 4.

As set out in the Fourth Schedule of the Competition Act, the section 54 prohibition does not apply to any merger:

- if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects because of the substantial lessening of competition in the relevant markets in Singapore;

- approved by any minister or any regulatory authority (other than the Commission) where the requirement for approval is imposed by written law (in the case of the Monetary Authority of Singapore, the section 54 prohibition also does not apply where the requirement for approval is imposed by instruments issued under written law);
- under the jurisdiction of another regulatory authority under any written law relating to competition or a code of practice relating to competition issued under any written law (eg, in the energy, telecommunications and media industries); or
- relating to the supply of licensed and regulated ordinary letter and postcard services, potable piped water, wastewater management services, licensed and regulated bus services, licensed and regulated rail services, and licensed and regulated cargo terminal operations.

Where the Commission proposes to make an unfavourable decision, the merging parties may apply to the Minister for Trade and Industry, within 14 days of the date of the notice, for the merger to be exempted on the ground of any public interest consideration. The CCCS Guidelines on Merger Procedures 2012 clarify the meaning of 'public interest consideration' with reference to section 2 of the Competition Act. 'Public interest consideration' for the purposes of the Competition Act refers to 'national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe'. Therefore, for a matter to qualify as a 'public interest consideration' for the purpose of an exemption from section 54 of the Competition Act, such a matter will first have to be gazetted. The Minister's consideration of an application for a transaction to be exempted on the ground of any public interest consideration is hence limited to matters of national or public security and defence, unless other matters are gazetted as such. The decision of the Minister will be final. The Minister may revoke any exemption of a merger (or anticipated merger) that has been granted if he or she has reasonable grounds for suspecting that the information on which he or she based the decision was incomplete, false or misleading in a material particular. As of 1 May 2019, the Minister has not exercised the power to gazette any matter on the basis of the 'public interest consideration' set out under section 2 of the Competition Act.

### 3 | What types of joint ventures are caught?

A joint venture is subject to the section 54 prohibition if it is considered a 'merger' under the Competition Act. A joint venture constitutes a merger when:

- it is subject to joint control;
- it operates in the market and performs all the functions of an autonomous economic entity operating in that market; and
- it is intended to operate on a lasting basis.

Joint ventures are broadly defined as collaborative arrangements by which two or more undertakings devote their resources to pursue a common objective.

Joint control exists where two or more parties have the possibility of exercising decisive influence over the undertaking, including the power to block actions that determine the strategic commercial behaviour of the undertaking. It is characterised by the possibility of a deadlock resulting from the power of two or more parent companies to reject proposed strategic decisions, and a requirement of consensus in determining the commercial activities of the joint venture. See question 4 for further elaboration on the definition of control.

A joint venture is subject to the section 54 prohibition only if it operates in the market and performs the functions normally carried out by undertakings operating in that market. Joint ventures that take over one specific function – for example, R&D or production – without access

to the market will generally not be caught. However, a joint venture that uses the distribution network of its parent companies or relies heavily or entirely on sales to its parent companies may be performing the functions of an autonomous economic entity, as may a joint venture performing the normal functions of a trading company operating in a trade market.

Joint ventures are subject to the section 54 prohibition only if they operate on a lasting basis. This may be shown by the commitment of resources from parent companies to perform its functions. Provisions that provide for the dissolution of the joint venture, the withdrawal of parent companies or a fixed duration for the joint venture do not prevent the joint venture from being considered as operating on a lasting basis. For joint ventures of a fixed duration to be considered as operating on a lasting basis, it must be sufficiently long to bring about a lasting change in the structure of the undertakings concerned, or where the agreement provides for possible continuation of the joint venture. On the other hand, a joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration.

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The essence of 'control' is the ability to exercise 'decisive influence' in relation to an undertaking.

For this purpose, control of an undertaking is seen to exist if, by reason of rights, contracts or any other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by:

- ownership of, or the right to use all or part of, the assets of an undertaking; or
- rights or contracts that enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

The Commission considers that decisive influence is generally deemed to exist if there is ownership of more than 50 per cent of the voting rights. Where the ownership is between 30 per cent and 50 per cent of the voting rights of the undertaking, there is a rebuttable presumption that decisive influence exists. 'Voting rights' refers to all the voting rights attributable to the share capital of an undertaking that are currently exercisable at a general meeting. However, these thresholds are only indicative and control could potentially be established at levels below these thresholds if other relevant factors provide strong evidence of control. Other forms of voting rights will also be taken into account in assessing control.

Besides legal ownership through the acquisition of property rights and securities, de facto control may also be established. As there are no precise criteria for determining when an acquirer gains de facto control of an undertaking's activities, the Commission will adopt a case-by-case approach taking into account all relevant circumstances.

In determining whether decisive influence is capable of being exercised, all relevant circumstances must be considered, and not solely the legal effect of any instrument, deed, transfer, assignment or other act.

It is possible that decisive influence may be capable of being exercised by a person who has only a minority interest. For example, control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major investments, appointment of senior management or market-specific rights.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

In general, mergers should be notified to the Commission if the merger parties think the merger may result in a substantial lessening of competition within any market in Singapore. Merger parties should note the risk that if a merger is not notified, the Commission may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for suspecting that the section 54 prohibition has been infringed or will be infringed, and has the ability to subsequently make directions or impose financial penalties in respect of any infringement.

The Commission is unlikely to consider a merger or anticipated merger to give rise to competition concerns unless it meets or crosses the following indicative thresholds:

- the merged entity will have a market share of 40 per cent or more; or
- the merged entity will have a market share of between 20 and 40 per cent and the post-merger market share of the three largest firms, that is, the concentration ratio of three largest firms (CR3), is 70 per cent or more.

If the merger situation meets or crosses either of the two thresholds, the Commission may review the merger situation further. However, because market concentration is only one of the various factors used in assessing a merger situation, a merger that does not cross the thresholds but raises competition concerns may still be subject to the Commission's consideration.

The Commission is also unlikely to investigate a merger situation that only involves small companies, namely where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S\$5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below S\$50 million.

The above thresholds are merely indicative, and the Commission may investigate merger situations that fall below these indicative thresholds in appropriate circumstances. Conversely, merger situations that meet or exceed the thresholds stated in the CCCS Guidelines on the Substantive Assessment of Mergers 2016 are not necessarily prohibited by section 54 of the Competition Act.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification to the Commission for a decision in respect of a merger or anticipated merger is voluntary. Merger parties may either make an application to the Commission in respect of an anticipated merger which has been made known to the public. Alternatively, merger parties may wait until the anticipated merger has been carried into effect before making an application. In these situations, merger parties are encouraged to notify as soon as possible after completion. If a merger or anticipated merger meets or exceeds the thresholds indicated in question 5, the Commission encourages merger parties to consider making an application for a decision, as the Commission is likely to give further consideration to the merger situation before being satisfied that it does not raise any competition concerns under the Competition Act.

To assist with the planning and consideration of future mergers, in particular at the stage when the merger parties consider it necessary to preserve the confidentiality of the transaction, merger parties may apply under section 55A to the Commission for its advice as to whether an anticipated merger, if carried into effect, is likely to infringe section 54. The Commission is prepared to give confidential advice on whether or not a merger is likely to raise competition concerns in Singapore,

with the necessary qualification that such advice is provided without having taken into account third-party views. Confidential advice is only available in certain circumstances, and at the absolute discretion of the Commission, so that its resources may be managed appropriately. Following self-assessment, merger parties may approach the Commission for confidential advice if the following conditions are met. First, the merger must not be completed but there must be a good faith intention to proceed with the transaction, as evidenced to the satisfaction of the Commission by the party or parties requesting the confidential advice. Second, the merger must not be in the public domain. In exceptional circumstances, the Commission may consider giving confidential advice in relation to mergers that are no longer confidential, but the requesting party or parties must provide good reasons as to why they wish to receive confidential advice and not proceed with a notification. In this regard, the Commission has clarified in its response to the public consultation on the amendments to the Competition Act (that came into effect on 16 May 2018) that while section 55A(2) of the Competition Act allows for the the Commission to give the advice where information about the anticipated merger enters the public domain after the Commission accepts an application for confidential advice, the Commission will only do so if the parties provide good reasons why they are not applying for a decision under section 57 of the Competition Act. Where information about an anticipated merger is already in the public domain, the Commission will not entertain requests for confidential advice.

Third, the merger situation must raise a genuine issue relating to the competitive assessment in Singapore. For example, there may be a genuine issue if there is a lack of relevant precedents and therefore the Commission's approach to the merger situation is genuinely in doubt. On the other hand, there would be no genuine issue if, for example, both merger parties have an insignificant market presence in Singapore. Finally, the requesting party or parties are expected to keep the Commission informed of significant developments in relation to the merger situation in respect of which confidential advice was obtained; for example, completion date or abandonment of the merger.

Prior to 1 July 2012, the Commission was unable to accept the notification of an anticipated merger if it was still confidential. This process, introduced as part of the Commission's revisions of the merger procedures, allows parties to obtain guidance from the Commission early in the merger process without having to wait until the public announcement of the transaction.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

With regard to foreign-to-foreign transactions, merger parties should note that the Competition Act will apply to any merger or anticipated merger that substantially lessens competition or that may substantially lessen competition in any market in Singapore for goods and services, notwithstanding that the merger takes place outside Singapore or that any party to the merger resides outside Singapore.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Singapore does not have general legislation prohibiting, or requiring consent for, foreign investment. Some sectors and industries, however, have specific requirements on foreign ownership. For example, sections 11 and 12 of the Newspaper and Printing Presses Act (Cap 206) require the approval of the Minister for Communications and Information before any person can become a substantial shareholder (5 per cent), a 12 per cent shareholder, or an indirect controller of a newspaper company. The Telecoms Competition Code requires that approval from the Info-communications Media Development Authority is obtained before any

party becomes a 12 per cent controller, a 30 per cent controller, or obtains effective control of a designated telecommunications licensee, or obtains a business (or any part of such business) of a designated telecommunications licensee as a going concern.

In addition to the general framework provided by the Competition Act, there are also sectoral competition regulatory frameworks (see question 1).

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Notification is voluntary and the Competition Act does not specify any deadlines for notification. If the merger parties wish to notify their merger to the Commission for a decision, they may do so at any time before, during or after the merger. In the case of completed mergers, parties are encouraged to notify as soon as possible after completion. Parties that wish to apply for a decision for an anticipated merger should only do so when the anticipated merger is no longer confidential. In deciding whether or not to notify a merger and when to notify the Commission, merger parties should bear in mind that the Commission may 'unwind' a merger that has already been effected, and (in the case of intentional or negligent infringements) impose financial penalties, if the Commission decides that the merger infringes the section 54 prohibition.

There are no deadlines for notification or sanctions for failure to notify as Singapore operates a voluntary merger regime. Merger parties have the option of proceeding, at their own commercial risk, with any merger during the notification process, before notifying the Commission, or without notifying the Commission at all. The risk, as highlighted in question 5, is that the Commission may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for suspecting that section 54 has been infringed or will be infringed, and has the ability to subsequently make directions or impose financial penalties in respect of any infringement.

#### 10 | Which parties are responsible for filing and are filing fees required?

Any party to a merger or anticipated merger may apply to the Commission for a decision. The Commission encourages joint filing.

In general, the filing fees for mergers or anticipated mergers are as follows:

- where the turnover of the target undertaking or asset is equal to or less than S\$200 million, the fee payable is S\$15,000;
- where the turnover of the target undertaking or asset is between S\$200 million and S\$600 million, the fee payable is S\$50,000; and
- where the turnover of the target undertaking or asset is above S\$600 million, the fee payable is S\$100,000.

If the merging parties are small or medium-sized enterprises (SME) or if the acquiring party is an SME and direct or indirect control in the small or medium-sized enterprise will not be (or has not been) acquired, the filing fee will be S\$5,000. SMEs have been defined in the Competition (Fees) Regulation 2007 as follows: businesses with annual sales turnover of not more than S\$100 million or employing no more than 200 staff.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

For waiting periods, please refer to question 18, which sets out the general timetable for clearance. Notification is voluntary and there is no

requirement to suspend the implementation of a merger or anticipated merger prior to clearance.

However, parties who give effect to or proceed with mergers prior to clearance by the Commission should note that they do so at their own commercial risk (see question 12).

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

As mentioned above, no requirement to suspend a merger or anticipated merger is specified in the Competition Act. However, where there is completion before clearance and the Commission subsequently finds that the merger infringes or is likely to infringe the section 54 prohibition, the Commission may take action to remedy, mitigate or prevent the harmful effects of infringement and prevent the recurrence of infringement. The Commission has the power to, inter alia, require a merger to be dissolved or modified. See question 24 for more details.

Parties should also note that the Commission has the power to direct interim measures where it has not completed its investigations but has a reasonable suspicion that the section 54 prohibition has been infringed or will be infringed. It may make such directions as it considers appropriate for the purpose of preventing merger parties from taking any action that might prejudice the Commission's ability to consider the merger situation and to impose the appropriate remedies; preventing serious, irreparable damage to a particular person or category of persons; or protecting the public interest. These measures could include a direction that the merger or anticipated merger be suspended. As a matter of practice, the Commission is unlikely to use these powers unless it believes that there is a real possibility of the merger situation raising serious competition concerns. In view of the risks involved in proceeding to implement a merger that may infringe the prohibition, parties may choose to voluntarily suspend implementation in whole or in part.

As of 1 May 2019, the Commission has only exercised its power to take interim measures once, namely, in the *Grab/Uber* case where the parties, without seeking clearance from the Commission, proceeded to complete Grab's acquisition of Uber's South East Asian business in exchange for Uber's acquisition of a 27.5 per cent stake in Grab. See question 36 for more details.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Notification of a merger is voluntary and merger parties may, at their own risk, proceed with closing before clearance or without seeking clearance. This applies equally to foreign-to-foreign mergers. Parties should take note of the actions that the Commission may take in the event that the merger is found to have an anticompetitive effect in Singapore (see question 24).

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is no prohibition against closing before clearance. However, parties should take note of the actions that the Commission may take in the event that the merger is found to have an anticompetitive effect in Singapore (see question 24).

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

There are no special rules in the Competition Act itself. Takeovers and mergers in Singapore are subject to non-statutory rules in the Singapore Code on Take-overs and Mergers, which is administered by the Securities Industry Council. Parties involved in public takeover bids should refer to the Singapore Code on Take-overs and Mergers and the Securities Industry Council Practice Statement on the Merger Procedures of the Competition Commission of Singapore for further information.

An offeror making a 'mandatory general offer' subject to the Singapore Code on Take-overs and Mergers is required to include a precondition that the offer lapses if the Commission proceeds to a Phase II review or prohibits the acquisition before the close of the offer. If the Commission prohibits the acquisition, the Securities Industry Council may require the offeror to reduce its shareholding back to the level before the mandatory general offer was triggered.

An offeror making a 'voluntary general offer' subject to the Singapore Code on Take-overs and Mergers is required to impose a precondition that the offer lapses if the Commission proceeds to a Phase II review or prohibits the acquisition before the close of the offer, and may include further conditions that the Commission's favourable decision must be on terms acceptable to the offeror.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Before submitting Form M1 and commencing the formal notification process, merger parties intending to make an application may approach the Commission for pre-notification discussions (PNDs), to facilitate their preparation of the form and to expedite the review process. PNDs are intended to help merger parties ascertain what information will be required by the Commission during the merger review process, and to help the Commission plan its work to facilitate an expeditious merger review process. The Commission is prepared to engage in PNDs for anticipated mergers not yet in the public domain, but will not entertain discussions on purely speculative or hypothetical transactions.

Merger parties seeking a PND should contact the Commission by phone through its hotline or email. The formality and length of the PND process depends on the preference of the merger parties, the complexity of the transaction, and the potential concerns raised by the merger. The Commission considers PNDs to be most useful where parties can provide a draft Form M1.

During the PND, the Commission will help to identify the information needed to provide a complete submission and any other useful information that might expedite its review. For mergers that involve more complex products or that raise potential competition issues, PNDs minimise the risk that the mergers will not be cleared in Phase I. The Commission will generally not, in the context of PNDs, give its views on whether a merger situation is likely to require a Phase II assessment or if it would lead to a substantial lessening of competition.

The Commission will review a merger situation in one or two phases and the level of detail required will increase with each phase. For each phase, merger parties must submit the duly completed merger review Forms M1 and M2 respectively (available on the Commission's website at [www.cccs.gov.sg](http://www.cccs.gov.sg)).

Form M1 requires information relating to, inter alia:

- ownership structure;
- the notified transaction;
- the activities of the merger parties;

- the industries affected;
- the market definition;
- market shares;
- efficiency gains; and
- ancillary restrictions, if they are included in the notification.

Merger parties are also required to provide their competitive assessment of the transaction, including:

- their assessment of the counterfactual (the competitive situation without the merger);
- competitors in the market;
- barriers to entry;
- existing and future countervailing buyer power;
- coordinated and non-coordinated effects of the transaction;
- vertical effects, if there is a potential vertical relationship between the merger parties; and
- cooperative effects of the joint venture, if the transaction is a joint venture.

Form M2 requires further information relating to, inter alia:

- the market conditions of the relevant markets, including the structure of demand and supply;
- the importance of research and development;
- the prevalence of cooperative agreements;
- possible efficiency gains arising from the merger;
- the likely effects of the merger; and
- any applicable failing firm or division arguments that the merger parties wish to submit.

The information required in Form M2 may also be submitted voluntarily by the applicant when submitting Form M1 to expedite the process in more complex cases. Otherwise, the submission of Form M2 will only be required when the Commission is of the view that it is necessary to proceed to a Phase II review, and in which case the applicant will be notified accordingly.

Parties should note that even where the applicant has submitted complete Forms M1 or M2, the Commission may require the applicant to provide additional information, over and above that which is required under Forms M1 and M2 during its review process to enable it to assess the merger situation.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

There are two phases of review (see question 18). The Commission's Guidelines give an indicative time frame of 30 working days to complete a Phase I review and this time frame commences from the date on which the Commission accepts a complete Form M1 and receives the requisite filing fee. Should the Commission find that it is necessary to proceed to a Phase II review, the indicative time frame for completion is 120 working days, commencing from the date on which the Commission receives a complete Form M2.

The receipt of an application by the Commission does not indicate that the application is complete. The indicative time frames for the review of the merger notification commence only when the Commission receives a complete form that meets all the applicable filing requirements, accompanied by the relevant supporting documents and the appropriate fee. To avoid any unnecessary delay, merger parties should therefore ensure that the relevant forms are complete and meet all the filing requirements upon submission.

While the Commission typically reviews mergers within the indicative time frames, the time frames are not binding on the Commission

and the Commission may 'stop the clock' in a review, *inter alia*, if the merger parties do not respond to the Commission's request for information within the stipulated time period or when commitments are being considered. The indicative time frames may also be extended by the Commission to accommodate the commitments process.

The Commission strongly encourages merger parties to engage the Commission in PND's. PND's permit the parties to ascertain information that will be necessary for their notification and help the Commission to plan its work to facilitate an expeditious merger review process. Please see question 16 for details on PND's.

Merger parties may also wish to request confidential advice from the Commission to seek the Commission's view on whether the merger is likely to raise competition concerns in Singapore and whether a notification is necessary. However, it should be noted that the Commission's confidential advice is not binding and the Commission reserves the right to investigate mergers in all cases where confidential advice is given.

## 18 | What is the statutory timetable for clearance? Can it be speeded up?

Two separate processes are available to parties before notification to the Commission. First, parties may seek confidential advice from the Commission on whether or not a merger is likely to raise competition concerns in Singapore and therefore whether a notification is advisable. See question 6 for details on confidential advice. Second, parties may engage the Commission in PND's to discuss the content and timing of their notifications to expedite the merger review process. See question 16 for details on PND's.

Confidential advice may be requested through the Commission's hotline or by email. The Commission will then agree on a provisional timeline for the parties to submit full information similar to that required in Form M1. Third-party contact details are not required and third-party views will not be sought, and the Commission does not expect to request further information by way of written questions to the requesting party. The Commission will carry out an internal assessment of the merger and may meet with the requesting parties, and expects to provide its confidential advice in the form of a letter stating whether the merger is likely to raise competition concerns in Singapore and whether notification is advisable, within 14 working days of receiving all the required information. The advice is not binding on the Commission and the merger may be investigated regardless of the advice given.

PND's are similarly commenced by contacting the Commission through its hotline or by email. No specific timetable is given, although the Commission states that their length and formality depend on the preference of the merger parties, the complexity of the transaction and the concerns that the merger may raise. The Commission states that PND's are most useful where a draft Form M1 is provided.

The formal notification process begins with the filing of Form M1 with the Commission. The Commission will first determine if the application is complete, with the necessary supporting documents and filing fees. Once a completed Form M1 that meets all the applicable filing requirements is accepted, the indicative time frame of 30 working days for Phase I review commences and the Commission will review the transaction to determine whether it falls within the meaning of a 'merger' or 'anticipated merger' as defined in the Competition Act (and as outlined in question 2), and whether the transaction is excluded under paragraphs 1 and 2 of the Fourth Schedule of the Competition Act.

The Commission adopts a two-phase approach when evaluating applications.

### Phase I

Phase I review entails a quick review and allows merger situations that clearly do not raise any competition concerns to proceed without undue delay.

The Commission expects to complete a Phase I review within 30 working days commencing from the date on which the Commission receives a completed Form M1, accompanied by the relevant supporting documents and appropriate fee. The Commission may extend the Phase I review period in exceptional circumstances. By the end of this period, the Commission will decide whether to issue a favourable decision to allow the merger situation to proceed or to carry on to a Phase II review.

### Phase II

If, during the Phase I review, the Commission is unable to conclude that a merger situation does not raise competition concerns and is of the view that a more detailed examination of the merger is required, it will notify the merger parties of the decision to carry out a more detailed assessment (ie, Phase II review). The indicative time frame of 120 working days for a Phase II review commences when the Commission receives a complete Form M2. The Commission may extend the Phase 2 review period in exceptional circumstances.

During the review, the Commission may impose interim measures to preserve its ability to review the merger situation further or preserve its ability to impose appropriate remedies later, or both. Interim measures may also be imposed as a matter of urgency to protect public interest or to prevent serious, irreparable damage to persons.

Apart from notifications, the Commission may also investigate a merger arising from a third-party complaint or other sources of information if there are reasonable grounds for suspecting that the section 54 prohibition has been or will be infringed. The Commission may exercise its powers of investigation, which include the right to require the production of specified documents or information, the power to enter premises with or without a warrant, and the power to search premises with a warrant. In the recent amendments to the Competition Act that came into effect on 16 May 2018, the Commission's powers were widened to enable enforcement officers empowered or authorised to enter any premises for the purposes of an investigation, to conduct interviews with persons on the premises without having to issue a notice under section 63(1) to any of such persons (as currently required). The Commission may also invite comments from interested third parties on the merger situation under investigation through a notice on the Commission's website.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

For the Commission to clear the merger or anticipated merger, it must be satisfied that the merger does not, or will not be expected to, result in a substantial lessening of competition within any market in Singapore for goods or services. In applying the substantial lessening of competition test, the Commission will evaluate the prospects for competition in the future with and without the merger (commonly termed as a comparison between the 'factual' and the 'counterfactual'). In many cases, the best guide to the appropriate counterfactual will be the prevailing conditions of competition in the market without the merger. However, the Commission will take into account likely and imminent changes in the structure of competition to reflect as accurately as possible the nature of rivalry without the merger. For instance, where one of the parties is a failing firm, pre-merger conditions of competition might not prevail even without the merger.

Further, a merger or anticipated merger may be exempted on the ground of public interest with the approval of the Minister for Trade

and Industry, or by virtue of one of the exclusions specified in the Competition Act itself.

As set out in the Fourth Schedule of the Competition Act, the section 54 prohibition does not apply to a merger:

- if the economic efficiencies arising, or that may arise, from the merger outweigh the adverse effects because of the substantial lessening of competition in the markets in Singapore;
- approved by any minister or any regulatory authority (other than the Commission) where the requirement for approval is imposed by written law (in the case of the Monetary Authority of Singapore, section 54 also does not apply where the requirement for approval is imposed by instruments issued under written law);
- under the jurisdiction of another regulatory authority under any written law relating to competition or a code of practice relating to competition (eg, in the energy, telecommunications and media industries); or
- relating to the supply of licensed and regulated ordinary letter and postcard services, potable piped water, wastewater management services, licensed and regulated bus services, licensed and regulated rail services, or licensed and regulated cargo terminal operations.

## 20 | Is there a special substantive test for joint ventures?

No, the same test applies. See questions 3 and 19.

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

The Commission has set out the factors that it will take into account in its assessment of the competitive effects of a merger in the CCCS Guidelines on the Substantive Assessment of Mergers 2016.

In the case of horizontal mergers, the Commission has stated that a horizontal merger may result in a substantial lessening of competition by virtue of coordinated or non-coordinated effects, or both.

Non-coordinated effects may occur where, as a result of a merger, the merged entity could raise prices (or reduce output or quality) with the objective of increasing profits because of the loss of competition between the merged entities. Other firms in the market may also find it profitable to raise their prices because of the loss of competitive pressure arising from the merger. For example, the higher prices of the merged entity's products may cause some customers to switch to rival products, thereby increasing demand for the rivals' products.

Coordinated effects may arise where the merger increases the possibility that, post-merger, firms in the same market may coordinate their behaviour to raise prices or reduce quality or output. The Commission will also consider the structure of the market, its characteristics and any history of coordination in the market concerned.

In the case of non-horizontal mergers, the CCCS Guidelines on the Substantive Assessment of Mergers 2016 describe situations in which vertical mergers and conglomerate mergers may trigger competition concerns. With respect to vertical mergers, factors that the Commission will consider include the possibility of foreclosure, the increased potential for collusion, and the creation of barriers to entry.

With respect to conglomerate mergers, factors that the Commission will consider include the likelihood of the conglomerate merger increasing the feasibility of anticompetitive strategies and whether it may facilitate coordination. In assessing whether a conglomerate merger could have anticompetitive effects, the Commission will consider the ability of customers to exercise countervailing power and whether another firm could replicate the portfolio of products offered by the merged entity. The Commission will also consider whether

the creation of the portfolio of products itself represents a strategic barrier to entry.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

The Minister for Trade and Industry has the power to exempt a merger or an anticipated merger on the grounds of any public interest consideration. The power may be exercised on the application of a merger party, which has been notified that the Commission proposes to issue a decision that the section 54 prohibition has been infringed.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Competition Act allows the Commission to take efficiency gains into account at two separate points in the analytical framework. First, efficiencies may be taken into account where they increase rivalry in the market so that no substantial lessening of competition would result from a merger. For example, the efficiency gains from the merger between two of the smaller firms in a market may enable the merged entity to exert greater competitive pressure on its larger competitors. Second, efficiencies may also be taken into account where, despite not averting a substantial lessening of competition, they are of sufficient magnitude that the merger could be said to give rise to net economic efficiencies in markets in Singapore.

To be taken into account by the Commission, efficiencies must be demonstrable (in that they are clear and quantifiable), likely to arise from the merger within a reasonable period of time, sufficient in extent and merger-specific. Such efficiencies could include lower costs, greater innovation and greater choice or higher quality.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Where the Commission, upon completion of its investigations, decides that there has been an infringement of the section 54 prohibition or that an anticipated merger, if carried into effect, will infringe the section 54 prohibition, it will decide on the appropriate action to remedy, mitigate or prevent the harmful effects of such practice and to prevent the recurrence of infringement.

The Commission may implement the remedies by issuing directions or by accepting commitments. The direction may prohibit an anticipated merger from being carried into effect or require a merger to be dissolved or modified in such manner as directed. The direction may also require the merger parties to:

- dispose of such operations, assets or shares of the undertaking as may be specified by the Commission in such a manner as the Commission may require;
- enter into such legally enforceable agreements as may be specified by the Commission and designed to prevent or lessen the anticompetitive effects that have arisen;
- provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine; or
- pay to the Commission such financial penalty in respect of the infringement as the Commission may determine if the Commission is satisfied that the infringement has been committed intentionally or negligently.

The financial penalty imposed by the Commission may not exceed 10 per cent of the turnover of the business of each relevant merger party in Singapore for each year of infringement, up to a maximum of three years. The Commission's basis of calculation of financial penalties is based on an undertaking's relevant turnover of the financial year preceding the end of the infringement (rather than of the financial year preceding the infringement decision). Information on the calculation of financial penalties is generally set out in its Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016, and particularly in respect of infringements of the section 54 prohibition, its Guidelines on Merger Procedures 2012.

The Commission may accept commitments at any time during a review or during an investigation before a final decision on whether there has been an infringement is made. Commitments are generally proposed by the merger parties. If the Commission considers the proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached. Applications may be made to the Commission to vary, substitute or release a commitment.

Both directions and commitments are enforceable in the District Court.

The Competition Act also gives the Commission the power to take interim measures. See also question 12 on possible sanctions.

## Remedies and conditions

### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Merger parties may propose, and the Commission may accept, commitments at any time during a review or during an investigation, before a final decision on whether there has been an infringement is made. Commitments are generally proposed by the merger parties, although the Commission may invite merger parties to consider whether they want to offer commitments. The commitments must aim to prevent or remedy the adverse effects to competition identified. If the Commission considers proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached. Applications may be made to the Commission to vary, substitute or release a commitment.

Generally, the Commission will only accept commitments that sufficiently and clearly address the adverse effects to competition and are proportionate to them. According to the CCCS Guidelines on the Substantive Assessment of Mergers 2016, a precondition to accepting any commitment is that the Commission must be confident that the competition concerns identified can be resolved through the commitment. Further, the commitments must not give rise to new competition concerns or require substantial monitoring by the Commission.

There are broadly two types of remedies that the Commission may consider: structural remedies and behavioural remedies.

Structural remedies are generally preferred to behavioural ones because they clearly address the market structure issues that give rise to the competition problems and require little monitoring by the Commission. Typically, structural remedies require the sale of one of the overlapping businesses or assets that has led to the competition concern. The CCCS Guidelines on the Substantive Assessment of Mergers 2016 states that ideally, this should be a self-standing business that is capable of being fully separated from the merger parties, and in most cases, will be part of the acquired enterprise. The sale should be completed within a specified period.

In appropriate cases, the Commission will consider other structural or quasi-structural remedies, for example, the divestment of the buyer's existing business (or part of it) or an amendment to intellectual property licences. Before the sale of any business, the Commission must approve the buyer. This is to ensure that the proposed buyer has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace. If that is not the case, it is unlikely that the proposed divestiture will be considered as an effective remedy for the anticompetitive effects previously identified.

The Commission will consider behavioural remedies in situations where it considers that divestment will be impractical or disproportionate to the nature of the concerns identified. Further, behavioural remedies may sometimes be necessary to support structural divestment.

In general, in assessing which remedies would be appropriate and comprehensive, the Commission will take into account how adequately the action would prevent, remedy or mitigate the competition concerns caused by the merger. The Commission's starting point will be to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of the merger. Given that the effect of a merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be a more direct way of addressing the adverse effects, although other remedies may be considered in view of the associated costs and effectiveness.

### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

In the CCCS Guidelines on Merger Procedures 2012, the Commission specifically sets out a process whereby the Commission and the merger parties can resolve competition concerns in Phase I by way of commitments. Merger parties are encouraged to take the initiative to propose suitable commitments that can appropriately resolve any competition concerns that they foresee arising from the merger situation. This can be done at any time during the review process.

The Commission will indicate its competition concerns in an 'issues letter' to the merger parties where the Commission considers that a Phase II review may be appropriate, although this letter does not constitute a decision to proceed to a Phase II review. At this stage, parties may propose commitments to address the competition concerns in Phase I.

If, towards the end of a Phase II review, the Commission is of the preliminary view that the merger situation is likely to give rise to a substantial lessening of competition, it will issue a Statement of Decision (Provisional) to the merger parties, stating the facts on which the Commission relies and its reasons. It may outline remedies that the Commission considers appropriate. The Commission will give the parties an opportunity to make written representations to the Commission, which will also be the last opportunity to propose commitments or to give its views on remedies proposed by the Commission. The Commission may consider and impose alternative remedies different from those proposed by the parties.

If the Commission considers the proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached.

Applications may be made to the Commission to vary, substitute or release a commitment. Such applications must be made in writing and include an explanation as to whether the competition concerns addressed by the commitment still exist and what impact the variation, substitution or release of the commitment will have on the competition concerns. The Commission may consult with persons it thinks appropriate by publishing a notice on its website.

It is likely that Phase I will have to be extended to accommodate the commitments procedure. Phase II may also have to be extended if a commitments procedure is commenced in Phase II. Time extensions are at the discretion of the Commission, which also reserves the right to terminate the commitments process at any time.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

From the publicly available decisions as of 1 May 2019, three mergers were cleared conditional upon the Commission receiving remedies or commitments: the Commission's decision on the notification for decision of the proposed acquisition by Seek Asia Investments Pte Ltd of the Jobstreet Business in Singapore (which was granted on 13 November 2014), the Commission's decision on the notification for decision of the proposed acquisition by ADB BVBA of all the shares of Safegate International AB from Fairford Holdings Private AB (which was granted on 29 January 2016) and the Commission's decision on the notification for decision of the proposed acquisition by Times Publishing Limited of Penguin Random House Pte Ltd and Penguin Books Malaysia Sdn Bhd (which was granted on 25 September 2017). In 2008, in the Commission's decision on the Notification for Decision: Merger between The Thomson Corporation and Reuters Group Plc, the Commission considered that the commitments offered to other competition authorities (namely the European Commission and the United States Department of Justice) had a worldwide effect and that competition concerns arising in Singapore would be sufficiently addressed as such. The Commission stressed, however, that the fact that commitments were accepted by overseas competition authorities does not necessarily imply that the Commission will allow the merger to proceed in Singapore and any overseas commitments must be viewed in light of the facts and circumstances of the case to see whether they are capable of addressing competition concerns arising in Singapore, if any.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Ancillary restrictions to a merger or anticipated merger are defined in the CCCS Guidelines on the Substantive Assessment of Mergers 2016 as agreements, arrangements or provisions that are directly related and necessary to the implementation of a merger. Such ancillary restrictions are excluded from the prohibition against anticompetitive agreements (section 34 prohibition) and the prohibition against abuse of dominance (section 47 prohibition) under the Third Schedule of the Competition Act. To be directly related, the restriction must be connected with the merger but ancillary or subordinate to its main object. A restriction is likely to be necessary if, for example, in the absence of the restriction, the merger would not go ahead or could only go ahead at substantially higher costs, over an appreciably longer period, or with considerably greater difficulty. In addition, in determining the necessity of the restriction, considerations such as whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger will also be taken into account. Merger parties must demonstrate that they have chosen the option that is the least restrictive of competition.

Merger parties should conduct a self-assessment as to whether any agreements, arrangements or provisions that are not integral to the merger, but that are concluded in conjunction with the merger, qualify as ancillary restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Commission also requires the contact details of the five most significant competitors and customers to be provided in the notification forms, as well as of the five most significant end-users if these are not customers. The Commission may contact them to solicit feedback in relation to the notified mergers.

The Commission will gather information about the competitive effect of the merger situation from the applicant and from third parties, including customers, competitors, suppliers, and other regulatory bodies and government departments, where relevant. The details of the merger will be published on the public register on the Commission's website (see question 30).

Complainants may make complaints to the Commission by its online form (as found on the Commission's website), fax, telephone or email. The Commission will acknowledge receipt of the complaint within three working days and may ask for further information and may launch a formal investigation if there are reasonable grounds for suspecting that the merger may result in a substantial lessening of competition. The Commission prefers that complaints are not anonymous, although the Commission will protect the complainant's identity as far as possible.

Parties that suffer loss or damage as a result of the infringement will have a private right of action to seek relief in civil proceedings. Such rights of private action will only arise after the Commission has made a decision that a merger has infringed the section 54 prohibition and the appeal period has expired or, where an appeal has been brought, upon the determination of the appeal. There is also a two-year time bar from the time the Commission has made its decision or from the determination of the appeal, whichever is later. The relief that the court may grant includes an injunction or declaration, damages, and such other relief as the court deems fit.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Upon acceptance of a satisfactory application, the Commission will publish the details of notified mergers or anticipated mergers on the public register on the Commission website at [www.cccs.gov.sg](http://www.cccs.gov.sg). The information provided will usually include:

- the names of the merger parties;
- a description of the transaction;
- a description of the business activities of the merger parties worldwide and in Singapore;
- a description of the overlapping goods or services, including brand names;
- a description of substitute goods or services; and
- the applicant's views on the definition of the relevant markets, the way in which competition functions in these markets, barriers to entry and countervailing buyer power, and the competitive effects of the merger.

Third parties are invited to comment on the merger via an invitation to comment on the Commission's website, and when the Commission consults on commitments.

When applying to the Commission, merger parties must include all relevant information including information that may be confidential. When submitting an application, parties must provide the Commission

with both confidential and non-confidential versions. Non-confidential versions are necessary for the Commission's purposes of facilitating discussions and meetings with third parties and publishing a non-confidential version of its decision.

In the confidential versions of submissions, confidential information must be enclosed in square brackets. In non-confidential versions, redactions must be marked by square brackets containing the word 'confidential', with a separate annex identifying the confidential information and giving reasons why the information should be treated as confidential.

Information is confidential only if, in the Commission's opinion, disclosure of the information would:

- significantly harm the legitimate business interests of an undertaking, where it is commercial information;
- significantly harm an individual's interest, where it relates to an individual's private affairs; or
- be contrary to the public interest.

Where excessive or unreasonable confidentiality claims are made, the Commission may stop the working time frame until the applicant files an acceptable non-confidential version. In the CCCS Guidelines on Merger Procedures 2012, the Commission specifically cautioned against blanket and overly wide confidentiality claims.

The Commission will generally treat parties' submissions on confidentiality seriously. In exceptional circumstances, the Commission may wish to disclose confidential information, in which case it will discuss with parties in advance to minimise any detriment to them. The Commission will give applicants the opportunity to review its draft decision before publication to determine whether it contains confidential information, though the Commission maintains ultimate discretion in relation to decisions on confidentiality.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Under the Competition Act, the Commission has the ability to enter into cooperation arrangements with any foreign competition body with approval from the Minister for Trade and Industry. Cooperation may take the form of information exchange or any other assistance as necessary to assist in the enforcement or administration of competition laws.

It appears that the Commission intends to cooperate with antitrust authorities in other jurisdictions. Form M1 includes specific questions on which other jurisdictions parties intend to notify (or have notified) the merger. Parties are requested to notify the Commission of any material change in status in relation to any of the notifications to overseas competition agencies, including, for example, approvals, unfavourable decisions and negotiations of commitments. Parties are also asked if they would be willing to provide the Commission with a waiver allowing the Commission to exchange confidential information with competition agencies in other jurisdictions.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

There is a right of appeal to the Competition Appeal Board (the Board) against any decision by the Commission in respect of a merger or anticipated merger or any direction (including interim measures) imposed by the Commission. An appeal against the Commission's decision in respect of a merger or anticipated merger may be made by any merger party, while an appeal against a direction may be made by the person

to whom the Commission gave the direction. The Board can confirm, impose, revoke or vary a direction, or make any other direction or decision, as long as it is a decision or direction that the Commission itself could have given. There is no right to appeal to the Board against the Commission's refusal to accept any commitments offered, but appeals may be made against the Commission's refusal to vary, substitute or release existing commitments. An appeal to the Board against a direction imposed will not operate to suspend that direction, except in the case of appeals against financial penalties. The infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

Parties may make further appeals against the decisions of the Board to the High Court and then to the Court of Appeal, but only on points of law and the quantum of the financial penalty. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made. The High Court may determine any such appeal by confirming, modifying or reversing the decision of the Board and making such further or other order on appeal.

It is also possible to bring an action in judicial review. To do so, parties must make an application under Order 53 of the Rules of Court, before a judge, for leave to bring an action in judicial review. Once leave is granted, parties must make the judicial review application within 14 days (see question 33).

As of 1 May 2019, there is an appeal pending before the Board in respect of the Notice of Appeal submitted on 20 October 2018 by Uber with regard to the Commission's decision issued on 24 September 2018, which found that Grab and Uber had infringed the section 54 prohibition. This is the first appeal in respect of the section 54 prohibition before the Board, and the appeal hearing is scheduled to be heard sometime in the second half of 2019. Separately, there have been 18 appeals (three of which were withdrawn by the appellants) in respect of infringement decisions relating to anticompetitive agreements and abuse of dominance. There have to date been no appeals from the Board to the High Court, and no cases of judicial review in respect of Commission decisions.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

A party who wishes to appeal to the Board must lodge a notice of appeal in the prescribed form within four weeks of the date on which the appellant was notified of the contested decision or the date of publication of the decision, whichever is the earlier. The Board may, on the application of the appellant, in its discretion, extend the time limit provided for the lodgement of the notice of appeal.

As soon as is practicable, the Board shall set a timetable outlining the steps to be taken by the parties in preparation for the oral hearing of the appeal, whether pursuant to the directions of the Board or otherwise, fix the date for the oral hearing, notify the parties in writing of the date and place for the oral hearing and of any timetable for that hearing, and, if it considers it necessary for the expeditious disposal of the appeal, send the parties a report that contains a summary of the factual context of the case and the parties' principal submissions.

The Competition Act does not prescribe a time frame or limitation period for judicial review. Accordingly, the time frame is prescribed by the Rules of Court of Singapore. Under Order 53, Rule 1 of the Rules of Court, no application for a mandatory, prohibiting or quashing order may be made unless leave to make such an application has been granted. For quashing orders, leave will not be granted to apply for the same unless the application was made within three months of the date of the proceedings.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The provisions relating to mergers and acquisitions came into force on 1 July 2007. As of 1 May 2019, a total of 74 mergers have been notified to the Commission, of which 67 have been cleared, four have been withdrawn, two anticipated mergers abandoned and one merger pending. Regarding the abandoned anticipated mergers, on 11 March 2015, the Commission informed the parties of its provisional decision to block the proposed acquisition by Parkway Holdings Ltd of RadLink-Asia Pte Ltd. However, the anticipated merger was subsequently abandoned and the sale and purchase agreement relating to the proposed merger lapsed and ceased to be in effect as of 13 March 2015. More recently, on 30 July 2018, the Commission formally ended its assessment of Wilhelmsen Maritime Services AS's (WMS) proposed acquisition of Drew Marine's technical solutions, fire, safety and rescue businesses after WMS announced on 22 July 2018 that the parties would abandon the proposed acquisition. The Commission had issued its provisional decision on 25 May 2018, which found that the proposed acquisition was likely to be in breach of the section 54 prohibition.

In addition to the notified mergers, the Commission had on 27 March 2018 commenced an investigation into Grab's acquisition of Uber's South East Asian business in exchange for Uber's acquisition of a 27.5 per cent stake in Grab. The investigations have concluded, with the Commission issuing an Infringement Decision finding that Grab and Uber have contravened the section 54 prohibition. Uber has filed a Notice of Appeal on 20 October 2018 against the Commission's decision, with the appeal hearing scheduled to be heard in the second half of 2019. See question 36 for further details.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

While there are no current public proposals to revise or change the Competition Act, the Commission has indicated that it will be undertaking a comprehensive review of the Competition Act with a view to recommending changes to balance regulatory and business compliance costs against the benefits from effective competition. Please see question 36 for a summary of the latest amendments to the Competition Act, which were passed by Parliament on 19 March 2018 and came into effect on 16 May 2018.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

##### Grab/Uber merger

Of the 14 merger cases decided by the Commission over the past year, the most significant case concerned Grab's acquisition of Uber's South East Asian business in exchange for Uber's acquisition of a 27.5 per cent stake in Grab. This case marked the first time that the Commission has publicly investigated a merger that was not notified to the Commission, for which financial penalties and remedies were imposed. The significant aspects of the case are as follows.

First, the parties did not voluntarily notify the merger to the Commission. Following the parties' announcement of the merger on 26 March 2018, the Commission sent a letter to the parties requesting clarifications on the details of the merger, and whether the parties



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intended to notify the merger to the Commission. As the parties had begun transferring Uber's assets to Grab immediately after the announcement, the Commission commenced an investigation into the merger on its own accord on 27 March 2018, as there were reasonable grounds to suspect that the section 54 prohibition had been breached.

Second, while investigations were ongoing, the Commission issued a Notice of Proposed Interim Measures Directions on 30 March 2018, which was finalised on 13 April 2018 as the Commission's first-ever Interim Measures Directions (IMD) issued in respect of a merger. The purpose of the IMD was to preserve and, to the extent possible, restore competition and market conditions to the pre-transaction state until the completion of the Commission's investigations or the resolution of any competition concerns that may arise from the transaction, unless otherwise varied or revoked by the Commission because of material changes in market conditions. The IMD required the parties to, inter alia, not take such action that may lead to the integration of the parties' businesses in Singapore, reduce the viability and saleability of the parties' businesses, and prejudice in any manner the giving of any direction by the Commission under section 69 of the Competition Act. Subsequently, the Commission issued a Proposed Infringement Decision against the parties on 5 July 2018 (which was finalised on 24 September 2018), finding that the acquisition has led to a substantial lessening of competition in the provision of ride-hailing platform services in Singapore.

Apart from directing the parties to take certain remedial measures, the Commission also imposed a total of around S\$13 million in financial penalties on Grab and Uber for completing an irreversible merger that harmed competition, as the transfer of acquired assets between the parties rendered it practically impossible to restore competition and the market conditions to the pre-transaction state. This marked the first time in the Commission's history that financial penalties were imposed in respect of mergers that contravened the section 54 prohibition, which also highlights the risk that companies face when deciding to proceed with a merger without notifying the Commission.

On 20 October 2018, Uber filed its Notice of Appeal to the Board against the Commission's decision, with the appeal hearing scheduled to be heard in the second half of 2019. As noted in question 32, this is the first appeal before the Board in respect of the section 54 prohibition. Grab is not appealing against the Commission's decision.

**Amendments to the Competition Act**

Following a public consultation conducted between 21 December 2017 and 11 January 2018, amendments to the Competition Act were tabled in Parliament and passed on 19 March 2018. Pertinently, the amendments, which came into effect on 16 May 2018, formalised the existing process by which the Commission provides confidential advice on anticipated mergers, to provide greater clarity and assurance to parties who wish to consider approaching the Commission for advice (see question 6). Previously, the provision of confidential advice was set out in the CCCS Guidelines on Merger Procedures 2012, which were not formally binding on the Commission. The amendments also strengthened the existing statutory regime by allowing the Commission to accept binding and enforceable voluntary commitments for all three main prohibitions, rather than only in section 54 cases, as it then was, and widened the Commission's powers to enable enforcement officers empowered or authorised to enter any premises for the purposes of an investigation, to conduct interviews with persons on the premises without having to issue a notice under section 63(1) to any of such persons.

# Slovakia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Merger control, as well as other aspects of competition law, is substantially governed by Act No. 136/2001 on Protection of Economic Competition (the Act). The Act became effective on 1 May 2001 and was last amended by Act No. 350/2016 with effect from 27 December 2016.

Details concerning the content of the notification and the respective documents required are set forth in Decree No. 170/2014, which entered into force on 1 July 2014. In addition, some other aspects are regulated by soft law, such as the guidelines on pre-notification contacts, turnover calculation, details of simplified notification, details of granting an exemption from the prohibition of merger implementation and the guidelines on ancillary restraints.

The filing fee is determined by the Act on Administrative Fees. The General Administrative Procedural Act applies to any procedural matters not specifically regulated in the Act.

The relevant authority for merger control (and competition law in general) is the Antimonopoly Office of the Slovak Republic (AMO). More information on the AMO may be found on its website, [www.antimon.gov.sk](http://www.antimon.gov.sk).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Act defines the following as a concentration (if on a lasting basis):

- a merger or amalgamation of two or more separate undertakings (including mergers and amalgamations pursuant to special legislation, as well as 'economic mergers', namely, situations whereby the undertakings concerned become economically combined, while retaining their legal independence, especially in the case of joint economic management);
- the acquisition of direct or indirect control by an undertaking or several undertakings over another undertaking, its part or their parts; or
- the creation of a joint venture controlled by two or more independent undertakings, performing all the functions of an autonomous economic entity (full-function joint venture) on a lasting basis.

A concentration does not arise if banks, branches of foreign banks, insurance companies or other financial institutions, the normal activities of which include trading in securities on their own accounts or on the accounts of others, temporarily acquire securities with a view to reselling them. This exemption only applies if they do not exercise voting and other rights with a view to influencing the competitive behaviour of that undertaking or if they exercise these voting rights only with a view to preparing for the sale of the entire undertaking or part thereof

or the sale of securities, and upon such sale, they will lose the control, provided that this sale is effected within one year of the date of acquisition of the securities. If the disposal is not reasonably possible within this period of time, it may – upon request – be extended by the AMO. Further exemptions exist under special laws; for example, regarding the acquisition of control over an undertaking by liquidation trustees under the Commercial Code or by the bankruptcy trustee under the Bankruptcy Act.

#### 3 | What types of joint ventures are caught?

The creation of a joint venture controlled by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration (see question 2). If the creation of such joint venture has as its object or effect the coordination of the competitive behaviour of undertakings, the AMO appraises such coordination in accordance with the cartel prohibition (articles 4 and 5 of the Act).

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

According to the Act, 'control' is the ability to exercise a decisive influence on the activities of an undertaking, especially by means of:

- ownership rights or other rights; and
- rights, contracts or other facts allowing the exercising of a decisive influence on the composition, voting or decisions taken by bodies belonging to the undertaking.

Minority interests are caught only provided that they confer control by any of the means described above.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The AMO must be notified of a concentration where in the business year preceding the concentration:

- the combined aggregate Slovak turnover of the undertakings concerned amounted to at least €46 million and each of at least two of the undertakings concerned achieved a turnover of at least €14 million in Slovakia; or
- the worldwide aggregate turnover of at least one of the undertakings concerned amounted to at least €46 million; and
- in case of a merger or amalgamation of two or more separate undertakings (including mergers and amalgamations pursuant to special legislation, as well as 'economic mergers' (ie, situations whereby the undertakings concerned become economically

combined, while retaining their legal independence, especially in the case of joint economic management)) the aggregate turnover of at least one other undertaking concerned amounted to at least €14 million in Slovakia; or

- in case of the acquisition of direct or indirect control by an undertaking or several undertakings over another undertaking or part of another undertaking or undertakings, the target (different from the undertaking meeting the worldwide €46 million threshold) generated an aggregate turnover of at least €14 million in Slovakia; or
- in case of the creation of a joint venture controlled by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), the aggregate turnover of at least one undertaking concerned creating a joint venture (which must be different from the undertaking meeting the worldwide €46 million threshold) amounted to at least €14 million in Slovakia.

For the purpose of turnover calculation, 'turnover' means a total of revenues, yields or incomes from the sale of goods, to which – if applicable – in addition, financial assistance granted to the undertaking has to be added. Financial assistance means financial aid granted from public sources, which concerns an activity performed by the undertaking and will be reflected in the price of its goods, and the undertaking is the recipient of the respective aid.

The aggregate turnover of an undertaking concerned includes:

- (i) the turnover of the undertaking concerned;
- (ii) the turnover of undertakings in which the undertaking concerned directly or indirectly:
  - holds more than 50 per cent of the share capital;
  - is entitled to exercise more than 50 per cent of the voting rights;
  - has the right to appoint more than 50 per cent of the members of bodies belonging to the undertaking; or
  - has the right to manage the undertaking;
- (iii) the turnover of undertakings having the rights referred to in (ii) in an undertaking concerned;
- (iv) the turnover of undertakings in which the undertakings referred to in (iii) have the rights referred to in (ii); and
- (v) the turnover of undertakings in which two or more undertakings referred to in (i) to (iv) have joint rights as referred to in (ii).

In case of an acquisition of direct or indirect control over an undertaking or part of one undertaking or several undertakings, only the turnover pertaining to the acquired undertaking (or the relevant parts thereof) being subject to the concentration is taken into account for the purpose of turnover calculation.

Turnover generated by sales or services between companies belonging to the same group is not taken into account. The turnover generated from the sales between the joint venture and other undertakings shall be proportionally divided among the parties to the concentration.

Two or more concentrations that are effected between the same undertakings or between undertakings from the same respective economic groups within two years are deemed to constitute one single concentration that occurred on the date of the occurrence of the last concentration.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act (see question 2) and exceeds the jurisdictional thresholds (see question 5), filing is mandatory.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are subject to Slovak merger control if they qualify as a concentration (see question 2) and meet the jurisdictional thresholds set out above (see question 5). The currently applicable jurisdictional thresholds (which entered into force in January 2012) intensified the local nexus requirement of notifiable concentrations. As a result, many foreign-to-foreign transactions that previously required a merger notification in Slovakia today usually fall outside the scope of the AMO's jurisdiction.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special rules on foreign investments.

Approval or at least a notification of acquisitions of interests above certain thresholds is required in certain other sectors, including energy, finance and media.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no explicit filing deadline. However, in any event the concentration has to be notified to the AMO prior to its implementation (ie, before any rights or obligations resulting from a concentration are executed) and after:

- an agreement on which the concentration is based has been concluded;
- the acceptance of a bid in a public tender has been announced;
- a state authority's decision has been delivered to an undertaking (eg, certain sector-specific approvals);
- announcement of a takeover bid;
- the day on which the European Commission informed an undertaking that the transaction falls within the jurisdiction of the AMO; or
- the day on which a particular event that led to the concentration occurred.

The notification can also be filed with the AMO prior to the conclusion of an agreement or other event causing the concentration to arise, provided that it results in a concentration that requires a filing with the AMO. Such notification must also contain reasoning and documents certifying the facts essential for the concentration.

In the event of a failure to notify the concentration, the AMO shall impose a fine of:

- up to 10 per cent of the undertaking's worldwide turnover generated in the preceding business year; or
- up to €330,000 on an undertaking that generated turnover not exceeding €330 or has not achieved any turnover, or when its turnover cannot be calculated.

## 10 | Which parties are responsible for filing and are filing fees required?

The responsibility for the submission of the filing depends on the type of the concentration. Against this background, the filing has to be submitted:

- jointly by the parties to the concentration in the case of a merger or amalgamation of two or more independent undertakings;
- in the case of a public tender, by the selected bidder;

- in the case of a decision issued by a state authority on a merger or amalgamation of undertakings pursuant to special legislation, by the parties to the concentration jointly;
- in the case of a takeover bid, by the proposer of the takeover bid; and
- in any other cases the notification has to be submitted by the undertaking or undertakings that acquire control over another undertaking or its part or other undertakings or their parts.

The filing fee is determined by the Act on Administrative Fees. It currently amounts to €5,000. As of 1 March 2016, the filing fee is paid based on the payment order issued by the AMO. If the parties wish to evidence the payment together with the merger notification (and thus avoid losing time with additional formal letters), the AMO should be contacted at least one day before the actual notification and application for the payment order.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

For details on the waiting period, see question 18.

The intended concentration must not be implemented prior to clearance (ie, the undertakings concerned may not exercise rights or obligations arising from the intended concentration until the AMO issues a clearance decision (suspension obligation)).

However, the Act recognises the following exemptions:

- In the case of a public tender, the selected bidder may make its bid provided that it does not exercise the voting rights arising in relation to the implementation of the bid.
- The implementation of a public takeover bid or of transactions with securities at the securities market through which control is acquired from various subjects, provided that:
  - such concentration is immediately notified to the AMO (ie, in practice, as soon as the acquirer learns that it has acquired control); and
  - the acquirer of the control does not exercise its voting rights related to these securities or only does so to maintain the full value of its investments based on an individual exemption granted by the AMO.
- Under exceptional circumstances, the AMO may (upon request of the parties) grant an exemption from the standstill obligation if there are 'serious reasons'; for example, serious financial problems or insolvency threats. The AMO has to decide on the exemption request within 20 working days of its submission (however, if the AMO asks for the further information, the clock may be stopped). The exemption should generally concern only the performance of certain urgent actions if no threat to competition is identified. The AMO may bind the grant of the exemption to conditions and commitments to ensure effective competition.

#### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the suspension obligation is breached (closing before clearance), the AMO shall impose fines (see question 9).

In addition, the AMO may oblige the parties to restore the level of competition that existed prior to the implementation of the concentration, especially by ordering the division of a company or the transfer of rights, or imposing of other obligations.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance (see question 12) are applicable also in case of foreign-to-foreign mergers. However, we are not aware of any recent cases in this regard.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In general, foreign-to-foreign concentrations are assessed and treated in the same way as domestic concentrations. The Act does not provide for hold-separate (carveout) solutions. For the means of requesting an exemption from the standstill obligation, see question 18.

#### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

As mentioned in question 11, certain actions related to public takeover bids are – by law – exempted from the standstill obligation.

#### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Details concerning the content of the notification and the respective documents required are set forth in Decree No. 170/2014, which entered into force on 1 July 2014. The Decree sets out the following situations where a short-form notification may be submitted:

- an undertaking intends to acquire sole control over another undertaking in which it already exercises joint control;
- there is no horizontal or vertical overlap between the undertakings concerned under any alternative definition of the relevant market; or
- the combined market share of the parties concerned (including their affiliated companies) is less than 15 per cent at the horizontal level and individually or combined less than 30 per cent at the vertical level also under any alternative definition of the relevant markets.

A short-form notification must contain only a limited level of information, in particular:

- information on the parties to the concentration (ie, their business activities);
- description of the concentration;
- information on the capital, financial and personnel structure;
- general market information (eg, list of all categories of goods produced or imported including the respective territories, possible product or geographical market definition based on such product categories, statement on the (non-)existence of affected markets and the possibility to use the short-form notification, total market size, individual market shares held by the parties, most important competitors);
- information on cooperative effects of a joint venture;
- reasons for and effects of the concentration and the impact on competition;
- information on other applicable competition authorities; and
- underlying documentation.

If the criteria for the submission of a short-form notification are not met, the usual long-form notification must be submitted that requires the

parties to submit, in addition to the limited information contained in a short-form notification, rather extensive data on the affected markets and their functioning.

Together with the notification, a power of attorney must be submitted, which is not, however, required to be notarised and apostilled. If some of the required information is not available or known, the parties may ask (in the filing) for a waiver from providing such data and provide their best estimates or at least an indication of from where the AMO could get the information. Also, if some information is not deemed as relevant for the assessment of the concentration, the parties may ask the AMO to agree with the waiver.

The filing and all documents must be submitted in the Slovak language with the certified translation or the affidavit that the uncertified translations are correct and complete. Also, if only copies are submitted, the affidavit declaring the identity of the copy with the original is required. In practice, the AMO tends to agree with the submission of certain documents (such as annual reports) in English or the translation of only certain parts thereof into Slovak.

The submission of false or incomplete information in a merger filing is subject to fines, which may amount up to 1 per cent of the total turnover for the preceding accounting period.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

For the statutory timetable for clearance, see question 18. In practice, it is our experience that the AMO adheres to mandatory deadlines and usually strives to clear cases within Phase I proceedings. The Act does not provide for the possibility to request expedited proceedings.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The AMO recommends that pre-notification contacts are initiated before the notification is being formally submitted with the AMO, even if the case does not raise substantial merger control concerns. Although the provision of a draft merger notification is not mandatory, practice shows that this is usually welcomed by the AMO. Pre-notification contacts should be initiated at least two weeks prior to the intended formal submission of the notification to the AMO.

Following the formal submission of the notification, the AMO issues an official letter informing the parties about the initiation of proceedings. Then the AMO assesses the completeness of the filing. It is recommendable to be in contact with the authority during this stage to ensure that this period is short. If the AMO finds that the submitted notification does not contain all the required information, it will issue a request for additional information (which will stop the clock). Once the filing is accepted as 'complete', the AMO issues an official confirmation letter to this effect.

The subsequent handling of the case depends on whether Phase I or Phase II proceedings are applied.

If the concentration does not require an in-depth analysis owing to the identification of competition concerns as to its compatibility with the Slovak competition law rules, the AMO issues a decision within 25 working days of the receipt of the notification (Phase I proceedings). This decision usually contains only a 'simplified reasoning', essentially some general information about the parties to the concentration, the business sectors or relevant markets where they are active.

In cases that require in-depth analysis because of the identification of competition law concerns (Phase II proceedings), within the deadline for the Phase I proceedings the parties must be informed about the initiation of Phase II proceedings in writing. Once the AMO has initiated Phase II, it must issue a decision within 90 working days following the

date of delivery of the written notification about the initiation of Phase II to the parties.

In the event that the AMO requests from the parties additional information or documents that it considers relevant for the assessment of the case, this effectively stops the clock. If the notification contains false (misleading) information, the clock is reset and newly starts running only as of the day following the delivery of the true information. At the request of the parties or with their consent, the AMO may prolong the Phase I and II periods, even repeatedly, by a total of up to 30 working days at most.

If the concentration raises competition law concerns, the AMO may request the parties in writing (including reasoning) to propose conditions (commitments) within 30 working days upon delivery of such request. Such request effectively stops the clock, namely, the above-described Phase I and II review or decision-making periods are not in effect until the parties submit their proposed conditions or commitments or the expiry of the 30-working-day period (whichever occurs first). At justified request, the 30-working-day deadline may be prolonged or the AMO may accept the proposal even after its expiry in exceptional cases. Moreover, inspired by the European Commission's practice, the AMO may test the proposed conditions or commitments by addressing them to natural persons or legal entities, publishing or in another manner or may appoint an independent trustee to supervise the fulfilment of such conditions or commitments.

Before issuing its final decision in Phase II, the AMO is required to inform the parties about its assessment of the matter and conclusions and asks them to provide their comments (if any) in writing. Subsequently, the final decision is issued and delivered to the parties. The decision becomes valid and effective if it is not appealed within 15 days of the delivery or the parties waive the right of appeal.

### SUBSTANTIVE ASSESSMENT

#### Substantive test

#### 19 | What is the substantive test for clearance?

The AMO follows the significant impediment to effective competition (SIEC) test, which is also applied by the European Commission. Therefore, the AMO assesses whether the concentration does not significantly distort effective competition on the relevant market, in particular owing to the creation or strengthening of a dominant position. We are not aware of any cases where the AMO took into account the 'failing firm' defence.

#### 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. With regard to the assessment of the cooperative effects, see question 3.

#### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The AMO examines whether the concentration will not significantly impede effective competition in the relevant market, in particular owing to the creation or strengthening of a dominant position (see also question 19).

This may especially be the case if an undertaking or several undertakings are not subject to substantial competition or can act independently as a result of their economic power. As the Act does not contain any market share presumptions, each case requires an individual assessment on a case-by-case basis.

The Act does not list specific additional factors to be taken into account by the AMO for the purpose of its assessment. In practice,

however, the AMO usually considers various factors, including the market position of the undertakings concerned, market structure and possible future developments, barriers to entry, existence of competitors, intentions of companies to enter the market, supply and demand structure, price development, etc.

When assessing the concentration on this basis, the AMO enjoys a wide discretion. Inter alia, it takes into account the European Commission's guidelines on the assessment of horizontal and non-horizontal mergers, the guidelines on the definition of the relevant market and other relevant soft law.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The Act does not expressly mention non-competition issues as being relevant for the assessment process. However, as the AMO enjoys wide discretionary powers for analysing the effects of the concentration and tends to follow in general the practice applied under the EU merger control regime, it is not unlikely that the AMO would take into account non-competition issues in a similar way as the European Commission.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Act does not expressly mention economic efficiencies. In practice, however, the AMO would most likely take them into consideration (in particular if the parties refer to them in the notification).

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Based on the assessment of the concentration under the substantial test (question 19), the AMO may issue:

- a decision approving the concentration;
- a decision approving the concentration provided that certain conditions and obligations imposed on the undertakings concerned are observed and met; or
- a prohibition decision.

After clearance has been granted, the AMO:

- on its own initiative, has to reverse a decision that has been made subject to conditions and decide on the concentration anew if the parties fail to fulfil the conditions imposed;
- at the request of the parties, may change a decision that has been made subject to conditions if:
  - the situation on the relevant market has changed so substantially that the imposed conditions or obligations are no longer justified; or
  - the parties request the prolongation of the fulfilment deadline, because they cannot fulfil the conditions or obligations for serious reasons; or
- on its own initiative, may change or reverse a decision if:
  - information relevant for granting clearance later proves incomplete or wrong; or
  - the parties fail to fulfil the commitments related to the condition imposed in the decision.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

At the request of the AMO, the notifying party may submit proposals suggesting certain conditions and related commitments in view of eliminating competition law concerns (see question 18). In general, the AMO accepts both structural and behavioural remedies.

As mentioned in question 18, the AMO may test draft conditions and commitments by directly inviting natural persons and legal entities to provide comments and observations, making them public on its website or in any other manner. Inter alia, the conditions and commitments may include an obligation to appoint an independent trustee who monitors the compliance with the agreed conditions and commitments at the costs of the parties.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

If the AMO identifies competition law concerns, the notifying party is obliged within 30 working days to provide a proposal for commitments and conditions (see question 18). If the notifying party fails to meet this deadline, the AMO may prohibit the concentration. The AMO does not usually consider any proposals submitted after the expiry of the 30 working days deadline. However, upon a justified request the AMO may accept them even after the expiry of the deadline provided that the remaining time period for issuing the decision (see question 18) still allows for a proper review or assessment of the proposal.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of any foreign-to-foreign mergers where the AMO has requested remedies.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The clearance decision of the AMO usually covers restrictions directly related to and necessary for the implementation of the intended concentration. Details are set out in the AMO's Guidelines on Restrictions of Competition Relating Directly to a Concentration and Being Essential for its Realisation.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The fact that a notification has been submitted is made public on the website of the AMO and the Commercial Bulletin, inviting third parties to submit their observations and comments on the intended concentration.

Although third parties thus have the right to be heard, they do not enjoy procedural rights comparable with those of the notifying parties (eg, third parties in particular generally have no right to appeal the AMO's decision). However, they may receive access to the file based on article 40(1) of the Act if they are able to demonstrate their legitimate interest.

The AMO may also gather information ex officio, in particular by contacting customers and competitors to get their opinions on the intended concentration or for requesting information, clarifications or

documents related to the concentration. The AMO may also market test the proposals for conditions or commitments (see questions 18 and 26).

### Publicity and confidentiality

**30** | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The fact that a notification has been submitted is made public on the website of the AMO and in the Commercial Bulletin (see question 29). The AMO also publishes its decisions in a similar way. The AMO may, however, not disclose information or documents that contain business secrets subject to protection under special laws (eg, banking secrecy) or that are marked as confidential information. In practice, it is therefore recommended to explicitly mark any business or confidential information as such in the notification and any other comments, statements and documents sent to the AMO, including a short reasoning as to why confidentiality has been requested. To be specific, as regards notification of the concentration, the notifying party is obliged to provide reasons for the requested confidentiality and provide a non-confidential version of the notification. The AMO published a guidance on the assessment of information marked as business secret, confidential information or personal data.

Otherwise, the parties may be requested by the AMO to provide a non-confidential version of the information or documentation, including reasons for the requested confidentiality. Only under exceptional circumstances could the protected information be made accessible by the AMO to another party to the proceedings (with the consent of the affected party) or to its representative (in absence of such consent). Decisions issued within Phase I (see question 18) are rather short and contain only the simplified reasoning.

### Cross-border regulatory cooperation

**31** | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The AMO is a member of the European Competition Network and the International Competition Network. It actively cooperates with competition authorities that are members of these networks. According to the annual report of the AMO, its employees were actively involved in European Commission cases as rapporteurs within the Advisory Committee as well as in various working groups with the European Commission. Moreover, the AMO maintains a close cooperation with the Czech competition authority, including the regular exchange of experience and know-how, discussion of legal and other current issues and the organisation of seminars, conferences and workshops. Bilateral cooperation also exists with the Hungarian and Austrian competition authorities.

## JUDICIAL REVIEW

### Available avenues

**32** | What are the opportunities for appeal or judicial review?

Within 15 days of its delivery, the AMO's decision may be appealed with the Council of the AMO (the Council). The decision of the Council may be appealed with the Regional Court Bratislava within two months of its delivery. The decision of the Regional Court Bratislava may be challenged only in limited occasions with the Supreme Court of the Slovak Republic based on the special remedy.

Filings with the courts do not have a suspensive effect. However, the courts may grant a suspension of the enforceability of the decision at the party's request, provided that serious harm would otherwise occur to the applicant.

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There are only very few cases where the AMO has prohibited concentrations in the past (and thus merger control decisions of the AMO have been only very rarely challenged). In 2016, the AMO had competition concerns in several cases. In two of them, the parties decided to refrain from offering commitments to overcome those concerns, and to discontinue the intended transaction. They withdrew the notification and the proceedings were closed. Another of the cases in which competition concerns were identified ended with a commitment decision issued in early 2017. We are not aware of any more recent cases.

### Time frame

**33** | What is the usual time frame for appeal or judicial review?

The Council of the AMO is obliged to issue a decision within six months. However, this time frame may be (repeatedly) prolonged by up to 24 months in complex cases. The judicial review performed by the Regional Court Bratislava and the Supreme Court of the Slovak Republic is not subject to any time restrictions; therefore, the time frame largely depends on the complexity of the case and cooperation of the parties.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

**34** | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

There are no statistical data for 2018 yet; however, all notified concentrations were most likely approved according to publicly available information. The AMO approved one concentration subject to structural remedies in 2017. Further, in March 2017, the AMO opened official administrative proceedings against entities for alleged infringements of the merger notification obligation and the suspension obligation in the area of retail sales of books. The unofficial investigations have been going on since 2015, when the AMO conducted a dawn raid at the premises of the largest bookselling network in Slovakia.

The AMO does not distinguish between local mergers and foreign-to-foreign mergers in its assessment. As far as we are aware, all foreign-to-foreign mergers that have been notified to the AMO have

been cleared. In 2012, the AMO issued a prohibition decision concerning a local merger in the bakery sector.

### **Reform proposals**

35 | Are there current proposals to change the legislation?

We are unaware of any proposals to further amend the Act in the near future.

# Slovenia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

In Slovenia, merger control, as well as other aspects of competition law, is substantially governed by the Act on the Prevention of Restrictions of Competition (the Act). The Act became effective in 2008 and was amended in June 2009, April 2011, November 2011, July 2012, August 2013, April 2014, October 2015 and May 2017.

The information and documents to submit in a merger control notification are set out in the Decree Defining the Contents of the Concentration of Companies Notification Form. The filing fees are determined by the Administrative Fees Act. With regard to procedural matters that are not specifically regulated in the Act, the General Administrative Procedure Act applies.

The relevant authority for merger control (and competition law in general) is the Slovenian Competition Protection Agency (CPA), which is competent for receiving, reviewing and issuing decisions on notified concentrations. In fulfilling its competencies, the CPA acts independently and autonomously.

The Agency Director and the Agency Council are the main bodies of the CPA. The latter consists of five members who are appointed by the parliament for a term of five years. The Agency Director is the chairman (president) of the Agency Council. For each case, the Agency Council sets up a separate decision panel (which consists of all members of the Agency Council who in turn appoint from their midst a panel chairman). The merger control review procedure until the adoption of the decision is then conducted by a public officer authorised by the Agency Director.

The decision to impose a fine (in cases envisaged by the Act) is adopted in a separate procedure that is decided by a panel composed of three members of the Agency Council and employees of the CPA. The panels adopt decisions by a majority of votes in sessions that are not open to the public. More information about the CPA and its activities can be found at [www.varstvo-konkurence.si](http://www.varstvo-konkurence.si).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Act defines the following as concentrations:

- the merger of two or more previously independent undertakings or parts of undertakings;
- the acquisition of direct or indirect control of one or more other undertakings, in whole or in part, by one or more natural persons already controlling at least one undertaking, or by one or more undertakings, whether by purchasing of securities or assets, entering into a contract or by any other means; or

- creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity.

A concentration does not arise if banks, insurance companies, savings institutions or other financial institutions, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold business assets on a temporary basis that they have acquired in an undertaking with a view towards reselling them. This exemption only applies provided that they do not exercise any voting rights in respect of those business assets with a view towards determining the competitive behaviour of such an undertaking or that they exercise these voting rights only with a view towards preparing for the disposal of business assets and that any such disposal takes place within one year of the date of acquisition. If the disposal is not reasonably possible within this period of time, it may – upon request – be extended by the CPA.

#### 3 | What types of joint ventures are caught?

The creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration (see question 2). If the creation of this joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent (ie, the joint venture partners), the CPA appraises this coordination in accordance with the cartel prohibition (prohibition of restrictive agreements; article 6 of the Act). If the CPA concludes that the exemption criteria set out in article 6 of the Act are not met, it will not approve the concentration (article 11(3) of the Act).

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

According to the Act, 'control' may be obtained through rights, contracts or any other means that separately or together, taking into account facts and regulations, confer the possibility of exercising decisive influence on an undertaking or part of an undertaking, in particular on the basis of:

- ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking.

Control is acquired by individuals or undertakings that are holders of rights or entitled to rights under the contracts concerned, or while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving from the contracts.

Minority interests are caught only provided that they confer control by any of the means described above.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The CPA must be notified of a concentration where in the business year preceding the concentration:

- the combined turnover of the undertakings concerned (including undertakings belonging to the same group) exceeded €35 million in Slovenia; and
- either the turnover of the undertaking acquired (ie, the target), including undertakings belonging to the same group, exceeded €1 million in Slovenia, or in the case of the creation of a full-function joint venture, the turnover of at least two undertakings concerned (including undertakings belonging to the same group) exceeded €1 million in Slovenia.

Even where these turnover thresholds are not met, the undertakings concerned should inform the CPA of the implementation of a concentration, if a combined market share of the undertakings concerned exceeds 60 per cent in Slovenia. The CPA may then request a notification of the concentration within 15 days following the date on which the undertakings concerned informed the CPA (article 42(3) of the Act). At present, it is unclear whether the above market share test would also be met if one undertaking concerned alone represents a market share exceeding 60 per cent and there are no overlaps with the other undertaking or undertakings concerned.

The undertaking or undertakings concerned are the merging undertakings, the undertaking gaining control over another undertaking (ie, the acquirer), the acquired undertaking (target), and undertakings creating a notifiable joint venture.

For the purpose of turnover calculation, the net revenues from the sale of products and the provision of services in Slovenia have to be taken into account. Turnover generated by sales or services between companies belonging to the same group is not taken into account. Where the concentration consists of the acquisition of control in a part of one or more undertakings, regardless of whether these parts qualify as a legal entity, only the turnover relating to the parts that are subject to the concentration are taken into account for the purpose of turnover calculation. Two or more transactions that take place within a two-year period between the same persons or undertakings are treated as one and the same concentration arising on the date of the last transaction.

Specific rules apply to the calculation of the turnover of credit and financial institutions where the financial income from shares, loans granted and operating receivables has to be taken into account. With regard to insurance companies, the amount of the gross premiums written is relevant, comprising all revenues and receivables from insurance contracts, including reinsurance premiums paid, after the deduction of taxes or contributions associated with insurance premiums.

Concentrations falling within the jurisdiction of the European Merger Control Regulation are not subject to the Slovenian merger control regime (one-stop-shop principle).

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act (see question 2) and exceeds the jurisdictional thresholds (see question 5), filing is mandatory.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign concentrations are subject to merger control if the jurisdictional thresholds set out in question 5 are met. It is not required that any of the undertakings concerned have a registered seat or local branch in Slovenia. To date, the CPA's practice has not developed a de minimis or effects-based exemption.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act does not contain any provisions that would specifically relate to foreign investment or special sectors. However, provisions related to merger control and other relevant approvals can be found, inter alia, in the following areas.

#### Media sector

The Act applies to media mergers in the usual way (ie, the CPA is competent to review, assess and clear or prohibit the concentration if the jurisdictional thresholds are met). However, according to the Media Act, in addition a special consent granted by the Ministry of Culture is required for the acquisition of shareholdings (or voting rights) of 20 per cent or more in publishers of radio or TV programmes or printed daily newspapers. According to article 58(3) of the Media Act, the Ministry of Culture may refuse to grant such approval if the merger results in the creation of a dominant position:

- on the advertising market;
- in the media market where coverage of more than 15 per cent of analogue terrestrial radio programmes is reached on the Slovenian market for radio programmes transmitted via analogue terrestrial radio signals;
- in the media market where coverage of more than 30 per cent of analogue terrestrial television programmes is reached on the Slovenian market for television programmes transmitted via analogue terrestrial radio signals; or
- where the number of issues of daily newspapers exceeds 40 per cent of all sold issues of daily informative printed media in the Republic of Slovenia that is issued at least three times a week.

#### Energy sector

In the energy sector, the role of the market regulator is performed by the Agency for Energy. According to the Energy Act, it is, inter alia, competent to supervise the transparency and competitiveness of the electricity and gas markets. In this function, the Agency for Energy may be involved in the assessment of sector-specific mergers.

#### Electronic communications sector

The market regulator in the electronic communications sector is the Agency for Communication Networks and Services of the Republic of Slovenia (ACNS). The Electronic Communication Act provides specific rules for the cooperation between the ACNS and the CPA. Inter alia, both authorities are authorised to exchange relevant information and cooperate in determining and analysing relevant markets and identifying significant market power. The ACNS is also competent to define relevant markets and to assess significant market power. Hence, in practice, it is likely that the CPA will involve the ACNS when assessing sector-specific mergers.

#### Financial sector

In the case of the acquisition of 'qualified shareholdings' (ie, above 10, 20, 33 and 50 per cent), the laws regulating banks, insurance companies, stock brokerage companies and fund management companies

require the approval of the respective regulatory bodies. Obtaining such shareholding without the prior consent of the competent regulatory body results in the loss of voting rights based on the shares beyond the qualified shareholding.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A merger notification has to be submitted to the CPA no later than 30 days after the conclusion of the agreement, the announcement of a public bid or the acquisition of a controlling interest (whichever of these triggering events occurs first). If the CPA requests the parties to notify the concentration because their combined market share in Slovenia exceeds 60 per cent (see question 5), the merger notification must be submitted no later than 30 days from receipt of this request.

In case of a failure to notify the concentration within the filing deadline, the CPA may impose fines in the amount of up to 10 per cent of the annual turnover generated by the undertakings involved in the concentration (including other undertakings belonging to the same group) in the preceding business year. In addition, a fine between €5,000 and €10,000 may be imposed on the responsible persons of such undertakings and (if applicable) a fine between €3,000 and €5,000 on a natural person already controlling at least one undertaking.

If the nature of the infringement of the filing obligation is particularly serious (eg, owing to the amount of damage inflicted, the pecuniary benefit, the infringer's intent or unlawful gain), a fine between €15,000 and €30,000 may be imposed on the responsible person of a legal entity, and (if applicable) a fine of between €10,000 and €15,000 on a natural person already controlling at least one undertaking.

With regard to the sanctions for closing before clearance, see question 12.

#### 10 | Which parties are responsible for filing and are filing fees required?

Concentrations that consist of a merger or acquisition of joint control have to be notified jointly by the undertakings involved in the merger, or by those acquiring joint control. In all other cases, the undertaking acquiring control is responsible for the filing.

The filing fee is determined by the Administrative Fees Act. At present, it amounts to €2,000.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The intended concentration must not be implemented prior to clearance, as undertakings are not allowed to exercise rights and obligations arising from the intended concentration until the CPA issues a clearance decision (suspension obligation).

In the event the CPA requested the parties to notify the concentration because their combined market share in Slovenia exceeds 60 per cent (see questions 5 and 9), the undertakings must cease implementing the concentration as of the date of receipt of this request.

Under exceptional circumstances, the CPA may (upon the request of the parties) permit the implementation of the concentration prior to clearance, if such an implementation is essential to maintain the full value of the investment or to perform services of general interest.

The suspension obligation does not have an effect on the implementation of public bids pursuant to the Slovenian Takeovers Act, provided that the acquirer does not exercise voting rights (or exercises

them only according to a permit for early implementation granted by the CPA).

The duration of the waiting period depends on whether Phase I or Phase II proceedings are applied (see question 17).

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

In the case of closing before clearance, the CPA may impose fines (see question 9).

In addition, the CPA may file a legal action with the competent civil court to declare the implementation (the exercise of rights and obligations), which is contrary to the suspension obligation, null and void (articles 12(4) and 44(3) of the Act). We are not aware that this legal action has so far been filed by the CPA.

Also, according to article 53 of the Act, the CPA may impose measures on the undertakings concerned to restore the situation prevailing prior to the implementation, in particular through the division of the undertaking or the disposal of all the shares acquired. The latter of these measures has recently been applied in a merger between two Slovenian newspaper companies (the acquirer was ordered to dispose of the acquired 75 per cent shareholding).

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable with regard to foreign-to-foreign mergers. We are not aware of any specific cases where these sanctions have recently been applied.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In principle, foreign-to-foreign concentrations are assessed in the same way as local concentrations. Hence, under exceptional circumstances, the CPA may (upon the request of the parties) permit the implementation of the concentration prior to clearance, if such implementation is essential to maintain the full value of the investment or to perform services of general interest (see question 11).

The Act does not explicitly provide for hold-separate (carveout) solutions. Given that the Slovenian merger control regime assesses the effects of a merger in the Slovenian market (see question 19), depending on the transaction structure, one could argue that it is possible to carve out the transaction steps related to the Slovenian market and to proceed with the implementation outside Slovenia without infringing the Slovenian suspension obligation. Although widely discussed in practice, we are not aware that such solutions have been tested with the CPA so far.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

Public takeover bids are primarily monitored by the Slovenian Security Market Agency and subject to the provisions of the Slovenian Act on Takeovers. The CPA has to be informed of the intended public bid by a simple written notice on the day such intention is published. Also, the CPA must be provided with the bid document (ie, the prospectus).

Public takeovers that lead to notifiable concentrations within the meaning of the Act require the submission of a merger notification to the CPA no later than 30 days after the announcement of the public

bid (see question 9). Importantly, the suspension obligation does not apply to the implementation of public bids within the meaning of the Slovenian Takeovers Act, provided that the acquirer does not exercise voting rights or exercises them only according to a permission for early implementation granted by the CPA.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The information and documentation to be submitted in a merger notification is set out in the Decree Defining the Contents of the Concentration of Companies Notification Form (the Form). The Form requires the parties to provide quite substantial information on the concentration, as well as on the relevant markets, market shares and market size. Inter alia, the following needs to be provided:

- information on the parties to the concentration (eg, name, registered seat, contact person, nature of business, ownership and control; personal and financial links and previous acquisitions; annual reports);
- description of the intended concentration;
- originals or certified copies of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- total size of the relevant markets and market shares of the undertakings concerned;
- information on main competitors, customers and suppliers, the structure of supply and demand, market entry, relevance of research and development, efficiency gains, etc;
- information on indispensable ancillary restrictions; and
- (if available) copies of analyses, reports or studies related to the relevant market.

The Slovenian merger control regime does not provide for a short-form notification. Therefore, as a general rule, each notification has to include all the (detailed) information requested in the Form. However, if the (combined) market shares after the concentration are lower than 15 per cent (horizontal relationships) or 25 per cent (vertical relationships) in the relevant product market, the parties may limit information in relation to such markets. In any case, however, the parties must provide information on the size of the relevant markets, their turnover and market shares in such markets, and information about the largest competitors and their market shares.

The parties may also request from the CPA a waiver from providing certain information required by the Form, if the entire set of such information is, in the opinion of the parties, not necessary for the accurate and complete filing and the assessment of the case.

If some of the information requested in the Form is not available to the parties, this must be stated in the filing, together with information on where the CPA may obtain such information.

The notification and all documents attached thereto need to be submitted in the Slovenian language. Documents on the basis of which the concentration takes place must be provided in certified copies; all other documents attached to the filing may be provided in simple copies.

The notification needs to be complete and include accurate and true information. If information is missing in the notification, the CPA may request from the notifying party to supplement the required information within the deadline set by the CPA. The notifying party's failure to supplement the notification will trigger a legal presumption that the transaction has not been filed and will make the notifying party subject to the sanctions for failure to notify concentrations (see question 9).

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

The CPA decides in Phase I proceedings if the concentration does not raise serious doubts as to its compatibility with the Slovenian competition law rules. The CPA then must issue its decision within 25 working days of the receipt of a complete notification.

In cases that raise serious doubts as to their compatibility with the Slovenian competition law rules, the CPA initiates Phase II proceedings within 25 working days of receipt of a complete notification. Once the CPA has initiated Phase II, it must issue a decision within 60 working days of initiating such proceedings.

If the parties propose remedies, the deadline for issuing the Phase I or Phase II decision is extended by an additional 15 working days.

The waiting period starts running only once a complete notification has been submitted. Hence, if the CPA finds that the submitted notification does not contain all mandatory information, it will issue a request for additional information and the clock does not start running.

There is no legal presumption that the concentration has received approval once the waiting period expires. In general, the parties may in such a case file a legal action with the Administrative Court of Slovenia.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

See question 17. The Act does not provide for the possibility of obtaining a waiver or expedited proceedings and there is no formal procedure in respect of extensions of the waiting periods. There is no legal presumption that the concentration has obtained approval once the statutory waiting period has expired (see question 11). Therefore, depending on the workload of the CPA, in practice Phase I clearance decisions are often rendered around two to two-and-a-half months after the submission of the notification.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The CPA assesses whether the intended concentration would result in a significant impediment to effective competition within the territory of Slovenia, or in a substantial part of it, in particular because of the creation or strengthening of a dominant position (see also question 21).

We are not aware of cases in which the CPA took somewhat special circumstances into consideration.

#### 20 | Is there a special substantive test for joint ventures?

No. However, if the creation of a joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination is assessed in accordance with the criteria of article 6 of the Act (see question 3).

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

Inter alia, the CPA investigates the intended concentration on the basis of the following:

- market position of the undertakings involved in the concentration;
- options for financing the undertakings involved;
- the structure of the market;

- choices and alternatives that are available to suppliers and customers and their access to sources of supply or the market itself;
- barriers to entry;
- supply and demand projections with regard to the relevant markets;
- benefits to intermediate and final customers; and
- technical and economic development (provided that it is advantageous for consumers and does not hinder competition).

### Non-competition issues

- 22 | To what extent are non-competition issues relevant in the review process?

The Act does not expressly mention non-competition issues such as industrial policy or public interest issues as being relevant for the assessment process. In practice, however, it is not unlikely that the CPA would take into account non-competition issues in a similar way to the European Commission.

### Economic efficiencies

- 23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies (described rather generally as 'technical and economic development'; see question 21) are part of the appraisal of the concentration and are taken into account under the condition that they are advantageous to the consumers and do not hinder competition.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

- 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The CPA assesses whether the intended concentration would result in a significant impediment to effective competition within the territory of the Republic of Slovenia, or on a substantial part of it, in particular owing to the creation or strengthening of a dominant position. The parties may propose remedies at any time and submit comments and evidence to remove the CPA's concerns (see questions 25 and 26). However, ultimately, if the remedies proposed or comments submitted by the parties cannot eliminate the CPA's concern, it may issue a decision declaring the concentration incompatible with Slovenian competition rules.

### Remedies and conditions

- 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

According to article 51 of the Act, the notifying party may submit remedies to eliminate serious doubts as to the compatibility of the concentration with Slovenian competition rules. The Act does not distinguish between structural and behavioural remedies. In practice, depending on the individual cases, both may be accepted by the CPA.

- 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Remedies can be submitted at any time during the proceedings to remove serious doubts as to the compatibility of the concentration with Slovenian competition rules. In this case, the time limit for the CPA to issue its decision is extended by an additional 15 working days (see question 11).

When assessing the proposed remedies, the CPA takes into account their nature and scope, as well as the likelihood of their effective and

timely implementation. If accepted by the CPA, it specifies the adopted remedies, the obligations to ensure their implementation and supervision, and time limits for their implementation in the clearance decision.

Later on, the CPA may require the notifying party to provide a report on the implementation of the remedies imposed.

- 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CPA was in the past conducting a market test in relation to remedies proposed by undertakings participating in a foreign-to-foreign merger (the transaction concerns the market for the wholesale supply of sports television channels). However, according to public sources, the merger was not cleared.

### Ancillary restrictions

- 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In the merger filing, inter alia, the parties have to provide information on indispensable ancillary restrictions related to the transaction (see question 16). If the CPA issues a clearance decision, either in Phase I or Phase II, that decision is deemed to cover restrictions directly related to and necessary for the implementation of the intended concentration.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

- 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The CPA publishes a list of notified concentrations on its website. Phase I decisions are also made public on the CPA's website. In a similar way, in Phase II proceedings both the fact that such proceedings have been initiated and the final decision are published on the CPA's website. The information on the initiation of Phase II proceedings states the names of the parties, a brief summary of the grounds for initiation of the proceedings, and invites third parties to submit their observations and comments. Decisions of the court issued in a judicial review against the decisions of the CPA are published on the CPA's website in a non-confidential version.

Third parties able to demonstrate their legally recognised interest may lodge an application for participation in the proceedings. Such a request needs to be filed with the CPA within 30 days from the publication of the initiation of proceedings. If the participation in the proceedings is granted, the third party may take part in the entire proceedings, receive access to the file, lodge statements and opinions and, ultimately, challenge the final decision issued by the CPA.

Apart from the above, any third parties, even without formally joining the proceedings, may submit comments and statements to the CPA at any stage of the Phase I and II proceedings. Although the CPA is not legally obligated to consider such information, it usually takes it into account when assessing the case.

Also, the CPA may, in the course of the proceedings, approach third parties (eg, competitors, customers, suppliers) on its own initiative, in particular via written requests for information.

### Publicity and confidentiality

- 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As to the publicity given to the process, see question 29.

Upon request, the CPA must protect the identity of the complainant or provider of other information, if this person requests protection, and shows that it is likely that disclosure may cause significant harm to it.

Access to the case file may only be granted to the parties to the proceedings. However, inter alia, the parties are not allowed to review or make copies of confidential information or information relating to confidential sources. The burden of proving the existence of such confidential information (eg, business secrets) rests with the undertaking claiming so. The parties may also be asked by the CPA to submit a non-confidential version of their respective documents. It is advisable to explicitly mark any confidential information as such already in the merger notification and any comments, statements and documents sent to the CPA.

The CPA may disclose confidential information that constitutes a business secret to the notifying parties, if the need for disclosing this information prevails over the interest in protecting it. To the best of our knowledge, we are not aware of any such case of disclosure with regard to merger proceedings.

Information on the initiation of the procedure as well as the Phase I and II decisions published on the CPA's website are non-confidential versions from which business secrets of the parties have been removed (the CPA requests the parties upfront to provide non-confidential versions of the decisions).

### Cross-border regulatory cooperation

**31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?**

The CPA is a member of the European Competition Network and the International Competition Network. It also cooperates with the OECD and maintains informal contacts with some competition authorities of non-EU countries in the region.

## JUDICIAL REVIEW

### Available avenues

**32 | What are the opportunities for appeal or judicial review?**

Legal actions for judicial review against the CPA's decision can be filed with the Administrative Court of the Republic of Slovenia. The court generally decides without an oral hearing. The plaintiff may not put forward any new facts or evidence, unless the plaintiff was not given the chance to put forward facts and evidence in the proceedings in front of the CPA. An appeal against the decision of the Administrative Court of the Republic of Slovenia can be filed with the Supreme Court of the Republic of Slovenia.

We are not aware of the merger cases that actually went through judicial review, as the undertakings involved usually satisfy the concerns of the CPA by offering corrective measures (commitments).

### Time frame

**33 | What is the usual time frame for appeal or judicial review?**

The legal action has to be filed with the Administrative Court of the Republic of Slovenia within 30 days of the date on which the decision of the CPA was served. Because the Administrative Court of the Republic of Slovenia has, in the course of the amendment of the Competition Act in August 2013, only recently become competent for judicial review in first instance, there is not yet much experience concerning its usual time frame for decision-making. The appeal procedure before the second instance court (ie, the Supreme Court of the Republic of Slovenia) usually takes between several months and one year until the court issues its decision.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

**34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

In the past year, the CPA was deciding on several merger notifications, whereby the CPA cleared one merger only after the notifying parties proposed sufficient commitments. In several cases the CPA has conducted market tests in relation to the concentration or the proposed commitments. Otherwise the number of the notified (and cleared) mergers is relatively stable throughout recent years.

### Reform proposals

**35 | Are there current proposals to change the legislation?**

The latest amendments to the Act were adopted in May 2017; however, these amendments do not concern the merger control regime. The first proposal for the amendments prepared by the Ministry of Commerce included the introduction of a simplified assessment of concentrations under certain conditions; however, these proposals were not contained in the amendment to the Act that was eventually adopted. We are not aware whether any further proposals to simplify the Slovenian merger control regime for certain types of concentrations will be put forward in the near future.

## UPDATE AND TRENDS

### Key developments of the past year

**36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

Currently, amendments to the Competition Act are being considered by the competent bodies, and the legislative proposal was published in the beginning of 2019. The proposal aims to introduce a simplified merger notification procedure. The respective conditions will be determined in a separate implementing regulation, the draft of which is not available yet. Another important change concerns the imposition of fines on undertakings for, among others, infringements of the duty to file a merger notification and infringements of the standstill obligation. Under the current legislation, the CPA may only impose fines in a separate misdemeanour procedure, which is carried out once the administrative procedure has been completed. The legislative proposal, however, envisages merging the administrative and misdemeanour proceedings into one single proceeding that shall render the imposition of fines more efficient pursuant to the ECN+ Directive. However, the legislative proposal was criticised by many of the interested parties, including the CPA, and it was not yet submitted to the parliament.

The CPA appears to become stricter in assessing the notified concentrations, in particular in the media sector. The acquisition of a media production company by the domestic telecommunication services provider was abandoned by the parties following the receipt of an extensive statement of objections from the CPA raising serious competition concerns. In another matter concerning the media production sector, after an in-depth assessment that took several years, the CPA found the acquisition of a media distribution company by a telecommunications and media group incompatible with competition law and issued a divestment order regarding several sport channels. The Slovenian Supreme Court has stopped the implementation of the divestment order until a final decision on the merits of the case has been issued. In the same case, the acquirer is also at risk of being fined for submitting a late merger notification on the one hand as well as for violation of the standstill obligation on the other.

Very recently, the CPA, ex officio, commenced another merger control proceeding because of failure of the concerned undertakings to submit a merger notification.

The CPA also keeps an eye on the automotive sector. After several cases relating to the general prohibition of restrictions of competition contained in agreements and abuse of dominance cases, the CPA has performed a sector inquiry and has recently presented its findings. Whether the CPA's analysis in the sector inquiry will have any impact on merger control proceedings in Slovenia is yet to be seen.

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# South Africa

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Act No. 89 of 1998 (the Act) and the regulations promulgated thereto. The Competition Amendment Act No.18 of 2018 (the Amendment Act), which has been assented to by the President of the Republic of South Africa, but at the time of writing has not yet come into force, seeks to address the high levels of economic concentration and ownership profile of the South African economy. As a result, several potentially far-reaching amendments have been introduced (see questions 8, 35 and 36).

The Act is enforced by the Competition Commission (Commission) and the Competition Tribunal (Tribunal). Decisions by the Tribunal can be appealed or taken on review to the Competition Appeal Court (CAC). In circumstances where a competition matter raises constitutional issues or if the matter raises an arguable point of law of general public importance, such matters can also be referred to the Constitutional Court (CC).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Act stipulates that parties to transactions that meet the following two requirements must notify and obtain the approval of the relevant competition authority. First, the transaction must constitute a 'merger' as defined in the Act. Second, the transaction must exceed the prescribed financial thresholds.

In terms of the Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. The Tribunal has found that a business is something to which a market turnover can be clearly attributed, represents a measurable and relatively permanent transfer of market share or productive capacity from one firm to another, or tends to increase concentration or give the acquiring firm a larger market share even though the asset itself does not increase productive capacity. It appears that the decision by the Tribunal was subsequently amplified by the CAC and that parties should consider whether a transaction results in the 'transfer of an identified set of activities and structures which can now be identified as a separate business undertaking and which could be pursued by the transferee'.

Mergers are categorised as either being small, intermediate or large depending on which threshold is met. Only intermediate and large mergers require merger control approval, although the Commission can request parties to a small merger to apply for merger control approval where the Commission considers that the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds (see question 5).

The Commission is responsible for investigating and issuing a decision in respect of small and intermediate mergers. Large mergers are adjudicated by the Tribunal following an investigation and recommendation by the Commission on whether the transaction should be approved, approved with conditions or prohibited.

#### 3 | What types of joint ventures are caught?

The merger control provisions of the Act do not specifically refer to joint ventures, but the Act's definition of a merger is wide enough to catch any joint venture that results in an acquisition of control by the joint venture (and therefore the parents of the joint venture) over the businesses of the parents that are transferred or contributed to the joint venture.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act provides a list of examples of situations in which a firm is deemed to control another firm, including if that firm beneficially owns more than half of the issued share capital of the other firm, holds or controls the majority of votes at the shareholder or board of directors levels of the other firm, or has the ability to materially influence the policy of the other firm in a manner comparable to, for example, a majority shareholder.

The competition authorities typically consider a firm to have material influence over the policy of another firm where the former has a required say on or veto over strategic issues such as the budget, business plan, appointment of senior management, and direction of commercial policy of the latter, or a casting vote in the event of a tie in voting in members meetings or board meetings of the latter (similar to the factors considered by the European Competition Commission).

However, this is not an exhaustive list, and there may be matters not involving the typical decisions referred to above, which are of such a nature that they are nevertheless material to the strategic direction of a particular business (such as approving borrowing plans in a capital-intensive business requiring large amounts of loan funding).

The question of whether parties to an internal reorganisation must apply for merger control approval has been a hotly debated topic in South Africa for many years. The Commission has taken a view that internal reorganisations are subject to the merger control provisions of the Act, whereas the CC's decision in *Competition Commission and Hosken Consolidated Investments Limited/Tsogo Sun Holdings Limited* seems to suggest that internal reorganisations need not be notified for merger control approval – this interpretation is untested.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Parties to an intermediate or large merger may not implement the merger until the relevant competition authority has issued a clearance certificate.

Parties to a merger that do not meet the relevant merger notification thresholds (a 'small merger') may implement the merger without the approval of the Commission. However, the Commission has the discretion to require parties to a small merger to apply for merger control approval within six months of the implementation date in circumstances where the Commission considers that the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. Moreover, the Commission's guidelines on small merger notifications state that, if at the time of entering into the transaction, any of the firms (or firms within their group) is subject to a prohibited practice investigation by the Commission or respondents following a referral by the Commission of a prohibited practice investigation to the Tribunal, then the Commission will require the notification of the small merger. The Commission's guidelines on small merger notifications do not have the force of law and any merger parties may use their own discretion in deciding whether to voluntarily notify a small merger.

A merger will be categorised as an intermediate merger if:

- the turnover of the target firm in, into or from South Africa or asset value in South Africa (whichever the highest) exceeds 100 million rand; and
- the combined turnover in, into or from South Africa or asset value in South Africa of the acquiring firm (whichever the highest) and the turnover or asset value of the target firm (whichever the highest) exceed 600 million rand.

A merger will be categorised as a large merger where:

- the turnover of the target firm in, into or from South Africa or asset value in South Africa (whichever the highest) exceeds 190 million rand; and
- the combined turnover in, into or from South Africa of the acquiring firm (whichever is highest) and the turnover or asset value of the target firm (whichever the highest) exceed 6.6 billion rand.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Parties to a transaction that constitutes a 'merger' and meets the prescribed financial thresholds must apply for merger control approval and may not implement the merger until such time as the Commission or Tribunal (as the case may be) has issued a merger clearance certificate.

As mentioned in question 5, the Commission can call upon parties to a small merger to apply for merger control approval in which circumstances the Commission may ask the parties to take no further steps in implementing the merger.

Mergers involving banks and insurance companies may be excluded from the suspensory provisions of the Act in circumstances where consent or approval is required in terms of the Banks Act, Financial Services Boards Act and Financial Markets Act and where the Minister of Finance has issued the relevant notice to the Commission (see question 8 for more detail).

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Act applies to all economic activity within or having an effect within South Africa. The competition authorities have taken a broad view on what constitutes 'economic activity' and it would cover circumstances where firms outside of South Africa render services or supply goods to customers in South Africa.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act provides that the Commission and Tribunal may not make an order in relation to an intermediate or large merger where consent or approval is required in terms of the Banks Act, Financial Services Boards Act and Financial Markets Act and where the Minister of Finance has issued a notice to the Commission certifying that it is in the 'public interest' that the jurisdiction of the Act is excluded.

This public interest requirement has typically only been applied in circumstances where applying for the approval of a merger by the Commission or Tribunal would result in systemic or economic risk (due to timing or confidentiality reasons) as a result of a failing financial institution. Nevertheless, there is precedent for the Minister of Finance excluding the jurisdiction of the competition authorities even after a merger application has been filed to reduce confusion arising from approval having to be obtained from more than one regulator.

The Amendment Act will introduce provisions that allow the President of South Africa to intervene in mergers where the acquiring firm is foreign and where the merger may adversely affect South Africa's national security interests. The intervention by the President will take place via a committee, which is to be appointed by the President and which will comprise of Cabinet members and other public officials.

The foreign acquiring firm will be required to notify the committee of an intermediate or large merger. The committee must consider whether the merger will have an adverse effect on South Africa's national security interests, and in doing so, may consult and seek advice from the competition authorities or any other regulatory authority or public institution. The committee will effectively have a veto over mergers that are deemed to have a national security interest as the Commission and Tribunal may not consider a merger if the committee was not notified of the merger and may not approve the transaction if it was prohibited by the committee.

The President is required to publish a list of national security interests and must take into account the following factors in determining what constitutes a national security interest: the potential impact of the merger on defence capabilities; sensitive technology; infrastructure security; supply of critical goods or services; foreign surveillance risks; foreign relations; and terrorism.

This new provision is exceptionally broad and may result in many foreign mergers being subject to an additional level of scrutiny, which in turn may lead to procedural and timing delays and additional costs.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing a merger, but intermediate or large mergers may not be implemented until the merger has been approved by the relevant competition authority. The sanctions for failing to notify an intermediate or large merger may include: an administrative penalty of up to 10 per cent of a firm's South African turnover and or

exports from South Africa; and any other order deemed appropriate by the Tribunal, including the unbundling of the merger and divestiture (most likely in mergers giving rise to competition concerns). To date, the competition authorities have only imposed administrative penalties for failing to receive merger control approval and the penalties to date have typically ranged between 350,000 and 2 million rand.

#### 10 Which parties are responsible for filing and are filing fees required?

The acquiring and target firm are responsible for filing a joint merger application. The applicable filings fees are set out in the table below.

Merger classification	Filing fee
Small merger	No fee
Intermediate merger	165,000 rand
Large merger	550,000 rand

#### 11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The implementation of intermediate and large mergers must be suspended until the merger has been approved by the relevant competition authority. The waiting period for approval depends on whether the merger is intermediate or large. For intermediate mergers, the Commission has an initial period of 20 business days within which to approve or prohibit a merger. This period can be extended by a further 40 business days, at the Commission's discretion.

In the case of large mergers, the Commission has an initial 40 business days to investigate the merger and make a recommendation to the Tribunal to approve or prohibit a merger. The Commission can, however, apply to the Tribunal to extend the 40-business-day investigation period by 15 business days at a time. The merger parties may consent or object to such an extension request. The number of extensions requested by the Commission typically depends on the complexity of the merger. Once the Commission has made its recommendation to the Tribunal, the Tribunal must convene a hearing within 10 business days of the Commission making its recommendation to: make a final decision on the merger; or, in the case of a contested merger or a merger where third parties wish to participate in the Tribunal proceedings, determine the procedure and dates for the hearing of the matter, including any interlocutory procedures (ie, discovery, procedures for intervening parties, filing of witness statements or expert reports, etc) as may be required.

#### Pre-clearance closing

#### 12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The sanctions for implementing a merger before clearance are the same as the sanctions that may be imposed for failure to notify. Please refer to question 9. The Commission published Guidelines for the determination administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act. The Guidelines could result in higher administrative penalties being imposed for prior implementation in future. The Guidelines set out a series of steps to be followed by the Commission when determining the administrative penalty.

Under the Guidelines, as a first step, the base amount for the administrative penalty will be double the filing fee (ie, 330 000 and 1.1 million rand for intermediate and large mergers, respectively). This step is followed by multiplying the base amount by a percentage relevant to the duration of the contravention. For example, if the conduct endured for

less than a year, 50 per cent is added for every month during which the conduct was ongoing, 75 per cent and 100 per cent is added for every month if the conduct endured for between one and two years, or for longer than two years, respectively. Mitigating and aggravating factors can also be taken into account in determining the appropriate penalty.

#### 13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions for closing before clearance apply equally to local and foreign-to-foreign mergers.

#### 14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act does not provide for any hold-separate arrangements, but parties who wish to implement foreign-to-foreign mergers prior to obtaining approval in South Africa have in the past established a 'hold-separate' arrangement to ring-fence the South African leg of the merger. While the Commission or Tribunal has not expressly proffered a view on such arrangements, it has in the past been accepted in circumstances where the parties are able to illustrate that the South African leg of a global merger can be ring-fenced and will not be implemented prior to approval being granted.

#### Public takeovers

#### 15 Are there any special merger control rules applicable to public takeover bids?

There are no specific merger control rules applicable to public takeover bids. To the extent that such bids meet the definition of a 'merger' in the Act (ie, results in a firm acquiring control over the whole or part of the business of another firm), such bid requires the approval of the competition authorities, if the prescribed financial thresholds are met.

#### Documentation

#### 16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Regulations to the Act prescribes certain forms and schedules to be completed on behalf of the acquiring and target firm. The information required in these schedules include the control structure of the acquiring firm or group, its controlling interests in South Africa, details of the largest customers and competitors of the parties to the merger and the market shares of the parties in respect of each relevant market.

It is a criminal offence under the Act to provide the Commission with false information. The sanction for such offence is a fine of up to 500,000 rand, imprisonment for a period of up to 10 years, or both a fine and imprisonment. In addition, if information is missing or certain prescribed documentation is not provided, the filing may be deemed incomplete, and the review period will not commence until the outstanding information or documentation is provided.

Documents relating to the merger that must be filed include: all merger agreements, any document including minutes, reports, presentations and summaries prepared for or by the board of directors of both the acquiring and target firms relating to the transaction, financial statements and the parties' most recent business plan.

**Investigation phases and timetable**

**17 | What are the typical steps and different phases of the investigation?**

After a merger is filed with the Commission, an investigating team will be assigned. The investigating team will liaise with the parties' legal counsel throughout the investigation process. The typical steps taken by the investigating team during the investigation include contacting customers and competitors of the parties to get their views on the merger, sending out questionnaires to the parties or other market participants, conducting interviews or conference calls with relevant stakeholders, conducting site visits (if necessary) and meeting with the parties. Consultations with the Commission prior to filing a merger are not required. However, should the parties wish to meet with the Commission prior to filing, such a meeting can be arranged. These consultations may be helpful in extremely time-sensitive transactions, or transactions that are likely to have a substantial public interest impact (eg, significant job losses).

Once the investigating team has finalised its investigation, it will submit a report to the Commission's Executive Committee for decision making.

**18 | What is the statutory timetable for clearance? Can it be speeded up?**

See question 11 for the statutory periods for clearance in respect of intermediate and large mergers. The Commission published service standards for the review of mergers according to complexity. The table below summarises the Commission's service standards. These periods are not binding on the Commission and merely serve to indicate the typical time period within which the Commission seeks to review mergers.

Type of merger	Description	Service standard
Phase 1	Non-complex Parties' market share is below 15%, no complex control structure and no public interest concerns arise	20 business days
Phase 2	Complex Transactions involving actual or potential competitors, parties in a vertical (supply) relationship, where the parties hold more than a 15% market share, or raising public interest concerns	45 business days
Phase 3	Very complex Transactions involving close competitors, high market shares, and requiring specific documents and information from parties (in addition to the prescribed documents and information) as well as third parties	60 business days (intermediate merger) 120 business days (large merger)

Although the Commission aims to finalise Phase 3 large mergers within 120 business days, these can often take much longer to finalise, particularly in circumstances where third parties have raised issues with the merger. There is no formal process in terms of which the merger review period can be fast tracked. However, with mergers that are extremely time sensitive and where delays could result in significant consequences, such as job losses or the closure of a firm, the parties can meet with the Commission prior to filing or during the investigation to explain the challenges and work with the Commission in an attempt to expedite the review.

**SUBSTANTIVE ASSESSMENT**

**Substantive test**

**19 | What is the substantive test for clearance?**

The substantive test has two legs, a competition assessment and a public interest assessment. The competition assessment considers whether the merger is likely to substantially prevent or lessen competition in any relevant market, and if so, whether the merger can be justified on the basis of any technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect of the merger. The public interest assessment considers the effect of the merger on certain public interest grounds set out in the Act.

In considering whether a merger is likely to substantially prevent or lessen competition, the competition authorities must assess the strength of competition in the relevant markets, and the probability that the firms in question would behave competitively or cooperatively, by taking into account any relevant factors, including:

- whether the merger is likely to result in the removal of an effective competitor;
- the actual or potential level of import competition;
- ease of entry into the relevant market;
- the level and trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- market dynamics such as growth, innovation and product differentiation;
- the nature and extent of vertical integration in the market; and
- whether the business of part of the business of a party to the merger has failed or is likely to fail (the failing firm defence).

Three further factors that the Amendment Act introduces are: (i) the extent of ownership by a party to the merger in another firm or other firms in related markets; (ii) the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and (iii) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Commission.

In considering whether the merger can be justified on public interest grounds, the Commission or Tribunal must consider the effect of the merger on:

- employment;
- a particular industrial sector or region;
- the ability of small businesses, or firms controlled by historically disadvantaged persons to become competitive; and
- the ability of national industries to compete in international markets.

Once the Amendment Act comes into effect, firms would also need to consider the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

**20 | Is there a special substantive test for joint ventures?**

No. The same substantive test (see question 19) is applied to all transactions.

**Theories of harm**

**21 | What are the 'theories of harm' that the authorities will investigate?**

The theories of harm investigated by the competition authorities typically depend on the type of merger being considered. In the context of

horizontal mergers, the authorities will generally consider whether the transaction will result in any unilateral effects (ie, whether, post-merger, the parties will have the ability to profitably increase prices or otherwise unilaterally exercise market power) or coordinated effects (ie, whether the merger will increase the ability of the parties to coordinate their behaviour with that of their competitors). In this regard, the authorities also consider whether mergers are likely to result in information sharing between competitors because of firms having common shareholding or ownership in competing firms.

In vertical mergers, the primary theory of harm is whether the merger is likely to result in the foreclosure of any competitors of the merging parties at any level of the supply chain and whether this is likely to result in the substantial lessening or prevention of competition. This theory of harm is typically of concern when one or both of the parties have high market shares in their respective market or markets, or is a large customer or supplier of third parties within the supply chain, such that the vertical integration of the merging parties would result in competitors being foreclosed from the relevant market. In the case of mergers involving firms in different product markets and no vertical relationship (conglomerate mergers), the authorities will consider whether the merger gives rise to any conglomerate or portfolio effects. This includes considering whether the merged entity could foreclose competitors through tying, bundling products, exclusive arrangements or otherwise give the merged entity market power.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

When determining whether a merger can or cannot be justified, the Act prescribes that the authorities must consider certain public interest issues. See question 19. Public interest issues are therefore a critical part of the merger review process.

The Commission's Guidelines on the Assessment of Public Interest Provisions in Merger Regulation sets out the general approach that the Commission will follow and the information the Commission is likely to require in respect of each of the public interest factors listed in question 19. In terms of the Guidelines, the Commission will assess the effect of the merger on each of the relevant public interest factors with reference to whether: (i) the effect is merger specific; (ii) substantial; and (iii) there are any remedies or conditions to address the negative public interest effect.

The effect of mergers on employment is a key concern for the competition authorities. Most mergers resulting in job losses (often even in cases where job losses are not substantial) are approved subject to one or more conditions relating to employment. For example, moratoriums on the number of job losses, commitments to train or re-skill staff, commitments to redeploy staff in other areas of the parties' businesses or providing counselling and assistance in finding alternative employment.

Generally, public interest issues arising from a merger are addressed by way of conditions. Other conditions imposed by the Tribunal to address public interest concerns include:

- commitments by the merging parties to maintain local production facilities, head offices and supply or sourcing relationships;
- establishing supplier development funds for technical and financial support and assistance for small and medium sized businesses or businesses owned by historically disadvantaged groups;
- establishing skills development and training programmes; and
- commitments to make a specified investment within a certain period of time post-merger.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

To the extent that a merger is likely to substantially prevent or lessen competition, the Act requires the authorities to consider whether there are any technological, efficiency or other pro-competitive gains: (i) resulting (or likely to result) from the merger; (ii) which outweigh the negative effect of the merger on competition; and (iii) which would not likely be achieved without the merger. In terms of approach, given that efficiencies are only relevant in transactions that are likely to result in a substantial lessening or prevention of competition, efficiency arguments need not be raised upfront, and parties often wait until the Commission has expressed a view as to the effect on competition before raising any efficiency arguments.

In the *Trident Steel/Dorbyl* transaction, the Tribunal adopted the following two-pronged approach to assessing efficiencies: (i) where efficiencies can be qualitatively and quantitatively verified, it need not be shown that consumers will benefit from a merger (ie, evidence of consumer benefit will be less compelling); and (ii) where efficiencies are not clearly verifiable, pass-through or benefit to consumers must be illustrated.

The most recent Tribunal decision dealing with efficiencies is the *Pioneer Hi-Bred/Pannar Seed* transaction. The merger was taken on appeal to the CAC by the parties after initially being prohibited by the Tribunal (it was considered a three-to-two merger). On appeal, the CAC found that without the merger the business of the South African-based Pannar Seed would decline and ultimately fail. This would result in a loss of significant and important resources. The CAC also found that the merger would result in the market leader being constrained and will ultimately result in long-term dynamic efficiency improvements, improvements in the quality of seed produced and ensure competitive pricing. The merger was ultimately approved by the CAC, subject to various conditions, some of which were aimed at achieving these efficiencies.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission, in the case of small and intermediate mergers, or Tribunal, in the case of large mergers, can approve, approve subject to conditions or prohibit a merger. Parties to an intermediate merger can ask the Tribunal to reconsider a decision by the Commission to prohibit or approve a transaction subject to conditions, whereas a decision by the Tribunal can be appealed to the CAC.

In terms of the Amendment Act, the Commission or Tribunal may make any appropriate decision regarding any condition relating to their prior approval of a merger.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy competition issues with divestment undertakings or behavioural remedies. The remedies are typically prepared by the merger parties with input from the Commission and both the Commission and Tribunal have a preference for the remedies to be tested with market participants before issuing a decision.

Over the 2017/18 financial year, seven mergers were approved subject to divestment undertakings. Some prominent examples include the *Bayer/Monsanto*, *Dow/DuPont*, and *Media24/Novus* mergers.

Over the same period, 17 mergers were approved subject to a range of behavioural remedies, primarily relating to information exchange and cross-directorships or shareholdings. In these instances, the mergers were approved subject to undertakings not to exchange competitively sensitive information and limitations on the appointment of common directors. Over the last few years, there have been noticeable increases in the number of mergers approved subject to these types of conditions, which are primarily aimed at preventing coordinated conduct between competitors and other potentially collusive activities.

Other common behavioural remedies include the obligation to amend restraint of trade clauses, notify additional acquisitions, implement competition compliance policies, and continue existing supply arrangements.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The time periods relating to the implementation of remedies are usually agreed between the parties and the Commission, but the Commission typically requires that the remedies be implemented within a short period of time following approval.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The competition authorities do not have a different approach in assessing foreign-to-foreign mergers compared to mergers involving local firms. However, see question 8, relating to the potential implications relating to foreign acquirers over local firms.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is not uncommon for the competition authorities to impose behavioural conditions that cover ancillary restrictions such as restraint of trades. For example, the scope or duration of the restraint could be limited. Generally, the competition authorities require that restraints of trade be reduced to three years.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The customers and competitors of the merger parties are typically contacted by the Commission as part of its investigation of a merger. Depending on the complexity of the matter, the Commission may issue detailed information requests and ask customers and competitors to respond thereto.

Customers and competitors may also contact the Commission during the investigation period and make submissions on a voluntary basis and without being approached or asked to do so by the Commission.

As explained above, large mergers are adjudicated by the Tribunal after a public hearing is held. The hearing represents a further opportunity for third parties to make submissions in circumstances where they do not agree with the Commission's recommendation. However, only the Minister of Economic Development and trade unions or employee

representatives of the parties have an automatic right of participation in merger proceedings. Other third parties will need to make a formal application to intervene and demonstrate that they have a material interest in the matter and can assist the Tribunal (by providing relevant information through discovery of documents, oral submissions or witnesses) in its adjudication of the matter. In practice, this is a low threshold.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Parties can claim information as being confidential if the information comprises of 'trade, business or industrial information that belongs [to the party], has a particular economic value, and is not generally available to or known to third parties'. The Commission may not disclose information over which a confidentiality claim has been filed. Third parties seeking access to information that has been claimed as confidential must apply to the Tribunal for an order granting them access to such information. The Tribunal will consider whether the information is confidential and make an appropriate order.

The Commission does publish a list of mergers filed, although this list is not frequently updated, and there is some publicity around the adjudication of mergers. The Commission issues weekly media statements wherein it identifies which intermediate mergers have been approved or prohibited by providing a concise summary of each adjudicated merger. The Commission is also required to publish in the government gazette a notice of its decisions and will make available to the merger parties a confidential version of its reasons for decision. In respect of large mergers, the Commission will in its media statement also indicate whether it has recommended that a particular merger be approved or prohibited.

The Tribunal issues weekly media statements indicating which large mergers will be heard by it in the coming week. The Tribunal's decision and reasons for decision are published on its website, but its reasons do not contain confidential information. The confidential version of its reasons for decision is only made available to the merger parties.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission has concluded memorandums of understanding (MoU) with several competition authorities, but there is no formal requirement for the competition authorities to cooperate. Irrespective of whether MoUs have been signed, the Commission does cooperate with other competition authorities where multijurisdictional mergers have been filed and in particular when there is a high-profile merger. In this regard, the authorities will exchange information relating to market definition, theories of harm and conditions to remedy competition or public interest concerns.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

The merger parties can ask the Tribunal to reconsider a decision by the Commission, whereas decisions by the Tribunal can be appealed to the CAC. The Commission cannot appeal decisions by the Tribunal. See question 29.

**Time frame****33 | What is the usual time frame for appeal or judicial review?**

Appeal or review proceedings can take up to six months to complete from the date on which the appeal or review application is filed. The Tribunal and the CAC rules prescribe the time periods within which such applications must be brought and the various answering and replying pleadings filed. Once pleadings have closed, the Tribunal or CAC will set down a date for the hearing of the appeal or review. Matters of an urgent nature can be expedited depending on the reasons for the urgency and the availability of the relevant decision-making body.

**ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS****Enforcement record****34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

As at the time of writing, the Commission's merger clearance statistics for its most recent financial year (March 2019) were not available. During its previous financial year (ending March 2018), the Commission finalised 388 merger investigations, 325 mergers were approved without conditions, 52 with conditions and 12 were prohibited during this period.

The Commission has identified certain sectors that it considers priority sectors. In the context of mergers, these are sectors that the Commission views as having high levels of concentration. These sectors include food and agro-processing, infrastructure and construction, mining, energy, financial services, ICT, pharmaceuticals, transport and intermediate industrial products. In terms of the Amendment Act, the competition authorities are mandated to address economic concentration and to promote economic transformation. Therefore, going forward, the competition authorities, in the context of mergers, will focus particularly on addressing concentration levels in these sectors as well as the participation by small, medium and micro-sized businesses in the economy and ownership or control of businesses by historically disadvantaged groups.

The Commission is also conducting a number of market inquiries in different sectors. These include private healthcare, data services, public passenger transport, liquefied petroleum gas and the grocery retail sector. Although these inquiries are distinct from the Commission's merger investigations, mergers in these sectors are likely to attract closer scrutiny.

**Reform proposals****35 | Are there current proposals to change the legislation?**

The Amendment Act was signed into law on 14 February 2019 and will become effective on a date to be proclaimed by the President. The Amendment Act provides, inter alia, for changes to the merger control rules and the introduction of national security clearance for certain deals involving foreign purchasers. As noted in question 19, the Amendment Act introduces additional factors to be considered by the authorities in assessing the competition and public interest factors.

The national security clearance provision provides for the President to constitute a Committee with powers to intervene in respect of mergers involving foreign acquiring firms, and which may adversely affect the country's national security interests. The President is required to publish a list of national security interests, taking into account factors such as the potential impact on defence capabilities, sensitive technology, infrastructure security, supply of critical goods and services, foreign surveillance risks, foreign relations, terrorism and national stability. A foreign firm filing a merger would be required to file a notice with the Committee.

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The amendments are aimed at achieving the government's objectives of dealing with the high levels of economic concentration in South African markets, and the lack of transformation of the ownership (by historically disadvantage groups) demographics of South African businesses. This is likely to result in the authorities seeking various conditions or undertakings from parties aimed at achieving these objectives.

**UPDATE AND TRENDS****Key developments of the past year****36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

A number of key merger-related decisions have been handed down over the past year:

- In the *SABC/Multichoice* case, the extent of the Commission's investigatory powers was challenged. The parties contended that the Commission was limited to a 'desktop study' of the case and could not investigate any further or interview witnesses. However, the Constitutional Court confirmed that the Commission may investigate transactions to determine whether they constitute or give rise to a notifiable merger.
- In the *Murray & Roberts/Aton* case, the CAC delivered a significant judgment on shareholder voting rights. In particular, the CAC ruled that an acquirer, in a hostile merger context where merger approval by the competition authority remains outstanding, is not prohibited from acquiring and voting shares in a target company, provided there is no acquisition of control.
- In the *Competition Commission/HCI* case, the CC confirmed that the approval of a merger is a one-off affair. The Court held that the need for notification of a merger is triggered when a firm acquires control of another and once approval for such merger is granted, no further investigation is allowed other than to confirm that

assurances made and conditions placed by the Commission have indeed been met.

- In May 2019, the CAC is expected to hand down its judgment on the mining merger involving Sibanye-Stillwater and Lonmin. The appeal was launched by the Association of Mineworkers and Construction Union, who allege that the Tribunal failed to take into consideration its submissions on the merger, particularly in relation to employment concerns.

The Amendment Act being signed into law has been one of the most important legislative developments of the past year, and, in fact, is one of the most significant developments in South African competition law since the Act came into force. This historic development marks the beginning of a new era of competition law, which is significantly more public-interest focused.

As noted in question 26, the Amendment Act provides, inter alia, for changes to the merger control rules (particularly the public interest assessment) and the introduction of national security clearance for certain deals involving foreign acquirers. Whether these changes will have an effect on potential M&A transactions depends on the deal in question. Parties will need to be sensitive to the government's objectives of tackling high levels of economic concentration in South African markets, and the lack of transformation of the ownership demographics of South African businesses.

The Commission has also gazetted final Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Act. The Guidelines present the general methodology that the Commission will follow in determining administrative penalties in cases where parties fail to notify a merger or implement a merger without the approval of the competition authorities. See question 12.

# Spain

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Spanish competition legislation is contained in Law No. 15/2007 on the Defence of Competition (the Competition Act), which came into force in September 2007. The Competition Act regulates restrictive practices and abuses of dominant position (closely modelled on articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) as well as merger control and state aid. In February 2008, the government adopted Royal Decree No. 261/2008 (the Royal Decree), which implements the Competition Act.

After entry into force of Law No. 3/2013 setting up the National Markets and Competition Commission (the CNMC Act and the CNMC respectively), the authority entrusted with the enforcement of the Competition Act is the CNMC. The start of operations of the new CNMC and the subsequent ceasing of operations of the former National Competition Commission (CNC) took place on 7 October 2013. The CNMC is the entity resulting from the merger of the Spanish competition, energy, telecoms, railways, audiovisual, airports and postal regulators.

The CNMC is led by a board of 10 members entrusted with decision-making powers (the Council), which is divided into a competition chamber and a regulatory chamber. The CNMC has four sector-specific directorates: Competition, Telecommunications and Audiovisual, Energy, and Transport and Post. In August 2013, the government adopted Royal Decree No. 657/2013, approving the CNMC's statute, which further specifies its organisation and modus operandi. The Competition Directorate is entrusted with investigative powers for merger control.

Under the Competition Act, the CNMC has the final decision on merger control proceedings in the majority of cases, and the government has only some limited decision-making powers in merger control matters (see question 18).

Although the Competition Act reinforced the role of the regional competition authorities of the different Spanish autonomous communities, merger control proceedings remain outside the scope of their jurisdiction.

The Sustainable Economy Act (Law No. 2/2011, of 4 March, of Sustainable Economy) entered into force on 6 March 2011. It brought about the first amendment in the Competition Act since its adoption in 2007 by introducing a *de minimis* exception to the mandatory merger filing obligation. In addition, Law No. 3/2013 amended the relevant filing fees, and Law No. 6/2018, of 3 July, of the Annual Budget of the State for 2018, amended the relevant filing fee for simplified procedure cases (see question 10).

In November 2015, the CNMC issued a new version of the guidelines on simplified proceedings to adapt it to the new institutional framework brought about by the creation of the CNMC. The new guidelines reflect the nature of the CNMC (which results from the merger of the Spanish

competition, energy, telecoms, railways, audiovisual, airports and postal regulators). Consequently, since then mergers taking place in regulated sectors under supervision of the CNMC have benefited from short-form notifications, something that was explicitly excluded by the guidelines in the past as reports from the relevant regulatory authorities had to be obtained beforehand.

In late 2016, a new act on administrative proceedings came into force (Law No. 39/2015 on the standard administrative proceeding of public administrations) which, among other things, modifies the concept of working days. Under the aforesaid act, Saturdays are no longer working days as regards administrative deadlines, including those applicable to merger control proceedings.

In March 2017, the Spanish government launched a public consultation on a draft bill for yet another reorganisation of the institutional framework. This would demerge the current CNMC into two independent administrative authorities or AAI (*autoridades administrativas independientes*) and the CNMC would cease to exist. The draft bill entrusted enforcement to a new AAI for Competition (*Autoridad Independiente de Defensa de la Competencia* (AIDeCo)) while a new AAI for Supervision and Regulation of the Markets (*Autoridad Independiente de Regulación de los Mercados* (AIReM)) would be responsible for regulating and supervising energy, telecoms, railways, media, airports and postal markets. In addition, on 29 December 2017, the Commission of Economic Affairs of the Spanish Parliament accepted a proposal calling upon the government to consider the possibility of demerging the CNMC. However, as at the date of writing, the draft bill has not been sent to the Spanish Parliament yet and an institutional reform (if any) will be dependent upon the political landscape resulting from 2019 general elections.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Competition Act provides that transactions capable of being caught are 'any project or transaction involving a concentration of undertakings'. Concentrations are those transactions affecting on a lasting basis the structure of control of the undertakings concerned, normally through a merger between two or more formerly independent companies, the acquisition of control of the whole or parts of one or more undertakings, or the creation of a joint venture and the acquisition of joint control of an undertaking that performs on a lasting basis all the functions of an autonomous economic entity.

#### 3 | What types of joint ventures are caught?

The Competition Act states that full-function joint ventures are caught by the merger control rules (see question 2). Spanish merger control provisions are aligned with EU competition rules in this respect.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Act provides for a definition of 'control' that is modelled on the definition under the EU Merger Regulation (EUMR). Under the Competition Act, control means the possibility of exercising decisive influence on an undertaking.

#### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Competition Act provides two alternative thresholds based on market share and turnover. It applies where:

- a share of 30 per cent or more of the national market or a 'defined' geographic market within it, of a given product or service, is acquired or increased unless the turnover in Spain in the preceding accounting period of the target (or of the assets being acquired) does not exceed €10 million and the individual or combined market share of the parties does not amount to 50 per cent or more in any 'affected market' in Spain or in any 'defined' geographical market within Spain; or
- the aggregate turnover in Spain of the companies involved exceeded €240 million during the last financial year provided that the turnover in Spain of each of at least two parties exceeded €60 million. The market share threshold can be satisfied by the target company only.

As provided for in the EUMR, the Royal Decree provides that the turnover is deemed to be the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year in Spain, and must be considered for the acquirer on a group basis (the turnover of the target company should only include the amount derived from the sale of products or the provision of services attributable to the target company). In addition, there are sector-specific rules, in particular for banks and other financial institutions and insurance undertakings.

The CNMC has not referred to the Commission any cases below the thresholds set forth in the Spanish Competition Act.

The Competition Act will not apply to any transaction caught by the provisions of the EUMR (with exceptions, provided for in the EUMR, as set out in the European Union chapter).

The Competition Act provides for a consultation procedure so that the merging parties may, before notification, consult the CNMC as to whether their transaction amounts to a concentration or whether it exceeds the thresholds. Under the consultation procedure, the CNMC has a three-month deadline to issue a decision.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for those transactions exceeding either of the two above-mentioned thresholds. There are no exceptions.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified provided that they meet one of the two thresholds mentioned in question 5. Indeed, foreign-to-foreign mergers have been notified to the Spanish competition authorities on several occasions. There is no local effects or nexus test (apart from the two thresholds). However, lack of local presence may

in practice hamper enforcement of the final decision or other measures adopted by the competition authorities.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Spain has separate rules on foreign investment that may be relevant to certain acquisitions and require specific notifications or prior approvals depending on the sectors involved.

Except for specific turnover calculation rules for the financial and insurance sectors, there are no special rules for specific sectors in the Competition Act.

After the start of operations of the CNMC, the roles formerly played by the National Energy Commission and the Telecommunications Market Commission are now mainly played by the CNMC.

In the case of merger control, the different sectoral directorates of the CNMC may notify the Competition Directorate of any merger within their respective sectors if they believe it might be caught by the merger control provisions of the Competition Act.

In the energy sector, certain acquisitions of interests or assets in the electricity and gas sectors need to be communicated to the CNMC. The CNMC is entitled to impose conditions on the acquisition: if the acquirer is not a European Union or European Economic Area country and in case of a real and sufficiently serious threat to the supply of electricity, gas or hydrocarbons.

Certain acquisitions in the Spanish banking, insurance, defence and media sectors may also require specific approvals from the relevant authorities in these sectors.

Likewise, in Phase II investigations of transactions that may have a significant impact in a specific Spanish region, a non-binding (but compulsory) opinion is requested from the relevant authorities of the affected region.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Any project or transaction involving an economic concentration of undertakings caught by the Competition Act must be notified to the CNMC prior to completion (ie, prior to putting the transaction into effect). There are no specific deadlines for filing as long as the transaction has not been put into effect. However, as regards Spanish public takeover bids, filings must be made before, or up to five days after submitting the bid to the Spanish Securities Market Commission. Failure to notify within the five-day deadline may give rise to the imposition of fines of up to 1 per cent of the annual turnover of the undertakings concerned.

In addition, a 20-day deadline for filing is applicable only in cases where the CNMC requests parties for filing a transaction ex officio. Failure to notify within the said deadline may give rise to the imposition of fines of up to 1 per cent of the annual turnover of the undertakings concerned. In addition, such filings do not benefit from the legal deadlines to which the CNMC is bound.

#### 10 | Which parties are responsible for filing and are filing fees required?

The offeror or acquirer is responsible for filing in the case of an acquisition. For mergers, or in the case of the acquisition of joint control (ie, joint ventures), the filing must be made jointly by the merging parties.

The following filing fees for merger control proceedings are payable:

- €5,502.15 if the Spanish turnover of all the companies involved in the transaction does not exceed €240 million;
- €11,004.31 if the Spanish turnover of all the companies involved in the transaction exceeds €240 million but not €480 million;
- €22,008.62 if the Spanish turnover of all the companies involved in the transaction is higher than €480 million and does not exceed €3 billion; and
- a fixed amount of €43,944 if the Spanish turnover of all the companies involved in the transaction exceeds €3 billion, plus an additional €11,004.31 for each €3 billion exceeding the aforesaid turnover, up to a maximum of €109,860.

The filing fee for mergers notified under the abbreviated form (see question 16) procedure is €1,545.45. The fee must be paid in advance and the notification form must have evidence of payment attached.

### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As a general rule, the notified transaction may not be put into effect before clearance from the CNMC has been obtained. However, the Competition Act provides for the possibility for the parties to request a derogation from this duty from the CNMC, which may allow implementation of the transaction before clearance. In these cases, the transaction cannot benefit from the short-form notification and must be notified using the regular notification form. The CNMC will decide whether to grant the requested derogation in light of the specific circumstances of each case and the potential consequences of waiving the obligation to suspend. The derogation can be made subject to certain obligations and conditions to guarantee the effectiveness of the CNMC's final decision. If the transaction is purely foreign-to-foreign, where one of the parties does not make sales in Spain, this could be regarded as a reason to allow the early implementation of the transaction before clearance. To date, such derogation has been granted in exceptional circumstances (see for instance, the *COPE/Vocento/Punto Radio* case (C/0493/13) where the CNMC conditionally allowed the parties, a week after a formal filing was carried out, to implement a temporary agreement on non-exclusive assignment of sports radio content – the transaction was subsequently cleared in Phase I with remedies). In November 2016, in the *Daimler/Hailo/MYTAXI/Negocio Hailo* case (C/0802/16), the CNMC allowed the parties to carve out Spain (by partially lifting the suspension obligation), that is, to close the deal on a global basis as long as the transaction was not implemented in Spain. This derogation was granted in exchange for a number of commitments submitted by Daimler and Hailo which, prior to clearance of the transaction by the CNMC, guaranteed the commercial autonomy of the Spanish subsidiary of the target company.

Similarly to the EUMR, the Competition Act states that public takeover bids are not subject to the general suspension obligation provided that certain conditions are met (see question 15).

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Competition Act provides for a fine of up to 5 per cent of the turnover of the notifying party or parties in the financial year in which the merger took place if the transaction is put into effect before clearance. The amount of the fines imposed by the CNMC can vary depending on the particular features of the transaction. The practice of the Spanish competition authorities is to take into consideration the Spanish turnover when determining the level of fines.

The CNMC has taken action against a number of non-filed mergers and has imposed several fines in this regard over the past years. By way of example, on 24 October 2012 the CNMC imposed a €286,000 fine on Verifone – the highest fine to date – for gun jumping in the context of the acquisition of control over Hypercom. The *Verifone/Hypercom* merger was filed in October 2011 and it was authorised in December 2011 subject to remedies, but the transaction was put into effect in August 2011. On 16 October 2015, the CNMC imposed a €106,005 fine on Grifols for gun jumping in the context of the acquisition of certain assets of Novartis. The *Grifols/Activos Novartis* merger was filed in October 2014 and it was authorised in March 2015 in Phase I, but the transaction was put into effect in January 2014. In November 2015, the CNMC also fined Masmovil €39,578 for closing the acquisition of Xtra Telecom prior to clearance. The *Masmovil/Xtra Telecom* merger was notified in January 2015 and authorised in February 2015 in Phase I, but the transaction was put into effect prior to clearance. According to the activity report issued by the CNMC in February 2017, in 2016, the CNMC kept a good track record on enforcement in this field and investigated eight potential gun jumping cases. In 2017, the CNMC continued to actively pursue companies breaching the suspensory obligation applicable to merger control proceedings. Indeed, the CNMC levied a fine of €20,000 on Consenur for gun jumping in the context of the acquisition of the waste management services business of Cathisa. The *Consenur/Activos Cathisa* merger was filed in June 2016, following a request from the CNMC to do so on April 2016, and it was authorised in July 2016 in Phase I. The transaction had, however, been put into effect in July 2015. There were no gun jumping cases in 2018.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes. The former CNC initiated in 2011 for the first time an investigation for alleged gun jumping in the context of a foreign-to-foreign merger (ie, the parties did not have any relevant corporate presence in Spain). The acquisition by Dorf Ketal Chemicals (India) Private Limited of the titanates and zirconates business of El Du Pont De Nemours & Company was allegedly put into effect before it was authorised by the former CNC. The CNC fined Dorf Ketal Chemicals (India) Private Limited €35,400 (3 per cent of the parties' turnover in Spain). In the same vein, on 31 July 2014, the CNMC fined Essilor International SA €5,065 for gun jumping in the context of the foreign-to-foreign acquisition of Polycore Optical Ltd. In addition, on 31 July 2014, the CNMC fined Essilor International SA €5,065 for gun jumping in the context of the foreign-to-foreign acquisition of Polycore Optical Ltd. This amount represented 0.0001 per cent of Essilor's worldwide turnover in 2013. The CNMC decided to impose a symbolic fine because there was an absence of bad faith; the company eventually notified the transaction and it was cleared in Phase I unconditionally as no possible harm to competition law was identified.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Though no such cases have been made public, in principle, there should be no reason for the Spanish authorities to object to a 'hold-separate' arrangement if it means that the implemented transaction has no impact on the Spanish market (see question 11).

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

For public takeover bids under Spanish law, filings must be made before, or up to five days after, submitting the bid to the Spanish Securities Market Commission (CNMV) and the bid will be conditional

upon the outcome of the national merger control procedure. However, the Competition Act, in line with the EUMR, provides for the possibility to implement the public bid and acquire the shares before clearance has been obtained, provided that the transaction is filed with the CNMC within five days of submitting the bid to the CNMV and that the acquirer does not exercise the voting rights attached to the securities acquired or does so only to maintain the full value of those investments and on the basis of a derogation granted by the CNMC.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Notification is made to the CNMC using an official form (which is attached as Annex II to the Royal Decree). For straightforward cases raising no issues, which are specifically listed in article 57 of the Royal Decree (see below), a short form is available (Annex III to the Royal Decree). Notifications must be submitted in Spanish. The notifying party should indicate in its notification which data are business secrets in order for such data to be treated as strictly confidential, and provide a non-confidential version of the notification form.

## Notification form

The information required is similar to the information to be provided on Form CO under the EUMR (information on the parties, their turnover and business sectors, basic features of the transaction, details of ownership and control provisions, detailed market information, and the existence of cooperative and vertical aspects). Notification is a time-consuming and cumbersome exercise. It has to be complete and the Competition Act does not provide for the possibility of obtaining waivers of any of the information requirements. The CNMC can reject notifications for incompleteness, or require more detailed information to be provided during the investigation. It sometimes requires the clock to be stopped pending receipt of the information, which can significantly increase the length of the review period.

## Short-form notification

The Competition Act introduced the possibility of short-form notification for straightforward cases that are unlikely to raise competition issues (similar to the Short Form CO under the EUMR). The short-form notification applies to concentrations when, inter alia:

- there are no vertical or horizontal overlaps between the parties' activities;
- the activities carried out by the parties in the markets affected by the transaction, because of their minor importance, are not capable of significantly affecting competition;
- there is a change from joint to sole control; or
- two or more undertakings acquire joint control over a joint venture, provided that the joint venture has no or minimal activity in Spain.

The 2012–2013 Annual Report of the former CNC stated that approximately 26 per cent of the merger control filings made in Spain during that period were short form. The proportion has since risen and, on average, it has been steady at around 50 per cent since 2014, accounting for 60 per cent of filings in 2017.

There is no shorter timetable for clearance for notifications made under short form (see question 18); however, in practice, in straightforward cases, the CNMC tends to issue a decision prior to the expiry of the one-month deadline for Phase I.

Finally, submitting incomplete, incorrect, misleading or false information is subject to fines of up to 1 per cent of the total turnover of the infringing undertaking.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

## Phase I investigations

One month after filing, the CNMC must reach a Phase I decision, extendible by 10 working days if the parties submit commitments. Within this one-month period, the CNMC will carry out Phase I investigations, which will end with a non-binding report produced by the Competition Directorate. On the basis of the report, the Council will decide whether to clear the transaction, to clear the transaction subject to the commitments presented by the parties, to shelve the file, or to open a Phase II investigation if the transaction could impede effective competition.

During Phase I investigations, if the CNMC considers the notification incomplete and requires additional information, the one-month period may be interrupted and will start running again when the additional information is submitted. Experience shows that it is very useful (and customary in practice) to enter into pre-notification discussions and agree a draft notification form with the CNMC prior to formal submission to avoid unnecessary delays and tackle any technical discussions from day one.

There is a possibility of clearing the transaction during Phase I through commitments or undertakings presented by the parties. The positive impact upon timing of choosing to offer Phase I remedies where potentially required. In 2018, the *Servired/Sistema4B/EURO 6000, BP/Petrocorner* and *Talleres Alegria/Duro Felguera Rail* transactions, where Phase I remedies were offered, were cleared in approximately two months from formal filing. However, some of these deals entailed lengthy pre-notification contacts.

## Phase II investigations

The basic period for Phase II investigations is two months, extendible by 15 working days where the parties submit commitments. In Phase II, the CNMC normally requests comments from 'interested third parties'. The merging parties may also request a hearing with the CNMC.

If the CNMC decides to clear the transaction unconditionally, such decision puts an end to the Phase II investigation, and thus the government cannot further intervene in the merger review process regarding such transaction.

Despite the statutory periods mentioned above, in practice Phase II cases have taken much longer for clearance because of the possibility to stop the clock in case additional information is required. For instance, and as recent examples of Phase II case duration, the *Schibsted/Milanuncios* case was cleared in seven months, the *Telefónica/DTS* case was cleared in six months and the *JCDecaux/Cemusa* case was cleared in five months (time periods calculated from filing). In 2019, the *Quirón/Clínica Santa Cristina* case was cleared in approximately nine months from filing.

## Phase III investigations

However, in those cases where the CNMC decides either to prohibit the transaction or to clear it subject to commitments or conditions, the Ministry of the Economy may ask the government to decide whether to confirm the CNMC's decision or clear it, subject or not to commitments or conditions. In the second case, the government's decision must be based on certain specified public interest criteria other than competition. In such cases, the Ministry of the Economy has 15 days to decide whether to ask the government to intervene. If it does, the government has one month to decide on the transaction. The intervention of the government in merger control proceedings is informally known as 'Phase III'.

In practice, the government tends not to intervene in merger control proceedings. The *Antena 3/La Sexta* case (2012) is the only 'Phase III case' in Spain to date. The transaction was notified after the *Telecinco/*

*Cuatro* merger, which had already reduced the number of private free-to-air television broadcaster from four to three; the *Antena 3/La Sexta* merger would leave only two such operators. The former CNC imposed conditions that were more severe than the remedies the former CNC had accepted in *Telecinco/Cuatro*. The Ministry of the Economy decided to refer the case to the government, arguing that the decision concerned 'reasons of general interest related to the guarantee of an adequate maintenance of sector-based regulation and the promotion of research and technological development'. The government softened the conditions originally imposed by the former CNC and declared that the conditions should be in 'line with those [conditions applied to other operators] in the sector'. The merger was finally approved eight months after the first notification to the former CNC.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

During Phase I, the CNMC must reach a decision within one month of formal filing, extendible by 10 working days if commitments are submitted. However, during this phase of the investigation there is scope for contact with the authorities, particularly if they require additional information, either formally (which 'stops the clock') or informally. The Competition Directorate can also request information from third parties. For straightforward cases raising no issues, the CNMC tends to issue a decision prior to the expiry of the one-month deadline for Phase I. In fact, the average timeline for a decision to be delivered by the CNMC is 20 days, providing that there are no commitments submitted by notifying parties that need to be assessed.

Phase II investigations can last between two (basic period) and four months (due to the possibility to 'stop the clock' in case additional information is required). During the Phase II investigation, the law provides for requests for information to 'interested third parties' and the possibility for the merging parties to request a hearing before the CNMC.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test for clearance is whether the transaction 'may prevent the maintenance of effective competition in whole or in part of the national market'. The test is set out in the Competition Act together with additional criteria that the CNMC may consider when adopting its decision on a proposed transaction such as structure of the relevant markets, competitive position and economic strength of the parties involved in the transaction, actual and potential level of competition, suppliers and consumers' available choices, existence of barriers to entry, supply trends, countervailing demand power, and efficiencies.

#### 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures and, therefore, joint ventures (either cooperative or concentrative) are assessed under the same substantive test provided for in the Competition Act (ie, whether they 'may prevent the maintenance of effective competition in the market').

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The Spanish substantive test (ie, whether the deal prevents the maintenance of effective competition in whole or in part of the national market)

is aligned with the present substantive test provided for in the EUMR. The Spanish antitrust authorities may examine market dominance, unilateral effects, coordinated effects, conglomerate effects and vertical foreclosure when assessing mergers.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

In theory, the main criteria should be competition-related. The analysis by the CNMC should be strictly on competition grounds, although at the level of Phase II investigation, the relevant consumers' associations may be consulted.

However, if the government intervenes in the merger control review at Phase III (see question 17), the Competition Act expressly states that such decision must be based on certain public interest criteria different from competition criteria:

- national defence and security;
- the protection of public security and public health;
- free movement of goods and services within the national territory;
- protection of the environment;
- the promotion of technical research and development; and
- the maintenance of the sector regulation objectives.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Competition Act allows the authorities in practice to take into account efficiencies in the review process. It explicitly mentions 'efficiencies' as one of the substantive criteria for assessing mergers (see question 19). According to the Competition Act, the CNMC will only take into account efficiencies that are of direct benefit to consumers, merger-specific, substantial, timely and verifiable. In practice, this means that significant evidence will need to be adduced by the parties. To this effect, there is a specific section in the notification form dealing with efficiencies. The CNMC enjoys certain discretion in considering any efficiency claim.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The CNMC and the government may order any appropriate measures to restore effective competition, including divestments or the unwinding of the transaction. Fines of €12,000 may be imposed per day if the parties have been required to unwind the transaction and have delayed doing so or if the parties do not comply with the undertakings imposed by the CNMC or the government. Further, failure to comply with a decision issued by the CNMC in the context of merger control proceedings is a very serious infringement under the Competition Act. Fines foreseen for these types of infringements amount to 10 per cent of the infringing company's turnover in the last financial year.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Act allows the parties to offer commitments during Phase I and Phase II investigations. Such commitments are amendments to the transaction or other appropriate remedies to restore competition. The CNMC may market test such commitments with third

parties to assess their effectiveness in addressing the competition concerns arising from the transaction.

Divestiture is certainly one of the options available to the parties, as well as any other appropriate measures to restore competition.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The CNMC may authorise structural remedies presented by the parties such as divestments. The parties to the transaction must submit a detailed plan to the CNMC setting out the steps they will follow to comply with these remedies. With respect to behavioural remedies, the CNMC is likely to impose an obligation upon the parties to submit information periodically to the CNMC to allow effective monitoring of the implementation of the remedies.

Since September 2007, the merging parties have the possibility to offer commitments to the authority to obtain Phase I clearance. To date, the CNMC has closed 25 merger investigations subject to such commitments in Phase I. Almost half of the Phase I remedies cases to date took place in the last three years (see in particular the *Just Eat/La Nevera Roja, Bimbo/Panrico II, Gas Natural Fenosa/GLP Repsol Butano-activos, Naturgas/GLP Repsol Butano-activos* and *Gas Natural Fenosa/GLP Cepsa-activos* cases from 2016, the *Cepsa/Villanueva Paz, Disa/Gesa* and *Integra/Codman Neurosurgery Business* cases from 2017, and the *Servired/Sistema4B/EURO 6000, BP/Petrocorner, Talleres Alegría/Duro Felguera Rail* and *Naviera Armas/Trasmediterranea* cases in 2018) showing, as explained above, that the CNMC and parties are becoming more ready to remedy competition concerns upfront and proceed with early closing of transactions. Likewise, the parties can offer remedies in Phase II cases (as was the case in *Quirón/Clinica Santa Cristina*) and if the transaction is subject to Phase III, the government can impose on the parties any kind of remedies, including divestments, to clear the transaction. However, as already mentioned, the government's decision will be based on public interest criteria that are different from competition criteria.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, there are no precedents of remedies imposed by the CNMC on pure foreign-to-foreign transactions (ie, those where the parties involved did not have any corporate presence in Spain). In the *Integra/Codman Neurosurgery Business* transaction where Integra was active in Spain only through an independent distributor, the CNMC accepted remedies in Phase I consisting of the divestiture of a viable business in the market where competition concerns had been identified. The remedy ensured that the divested business would have the necessary means (eg, portfolio of products, brand licences, know-how, stocks, production facilities, supply agreements) required to sell the products and services concerned in Spain.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Act expressly states that ancillary restraints that are directly linked to and essential for implementing the concentration will be covered by the clearance decision. Contrary to the current 'self-assessment approach' followed by the European Commission, the Spanish competition authorities expressly deal with ancillary restraints in their clearance decisions. The notification form and short form contain a specific section on ancillary restraints, where the merging parties must provide detailed information on ancillary restrictions.

The CNMC will analyse the validity of ancillary restraints under the principles provided for in the European Commission's Notice on restrictions directly related and necessary to concentrations. However, the Spanish competition authorities have sometimes followed a more restrictive approach than the European Commission on this matter.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Third parties (ie, customers or competitors) have a different role in merger control proceedings than in proceedings relating to restrictive practices and abuses of dominant position. Normal merger control procedure can only be initiated by the notifying party or parties. However, a third party may initiate proceedings by filing a complaint making the CNMC aware of a notifiable transaction that has not been notified.

As to customers' and competitors' rights in the review process, while they are very limited in a Phase I investigation, they are greater in a Phase II investigation (if opened), where they can become involved in the procedure as 'interested third parties' if they ask to intervene (see question 30). Moreover, the Spanish competition authorities usually contact and send questionnaires to customers, suppliers and competitors of the notifying parties and relevant consumer associations in Phase II merger control cases (see question 22) and, sometimes, also in Phase I merger control cases. The CNMC usually pays close attention to any feedback received from the market while carrying out its assessment.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The procedure before the competition authorities is reasonably transparent. The fact of the notification is made public on the CNMC's website within one to three days after the transaction has been filed. Likewise, if the transaction is made subject to a Phase II investigation, a short notice of this event is made public on the CNMC's website. The purpose is that potentially interested parties may become aware of the starting of Phase II proceedings if they want to request leave to intervene and submit comments on the transaction. Finally, once the final decision regarding the transaction is adopted, a non-confidential version is published on the CNMC's website.

To avoid any possible concerns, the notifying party should indicate in its notification which data are business secrets to have them treated as strictly confidential, and it must provide a non-confidential version of the notification form.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Yes, mainly with the EU authorities. The CNMC also cooperates with other antitrust authorities in the context of the OECD and the ICN. In addition, the CNMC interacts with Latin American authorities in the Latin American, Caribbean and Ibero-American competition fora.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

Decisions of the Competition Directorate can be appealed to the CNMC Council (provided that certain conditions are met), and decisions of the Council can be challenged before the Audiencia Nacional (a Spanish tribunal with national jurisdiction). The government's final decision on merger control proceedings in Phase III investigations (see question 17) may be subject to judicial review by the Spanish Supreme Court. Experience shows limited appeal activity with regard to merger control decisions and unsuccessful outcomes.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

Although it is difficult to give a time frame, experience has shown that the Spanish Supreme Court's judicial review of government decisions may take between two and four years.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2018, 82 transactions were notified to the CNMC, as opposed to 96 in 2017. Most of them were unconditionally cleared in Phase I. Four cases were cleared subject to remedies in Phase I (*Servired/Sistema4B/EURO 6000, BP/Petrocorner, Talleres Alegría/Duro Felguera Rail and Naviera Armas/Trasmediterranea*). No transaction was prohibited and only one was subject to an in-depth Phase II analysis, and was cleared with remedies in April 2019 (*Quirón/Clinica Santa Cristina*). The number of filed transactions shows a slight reduction in merger control activity.

It is particularly interesting to note that the Phase I remedies offered in all four transactions included behavioural remedies, which shows how the CNMC is also making use of behavioural remedies in Phase I, whereas the European Commission favours divestments. Similarly, the recent Phase II case (*Quirón/Clinica Santa Cristina*) only included behavioural remedies. It is also worth noting that, following what was learned from the *Bimba/Panrico II* case, in *BP/Petrocorner* the authority accepted a fix-it-first remedy.

In the CNMC's Action Plan for 2019, the authority explained that special attention was to be paid to the following sectors: financial, pharmaceutical, port services, railway, telecoms, basic industry and digital economy, with an emphasis on e-commerce.

The CNMC has continued to show a clear willingness to monitor remedies and this has continued to be an enforcement priority. During 2013, the former CNC fined Telecinco €15.6 million (the highest fine to date in the context of merger control proceedings) for having failed to implement the remedies that were accepted by Telecinco as a result of the *Telecinco/Cuatro* merger. In the same case, in September 2015 and September 2016, the CNMC fined Telecinco €3 million each year regarding further failure to implement the remedies. During 2017 and early 2018, the CNMC has continued to closely monitor compliance with remedies as shown by cases *Telecinco/Cuatro, Verifone/Hypercom, Redsys/Redy, Integra/Codman Neurosurgery Business or Día/Eroski Activos*, where the CNMC has confirmed with a decision to that effect that the parties had complied with the remedies. In turn, in 2018 the CNMC opened an investigation in relation to an alleged failure to comply with the commitments undertaken by Repsol when it acquired Petrocat in 2014.



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In addition, and as explained above, the CNMC has continued to actively prosecute companies for breach of the suspensory obligation applicable to merger control proceedings (ie, closing the relevant transaction prior to clearance) as shown by the fact that, as mentioned above, in 2016, the CNMC investigated eight potential gun jumping cases. However, only one formal investigation was opened against the company Consenur in relation to case *Consenur/Activos Cathisa*, eventually imposing a fine of €20,000 on Consenur for gun jumping in the acquisition of the waste management services business of Cathisa.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

Following the reform of the Spanish competition rules that entered into force from September 2007 to March 2008, Spain's competition law has been in line with the EU rules and has streamlined the authorities responsible for competition enforcement in Spain. However, the competition authority can adopt 'soft law' (guidelines, notices, etc) to assist in the interpretation of key issues relating to Spanish merger control provisions and in fact did so in October 2011 with regard to simplified proceedings.

It is foreseen that the Competition Act will likely be amended in order to transpose the ECN+ Directive on the enforcement powers and resources of competition authorities of the member states (Directive (EU) 2019/1).

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The number of merger filings (82 notifications) made in Spain in 2018 shows a slight reduction in activity (13 per cent less than in the previous year) but still a healthy number of transactions were filed as opposed to the years prior to the economic upturn when merger control activity in Spain reached historical lows. The enforcement track record shows a mature and consistent approach to merger control scrutiny as most transactions were unconditionally cleared in Phase I and only four cases

were cleared subject to remedies in Phase I. No transaction was prohibited and one was subject to an in-depth Phase II analysis, which has been cleared subject to behavioural remedies in early 2019 (*Quirón/Clínica Santa Cristina*).

Recent enforcement shows a willingness to accept behavioural remedies both in Phase I and Phase II. All four cases cleared in 2018 subject to remedies in Phase I included behavioural remedies, which shows the CNMC also making use of behavioural remedies in Phase I, contrary to the practice of the European Commission, which favours divestments. In addition, the recent case cleared in Phase II in 2019 only included behavioural remedies. The remedies offered by the parties in those transactions also show that the regulator is willing to address proportionality concerns by accepting behavioural remedies.

Finally, the other 2018 transaction worth mentioning is *BP/Petrocorner*, where, following what was learned from the *Bimbo/Panrico II* case, the authority accepted a fix-it-first remedy for the second time.

# Sweden

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Swedish merger control is governed by the Swedish Competition Act (the Act), which entered into force on 1 November 2008. The changes relating to merger control were on the whole intended to bring the assessment undertaken under the Act even further into line with the EU Merger Regulation.

The Swedish Competition Authority (the Competition Authority) has primary responsibility for the administration of the Act. In January 2018, the Competition Authority gained the power to block a merger, when previously it had been necessary to argue such a case before the Patent and Market Court. Now, a prohibition decision from the Competition Authority can be appealed to the Patent and Market Court, with further appeal to the Patent and Market Court of Appeal. The Patent and Market Court and the Patent and Market Court of Appeal were both established in September 2016. Previously, orders concerning prohibitions and other sanctions were made by the Stockholm District Court and on appeal by the Market Court.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Act's merger control rules are based on the concept of 'concentration', which is intended to correspond completely to the concept of a concentration under the EU Merger Regulation. This concept is defined in a general way so as to allow a dynamic interpretation in line with EU law, including existing, as well as future, case law of the European Court of Justice. More precisely, the Act prescribes that a concentration within the meaning of the Act arises if there is a change of control on a lasting basis in the following situations:

- two or more previously independent undertakings merge; or
- one or more persons (already controlling at least one undertaking) or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect (sole or joint) control over the whole or parts of one or more undertakings.

The creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity, namely a full-function joint venture, constitutes a concentration within the meaning of the Act. In addition, if an undertaking having joint control in another undertaking acquires additional parts of that undertaking, giving the former sole control, a change of control occurs and constitutes a concentration within the meaning of the Act.

The Competition Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on the concept of concentration under the EU Merger Regulation.

#### 3 | What types of joint ventures are caught?

The Act is applicable to all full-function joint ventures, that is, all joint ventures constituting a concentration within the meaning of the Act. To the extent the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions on anticompetitive cooperation between undertakings.

Under the Act, a concentration should be blocked where such coordination cannot be accepted under the rules on anticompetitive cooperation between undertakings.

The Competition Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on the concept of full-function joint ventures.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Act's definition of a concentration follows the relevant rules of the EU Merger Regulation. In short, acquisitions of minority interests are only caught by the merger rules if they involve a de facto acquisition of control.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Act's merger control rules provide for mandatory notification where:

- the undertakings concerned by the concentration attain a combined turnover in Sweden of more than 1 billion kronor; and
- each of at least two of the undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

When calculating the turnover of the undertakings concerned, two or more transactions that have taken place within a two-year period between the same persons or undertakings are treated as one and the same concentration.

The Competition Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on calculation of turnover and on the concept of undertakings concerned.

Even if the second threshold (ie, at least two of the undertakings concerned have a turnover in Sweden exceeding 200 million kronor) is not met, the Competition Authority has jurisdiction to order that the

concentration be notified if there exist particular reasons to do so (ie, particular substantive competition concerns). Although still relatively infrequent, the Competition Authority has ordered such notifications in a number of cases.

If a concentration has a Community dimension (ie, meets the turnover thresholds in article 1 of the EU Merger Regulation), the concentration should instead be notified to the European Commission.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Provided the merger falls within the scope of the Act and the turnover thresholds are met, filing is mandatory. There are no exceptions to this rule.

The parties may notify a merger voluntarily where the second threshold is not met (see question 5). This may be advisable if the merger leads to high market shares in the Swedish market or a substantial part thereof.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are, in the view of the Competition Authority, caught by the Act and have to be notified when the turnover thresholds are met. In practice this means, for instance, that the creation of a full-function joint venture with no, or limited, foreseen activities in Sweden can still be caught by the Act's merger rules if the parent companies meet the thresholds. As long as the thresholds (see question 5) are met, the merger is presumed to have local effects in Sweden.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act contains no special merger rules relating to particular areas of the economy. However, such rules are sometimes contained in sector-specific legislation.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A notification of a concentration must be made before it is implemented. There are no pecuniary sanctions for not notifying a merger to the Competition Authority. However, should the Competition Authority become aware of a qualifying but unnotified merger, it may order the parties to notify, subject to a fine.

Should the Competition Authority find that a completed merger was not permitted under the Act, it also retains the right to bring an action before the Patent and Market Court for the divestiture of the acquired entity. Failure to notify brings with it the risk of the merger being annulled ex post facto.

Filing under the Act can be made as soon as the undertakings concerned can demonstrate to the Competition Authority a good faith intention to implement the concentration. This means that an unsigned copy of the agreement or a letter of intent is normally sufficient as a basis for notification. There are practical advantages in pre-notification contact with the Competition Authority, as it may then commence an informal investigation prior to formal notification.

#### 10 | Which parties are responsible for filing and are filing fees required?

A merger should be notified by the merging parties together or the party or parties acquiring control. There are no filing fees.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

From the date of receipt of a complete notification, the Competition Authority has a preliminary period of 25 working days (Phase I) in which to take a decision either that there are no grounds for action or that it will initiate a special investigation of the merger (Phase II). However, if an undertaking offers commitments during this period with a view to having the merger cleared by the Competition Authority, the preliminary investigation period is increased to 35 working days. On average, Phase I cases are resolved within 12 working days and Phase II cases within 86 working days.

After a decision to carry out a special investigation (Phase II), the Competition Authority has an additional three months in which to decide whether the merger should be prohibited or cleared. The three-month period may be extended provided the notifying parties agree to it or there are compelling reasons for doing so. The decision of the Competition Authority can be appealed to the Patent and Market Court.

Before clearance, no party to the concentration may take any steps to complete the merger. However, the Competition Authority may decide to waive this standstill requirement. The Competition Authority also has the power to order the parties to respect the standstill requirement, subject to a fine. If the Competition Authority clears the merger before the deadline, the parties to the concentration may complete the merger.

The Competition Authority has the power to suspend the time limit (stop the clock) in a preliminary investigation or a special investigation if, for example, the parties do not provide additionally requested information in due time. During the preliminary investigation period, the parties may also request that the Competition Authority suspends the time limit for as many days as the Competition Authority deems appropriate. This possibility is available if the parties need additional time to address a competition concern.

#### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Before the Competition Authority has taken a decision to clear a transaction, parties are prohibited, in the absence of express permission, from taking measures to implement the concentration fully or partly. Where necessary to uphold this rule, the Competition Authority can order the parties to respect the standstill period subject to a fine. Without this active step by the Competition Authority, there are no pecuniary sanctions but there is nonetheless risk arising from the scope for the Competition Authority subsequently to rule not to clear the merger (or to clear it conditionally). In such cases, divestiture of the company or purchased assets (or similar) will be required. In 2014, the Competition Authority successfully sought to block a completed, voluntarily notified merger (ie, below thresholds, see question 5).

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The answer to question 12 applies equally to foreign-to-foreign mergers.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act does provide for an exemption from the standstill requirement on a case-by-case basis. However, that is a general provision, not specific to foreign-to-foreign mergers, and there must be specific reasons to justify such a departure from normal procedure.

#### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

The Act does not include any special rules applicable to public takeover bids. However, it provides that a prohibition of a merger will have no effect on the validity of acquisitions made on a Swedish or foreign stock exchange, on another authorised marketplace or at a public auction. In such cases, the buyer may instead be required to divest what has been acquired.

The Act does not contain any explicit rule similar to that found in the EU Merger Regulation to the effect that the standstill rule does not prevent formal implementation of a public bid, in the sense that the acquirer may formally take over the shares as long as he or she does not vote for them. However, the Competition Authority takes the view that the same principle applies under Swedish competition law. In addition, the parties may apply for an exception to the standstill rule so that the acquirer may vote for the shares if it is necessary to maintain the full value of the investment, provided it would not harm competition.

#### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Filing under the Act requires the use of a specific form. The form must be filled out in Swedish. A convenience translation of the form is available on the Competition Authority's website. The form sets out a number of questions on the parties, competitors, market conditions, etc, similar to Form CO requirements for notifications under the EU Merger Regulation.

The information required by the form is relatively extensive. It is, however, sometimes possible to secure, on an informal basis, waivers from the Competition Authority as regards certain information that is confirmed as being unnecessary in a specific case. The time necessary for the preparation of the form varies widely from case to case, as does its size, depending mainly on whether the transaction involves any 'affected markets'.

Discussions on waivers from the Competition Authority as regards the information required may be held during pre-notification meetings. There is no formalised equivalent to the simplified form of notification available at EU level for uncomplicated transactions.

A notifying party must formally declare in the filing that information provided is true, correct and complete. In the event the Competition Authority considers that the information provided is misleading or deficient in some way, the filing will not be considered to be complete and time will not start to run. During the review process itself, and where necessary for the performance of its duties, the Competition Authority can request additional information from the parties under penalty of a fine. If necessary, the Competition Authority can stop the clock until the required information is provided. See also question 32 on judicial review.

#### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

Upon receipt of a complete notification, the Competition Authority has 25 working days in which to conduct a preliminary investigation (Phase I). However, if an undertaking offers commitments during this period with a view to securing clearance from the Competition Authority, the preliminary investigation period is increased to 35 working days. Before the end of the preliminary investigation, the Competition Authority either has to clear the merger or decide to initiate a special (Phase II) investigation. Should such an in-depth investigation be initiated, the Competition Authority shall, within three months, decide whether the merger should be prohibited or cleared. If no action has been brought within that time period, the merger is deemed to have been cleared. The Competition Authority may extend the three-month period by not more than one month at a time with the parties' consent, or if there are other compelling reasons. In addition, the Competition Authority has the power to suspend the time limit in a preliminary investigation or a special investigation if, for example, the parties do not provide additionally requested information in due time (ie, to 'stop the clock'). During the preliminary investigation period, the parties may also request that the Competition Authority suspends the time limit for as many days as the Competition Authority deems appropriate. This possibility is available if the parties need additional time to address a competition concern. Pre-notification contacts are advised and recommended by the Competition Authority, especially for more complex mergers with 'affected markets'. There are practical advantages in pre-notification contact with the Competition Authority, as it may then commence an informal investigation prior to formal notification.

A prohibition decision or conditional clearance from the Competition Authority can be appealed to the Patent and Market Court and must be ruled upon within six months of its receipt (subject to extension). An appeal against the Patent and Market Court decision lies to the Patent and Market Court of Appeal, which must pass final judgment within three months of expiry of the period for appeal.

No measures may be taken in respect of a merger, notified or not, when more than two years have passed since the concentration occurred.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetables applicable to first stage and in-depth investigations (Phase I and II respectively) are described in question 17. There are no set timetables for hearings, requests for information or other measures during the investigation. The Competition Authority may, from time to time, in the course of the investigation, as it deems appropriate, send questions to the parties and request additional information.

When the notification has been filed, the Competition Authority will normally contact competitors and other third parties listed in the notification and invite comments on the proposed merger. There is no formal distinction between different classes of third parties. No companies other than those concerned in the acquisition are treated as parties to the procedure.

The length of time required to obtain a decision varies considerably from case to case, depending mainly on whether the transaction involves any 'affected markets'. However, the Competition Authority will often seek to clear uncomplicated cases (those clearly involving no affected markets) before the expiry of the 25-working-day period (Phase I). The Competition Authority has published a goal to clear such cases within 15 working days. On average, in 2018, Phase I cases were resolved within 12 working days and Phase II cases within 86 working days.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

Under the Act, a merger shall be prohibited if it would significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. This is harmonised with the EU Merger Regulation. The Competition Authority's assessment will take account of all relevant factors including, for example, possible counterweighing efficiencies or failing firm argumentation.

However, a merger may be prohibited only if such a prohibition does not involve 'the setting aside of essential national interests of security or resources'. This exclusion is unlikely to apply other than in very special circumstances.

A number of factors will be taken into account in assessing the transaction, such as market shares, barriers to entry and buyer power.

#### 20 | Is there a special substantive test for joint ventures?

In addition to the substantive test described in question 19, the Act provides that, to the extent the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions on anticompetitive cooperation between undertakings.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The Competition Authority will typically consider possible unilateral, coordinated, vertical and conglomerate effects of a concentration when evaluating whether it would significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

As mentioned above, elements outside the competition law field may be taken into account by reference to the criterion that a merger cannot be prohibited if doing so would jeopardise important national interests of security or resources. The courts have not yet had the opportunity to interpret this criterion. However, the situations in which this exception could be invoked are considered to be rare.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Act does not explicitly mention economic efficiencies. However, the Competition Authority's 2018 'Guidance from the Swedish Competition Authority for the notification and examination of concentrations between undertakings', specifies that the parties must at an early stage provide the Authority with verifiable information on potential efficiency gains and counterfactuals to enable it to take economic efficiencies into account.

The Competition Authority refers to the European Commission's Guidelines on the assessment of horizontal mergers and its guidance on the assessment of economic efficiencies.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the substantive test is met (see question 19), the Competition Authority can either prohibit the transaction or accept and make binding appropriate commitments from the parties to remedy the concerns identified. Remedies could include an order to divest or to take other pro-competitive action. Any such commitments given by the parties may be linked to a fine.

Acquisitions made on a stock exchange or any other recognised market or at an auction may not be prohibited; instead the disposal of the assets acquired may be ordered.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

As an alternative to prohibiting a transaction, the Competition Authority can accept commitments for the disposal of an undertaking or a business activity in whole or in part or some other measure to address the competition concern identified.

Such commitments may be proposed at any stage during the procedure. The companies concerned normally present such solutions in the form of an undertaking to the Competition Authority. Structural, as well as behavioural, undertakings are accepted by the Competition Authority. However, the Competition Authority typically favours divestments, as opposed to behavioural undertakings. Compliance with such undertakings may be enforced through a fine to be imposed in the event of a breach of the undertaking.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Commitments may be proposed by the parties at any stage during the procedure. In Phase I, if commitments are offered, this initial period is extended to 35 days. In Phase II, an application to extend the time limit is required if a remedy is offered later than three weeks before the end of this in-depth period. The basic conditions applicable to a divestment or any other remedy are, in short, that they are sufficient to eliminate the adverse effects of the concentration.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Competition Authority has on occasion obliged the parties to a foreign-to-foreign merger to divest assets located outside Sweden to remedy competition issues on the Swedish market.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A decision by the Competition Authority not to take any action with regard to a concentration also covers restrictions directly related and necessary to the implementation of the notified concentration. There are no specific guidelines published by the Competition Authority, but the preparatory works indicate that the European Commission's Notice on ancillary restraints shall give guidance in matters concerning such restraints under the Act.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Customers and competitors will be invited to comment on the proposed merger. No companies other than those concerned in the merger are treated as parties to the procedure.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

All notifications are mentioned together with a brief summary on the Competition Authority's case list, which is publicly available on the Authority's website. The Authority also publishes the final decision in the case.

As for confidentiality, whereas the general rule in Sweden is that all documents held by a public authority are in the public domain, rules on confidentiality and business secrets are contained in the Public Access to Information and Secrecy Act. The Act provides that information shall be secret if it relates to a party's business, innovations or research and development, insofar as disclosure would cause the party to suffer injury. There must, however, be particularly strong reasons for refusing full access to the file to a party to the proceedings.

Information provided by the parties during pre-notification contact is covered by absolute secrecy; that is, without the requirement that disclosure would cause injury.

In situations where the granting of confidentiality has been an issue, the Competition Authority has adopted a generally cooperative attitude in relation to the party requesting confidentiality.

In certain circumstances, the Competition Authority can give a party access to secret information through a 'data room procedure'. During such a process, certain information contained in the Competition Authority's investigation file will be held available at its premises (the data room) to which only a restricted group will have access during a limited period of time. The purpose of this procedure is to protect commercially sensitive information covered by the Public Access to Information and Secrecy Act, and at the same time give a party access to, for example, the Competition Authority's economic analysis in a specific case. This procedure is normally only available once the parties have received the Competition Authority's draft prohibition or conditional clearance decision (similar to the European Commission's statement of objections).

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Authority may, where appropriate, contact the European Commission or any national competition authority formally or informally. Since 2004, Sweden has had an agreement with Denmark, Norway and Iceland on cooperation on competition issues. This was revised and extended in September 2017 to include Finland and Greenland. As a result of the agreement, information exchange between the national competition authorities concerned is facilitated, inter alia, in the area of merger control. The national competition authorities hold semi-annual conference calls and yearly meetings within the framework of the agreement to update each other on current trends and ongoing investigations.

The Best Practices on Cooperation between EU National Competition Authorities in Merger Review were adopted in November 2011 by the EU Merger Working Group.

Under EU merger control rules, the Competition Authority cooperates with the European Commission and the other member states' competition authorities concerning referral cases.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

The decision of the Competition Authority can be appealed to the Patent and Market Court. The decisions and orders of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal, but leave to appeal is required. There is also a possibility, subsequent to a decision by any of the above courts, of reviewing the decision, on application of the Competition Authority, where the decision has been based on false information provided by a party. This application must occur within one year of the date of the decision.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

From the date of receipt of a complete notification, the Competition Authority has 25 working days (or 35 working days if commitments have been offered, see question 17) in which to decide either that there are no grounds for action or that it shall initiate a special investigation. After a decision to carry out a special investigation, the Competition Authority has a further three months in which to decide whether to clear or prohibit the merger. The decision can be appealed to the Patent and Market Court, the court then has six months to decide whether the concentration shall remain blocked or not. If an appeal is made against the judgment of the Patent and Market Court, the Patent and Market Court of Appeal shall make a ruling within three months of expiry of the period of appeal.

All the time limits mentioned above, except the 25 or 35-day limit during Phase I, may be extended if the notifying parties agree to it or where there are special reasons for an extension. The Phase I limit can be extended only by the notifying parties offering commitments, thereby extending the investigation period from 25 to 35 days, or by the Competition Authority suspending the time limit due, for example, to the parties not providing additionally requested information in due time.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since 1993, the Competition Authority has taken action to prohibit 13 mergers in total. This somewhat underestimates the degree of regularity with which the Competition Authority may have reached negative conclusions, as other transactions have simply been abandoned on receipt of the draft summons (equivalent to a Statement of Objections, under the pre-2018 system), without the Competition Authority needing to take formal action in court, for example Blocket's acquisition of Hemnet or Visma's acquisition of Fortnox. Of course, there are also cases resolved via commitments, avoiding the need for prohibition altogether.

The only Phase II case that took place in 2018 (see question 36), was unconditionally cleared. Of the three Phase II cases that took place in 2017, all were unconditionally cleared. This suggests that a Phase II investigation in Sweden does not necessarily signify a case very likely to require commitments for clearance. Notwithstanding, the Competition Authority did block a transaction in April 2019.

In addition, although still somewhat infrequent, the Competition Authority has on a number of occasions in the relatively recent past used its power to call in a below-threshold merger when market conditions suggest that it in any event merits scrutiny (eg, in relation to small acquisitions in already concentrated markets). In such cases, a voluntary notification may be advisable.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

The Competition Authority received increased powers in January 2018 and can now prohibit a merger without taking action in court to do so. This power was exercised for the first time in April 2019 (see question 36).

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2018, the number of mergers notified to the Competition Authority remained stable. There were 80 cases notified in 2018, the same number as in 2017, compared with 74 cases notified in 2016 and 61 cases notified in 2015. More specifically, in 2018 there was only one Phase II merger review, leading ultimately to an unconditional clearance (*Nokas/Avarn*), and a single case resolved by remedies (*Metso/Jonsson*). The first months of 2019 indicate that recent notification levels looks set to continue, with 25 merger filings submitted by early April. In simple cases, the Competition Authority continues to succeed in reducing its review period (averaging 12 working days for Phase I cases). In 2018, 80 per cent of transactions were reviewed within 15 working days and 46 per cent were reviewed within 10 working days. Typically, cases involving no horizontal or vertical overlaps are almost always dealt with by the Competition Authority within 10 working days.

Mirroring the trend throughout Europe for increased procedural rigour, it is also noteworthy that the Competition Authority has started to make somewhat more regular use of its stop-the-clock powers, applied in, for example, *Unilabs/Praktikertjänst Röntgen*, *FS Gas/Swedegas* and *Nokas/Avarn*. Finally, the Competition Authority's relatively new scope to block mergers without going to court has now been exercised for the first time in the *Arla/Klassiska Ostar* case, which was prohibited in April 2019. Furthermore, this case was notified on 5 December 2018 but the filing was not considered complete until 27 December, delaying the start of Phase I and demonstrating another form of heightened procedural strictness.

In *Nokas/Avarn*, the inquiry concerned the acquisition by Nokas AS of its competitor Avarn Security Holding AB, with a particular focus on staffed security services. Although the merger increased concentration in an already concentrated market, it was not considered to significantly inhibit effective competition, in part because of the presence of Securitas, number one in the market. In November 2018, the Competition Authority unconditionally cleared the transaction in Phase II, around only five weeks into the three-month period available (notwithstanding earlier stop-the-clock delays).

In *Metso/Jonsson*, Metso Sweden AB acquired Aktiebolaget PJ Jonsson och Söner, its competitor in the stone crushing industry. The Competition Authority's investigation showed that the merger would lead to a very strong position in the market for mobile crushing and screening for building and construction applications used for hard rocks. The only other significant competitor was Sandvik Construction AB, whose products most in demand by Swedish customers were in large part assembled by Jonsson. The Competition Authority considered there



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to be a risk that the acquisition would undermine Sandvik's approach and weaken competitive pressure on the merged entity. Sandvik stated that it would need time to take the measures required for it to continue being active in the stone crushing industry in Sweden. To support this and secure clearance, the parties committed for a transitional period of two years to permit Sandvik to continue purchasing mobile crushing and screening work from Jonsson, integrated with Sandvik's crushers as the main component, to be sold under Sandvik's brand. Customers of the merged entity would then be able to choose freely which product to purchase (Sandvik or Metso products). The commitments are intended to enable Sandvik to develop into a long-term competitive player in the relevant markets. The case was resolved in Phase I.

The *Arla/Klassiska Ostar* transaction, involving Arla Foods AB, Norrmejerier ek.för and Falköping ek.för for joint control of Svensk Mjölk AB, and thereby of the important cheese trademarks, Präst, Herrgård and Grevé, was blocked by the Competition Authority in April 2019 due to concerns that the parties would have the opportunity and incentive to provide competitors with more unfavourable terms of access to the cheese licences, as well as leading to reduced competition between them. The parties have now appealed and the court must rule within six months.

# Switzerland

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Swiss merger control is mainly governed by the Federal Act on Cartels and Other Restrictions of Competition as well as the Ordinance on the Control of Concentrations of Undertakings (together, the Competition Law). The Competition Law came into effect on 1 July 1996 and was revised in 2004. Further minor amendments have since been made. An intended major revision of the Competition Law was rejected by the Swiss parliament in September 2014.

Merger control is enforced by the Competition Commission (the ComCo). The ComCo consists of between 11 and 15 members (currently 13), the majority of whom must be independent experts. It is based in Berne. The cases are prepared and processed by the Secretariat of the ComCo (the Secretariat). The Secretariat is divided into four departments responsible for product markets, infrastructure, services and construction respectively.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Transactions that are subject to merger control are:

- statutory mergers of previously independent enterprises;
- acquisition of control over a previously independent enterprise or parts thereof, including through the acquisition of equity interests or the conclusion of agreements. Acquisitions of minority shareholdings are not subject to merger control, except for any contractual arrangements or factual circumstances conferring factual control on the minority shareholder. However, the ComCo has decided that the acquisition of a minority interest may qualify as an anticompetitive agreement if the enterprises concerned intend to cooperate; and
- acquisition of joint control over an enterprise (joint venture).

#### 3 | What types of joint ventures are caught?

There are three different types of joint ventures caught by merger control:

- acquisition of joint control over an existing enterprise;
- acquisition of joint control over an existing joint venture if the joint venture performs all the functions of an autonomous economic entity on a lasting basis; and
- creation of a new joint venture if the joint venture performs all the functions of an autonomous economic entity on a lasting basis and if the business activities from at least one of the controlling enterprises are transferred to the joint venture.

Joint ventures for a transitional period are generally not caught by the Competition Law unless the period envisaged is sufficiently long or the term is renewable.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law defines control as the ability to exercise a decisive influence on the activity of another enterprise by acquiring its shares, or in any other manner. In particular, this ability is deemed to exist if an enterprise is in a position to determine the production, the prices, the investments, the supply, the sales or the distribution of the profits of the other enterprise. Control is also assumed if major aspects of a company's business activity or its general business policy may be decisively influenced. Whether control is actually or potentially, directly or indirectly, de jure or de facto exercised is irrelevant. However, the mere acquisition of a non-controlling minority interest or a representation in executive bodies is not notifiable. In contrast, a board or management representation could confer control if associated with veto rights concerning strategic decisions. Similarly, other rights or contractual arrangements could confer control if they decisively influence the composition, the deliberations or decisions of the executive bodies, needing to be assessed on a case-by-case basis.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The test applied to mergers is based on turnover. Two turnover thresholds must be reached cumulatively: for the last business year prior to the merger, the enterprises concerned must have reported an aggregate turnover of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs, and at least two of the enterprises involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million Swiss francs. These monetary amounts are relatively high compared to other jurisdictions. Turnover is calculated on a consolidated basis, but excluding intra-group business.

In the case of insurance companies, the gross annual insurance premiums are taken into account for the purpose of determining the relevant thresholds.

The turnover calculation for banks and financial intermediaries is based on gross income. With respect to the geographical allocation of turnover, the notification form of the ComCo (see question 16) provides that the Swiss turnover of a bank or financial intermediary is calculated based on the income received by the branch or division established in Switzerland.

In general, the test for the geographical allocation of the turnover is the contractual delivery place of a product (place of performance) and the place where competition with other alternative suppliers takes place, respectively. The billing address is not relevant.

In addition, once the ComCo has established that a specific enterprise holds a dominant market position, every merger transaction, even if the turnover thresholds are not met, involving that enterprise in the market in which it holds a dominant position or in an adjacent market or in a market upstream or downstream thereof is subject to the notification requirement, irrespective of any thresholds. The ComCo does not publish a list of enterprises held to be dominant. In 2014, the Federal Administrative Court held that this provision of the Cartel Act had to be interpreted narrowly. However, in a subsequent recommendation, the ComCo widened the scope of application of article 9, paragraph 4 of the Cartel Act and held that a single economic entity between the joint venture and its mother companies had to be assumed. Hence, to determine whether a notification obligation is triggered, the joint venture and the companies controlling the joint venture are to be considered. However, only if the binding part of a final and non-appealable decision has formally held a company to be dominant, a notification obligation for future concentrations is triggered. In contrast, no such obligation arises if only the reasoning of a decision holds an undertaking to be market dominant.

Parliament may adjust the turnover thresholds taking account of any change in circumstances and may establish special criteria for the notification of concentrations in certain sectors of the economy. Until now, no such federal decree has been passed.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory prior to completion of the transaction, provided the turnover thresholds are reached or a market dominant position in the meaning of article 9, paragraph 4 of the Cartel Act has been established in a final non-appealable decision (see question 5). There are no exceptions to this principle.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Law is applicable to foreign-to-foreign mergers provided the relevant thresholds are reached with respect to Switzerland (see question 5). According to the Federal Supreme Court, whenever the turnover thresholds of the Competition Law are met, an effect on the Swiss market is presumed, thus triggering a mandatory pre-merger filing.

In practice, given the relatively high thresholds, it is unlikely that a foreign-to-foreign merger would become subject to Swiss merger control without, at the same time, being subject to the relevant foreign merger control.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no generally applicable Swiss acts (such as catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest, regardless of the industry sector. However, foreign investments in companies engaged in certain regulated industries and sectors in Switzerland might require governmental permission or approval. For example, special authorisations are required if the merger transaction involves banks or Swiss real estate companies.

In particular, if a bank incorporated under the laws of Switzerland becomes foreign-controlled or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change, then a new special licence for foreign-controlled banks must be obtained prior to this event. The competent authority is the Swiss Financial Market Supervisory Authority (FINMA). When a concentration of banks is deemed necessary for reasons related to creditor protection, namely rescue mergers, FINMA replaces the ComCo, which is given a right of consultation only. However, the notification must still be addressed to the ComCo if the jurisdictional thresholds for notification are met (see question 5).

As a further example, any acquisition or actions that qualify as an acquisition of residential real estate assets in Switzerland are subject to the Federal Act on the Acquisition of Real Estate by Foreign Persons (Lex Koller) if the acquiring person qualifies as a 'person abroad' under the Lex Koller. Accordingly, the parties of a merger involving a foreign enterprise and a Swiss real estate company (ie, a company whose principal purpose is the holding of real estate in Switzerland and whose assets include a significant portfolio of residential properties in Switzerland) may need to obtain a special permit from the competent cantonal (local) authorities.

Furthermore, special authorisation requirements apply to enterprises holding special rights, such as broadcasting, telecommunication, nuclear energy and air transport licences.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A filing must be made prior to the completion of the merger. Typically, therefore, a filing will be made after the relevant agreements have been signed, but prior to completion. If a notifiable merger is not filed, the enterprise that was required to file may face a fine of up to 1 million Swiss francs. In addition, the management (individuals) may also be personally fined up to 20,000 Swiss francs. To date, the ComCo has imposed several fines on enterprises that did not file or filed a notification too late. In contrast, the managers of such enterprises have not been fined so far. Fines are calculated based on the following objective criteria:

- whether the notification requirement was breached intentionally or negligently;
- importance of the enterprises involved in the relevant market, measured by turnover realised in Switzerland;
- whether prima facie the concentration represents a threat to competition. Such a threat is presumed if the total aggregate market share of the enterprises involved in the concentration is 20 per cent or more (or, if no market shares are combined, the market share of one of these companies is 30 per cent or more); and
- whether the concentration adversely affects effective competition; that is, whether it creates or enhances a dominant market position that eliminates effective competition (without enhancing competition in another market in a way that outweighs the negative effects of the dominant market position).

#### 10 | Which parties are responsible for filing and are filing fees required?

In the case of a statutory merger, notification must be made jointly by the companies involved. Where control over an enterprise is acquired, the filing must be made by the enterprise or enterprises acquiring control. If a joint notification is made, the enterprises are required to designate at least one common representative to the ComCo. For a

Phase I investigation (see questions 17 and 18) there is a lump-sum filing fee of 5,000 Swiss francs. In a Phase II investigation (see questions 17 and 18), the Secretariat of the ComCo charges an hourly rate of 100 to 400 Swiss francs depending on the urgency of the case and the seniority of the case handler.

**11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?**

Once notification is complete, there is a first waiting period of a maximum of one month in which the enterprises are not allowed to complete the concentration (provisional ban). The ComCo informs the enterprises concerned of the opening of an investigation within this one month period. In case no such notice is given within that time frame, the concentration may be implemented without reservation. The provisional ban does not apply if the ComCo prior to the expiry of the period of one month notifies the enterprises that it regards the concentration to comply with the Competition Law (comfort letter). Alternatively, the ComCo at the request of the enterprises may provide authorisation to implement the merger for good cause, in particular if the merger otherwise could not be completed or the enterprises would suffer great financial loss. If the ComCo decides to open an investigation (see question 17) an additional provisional ban until the end of the investigation takes place. However, the enterprises may apply for a provisional completion of the transaction for good cause.

**Pre-clearance closing**

**12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?**

If an enterprise fails to comply with the provisional ban on closing the merger after notification to the ComCo, the enterprise may face a fine of up to 1 million Swiss francs. In addition, the enterprise may be required to take measures to reinstate effective competition, either by unwinding the transaction, by ceasing to exercise effective control, or by any other appropriate action such as the termination of personnel ties or contractual guarantees to competitors or counterparties. Unlike the breach of the notification requirement, there are no individual sanctions for the management.

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

As merger control is applicable to foreign-to-foreign mergers (see question 7), they are also subject to the ordinary sanctions regime. In fact, the ComCo has already fined enterprises of foreign-to-foreign mergers for breaching the notification requirement (*Rhône-Poulenc SA/Merck* and *Banque Nationale de Paris (BNP)/Paribas*).

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

The Competition Law does not provide for any specific solutions to remedy Swiss antitrust issues in a foreign-to-foreign merger. Instead, the general remedies outlined above are applicable (see questions 11 and 12). To our knowledge, 'hold-separate' arrangements have never been put into practice or accepted by the ComCo in relation to a foreign-to-foreign merger. However, arrangements regarding the voting rights of the shares of a party to the merger have been accepted and practised. If the antitrust issue is merely a local one and therefore does not arise at a European level, it may often be remedied on the basis of competitive arguments submitted in the filing.

**Public takeovers**

**15 | Are there any special merger control rules applicable to public takeover bids?**

The Competition Law does not contain any specific rules regarding public takeover bids. In these cases, the ComCo should be contacted in advance so that it can coordinate its course of action with the Swiss Takeover Board. This is particularly important for hostile bids. Past practice has shown that in most cases the ComCo will substantially follow the rules of the EU Merger Regulation on public takeover bids. Also, it is possible to request provisional completion specifically in public takeover bids.

**Documentation**

**16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?**

The ComCo issues a standard notification form. The notification form basically requires enterprises to provide the following information and materials:

- company name, registered office and description of business activity of parties to the merger;
- a description of the proposed merger, including objectives to be achieved by it;
- turnovers, gross premium revenues or gross income, as the case may be, of the enterprises involved for Switzerland and worldwide;
- information on the relevant product and geographic markets affected, as well as information on the main competitors and respective market shares;
- data regarding new market entries over the past five years in the relevant markets as well as barriers to entry and, in particular, estimates of market entry costs;
- copies of the latest annual accounts and business reports of the enterprises involved; and
- copies of the relevant agreements relating to the merger.

For public tenders, copies of the public tender offer and copies of reports, assessments and business plans made in connection with the merger, to the extent they contain information relevant for the assessment of the merger for competition purposes, must also be supplied.

Depending on the complexity of the case, the preparation of a typical filing may take anywhere between two to six weeks. A filing can be made in any one of the official languages of Switzerland (French, German or Italian). Accompanying documents may also be submitted in English.

For foreign-to-foreign mergers that do not significantly affect the Swiss market but meet the threshold requirements, a simplified notification procedure is available upon application. The ComCo may, for valid reasons, release the applicant from the obligation to provide certain information and materials.

According to article 40 of the Cartel Act, undertakings concerned in concentrations and affected third parties shall generally provide the competition authorities with all the information required for their investigations and produce the necessary documents. Failure to fulfil or incorrect fulfilment of the duty to provide information is subject to fines of up to 100,000 Swiss francs against the defaulting company pursuant to article 52 of the Cartel Act or by fines of up to 20,000 Swiss francs against the defaulting natural person pursuant to article 55 of the Cartel Act. In both cases it is, *inter alia*, required that the competent competition authority has issued a binding decision on the duty to provide information, which has not been fulfilled or has not been fulfilled correctly by the addressee of the decision.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

In the first step of an investigation (which is normally the pre-notification phase during which the Secretariat reviews a draft notification), the Secretariat usually requests further information from the parties. The enterprises involved in the merger are required to furnish the ComCo with any additional information that it may request (see also question 16). In the second step, unless the filing obviously raises no concerns, the Secretariat sends out questionnaires to competitors, suppliers and customers of the enterprises involved. The answers received will usually have an important bearing on the position taken by the ComCo.

If the ComCo decides to open a Phase II investigation, this is published. Usually, in a Phase II investigation, hearings take place and the parties may file further documents and information. Also, the ComCo sends out additional questionnaires to customers, suppliers and competitors to deepen the market research and analysis. Finally, when it comes to remedies, close contact is established between the Secretariat and the enterprises involved to define the scope of any undertakings.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The ComCo is required to notify the enterprises within one month of receiving the complete notification whether it intends to initiate an investigation (Phase I of the procedure). If within this period no notification is made by the ComCo, the merger may be completed. In practice, the one-month period can be shortened in less complex filings if, prior to the formal notification, the draft filing is submitted to the ComCo for review, thus enabling the ComCo to communicate its position shortly after formal notification is made.

If the ComCo decides to initiate an investigation (Phase II of the procedure), it must be completed within four months, unless the process has been delayed by the enterprises concerned. The ComCo has no possibilities to prolong Phase I without initiating a Phase II procedure.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The applicable substantive test is the CSDP test (creation or strengthening of dominant position). In September 2014, the Swiss parliament rejected the planned revision of the Cartel Act that intended to move to the SIEC test (significant impediment to effective competition) as applied in the European Union. However, the Swiss government is considering the submission of a proposal to parliament suggesting a switch from the CSDP test to the SIEC test applied in the EU (see question 35).

Remaining with the CSDP test, a merger is to be cleared based on one of the following two tests:

- the enterprises involved do not create or strengthen a dominant position eliminating effective competition in the relevant market; or
- competition in another market is enhanced by the merger and this improvement outweighs the harmful effects resulting from the creation or strengthening of the dominant position in the relevant market.

The substantive test as such is not directly affected by special circumstances. For example, a failing company defence is taken into account by the ComCo as part of the causality test (ie, the concentration must be causal to the creation or strengthening of the dominant position). According to ComCo's past practice, a failing company defence is possible if one or more parties to the concentration would disappear

from the market within a short time without external support, the other parties would absorb most or all of the market shares of the disappearing company, and there is no solution that is less harmful to competition than the proposed concentration.

For compelling public reasons (employment, regional development), a concentration of enterprises that has been prohibited by the ComCo may be authorised by the Federal Council at the request of the enterprises.

#### 20 | Is there a special substantive test for joint ventures?

The Competition Law does not provide for any specific substantive rules with respect to joint ventures. The same test as outlined under question 19 is applicable.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

As mentioned in question 19, the substantive test for clearance in Switzerland is that of market dominance. Applying this test, the ComCo also investigates coordinated effects in cases of oligopolies and unilateral effects. In addition, the ComCo examines conglomerate effects and vertical foreclosure.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

As a rule, the ComCo does not take into consideration non-competition issues in reviewing a merger. However, as the collapse of Swissair and decisions in agricultural markets in particular have shown, political considerations may have some impact on how (swiftly) the ComCo takes its decisions.

In connection with a merger involving banks, FINMA has the power to clear a merger that it deems necessary for reasons of creditor protection, which take precedence over competition issues. In such cases, FINMA replaces the ComCo, which is given a right of consultation only (see question 8).

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The ComCo takes – to a certain extent – economic efficiencies into account. The ComCo assesses whether and to what extent efficiency gains may positively affect competition and whether such gains are passed on to the consumers. Also, economic efficiency gains in one market may outweigh certain deficiencies of the merger in another (see question 19).

As an example, (input) foreclosure effects of a transaction could lead to higher consumer prices if a vertically integrated company ceases to supply the downstream markets. However, according to the ComCo, possible efficiency gains of the transaction should be balanced against (input) foreclosure effects, as they could lead to lower consumer prices (see *Goldman Sachs/Altor/Hamlet*).

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

To the extent the enterprises involved do not comply with the order of the ComCo prohibiting a merger, the ComCo can take all appropriate

measures to reinstate effective competition. Such measures include the cancelling of the merger transaction and the termination of control by the acquiring enterprise over the target.

### Remedies and conditions

**25** | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The clearance of a proposed merger may be subject to certain conditions or obligations designed to safeguard effective competition. The law does not specify the types of conditions or obligations that may be attached. Recent cases have shown that conditions and other remedies will generally be discussed by the enterprises concerned with the ComCo. Such remedies could involve divestments or certain behavioural undertakings.

**26** | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The divestment has to eliminate all material objections of the ComCo to the proposed merger. According to the ComCo, the divestment must be completed within a fixed period. It is not sufficient for the parties to commit to divest 'at the earliest possible stage'. A specific deadline must be offered. In international filings, it is important to coordinate the divestments to be proposed to other merger control authorities involved, namely the European Commission. So far, proposals for remedies have only rarely been offered by the parties in a Phase I investigation.

**27** | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Remedies have been required in relatively few foreign mergers. In parallel filings with the European Commission, the remedies offered to the European Union were also recognised and accepted by the ComCo.

### Ancillary restrictions

**28** | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In general, the ComCo only deals with ancillary restraints, in particular non-compete obligations that are directly related and necessary to the merger. The case practice of the ComCo, by and large, is in line with the European Commission's Notice on Ancillary Restraints. Other arrangements related to the merger are in most cases explicitly excluded from the clearance decision. If the parties have doubts about the legality of the arrangements not covered by the clearance decision, they have the option to submit the arrangement to the competition authorities for a formal or informal ruling.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

**29** | Are customers and competitors involved in the review process and what rights do complainants have?

In most cases, the ComCo will send out questionnaires to customers and competitors soliciting their opinion on a filed merger (see question 17). However, customers and competitors have no formal procedural rights and the ComCo is neither required to issue questionnaires nor bound by any answers submitted.

If the ComCo decides to open an investigation proceeding (Phase II of the procedure), it publishes the principal terms of the merger and gives third parties the right to state their position with respect to the proposed merger within a certain time limit. Third parties must

submit their statements in writing. Since 2008, the ComCo has changed its previous practice so that third-party hearings (of competitors in particular) are in principle held in the presence of the participating enterprises. According to the case law of the Federal Supreme Court, third parties are not entitled to any remedies against the decision of the ComCo to permit or prohibit a merger.

### Publicity and confidentiality

**30** | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The mere filing of a notification is not made public. However, the decision to open an investigation proceeding (Phase II) as well as the final decision of the ComCo authorising or prohibiting a merger are published both in the Official Federal Journal and the Official Commercial Gazette. As the involvement of third parties in the investigation procedure is limited, there are no specific Competition Law provisions regarding the protection of business secrets. The merging parties are advised to specifically identify sensitive business information and ask the ComCo to keep such information strictly confidential. The ComCo is bound not to disclose any business secrets.

### Cross-border regulatory cooperation

**31** | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The agreement between Switzerland and the European Union concerning the cooperation on the application of their competition laws provides a framework for a closer coordination of their respective enforcement activities. With regard to merger control, the scope of the agreement includes in particular mutual notifications of merger investigations, the coordination of merger enforcement activities such as aligning the conditions and obligations for the approval of a merger and the exchange of information obtained in merger investigations. The implementation of the agreement was accompanied by an amendment to the Competition Law by which the parties will be informed about and have the right to comment on the ComCo's decision to share the parties' information with a foreign competition authority.

## JUDICIAL REVIEW

### Available avenues

**32** | What are the opportunities for appeal or judicial review?

Decisions of the ComCo are subject to appeal to the Federal Administrative Court. The decision of the Federal Administrative Court is in turn subject to review by the Federal Supreme Court. However, third parties have no right of appeal against merger decisions.

Currently, a decision is pending before the Federal Supreme Court regarding the question of whether a decision by ComCo dismissing a merger must be appealed by both merging parties or whether the appeal by just one party is sufficient. According to the Federal Administrative Court's decision under appeal, such a decision must be appealed by both (respectively, all) merging parties.

### Time frame

**33** | What is the usual time frame for appeal or judicial review?

An appeal against decisions of the ComCo must be filed with the Federal Administrative Court within 30 days of the formal notification of the decision. The duration of this appeal procedure varies, but may well be more than one year.

Decisions of the Federal Administrative Court may be appealed to the Federal Supreme Court within 30 days of the formal notification of the decision. According to recent practice, these proceedings generally take more than one year.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The ComCo consistently enforces the Competition Law with respect to foreign-to-foreign mergers and has stated that it will more severely penalise companies that fail to notify. The ComCo considers that the sanctions imposed in the past have not been sufficiently effective to deter large international groups.

In the past year, the ComCo had to assess several mergers in the media market (see question 36).

The ComCo has no specific focus regarding its enforcement policy in merger cases. On a more general level, the competition authorities currently focus on horizontal cartels (in particular suspected bid rigging in the construction sector) and hardcore vertical agreements (in particular restrictions on direct or parallel imports from the European Economic Area into Switzerland).

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

At the moment, there are no concrete proposals to change the legislation concerning merger control. However, the Swiss government is considering the submission of a proposal to parliament according to which Switzerland would switch from the currently applied CSDP to the SIEC test applied in the EU. The respective legislative process has been pending for more than a year now. However, the respective next steps (opinion of the Federal Counsel, submission to parliament, etc) are only expected for 2020.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In the past year, the ComCo had to deal with a series of mergers in the media sector that all led to in-depth investigations of ComCo.

The first merger related to the acquisition of Goldbach, an important player in the market for TV and radio marketing by one of the largest media firms in Switzerland (Tamedia AG). The ComCo analysed in depth the effects on the relevant media markets and the potential portfolio effects. Notwithstanding the strong market positions, the ComCo concluded that there was no potential creation or strengthening of a (collective) domination position, which could eliminate effective competition.

In the second large media merger, the ComCo approved a joint venture of the two media companies, AZ Medien AG and NZZ in the field of regional media publications. In this merger, the ComCo examined over 100 relevant markets, covering not only regional and national newspaper and publicity markets, but also television and radio markets. Although the ComCo found indications for a potential creation or strengthening of a (collective) domination position in different markets including some markets for readers of newspapers, it concluded that none of these potential domination positions could eliminate effective competition. Therefore, the ComCo cleared the merger.

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In a third case, the ComCo conducted an extensive investigation regarding the acquisition of one of the bigger newspapers in the region of Bale (Basler Zeitung AG) by Tamedia. The ComCo examined several markets and considered the possibility of a collective domination position on the readers market in the region of Bale. Despite concerns regarding potential (collective) dominant positions, the ComCo cleared the merger as effective competition was not eliminated.

Facing media criticism regarding the clearance of the three mergers, the ComCo clarified in its annual report that it is not its task to protect media diversity in Switzerland. Therefore, the ComCo did not take into account such non-competition aspects in its decisions.

ComCo cleared the *Siemens/Alstom* transaction in Phase I based on the commitments offered by the undertakings concerned to comply with respective clearance conditions of the European Commission to the extent applicable in Switzerland. After the European Commission prohibited the transaction, it was not implemented in Switzerland.

# Taiwan

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The principal legislation concerning mergers and acquisitions, unfair competition and monopoly in Taiwan consists of the Fair Trade Act of 1991 (FTA), the most recent amendments to which were promulgated in June 2017, the Enforcement Rules to the FTA, last revised in July 2015, and the Fair Trade Commission Guidelines on Handling Merger Filings, first promulgated in July 2006 (the Guidelines), with the most recent amendment in July 2016. Article 10 of the FTA places mergers and acquisitions in the broader category of 'combinations of enterprises'. The 2002 amendments to the FTA and its related Enforcement Rules changed the filing process for combinations from an approval system to a notification system, and the Guidelines introduced a two-tier review system by classifying combination filings into 'simplified' and 'general' filings. The 2017 amendments to the FTA brought two further changes:

- the waiting period was changed from number of calendar days to number of working days; and
- the Fair Trade Commission (FTC) has been given the power to solicit opinions from the public and, if necessary, enlist academic research institutions to provide opinions, but, in the event that one of the participating parties to the combination does not agree to such combination (ie, a hostile takeover), the FTC must inform the said objecting party of the justification for the combination filing and seek the opinion of the said objecting party on this combination filing.

At the national level, the FTC is the government authority overseeing mergers and other types of combinations. The FTC is empowered to examine and investigate possible violations of the FTA and to take action against those who breach the FTA by imposing fines and other penalties. The FTC can also order the dissolution of any combinations that breach the provisions of the FTA. The FTC will investigate complaints against combinations effected without the consent of the FTC, but may also investigate matters on its own initiative.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Transactions that fall under the broad category of 'enterprise combinations' under article 10 of the FTA and meet one of the jurisdictional thresholds set out below must be reported to the FTC in advance. A combination under the FTA occurs when an enterprise:

- merges with another enterprise;
- holds or acquires one-third or more of the total voting shares or capital stock of another enterprise;
- accepts the transfer of or leases the whole or a major part of the business or assets of another enterprise;

- operates jointly with another enterprise on a regular basis or is entrusted by another enterprise with the operation of its business on its behalf; or
- directly or indirectly gains control over the business operations or the employment and dismissal of the personnel of another enterprise.

In calculating the shares or capital contributions to determine whether there is a combination, the shares or capital contributions held or acquired by those enterprises that have a controlling or subordinate relationship with the participating enterprise shall be aggregated with those held or acquired by the participating enterprise (see question 4).

The Guidelines further categorise combinations into three different types, including horizontal (where the combining enterprises engage in horizontal competition), vertical (where the combining enterprises have an upstream-downstream relationship), and conglomerate (where the combining enterprises do not engage in horizontal competition and do not have an upstream-downstream relationship).

#### 3 | What types of joint ventures are caught?

The establishment of a joint venture company by two or more enterprises is considered an enterprise combination subject to the FTA, regardless of the type of joint venture. Hence, the jurisdictional thresholds discussed below would apply.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Article 6 of the Enforcement Rules to the FTA prescribes that the following conditions constitute 'controlling and subordinate relationships':

- where an enterprise holds or acquires more than half of the total number of voting shares of, or contributes more than half of the total capital of, another enterprise;
- where an enterprise directly or indirectly controls the personnel, finances or business operations of another enterprise, and thus has controlling power over that other enterprise;
- where an enterprise is assigned by or leases from another enterprise the whole or a major part of the business or assets of such other enterprise, or where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business and thus where the assigned or leased enterprise has controlling power over such other enterprise; or
- where a person or a group and their related persons hold a majority of the total number of outstanding voting shares of, or contributes more than half of the total capital of, another enterprise (see question 5 for a discussion of the persons and groups that would be considered 'enterprises' under the FTA's merger rules).

In addition, the following relationships between enterprises would be presumed to be controlling and subordinate relationships:

- where at least half or more of the executive shareholders or directors of an enterprise concurrently act as executive shareholders or directors of another enterprise; or
- where the same shareholders hold at least 50 per cent or more of the total number of outstanding voting shares of another enterprise, or contribute at least 50 per cent or more of the total capital stock of another enterprise.

See question 2 for a description of situations where a notification is required in cases where there may not be a change in control.

### Thresholds, triggers and approvals

#### 5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Article 11 of the FTA sets forth the following three criteria, any one of which (subject to certain exceptions) triggers a requirement to notify the FTC before completion of a combination:

- if one of the participating enterprises to the combination has a market share of at least one-quarter;
- if, post-combination, the resulting enterprise will have a market share of at least one-third; or
- if the sales revenue during the previous fiscal year of any enterprise that is a party to the combination exceeds a figure set by the FTC. The current sales threshold promulgated by the FTC for the parties, where the enterprises in the merger are not financial institutions and the total sales in Taiwan of one of the merging parties in the preceding fiscal year exceed NT\$15 billion, while the total sales in Taiwan of one of the other merging parties in the preceding fiscal year also surpass NT\$2 billion; if all parties to the combination are financial institutions (eg, a bank, a securities company, an insurance company or a financial holding company), then the threshold is at least NT\$30 billion in sales revenue in Taiwan in the immediately preceding fiscal year for such financial institution, and the threshold for the other party is still NT\$2 billion in sales revenue in Taiwan. The FTC is authorised by the FTA to establish other new thresholds of sales revenue for certain industries as the need arises. A new turnover threshold adopted by the FTC on 2 December 2016 further provides that a merger control filing is required if the combined global sales volume in the immediately preceding fiscal year of all parties to a combination exceeds NT\$40 billion and at least two of the parties each had Taiwan sales volume for the same year of at least NT\$2 billion.

According to the Guidelines, a general filing is required to be made to the FTC (under the foregoing thresholds) unless special thresholds are met, in which case, a simplified filing can be made. A simplified filing generally requires a shorter waiting period and the submission of less information in the notification, such as fewer major products, competitors and customers covered and fewer years of market and economic information covered. Articles 7 and 8 of the Guidelines provide special thresholds and exceptions relating to simplified filings. A simplified filing is permissible where:

- sales for the preceding fiscal year of the combining enterprises in the combination exceed the revenue threshold (article 11, paragraph i, subparagraph 3 of the FTA) and the combined market share in any market in Taiwan of the enterprises participating in a horizontal combination is less than 20 per cent or the combined market share in any market in Taiwan of the enterprises participating in a horizontal combination is less than 25 per cent and one

of these enterprises has no more than a 5 per cent market share in such markets;

- the individual combined market share in any market in Taiwan of the enterprise participating in a vertical combination is less than 25 per cent;
- after taking into account major competition factors, the proposed conglomerate combination would not have a substantial negative effect on competition in the relevant markets of participating enterprises; or
- an enterprise participating in the combination directly holds not less than one-third, but less than half of the total voting shares or total capital of, and subsequently combines with, the other enterprise.

However, general filing may become applicable if the FTC determines that:

- the combined market share of the top two enterprises in a relevant market reaches two-thirds of that market, or where the combined market share of the top three enterprises in a relevant market reaches three-quarters of that market. However, this excludes where the combined market share of the enterprises participating in a combination is less than 10 per cent;
- the combination involves major public interest;
- one of the parties to the combination is a holding company as defined in either the Financial Holding Company Act or the Taiwan Stock Exchange Corporation Regulations for the Review of Stock Exchange Listing Applications by Investment Holding Companies;
- the scope of the relevant market or the market shares of the combining enterprises is difficult to determine; or
- the relevant market of the combining enterprises shows high barriers to entry, high market concentration, any other major disadvantages, etc.

For the purpose of calculating the sales revenue thresholds noted above, the sales revenue of the participating enterprises to the combination shall be aggregated with the sales revenue of all enterprises that have control over the participating enterprise, enterprises that the participating enterprises have control over, and all enterprises that are controlled by the ultimate parent enterprises of the participating enterprises. For the definition of 'control', see question 4.

The FTA prescribes that an individual or a group, along with certain related parties of such individual or group, that holds more than half of the voting shares or total capital of any of the participating enterprises to the combination would be deemed an 'enterprise' with respect to the combination under the FTA. For the purposes of calculating the shareholdings or capital contributions of the above individual or group, the shareholdings or contributions of the following related parties shall be included:

- the above individual, and the individual's spouse, and the individual's blood relatives within the second degree of kinship (related natural persons);
- an enterprise in which the related natural persons hold more than one-half of the total number of outstanding voting shares or total capital;
- an enterprise in which the related natural persons act as its chairman, president, or a director representing a majority of directors;
- the above group and its representative, manager, or any other person with representing authority, his or her spouse, and his or her blood relatives within the second degree of kinship (related persons in the group); and
- the above group and an enterprise in which a group or the related persons in the group hold more than one-half of the total number of outstanding voting shares or total capital.

It is unlikely that a transaction not reaching these thresholds would be investigated for not filing a notification for combination.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once any of the jurisdictional thresholds set out above are met, notification of the combination to the FTC is mandatory, unless the combination falls under one of the exceptions enumerated under article 12 of the FTA.

According to article 12 of the FTA, a combination is exempt from the requirement to notify where:

- one of the enterprises or its wholly owned subsidiaries already holds 50 per cent or more of the enterprise with which it plans to combine;
- the same parent company holds 50 per cent or more of the shares in each of the enterprises that plan to combine;
- an enterprise plans to sell a distinct division to a newly established and wholly owned enterprise;
- an enterprise plans to engage in a qualified stock redemption plan;
- an enterprise plans to invest in and establish a subsidiary in which it will hold all of the shares or contribute all of the capital; or
- other types of combinations promulgated by the FTC from time to time.

According to a ruling issued by the FTC in July 2016, notification of the combination to the FTC is not required for the following types of combinations:

- a combination between enterprises that already have a controlling and subordinate relationship;
- a combination between enterprises that are controlled by the same controlling company;
- an enterprise surrenders part or all of its voting shares or capital contribution in a third company to an enterprise with which it has a controlling and subordinate relationship; or
- an enterprise surrenders part or all of its voting shares or capital contribution in a third company to an enterprise that is also controlled by the same controlling company.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Yes. When the thresholds are met, a notification is required. However, in the process of reviewing the notification, the FTC may decide not to exercise jurisdiction pursuant to the Principles for Handling Applications of Extraterritorial Combinations (the Principles), the last amendment of which was promulgated in December 2016. The Principles apply not only to combinations involving foreign enterprises with no subsidiaries or branch offices in Taiwan, but also to combinations involving Taiwanese enterprises and foreign enterprises, and Taiwanese enterprises and Taiwanese subsidiaries, branches or affiliated enterprises of foreign enterprises.

The Principles define an 'extraterritorial combination' under article 10 of the FTA as an enterprise combination involving two or more foreign enterprises that occurs outside Taiwan. An extraterritorial combination must file a notification with the FTC if one of the jurisdictional thresholds outlined in question 5 is satisfied.

Once an extraterritorial combination meets jurisdictional thresholds, the Principles require the FTC to weigh certain factors based on international comity in determining whether to exercise jurisdiction. These factors include:

- whether the result of the combination has 'a direct, substantial, and reasonably foreseeable effect' on the Taiwanese market or not;

- the relative importance of the effects of the combination on Taiwan and foreign markets;
- the locations and principal places of business of the combining enterprises;
- the explicitness and foreseeability of the impact on the market competition in Taiwan;
- the degree of conflict with the law or policy of the country of the combining enterprises;
- the possibility of administrative sanctions or compulsory execution;
- the effect of compulsory execution on the foreign enterprise or enterprises;
- international conventions and treaties, or provisions of international organisations;
- whether the combining enterprises have equipment for production of goods or provision of services, engage distributors or agents, or have other substantial sales channels, within the territory of Taiwan; and
- other factors considered important by the FTC.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Although Taiwan has joined the World Trade Organization and generally moved towards the liberalisation of restrictions on foreign investment, it still prohibits or restricts foreign investment in a number of industries. According to the Negative List for Investment by Overseas Chinese and Foreign Nationals issued by the Industrial Development and Investment Centre of the Ministry of Economic Affairs, foreign investors should particularly be aware of investment caps or barriers to investment in sectors such as telecommunications, public transportation, military supplies and accounting services.

According to the Enterprises Merger and Acquisition Law, foreign companies may merge with or assume all of the assets and liabilities of Taiwan companies subject to the Negative List for Investment by Overseas Chinese and Foreign Nationals.

According to the Financial Institution Merger Law, foreign financial institutions may merge with or assume all the assets and liabilities of financial institutions incorporated in Taiwan. Under the Financial Holding Company Law, foreign financial holding companies may obtain controlling ownership interests (up to 100 per cent) in financial subsidiaries of financial holding companies.

Investment in Taiwan funded from mainland Chinese sources was previously strictly prohibited. However, the Taiwan Ministry of Economic Affairs promulgated new regulations on 30 June 2009, with the recent amendment in March 2015, with respect to investments from mainland China and the establishment of mainland Chinese companies' branch offices or agencies in Taiwan. So far, a considerable number of industries (including textiles, certain kinds of infrastructure industries, banks, securities firms, insurance companies and certain type II services (non-facility based) telecommunication services) are currently allowed to receive investment from mainland China.

In addition, the Taiwanese currency, the New Taiwan dollar, is not freely convertible. If a combination were to involve the inward remittance of more than US\$50 million or its equivalent by any company involved in the transaction, that company would be required to seek approval from Taiwan's central bank, on this and any other currency-related issue.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no specific rules on filing deadlines. However, notification must be filed at least 30 days prior to consummation of the combination. Sanctions for not filing include fines ranging from NT\$200,000 to NT\$50 million for each violation of the FTA (2015 FTA amendments increased the lower limit up from NT\$100,000 to NT\$200,000) and orders to cease or unwind the combination (see question 24). Fines have long been imposed for failure to file.

#### 10 | Which parties are responsible for filing and are filing fees required?

The following are responsible for filing:

- all enterprises participating in a combination where the combination consists of a merger, transfer or lease of the operations or assets of another enterprise or enterprises, regular joint operation of enterprises, or operation of another enterprise by agreement;
- the holding or acquiring enterprise, where it holds or acquires at least one-third of the shares or capital of another enterprise. However, if there are control or subordinate relations between the holding or acquiring enterprises, or the holding or acquiring enterprises are controlled by the same enterprise or a group of enterprises, then it shall be the enterprise with ultimate control;
- the controlling enterprise, where it directly or indirectly controls the operations or employment and termination of personnel of another enterprise; and
- an individual or a group holding more than half the voting shares or contributing capital of the ultimate parent enterprise of the participating enterprise may be required to file a notification.

If the enterprises that are responsible for filing have not been incorporated, other enterprises participating in such combination must file.

Most commonly, the ultimate foreign parent companies of foreign enterprises involved in an extraterritorial combination are the parties that file the notification. For a foreign enterprise that has a branch or subsidiary in Taiwan, filing may be made by the Taiwan branch or subsidiary. However, the FTC may request information from the ultimate foreign parent enterprise as it deems necessary.

There are no filing fees.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A combination cannot take effect until 30 working days after the FTC receives the complete notification materials; however, the FTC may shorten or extend the 30-working-day waiting period by providing written notification to the notifying enterprise of such change. This extension period cannot exceed 60 working days. If no extension is granted to the original 30-working-day period and no objection to the combination is issued by the FTC by the end of the original 30-working-day period, the enterprises may combine 30 working days after the FTC receives the complete notification. The FTC may shorten the original 30-working-day period if it determines that it has no objection to the combination. However, if the notifying enterprise agrees to the combination being further reviewed upon the expiry of the said extension period, the combination cannot take place.

Where the FTC extends the deadline, the enterprises may combine at the end of this extended deadline, or the parties may combine before

the deadline if the FTC issues a decision allowing them to do so. The parties may not combine if the FTC issues an objection to the combination, or if false or misleading statements are found in the enterprises' notification.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

A combination that is required to be notified to the FTC may not legally be implemented if the FTC objects to the combination. If the combination is implemented anyway, the enterprises may be punished as described in question 24. In practice, in cases where a combination occurred without the requisite notification, the FTC imposed a fine on the participating enterprise that would have been responsible for the filing and required that the participating enterprises supplement the filings. If there is no FTC objection after the waiting period as described in question 11 has ended, the combination may take place.

One unresolved legal issue is whether a combination is void *per se* if it is not notified, or if it is to be deemed valid unless and until the FTC declares it to be illegal and thus void *ab initio*. One district court held that a combination that triggered the application requirement was void because no prior approval was obtained from the FTC. It should, however, be noted that this opinion was issued by a district court, and that this holding is without precedent. There continues to be a lack of consensus on this issue.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As far as we know, there has been no such case where sanctions were applied.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no such solutions.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

No special rules apply to public takeover bids. As discussed above, if the takeover falls within the definition of 'combination' and any of the jurisdictional thresholds is met, notification to the FTC is mandatory.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The FTC requires the following information in a notification of an enterprise combination:

- a form describing the combination and the parties involved, the target closing date of the combination, contact information and domicile of the combining enterprises, and the name of the attorney and power of attorney, if applicable;
- basic information about each enterprise involved, including incorporation documents, business items, employment statistics, turnover for the previous fiscal year and total capital, as well as the turnover for the previous fiscal year of the controlling and subordinate enterprises of the enterprise involved;

- the balance sheet and income statement of the preceding year for each enterprise involved;
- transaction-related statement, agreements, or other documents that are issued or entered into for the purpose of combination;
- a report detailing each combining enterprise's production or operating costs and the value and sales of the top five goods and the overlapping goods each sells in Taiwan for the three years prior to the date of the notification filing;
- an explanation of the benefits of the combination to the overall economy of Taiwan, including information on the relevant markets of the participating enterprises in terms of market shares, major competitors, level of competitiveness and difficulty of entry into the markets, as well as the impact of the combination on the relevant markets;
- a business plan for each combining enterprise;
- the status of the investment of each combining enterprise;
- the latest financial report and prospectus or annual report of combining enterprises that are listed on the Taiwan Stock Exchange or the Taiwan over-the-counter market;
- market structure information related to horizontal and vertical businesses in the relevant markets of the combining enterprises. This may also include information regarding competitors' market information (market share, etc);
- any other documents that may be required by the FTC; and
- in the case of the establishment of a financial holding company by way of combination, contract documents.

Additionally, for any enterprise that proceeds with a merger where any false or misleading information was contained in the filing, according to the FTA, the FTC may prohibit such merger, prescribe a period for such enterprise to unwind, to dispose of all or a part of the shares, to transfer a part of the operations, or to remove certain persons from certain positions, or make any other necessary dispositions, and may impose an administrative penalty of no less than NT\$100,000, and no more than NT\$1 million, upon such enterprise. Further, for any enterprise violating such a disposition order from the FTC, the FTC may order a dissolution, suspension or termination of the business' operations.

In addition to the fines stipulated in the FTA, the Administrative Penalty Act (APA) can also be applied if an enterprise is found to be in violation of the FTA. According to the APA, if an enterprise is determined to have gained a benefit that exceeds the maximum statutory amount of the fine, the fine may be increased to represent the scope of the benefit gained. Further, if there has been a breach of duty because of an act of a director of an enterprise or of any other individual with the authority to represent an enterprise, the APA allows such director or individual to be separately fined if it is found that he or she has acted with intent or gross negligence.

### Investigation phases and timetable

#### 17 | What are the typical steps and different phases of the investigation?

Under the FTC's internal rules and procedures, notifications of combinations are first submitted for initial review to the department within the FTC that deals with combinations. During the initial review, the department will examine whether the combination falls within the jurisdiction thresholds and whether all required documents have been submitted. If such combination does not fall within the jurisdiction thresholds, the FTC will issue a letter to indicate this fact. If all the required documents have not been submitted, the FTC will issue a letter requesting supplementary information. After all required documents have been provided, the department will submit the case to the

Commissioners' Meeting of the FTC, which will make the final decision on whether or not to reject the combination, or whether to extend or shorten the clearance period.

Also, pursuant to article 27 of the FTA, the FTC may require that the parties or related third parties provide statements, or may require that relevant organisations or individuals submit records, documents or any other necessary materials. The FTC may consult with other Taiwan government authorities that regulate the industries of the parties to the combination. The FTC is also authorised to dispatch personnel to inspect the offices, places of business or other locations of the relevant organisations. The 2015 amendments to the FTA authorised the FTC to seize evidence found during an investigation.

The commissioners may also ask the participants to appear in person at hearings or interviews. In addition, the FTC passed an internal rule in April 2002 to the effect that any combination notification filed with the FTC will be published on the FTC's website accompanied by a public request for opinions concerning the combination. However, the FTC will not respond or make any statement regarding such opinions. The FTC may choose to not make a combination case public if doing so would be contrary to any other existing laws.

#### 18 | What is the statutory timetable for clearance? Can it be speeded up?

As discussed in question 11, clearance takes 30 working days or less from the time the FTC receives the complete notification materials or at the end of any extension period that may or may not be granted by the FTC. The FTC may shorten the clearance period when it has determined that it has no objection to the combination. The clearance period for a combination can vary significantly based on the complexity of the combination.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

As noted in question 5, the three jurisdictional thresholds relate to market share and revenue of sales for the previous fiscal year in the relevant product and geographic markets. Revenue of sales generally refers to the total sales of an enterprise. Market share, on the other hand, is a more complex matter. To calculate the market share of an enterprise, the FTC must first identify the relevant market. To do this, the FTC will consider the following factors under the Principles for Deciding the Scope of the Relevant Market, enacted and promulgated in March 2015 (the Instructions):

- demand substitutability, meaning the ease with which a purchaser can obtain substitute products or services as the prices of the purchasers' prior selections increase; and
- supply substitutability, meaning the ability of competing suppliers of products or services to provide substitutes when the original supplier raises its prices.

The Instructions suggest that the FTC will focus more on demand substitutability than supply substitutability.

According to the Instructions (article 3), the relevant market shall be determined by both the product market and the geographical market.

The product market means 'the scope of goods or services that, in terms of functionality, characteristics, purposes or prices, have a high degree of demand or supply substitution'. In applying demand substitutability and supply substitutability to determine the product market, pursuant to the Instructions, the FTC may take the following factors into account:

- changes in prices of products or services;
- characteristics and uses of products or services;
- previous records showing that substitution between products or services has occurred;
- costs incurred by purchasers for turning to substituted products or services;
- degree to which purchasers turn to other products or services because of changes in prices of certain products or services;
- points of view of purchasers and competitors;
- relevant laws and regulations; and
- other relevant facts.

The geographical market means 'a region or scope in which the combining enterprises supply particular goods or services, and the trading counterpart can select or switch easily to other suppliers'. In applying demand substitutability and supply substitutability to determine the geographical market, pursuant to the Instructions, the FTC may take the following factors into account:

- changes in prices of products or services in different areas and transportation costs;
- characteristics and uses of products or services;
- different transaction costs borne by purchasers in different areas;
- availability of products or services to purchasers;
- how purchasers decide to purchase products or services in different areas in response to changes in the prices of products or services;
- points of view of purchasers or competitors with respect to substitution of products or services in different areas;
- relevant laws and regulations; and
- other relevant facts.

In addition to the consideration of the product market and geographical market, the FTC may, depending on the case, examine how time influences the scope of the relevant market. The Instructions further provide examples of three approaches for determining the relevant market, which the FTC may use, on non-binding and non-priority bases: reasonable interchangeability of use analysis, cross-elasticity analysis and hypothetical monopoly test.

After the relevant market is identified, market share is calculated by considering the production, sales, stock, and import and export turnover of the enterprise in relation to the total market. As mentioned in question 5, article 11 of the FTA states that combinations in which one of the parties has a 'one-quarter market share' require notification to the FTC. In many jurisdictions, such market share tests apply only to markets in which the parties to a transaction have overlapping markets. This, however, is not the case under the FTA. Further, the FTC's position in its examination of notification filings is that the market share thresholds do not apply only to markets in which there is overlap.

It is the FTC's task to weigh the advantages of a possible combination against any negative effects it might have on the economy. If a combination would result in more positive than negative effects on the economy, the FTC cannot object to the proposed combination. For a combination notification with antitrust concerns, according to the Guidelines, the notifying party may present the following factors regarding the overall economy benefit in response to the FTC:

- economic efficiency;
- consumer benefits;
- one of the notifying parties is in a weak position in the proposed transaction;
- one of the notifying parties is a 'failing firm'; or
- other factors that could influence the economic benefits.

However, where the FTC needs to make a decision on a notified combination, it may attach conditions or burdens so as to ensure that the overall economic benefit of the combination will be greater than the negative effects on competition.

A number of combinations that were approved by the FTC in recent years under the earlier version of the FTA involved combinations of enterprises whose markets had little overlap. This type of transaction is likely to have little impact on the enterprises' relevant markets and the FTC is generally well disposed to approving such combinations.

The Guidelines present more specific substantive tests for clearance relating to simplified and general filing cases.

For simplified filings, the FTC may determine that the overall economic benefit of the combination outweighs the disadvantages resulting from competition restraint in the absence of exceptions leading to the application of a general filing.

For general filings, the FTC may determine that the overall economic benefit of the combination outweighs the disadvantages resulting from competition restraint if there are no obvious concerns of competition restraint, after taking into account the factors relating to horizontal, vertical and conglomerate combinations contained in the Guidelines. In the event of obvious concerns of competition restraint, the FTC shall further assess the overall economic benefits to determine whether they outweigh the disadvantages resulting from competition restraint.

When a filing raises obvious concerns of competition restraint, the FTC will review the following considerations submitted by the filing enterprise regarding overall economic benefit from the combination:

- (i) economic efficiency (this means that the overall economic benefit can be achieved in a relatively short period of time, the combination of the enterprises would be the only way and the economic benefits can be passed on to consumers);
- (ii) consumer benefits;
- (iii) the combining enterprises have been in a disadvantaged position in trade;
- (iv) one of the combining enterprises is in extreme operational difficulties; and
- (v) other concrete results relating to overall economic benefits (for (iv), this includes the enterprise being unable to repay its debts in the short term; except through combination, the enterprise is unable to use other methods less restrictive to competition to remain in the market; and if unable to merge with another enterprise, the enterprise will have to withdraw from the market).

## 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

For each category of combination, the Guidelines further set forth the following specific competition assessment factors that are used to determine whether there will be any harmful restraining effects on competition in the market.

### Horizontal combinations

The FTC may take into consideration the following factors to assess the restraint on competition resulting from the combination.

### Unilateral effects

After the combination, the combining enterprises can increase product prices or remuneration for services without being restrained by market

competition (in such event, the FTC may assess the combination based on factors such as the market shares of the combining enterprises, homogeneity of the products or services, production capacity and import competition).

#### Coordinated effects

After the combination, the combining enterprises and their competitors restrict each other's business activities, or despite the absence of such restriction, the enterprises and their competitors take uniform actions, thus causing the market to be actually void of competition (if this occurs, the FTC may assess the combination based on factors including whether the market situation would be beneficial to concerted actions from enterprises, the degree of difficulty in monitoring violations and the effectiveness of punitive measures).

#### Degree of market participation

Including the possibility and timing of entry of potential competitors, and whether such entry would result in competition pressure on existing market players.

#### Countervailing power

The ability of trading counterparts or potential trading counterparts to restrict increases in product prices or remuneration for services by the combining enterprises.

#### Other factors that restrain competition

Further, the FTC will consider competition restraint to be obvious and shall further assess the overall economic benefits where (i) the combined market share of the combining enterprises reaches half of the market; (ii) the combined market share of the top two enterprises in a relevant market reaches two-thirds of the market; or (iii) the combined market share of the top three enterprises in a relevant market reaches three-quarters of the market (for (ii) or (iii), the combined market share of the combining enterprises should reach 20 per cent).

#### Vertical combinations

The FTC may take into consideration the following factors to assess the restraint on competition resulting from the combination (such as vertical foreclosure):

- the possibility for other competitors to select trading counterparts after the combination;
- the degree of difficulty for enterprises not participating in the combination to enter the relevant market;
- the possibility for the combined enterprises to abuse their market power in the relevant market and other factors that may contribute to market blockage;
- the possibility of increased costs for competitors; and
- the possibility to implement concerted actions.

#### Conglomerate combinations (ie, involving neither vertical nor horizontal factors)

The factors used to assess restraint on competition resulting from horizontal or vertical combinations shall become applicable if the relevant market of the enterprises in a conglomerate combination possesses significant potentiality for competition that will cause a situation similar to a horizontal or vertical combination. The FTC may take into account the following factors to assess the significant potentiality for competition (eg, possible conglomerate effects):

- the impact of the elimination of legal restrictions on the combining enterprises operating businesses across industries;
- the possibility of the combining enterprises operating business across industries as a result of technological advancements;

- the original plans of the combining enterprises to develop business across industries outside the combination; and
- other factors that affect the significant potentiality for competition.

Under the Guidelines, factors such as harm to innovation and common ownership concerns have not been clearly defined. However, when making a decision regarding a combination, the FTC can impose burdens on a clearance if allowing such combination may harm innovation. For example, the FTC imposed certain burdens in the combination between Nokia and Microsoft in which it required Nokia to authorise its standard essential patent based on fair, reasonable and non-discriminatory principles.

#### Non-competition issues

##### 22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the review process in principle. In reviewing a notification of a combination, the FTC considers first and foremost whether the benefits of the combination for the overall economy are likely to outweigh the negative effects. According to the Guidelines, in cases where the combination filing is reviewed by simplified procedure or where the FTC believes that there are no obvious competition restraints, the FTC may decide that the overall economic benefits outweigh the disadvantages.

#### Economic efficiencies

##### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The operative principle is whether the overall benefit of the combination outweighs the disadvantages of restraining competition. The FTC will, however, examine economic efficiency issues more closely when there are strong disadvantages resulting from the proposed combination. Additionally, the FTC assigns less weight to efficiency benefits that accrue as an indirect result of a combination, or if the combination is not the only (or most important) way to achieve the efficiency benefit. The FTC may consider the following factors in conducting its analysis: increased efficiency with regard to the use of assets, lowered production and transport costs, economies of scale and diversification of services, whether there is a practical and effective savings plan, whether the combination lowers the variable costs of doing business, and the general impact of the combination on prices or services to consumers. The FTC only considers efficiency benefits that have been passed down to consumers in one form or another. As stated in question 19, the Guidelines added a provision that requires the FTC to consider the overall economic benefit of the combination even when obvious concerns arise regarding restraint on competition. The Guidelines state that when a filing raises obvious concerns of competition restraint, the FTC will review the following considerations submitted by the filing enterprise regarding overall economic benefit from the combination.

## REMEDIES AND ANCILLARY RESTRAINTS

#### Regulatory powers

##### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a combination occurs without the requisite notification or is disallowed by the FTC, the Commission may, in addition to imposing fines ranging from NT\$200,000 to NT\$50 million for each violation of the FTA, issue orders prohibiting the combination, set a deadline within which the enterprises must separate, require the disposal of acquired shares,

require that business activities be transferred, or require that certain company officers or employees resign from their positions. Also, the FTC may order the dissolution of the enterprise or suspension of its operations if that enterprise fails to comply with its orders. The FTC may also pursue remedies beyond those enumerated above where warranted under the circumstances.

In addition to the fines stipulated in the FTA, the APA can also be applied if an enterprise is found to be in violation of the FTA. According to the APA, if an enterprise is determined to have gained a benefit that exceeds the maximum statutory amount of the fine, the fine may be increased to represent the scope of the benefit gained. Further, if there has been a breach of duty because of an act of a director of an enterprise or of any other individual with the authority to represent an enterprise, the APA allows such director or individual to be separately fined if it is found that he or she has acted with intent or gross negligence. This fine can also be applied to the director or individual if the breach of duty is attributable to an act of a staff member, employee, or any other person with authority to act on behalf of the director or individual.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The February 2002 amendments to the FTA give the FTC the right to order additional conditions or burdens so as to ensure that the overall economic benefit of the combination will be greater than the disadvantages of restraining competition. For example, the FTC allowed one company to enter into a combination but forbade it from using its monopoly status to its advantage in the local market. While the FTC has the requisite power, it has yet to order a divestiture undertaking. The FTC is authorised to order the dissolution of the enterprise or the suspension of its operations if that enterprise fails to comply with its orders. For further information, see question 24.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestments or other remedies are enforced when enterprises combine without undergoing the mandatory waiting period, combine despite prohibition by the FTC, or fail to abide by conditions set by the FTC. The FTC can prohibit a combination or prescribe a period for such enterprise or enterprises to split, dispose of all or a part of the shares, transfer a part of the operations, remove certain persons from positions or make any other necessary dispositions. Enterprises that violate a disposition by the FTC within the prescribed period may be further ordered to dissolve, suspend or terminate their operations.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The FTC has imposed conditions and 'burdens' (a form of continuing obligations that may be imposed on a party to an administrative disposition under Taiwan Administrative Procedure Law) in a number of foreign-to-foreign mergers.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The FTC will consider related arrangements to the extent that such arrangements restrict competition. Non-compete agreements, obligations to license industrial property, purchase and supply obligations, and other obligations, where known to the parties at the time of filing,

must be disclosed and will be considered as relevant factors in the FTC's decision-making process. However, there are no specific provisions in law that address ancillary restrictions.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

As mentioned in question 1, in the event that one of the participating parties to the combination does not agree to such combination (ie, a hostile takeover), the FTC must inform the said objecting party of the justification for the combination filing and seek the opinion of the said objecting party on such combination filing. Further, the FTC is allowed to solicit opinions from the public. Therefore, if customers or competitors are aware of a notification to the FTC, they may submit their views, but the FTC is under no statutory obligation to accept or take such views into account.

Additionally, the FTC may require related third parties to make statements or require relevant organisations or individuals to submit records, documents and other necessary materials. The FTC is also authorised to dispatch personnel to inspect the offices, place of business, or other locations of relevant organisations.

Under the FTA, if a party is injured by the actions of an enterprise that is acting in violation of the FTA, the injured party may seek injunctive relief as well as damages. A court may award treble damages. However, a party's ability to recover damages for injuries resulting from merger and acquisition activities is largely theoretical.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As mentioned in question 17, any combination report filed with the FTC will be publicised on the FTC's website with a request for opinions from the public on the combination. The published information is general in nature, taking the form of a relatively brief announcement of the planned combination. The filings made to the FTC by the parties to the combination are not public. Similarly, opinions submitted by interested parties may only be reviewed by the FTC.

Beyond this, the review of a notification of a combination is an internal process kept within the FTC, except that the notifying enterprise or a related person may, as required for the advocacy or defence of legal rights and interests, request to read, transcribe, photocopy or photograph relevant materials or files, with some exceptions limited under the Taiwan Administrative Procedure Law and the internal rules enacted by the FTC.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The FTA does not explicitly authorise cooperation with antitrust authorities in other jurisdictions; however, the FTC has communicated with antitrust authorities in other jurisdictions while conducting investigations in the past. Also, the FTC has entered into cooperative treaties with the antitrust authorities in Australia, Canada, France, Japan, Mongolia, Hungary, New Zealand and Panama.

FTC policy statements note that in recent years there has been a trend toward large combinations between multinational corporations, the parent companies of which are located in advanced industrialised

countries. It is noted that while such combinations may improve the competitiveness of the parties in their respective home countries, because of the market power of such companies in other countries, it is necessary that the competition authorities coordinate and scrutinise the competitive impact of such transactions. Accordingly, it is the policy of the FTC to broadly interpret its jurisdiction in offshore transactions that may have a competitive impact in Taiwan.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

The 2015 amendments to the FTA allow an enterprise or person dissatisfied with an FTC decision to appeal the decision directly to the Taipei High Administrative Court and finally to the Supreme Administrative Court without first submitting to a review procedure by the Appeals Committee of the Executive Yuan, as previously required. This change was instigated after Taiwan's Grand Justice Council opined that decisions by an independent agency are exempt from review by its direct superior authority.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

According to the Taiwan Code of Administrative Procedure, if the requirement to first appeal to the superior authority is waived by laws, parties dissatisfied with administrative decisions may file for judicial review within two months of receiving such decisions. Thus, after the FTA's 2015 amendments (see question 32), parties dissatisfied with FTC decisions may file for judicial review directly within two months of receiving such decisions. Judicial review could take anywhere from eight months to one-and-a-half years to reach a final resolution.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the publicly accessible database maintained by the FTC, between October 2013 and April 2019 there were 11 cases of a party being penalised with an administrative fine of between NT\$50,000 and NT\$5 million for failing to file with the FTC. In many other cases, the FTC approved the combinations but set several conditions on the approvals. Those conditions varied depending on the type of combination, but included restrictions on the appointment of directors, supervisors and general managers for a certain period of time, restrictions on certain types of actions that could have the potential to harm competition, restrictions on certain types of actions that could constitute abuses of market power, and the provision of certain business information, such as pricing arrangements, to the FTC for a certain period of time.

According to a report issued by the Chair of the FTC in the Legislative Yuan, the FTC will be 'looking closely to the progress of investigations of international antitrust cases and will use those as references when enforcing the FTA' and will 'maintain open communication with other foreign agencies in charge of competition law to thwart international cartels and anti-competition activity'. In the future, decisions made by foreign agencies may be more likely to be scrutinised by the FTC.

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### Reform proposals

#### 35 | Are there current proposals to change the legislation?

None.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The key merger control cases in Taiwan for last year are as follows:

- The proposed share acquisition of Weilih by Uni-President group: the FTC was concerned that the negative economic consequences of the proposed share acquisition would outweigh the expected benefits, given the high market shares of the participants.
- The transaction among KKR & Co Inc, Carlton (Luxembourg) Holdings Serl, KKY Co, Ltd and LCY Chemical Corp: LCY is one of Taiwan's leading petrochemical companies. Many of its products have market share of more than 50 per cent in their respective product markets.
- The share acquisition of 21st Century Fox by Disney: this is already a well-known international deal.
- The joint share acquisition of Shin Hsiung Natural Gas Co, Ltd, and four other natural gas companies by the Zhu family, including its invested companies and related individuals: the transaction triggered the combination filing obligations, but a filing was not made. To the best of our knowledge, this was the first time that the FTC ordered a disposal for failing to file for a joint share acquisition by a family, including its invested companies and related individuals.

# Thailand

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Merger control in Thailand is primarily governed by the Trade Competition Act BE 2560 (2017) (TCA) and the relevant subordinate legislation is overseen by the Trade and Competition Commission (TCC). Section 51 of the TCA divides regulated mergers into two categories: those that require prior approval (pre-merger filing) and those that require subsequent notification (post-merger notification). With effect from 29 December 2018, the submission of a pre-merger filing will be required if the merger may result in the creation of either a 'monopoly', or 'a business operator with dominant market power'. On the other hand, a post-merger notification will be required if the merger may result in the 'substantial lessening of competition in a market'.

The TCC is supported administratively by the Office of the Trade and Competition Commission (OTCC), whose powers and duties include undertaking administrative works of the TCC and sub-commissions, monitoring violations of the TCA, receiving complaints in respect of alleged violations of the TCA and making recommendations to the TCC, as the enforcement agency. In case of disputes over alleged violations of offences under the TCA, civil claims for damages, or appeals of administrative orders issued in connection thereof, the Intellectual Property and International Trade Court or the Administrative Court has jurisdiction.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

##### Overview/scope

The TCA has a broad and general application and, with certain exclusions and exceptions outlined below, applies to any 'merger' by a 'business operator' that may result in (i) the 'substantial lessening of competition in a market'; or (ii) the creation of a 'monopoly' or a 'business operator with dominant market power'. However, activities of the following types of persons are excluded from the scope of application of the TCA:

- central, provincial or local government agencies;
- state enterprises, public organisations and other governmental organisations (but only for actions specified by law or undertaken pursuant to cabinet resolutions necessary for the benefit of maintaining public order, public benefit or the procurement of utilities);
- farmers' groups or cooperatives or societies recognised by law that have the objective of undertaking business for the benefit of the farming occupation; and
- business sectors where competition is regulated by industry-specific legislation.

Business operator or operators who are involved in a merger that triggers the pre-merger filing or post-merger notification requirement (see

further details in question 5) must either obtain approval from the TCC or notify the TCC, as the case may be.

### Definition of mergers

The definition of a 'merger' under the TCA means any of the following:

- the merger of a manufacturer with another manufacturer; a distributor with another distributor; a manufacturer with a distributor; or a service provider with another service provider, which will result in one of the businesses being maintained and the other extinguished, or a new business being formed (statutory mergers or amalgamations);
- the purchase of all or part of the assets of another business 'for the purpose of controlling business administration policy, administration or management' (asset acquisitions); and
- the purchase of all or part of the shares of another business 'for the purpose of controlling business administration policy, administration or management' (share acquisitions).

For the definition of 'for the purpose of controlling business administration policy, administration or management', see question 4.

### Definition of business operators

Section 5 of the TCA defines a 'business operator' as a 'distributor, producer for distribution, orderer or importer into Thailand for distribution, purchaser for the production or resale of goods, or service provider in the course of business'.

Because the TCA aims to regulate transactions that affect Thailand, the OTCC's interpretation is that a merger by a business operator shall be caught under the TCA if that business operator or operators engage in business activities or commerce in Thailand. Accordingly, legal entities incorporated outside Thailand will also be subject to the application of the TCA if the legal entity has a 'business presence' in Thailand (ie, operates business in Thailand, through a branch office, a representative office, or a subsidiary in Thailand that is a 'single economic entity' with the legal entity in question).

For the purpose of verifying the business presence of a business operator or operators conducting a merger, in case of amalgamation, both merging parties must be a company incorporated under the laws of Thailand. For an acquisition of assets or acquisition of shares, the acquirer and the target must have a business presence in Thailand.

### Exceptions

The only exceptions for section 51 are mergers implemented for the purpose of business restructuring and reorganisation between a business operator and its affiliates that are a 'single economic entity' under the TCA. Single economic entity is defined as two or more business operators that have a relationship in policy or directive power, where:

- 'relationship in policy' means a relationship between two or more business operators that have their own set of guidelines, policies

or procedures on business administration, direction or business management under the control of the same business operator with the directive power; or

- 'directive power' means the power to have control under any of the following situations: (i) holding shares with voting rights in a business operator of more than 50 per cent of the total voting rights in such business operator; (ii) having the power to control the majority of votes in a meeting of shareholders of a business operator, either directly or indirectly; (iii) having the power to control the appointment or removal of at least half of all directors or more of a business operator, either directly or indirectly; or (iv) having the directive power under (i) and (ii) at every hierarchical level, starting from the directive power under (i) or (ii) of the business operator that is at the ultimate level of command.

### 3 | What types of joint ventures are caught?

There are no separate rules for joint ventures and the OTCC's interpretation is that the establishment of a new joint venture company does not fall under the definition of a 'merger' under the TCA and is therefore not subject to the TCA. However, where the creation of a joint venture company involves an amalgamation, asset or share acquisition constituting a 'merger', this will be subject to the application of the TCA.

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

In respect of a share or asset acquisition transaction, it will only constitute a 'merger' under the TCA if such acquisition is for 'the purpose of controlling business management policy, administration or management'. The TCC prescribes that a share or asset acquisition is for 'the purpose of controlling business management policy, administration or management' if:

- in the case of asset acquisition: the value of the assets acquired from the other business operator exceeds 50 per cent of the total value of assets used in the ordinary course of business of the selling business operator; or
- in the case of share acquisition:
  - a listed public company: securities constituting at least 25 per cent of the total voting rights (at close of any day) of the acquired entity are acquired; or
  - a private and non-listed public company: shares constituting more than 50 per cent of the total voting rights (at close of any day) of the acquired entity are acquired.

### Acquisitions by affiliated persons

In the case of a share acquisition by a natural person, any acquisition of securities or shares by his or her spouse shall be deemed as securities or shares acquired by the acquirer.

In the case of a share acquisition by a juristic person, any acquisition of securities or shares by other juristic persons or natural persons who hold more than 30 per cent of voting rights of the acquirer and is also a single economic entity of the acquirer shall be deemed as securities or shares acquired by the acquirer.

An acquisition of assets or shares that does not satisfy the above criteria will not constitute a merger under the TCA.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

#### Pre-merger filing

The threshold for pre-merger filing is a merger that may result in the creation of either:

- 'a monopoly', defined as a situation where there is only one business operator in any market possessing absolute power to determine of price and supply of products or service freely; and such business operator has a sales turnover of at least 1 billion baht; or
- 'a business operator with dominant market power', defined as (i) any business operator having a market share of 50 per cent or more and having a sales turnover of at least 1 billion baht, in the previous year; or (ii) any of the top three business operators that together have an aggregate market share of 75 per cent or more and a sales turnover of at least 1 billion baht, in the previous year (excluding any business operator having a market share in the previous year of lower than 10 per cent or having a sales turnover in the previous year of lower than 1 billion baht).

#### Post-merger notification

The threshold for post-merger notification is a merger in which the sales turnover of any one business operator, or of all relevant business operators undertaking a merger in any market, amounts to 1 billion baht or more and that does not result in a 'monopoly' or result in a 'business operator with dominant market power'.

There are no circumstances where the pre-merger filing or post-merger notification, as the case may be, is required if the relevant thresholds are not met.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

In case of a regulated merger, the pre-merger filing and post-merger notification are mandatory. The only exceptions to the mandatory filing are (i) mergers for the purpose of business restructuring and reorganisation between a business operator and its affiliates that are a single economic entity; or (ii) mergers that do not fall within the scope of application of the TCA.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Based on the OTCC's interpretation, foreign-to-foreign transactions may be subject to the TCA if the relevant business operators have a business presence in Thailand (see question 2).

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The Foreign Business Act BE 2542 (1999) (FBA) is the principal legislation that regulates foreign investment in Thailand and specifies that 'foreigners' may not engage in certain types of business without the relevant approval from the competent Thai authority. Therefore, foreign investors will also need to comply with the provisions of the FBA, as well as those of the TCA.

In addition, for business sectors where competition is regulated by industry-specific legislation and industry-specific regulators, such industry-specific legislation will apply instead of the TCA. Currently, the following industries have specific industry legislation relating to

competition: broadcasting and televisions, telecommunications, energy, insurance and financial institutions.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

##### Pre-merger filing

The relevant business operator or operators must submit a pre-merger filing before the closing date (ie, the effective date of the amalgamation, asset acquisition or share acquisition) and the merger cannot be consummated until the approval from the TCC has been obtained. If a business operator is required to submit a pre-merger filing and fails to do so, the business operator may be subject to:

- administrative sanctions: a fine of not exceeding 0.5 per cent of the total value of the transaction may be imposed by the TCC; or
- civil penalties: any person who incurs loss or damage from the violation of pre-merger filing requirements by a business operator may claim civil damages against the business operator.

In addition, the TCC may order the relevant business operator or operators to suspend, cease or vary the merger transaction that was conducted in violation of the pre-merger filing requirements. In cases where the business operator fails to comply with this order, it may be subject to an additional administrative fine of not exceeding 6 million baht and a daily fine of not exceeding 300,000 baht throughout the period of violation.

##### Post-merger notification

The relevant business operator must submit the post-merger notification within seven days of the closing date (ie, the effective date of the amalgamation, asset acquisition or share acquisition). If a business operator is required to submit a post-merger notification and fails to do so, the business operator may be subject to an administrative sanction of a fine of not exceeding 200,000 baht and a daily fine of not exceeding 10,000 baht throughout the period of the violation.

There is no enforcement practice for non-compliance with a pre-merger filing or post-merger notification within the stipulated deadline, as merger control has only recently been implemented in Thailand.

#### 10 | Which parties are responsible for filing and are filing fees required?

##### Pre-merger filing

- Amalgamation: the entities that will amalgamate shall be jointly responsible for submission of the pre-merger filing.
- Asset acquisition: the acquirer of assets shall be responsible for submission of the pre-merger filing.
- Share acquisition: the acquirer of the shares shall be responsible for submission of the pre-merger filing.

The filing fee is 250,000 baht per transaction.

##### Post-merger notification

- Amalgamation: the newly created entity shall be responsible for submission of the post-merger notification.
- Asset acquisition: the acquirer of assets shall be responsible for submission of the post-merger notification.
- Share acquisition: the acquirer of shares shall be responsible for submission of the post-merger notification.

There is no fee for submission of the post-merger notification.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is no concept of waiting periods under the TCA where the parties can close merger transaction upon the lapse of the specified period. In the event that a pre-merger filing is required, the merger transaction may not be consummated until the approval from the TCC has been obtained. The TCA stipulates that the TCC must complete consideration of a pre-merger filing within 90 days of submission. If the TCC cannot reasonably make a decision within this 90-day period, the TCC may extend the consideration period for an additional 15 days. In granting approval, the TCC may set a specific time period or other conditions with which the business operator or operators must comply.

##### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

See question 9. As the merger control provisions of the TCA only came into effect on 29 December 2018, currently there have been no cases in which sanctions have been imposed by the TCC.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As the merger control provisions of the TCA only came into effect on 29 December 2018, currently there have been no cases in which sanctions have been imposed by the TCC.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In the event that a pre-merger filing is required, there are currently no mechanisms in place that would allow for closing prior to approval by the TCC.

##### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

In addition to the TCA, an acquisition of shares of a company listed on the Stock Exchange of Thailand will be subject to the Securities and Exchange Act BE 2535 (1992), as amended; in particular, with respect to the public disclosure and tender offers.

##### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The TCC has prescribed a list of documents and information it requires for consideration of a pre-merger filing and post-closing notification.

##### Pre-merger filing

- Application form (prescribed by the TCC) requiring, inter alia, general information on the relevant business operators and their businesses.
- Merger plan and implementation timeline.
- Details of the merging parties and the target company that shall, as a minimum, consist of the shareholding structure, voting rights, sales turnover and market share.

- Studies and analysis in respect of the merger transaction that shall, as a minimum, consist of:
  - analysis of shareholding structure, controlling power of merging parties for the purpose of ascertaining the relationship in policy or directive power before and after the merger;
  - analysis of the market for products or services relevant to the merging business operators for the purpose of ascertaining the effect as a result of the merger, that shall as a minimum consist of:
    - market structure before and after the merger transaction;
    - scope of market;
    - market share of each of the merging parties before and after the merger transaction;
    - sales turnover of each of the merging parties before and after the merger transaction;
    - effect of the merger transaction in respect of the following items:
      - market concentration;
      - market entry and expansion, taking into consideration the relevant factors such as laws and regulations of the government, logistic costs, access to patent rights of existing technologies, or access to raw materials or other resources necessary for production, etc;
      - non-coordinated effects, meaning the effect as a result of each of the merged entity's profit gained by increasing prices or a reduction in the quality of the products attributable to a reduction of competition;
      - coordinated effects, meaning the effect as a result of the business operators' tendency to jointly increase price after the merger transaction;
      - effect on the economy or consumers as a whole;
      - other effects on competition in a market (if any); and
      - efficiencies in a market after the merger transaction; and
- Studies and analysis in respect of valid business-related necessity and benefits in the promotion of business, damage to the economy, and consumers' benefits as a whole.

#### Post-merger notification

- Notification form (prescribed by the TCC) requiring, inter alia, general information on the relevant business operators and their businesses.
- Copy of documents submitted to the Ministry of Commerce, in case of amalgamation.
- Copy of documents submitted to the Securities and Exchange Commission (if applicable).
- Copy of definitive documents evidencing the share or asset acquisition (eg, share purchase agreement and appraisal reports).
- Copy of the minutes of the executive committee's meeting or shareholders' meeting in which the merger transaction is approved of each of the merging parties or documents evidencing each of the merging parties' intention to enter into the merger transaction.
- Other details in respect of the merger transaction.
- Copy of the minutes of the annual general meeting and audited financial statements for the preceding year of each of the merging parties for the previous three years.
- Copy of the list of shareholders of each of the merging parties before and after the merger transaction.
- Power of attorney (if any).

Business operators who intentionally provide false or misleading information to the TCC may be subject to criminal penalty under the Criminal Code for submission of false information to government officials. In addition, the approval for pre-merger filing can be revoked by the TCC if

it becomes aware of such false or misleading information. Furthermore, any person whose right or interest is adversely affected by the approval of the TCC may file a case to the Administrative Court for revocation of such approval.

All information and documents submitted to the TCC must be in hard copy in Thai language (or translated into Thai).

#### Investigation phases and timetable

##### 17 | What are the typical steps and different phases of the investigation?

No pre-consultations are required before submission of an application for a pre-merger filing and the TCA does not specify a process for pre-consultations. However, business operators may request an unofficial meeting with the OTCC to discuss the applicable merger control processes and the OTCC's initial views and assessment. However, the OTCC may not provide a definitive assessment and the opinion of the OTCC is not binding and subject to change by the TCC.

Generally, the relevant business operators must prepare and submit all of the required information (outlined above) to the OTCC. After acceptance of the pre-merger filing, the TCC shall undertake the following steps:

- the Secretary-General proposes the application for approval of the merger to the Chairman of the TCC within seven days from the date of receipt of the application for approval for further consideration by the TCC;
- the TCC may require additional information from a business operator or operators conducting a merger by issuing a letter requesting information or inviting the applicant to offer clarification; and
- the TCC may serve notices of invitation to relevant business operators or third parties to offer opinions and information in support of the consideration.

##### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The TCC must complete its consideration of a pre-merger filing within 90 days of submission. When a decision cannot reasonably be made within 90 days, the TCC may extend the period of consideration by up to 15 additional days.

There is no provision in the TCA that allows the pre-merger approval process to be expedited.

### SUBSTANTIVE ASSESSMENT

#### Substantive test

##### 19 | What is the substantive test for clearance?

The substantive test for clearance is that the merger:

- is reasonably necessary for the business;
- is beneficial to business promotion;
- poses no serious harm to the Thai economy; and
- has no material effect on the due interest of consumers in general.

There is currently no precedent on special circumstances or other exceptions.

##### 20 | Is there a special substantive test for joint ventures?

There are no separate rules for joint ventures.

### Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on what theories of harm the TCC will apply or consider. However, it is expected that, in addition to the substantive test in the answer to question 19, the TCC will consider factors such as the potential for coordinated effects, non-coordinated effects, barriers to market entry, expansion and foreclosure to newcomers.

### Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on this issue. See the substantive test for clearance in the answer to question 19.

### Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on this issue. However, it is expected that economic efficiency will be given prominent consideration in determining whether a merger will satisfy the substantive test outlined in question 19.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a business operator fails to comply with the TCA, including relevant subordinate legislation or orders of the TCC, in addition to the imposition of administrative fines, the TCC is empowered to suspend, cease, rectify or vary the merger. Additionally, in approving a merger, the TCC may set a time period or any condition for compliance.

### Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy the competition issues and in granting approval for a merger the TCC may specify the time period or any condition for compliance. As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on this issue.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

There is no specific provision, notification, guideline or precedent on this matter. As mentioned in question 25, the TCC has the power to fix the time or any condition for compliance, and may specify any relevant condition or timing.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is currently no track record as the merger control provisions only came into force on 29 December 2018.

### Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is currently no specific provision, notification or guideline on this matter.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

In considering a pre-merger filing, the TCC is empowered to invite any person to give facts, explanation, advice or opinions. Therefore, customers and competitors may be invited to provide information as required.

In addition, any person suffering damage because of a violation of the TCA can initiate an action for compensation from the offender. Therefore, any persons (including customers and competitors) who suffer damage as a result of such violation are entitled to file complaints.

Furthermore, the TCA specifically allows the Consumer Protection Board, or organisation or foundation recognised by the Consumer Protection Board to initiate actions for compensation on behalf of consumers or members of such organisation or foundation, as the case may be. The actions must be submitted to the relevant court within one year from the date that the injured party first knew or should have known of the violation.

### Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The TCA does not require any public disclosure of the process.

Confidential information is protected under section 76 of the TCA, which states that, 'any person who discloses restricted or confidential information concerning the business or operation of a business operator can be subject to imprisonment of not exceeding one year, or a fine not exceeding 100,000 baht, or both, if the information was acquired or known as a result of compliance with the TCA'. Persons are exempt from the disclosure provision if the information is disclosed in the course of performance of a government service or for the purpose of an inquiry or trial. In addition, if the disclosed information is regarded as a trade secret under the Trade Secrets Act BE 2544 (2001), the offender may be subject to a penalty under the Trade Secrets Act, and required to pay compensation for misconduct and injury suffered by the injured party.

### Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Thailand has signed economic partnership agreements with certain countries and such agreements establish collaboration on antitrust issues. Thailand is also a member of the International Competition Network (ICN) for mergers and other competition issues. However, the ICN does not facilitate cooperation in enforcement, only in establishing best practices for enforcement of competition rules.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

In respect of the merger control provisions, business operators may appeal two types of orders of the TCC: (i) orders to suspend, cease, rectify or vary a merger that has not obtained approval pursuant to section 60 of the TCA; and (ii) orders to grant (with conditions) or deny approval of a merger pursuant to section 52 of the TCA. In case of disagreement with a decision or order of the TCC, a business operator may file a case to the Administrative Court. Any appeal of a decision of the Administrative Court may be submitted to the Supreme Administrative Court and the determination of the Supreme Administrative Court will be final.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

The business operator must file an appeal to the Administrative Court of the First Instance within 60 days following receipt of the TCC's decision.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there have been no enforcement actions since the merger control provisions have come into effect.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

By the end of 2018, several subordinate regulations under the TCA were issued by the TCC to enforce the provisions with respect to prohibited behaviours which may be harmful to competition, including the rules, procedure and application process for merger control. Since the implementation of the merger control regime, the interpretation by the OTCC of certain criteria and requirements for pre-merger filing and post-merger notification is still unclear, which causes difficulties in practical handling. No written guideline or direction with respect to the merger control clearance process has been published by the TCC.

The TCC has clarified during a public event that proposed amendments to the current subordinate regulations are under consideration. To date, no official legislative proposals have been issued by the TCC.



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# Turkey

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation on merger control is the Law on Protection of Competition No. 4054 dated 13 December 1994 (the Competition Law) and the communiqué published by the Turkish Competition Authority (Competition Authority or Authority). In particular, article 7 of the Competition Law governs mergers and acquisitions.

Article 7 authorises the Competition Board to regulate, through communiqués, which mergers and acquisitions should be notified to the Authority to gain validity. Further to this provision, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) published on 7 October 2010, replaced Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 1997/1) as of 1 January 2011. The Communiqué No. 2010/4 is now the primary instrument for assessing merger cases in Turkey and sets forth the types of mergers and acquisitions that are subject to the Competition Board's review and approval, bringing about some significant changes to the Turkish merger control regime.

The national competition authority for enforcing the Competition Law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. The Competition Authority consists of the Competition Board, Presidency and Main Service Departments. As the competent decision-making body of the Competition Authority, the Competition Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Competition Board consists of seven members and is seated in Ankara.

The Main Service Departments consist of five supervision and enforcement departments, department of decisions, economic analyses and research department, information management department, external relations, training and competition advocacy department, strategy development, regulation and budget department, and cartel on-the-spot inspections support division. There is a 'sectoral' job definition of each supervision and enforcement department.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

It is a typical dominance test. As a matter of article 7 of Law No. 4054 and article 13 of Communiqué No. 2010/4, mergers and acquisitions that do not create or strengthen a 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. Accordingly, Communiqué No. 2010/4 defines the scope of the notifiable transactions in article 5 as follows:

- a merger of two or more undertakings;
- acquisition of or direct or indirect control over all or part of one or more undertakings by one or more undertakings or persons, who currently control at least one undertaking, through the purchase of assets or a part or all of its shares, an agreement or other instruments.

Pursuant to article 6 of Communiqué No. 2010/4, the following transactions do not fall within the scope of article 7 of the Competition Law and therefore will not be subject to the approval of the Competition Board:

- intra-group transactions and other transactions that do not lead to change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with such securities for their own account or for the account of others, provided that the voting rights attached to such securities are not exercised in a way that affects the competition policies of the undertaking issuing the securities;
- acquisitions by public institutions or organisations further to the order of law, for reasons such as liquidation, winding up, insolvency, cessation of payments, concordat or for privatisation purposes; and
- acquisition by inheritance as provided for in article 5 of Communiqué No. 2010/4.

In addition to the above, The Competition Authority has also introduced Communiqué No. 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board. One of the amendments introduced to Communiqué No. 2010/4 is that article 1 of Communiqué No. 2017/2 abolished article 7(2) of Communiqué No. 2010/4 propounding that 'The thresholds [...] are re-determined by the Board biannually'. Through the mentioned amendment, the Board no longer bears the duty to re-establish turnover thresholds for concentrations every two years. To that end, there is no specific timeline for the review of the jurisdictional turnover thresholds set forth by article 7(1) of Communiqué No. 2010/4. In addition, article 2 of Communiqué No. 2017/2 modified article 8(5) of Communiqué No. 2010/4. Together with this amendment, the Board would now be in a position to evaluate the transactions realised by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three-year period. Lastly, article 3 of Communiqué No. 2017/2 introduced a new paragraph to be included to article 10 of Communiqué No. 2010/4. This newly introduced provision by article 3 of Communiqué No. 2017/2 is similar to article 7(2) of the European Commission Merger Regulation. At any rate, although there was no similar specific statutory rule in Turkey on this matter, the case law of the Turkish Competition Board shed some light on this matter.

### 3 | What types of joint ventures are caught?

According to article 5(3) of Communiqué No. 2010/4, joint ventures are also subject to notification to, and approval of, the Competition Board. The provision of article 5(3) stipulates that joint ventures that permanently meet all functions of an independent economic entity (ie, full function) are deemed notifiable. Article 13/III of Communiqué No. 2010/4 provides that the Competition Board would carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect, the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review.

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Communiqué No. 2010/4 provides a definition of 'control' that does not fall far from the definition of this term in article 3 of Council Regulation No. 139/2004. According to article 5(2) of Communiqué No. 2010/4:

*Control can be constituted by rights, agreements or any other means which, either separately or jointly, de facto or de jure, confer the possibility of exercising decisive influence on an undertaking. These rights or agreements are instruments which confer decisive influence in particular by ownership or right to use all or part of the assets of an undertaking, or by rights or agreements which confer decisive influence on the composition or decisions of the organs of an undertaking.*

Pursuant to the presumption regulated under article 5(2) of Communiqué No. 2010/4, control shall be deemed acquired by persons or undertakings that are the holders of the rights, or entitled to the rights under the agreements concerned, or while not being the holders of the said rights or entitled to rights under such agreements, have de facto power to exercise these rights.

In short, much like the EU regime, under the Turkish Competition Law, mergers and acquisitions resulting in a change of control are subject to the approval of the Competition Board. Control is understood to be the right to exercise decisive influence over day-to-day management or on long-term strategic business decisions, and it can be exercised de jure or de facto. Therefore, minority and other interests that do not lead to a change of control do not trigger the filing requirement. However, if minority interests acquired are granted certain veto rights that may influence management of the company (eg, privileged shares conferring management powers), then the nature of control could be deemed as changed (such as a change from sole to joint control) and the transaction could be subject to filing.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Communiqué No. 2012/3 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (Communiqué No. 2012/3), amends the turnover thresholds that a given merger or acquisition must exceed before becoming subject to notification for the purposes of the Turkish merger control regime. After the enactment of the amendments, the new thresholds are as follows:

- Article 7(a) of the Communiqué No. 2010/4: the aggregate Turkish turnovers of the transacting parties exceeding 100 million liras and

the Turkish turnovers of at least two of the transacting parties each exceeding 30 million liras;

- Article 7(b)(i) of the Communiqué No. 2010/4: the Turkish turnover of the transferred assets or businesses in acquisitions exceeding 30 million liras; or
- Article 7(b)(ii) of the Communiqué No. 2010/4: the Turkish turnover of any of the merging parties exceeding 30 million liras and the worldwide turnover of at least one of the other parties to the transaction exceeding 500 million liras.

As seen above, the tests provided under Article 7(b) are two separate tests; Article 7(b)(i) is applicable only in cases of acquisition transactions (as well as joint ventures) while Article 7(b)(ii) is applicable only in cases of merger transactions.

Where the transaction does not meet the thresholds set out above, the transaction would not be deemed notifiable. Furthermore, Communiqué No. 2010/4 does not seek the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once the thresholds are exceeded, there is no exception for filing a notification cited in the Competition Law or its secondary legislation. There is no de minimis exception or other exceptions under the Turkish merger control regime, except for a certain type of merger in the banking sector.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are caught under the Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey. Sales into Turkey may trigger the notification requirement to the extent the thresholds are met. Article 2 of the Competition Law provides the 'effects criteria', pursuant to which the criterion to apply is whether the undertakings concerned affect the goods and services markets in Turkey. Even if the undertakings concerned do not have local subsidiaries, branches, sales outlets, etc in Turkey, the transaction could still be subject to the provisions of the Turkish competition legislation if the goods or services of such undertakings are sold in Turkey and thus have effects on the relevant Turkish market.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Article 9 of Communiqué No. 2010/4, along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, sets forth specific methods of turnover calculation for financial institutions. Such special methods of calculation apply to banks, financial leasing companies, factoring companies and insurance companies, etc.

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. The competition legislation provides no special regulation applicable to foreign investments.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

##### Deadlines for filing

The Competition Law provides no specific deadline for filing but based on ELIG Gürkaynak Attorneys-at-Law's experience in over 300 merger control filings so far, in light of the 30-calendar-day review period, it is advisable to file the transaction at least 40 to 45 calendar days before closing. Owing to this 30-day review period, Communiqué No. 2010/4 has introduced a much more complex notification form to be used in merger filings, therefore the time frame required for preparation of a notification form will be longer than the duration of preparation under the old regime. It is important that the transaction is not closed prior to the approval of the Competition Board.

##### Penalties for not filing

In the event that the parties to a merger or acquisition that requires the approval of the Competition Board realise the transaction without obtaining the approval of the Board, a monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition; both merging parties in the case of a merger), regardless of the outcome of the Competition Board's review of the transaction. The minimum fine for 2019 is 26,027 liras.

##### Invalidity of the transaction

Another very important sanction, which is more of a legal character than economic, is set out under article 7 of the Turkish Competition Law and article 10 of Communiqué No. 2010/4: a notifiable merger or acquisition that is not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

##### Termination of infringement and interim measures

Pursuant to article 9(1) of the Competition Law, should the Competition Board find any infringement of article 7, it shall order the parties concerned, by a resolution, to take the necessary actions to restore the level of competition and status as before the completion of the transaction infringing the Competition Law. Similarly, the Competition Law authorises the Competition Board to take interim measures until the final resolution on the matter, in case there is a possibility for serious and irreparable damages to occur.

##### Termination of the transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Competition Board decides that the transaction falls within the prohibition of article 7 (in other words, the transaction creates or strengthens a dominant position and causes a significant decrease in competition), the undertakings shall be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party. In determining the monetary fines on the parties, the Competition Board shall take into consideration repetition of the infringement, its duration, the market power of the undertakings, their decisive influence in the realisation of the infringement, whether they comply with the commitments given, whether they

assisted the examination, and the severity of the damage that occurred or is likely to occur.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the transaction, remove all de facto legal consequences of every action that has been unlawfully taken, return all shares and assets if possible to the entities that owned these shares or assets before the transaction or, if such measure is not possible, assign these to third parties; and meanwhile forbid participation in control of these undertakings until this assignment takes place and to take all other necessary measures in this regard.

##### Failure to notify correctly

If the information requested in the notification form is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data. In addition, the Competition Authority will impose a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of these associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for exemption, negative clearance or the approval of a merger or acquisition, or in connection with notifications and applications concerning agreements made before the Competition Law entered into force.

#### 10 | Which parties are responsible for filing and are filing fees required?

In principle, under the merger control regime, a filing can be made by either one of the parties to the transaction, or jointly. In case of filing by one of the parties, the filing party should notify the other party of the fact of filing.

There is no filing fee required under Turkish merger control proceedings.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The 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 days of a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval', through an implied approval mechanism introduced with article 10(2) of the Competition Law. While the timing in the Competition Law gives the impression that the decision to proceed with Phase II should be formed within 15 days, the Competition Board generally uses more than 15 days to form their opinion concerning the substance of a notification, and it is more sensitive about the 30-day deadline on announcement. Moreover, any written request by the Competition Board for missing information will restart the 30-day period.

If a notification leads to an investigation (Phase II), it changes into a fully fledged investigation. Under Turkish law, the investigation takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months, by the Competition Board.

## Pre-clearance closing

- 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a merger or acquisition is closed before clearance, the substantive test is the main important issue for determination of the consequences. If the Competition Board reaches the conclusion that the transaction creates or strengthens a dominant position and significantly lessens competition in any relevant product market, the undertakings concerned as well as their employees and directors will be subject to the monetary fines and sanctions stated under question 9. In any case, a notifiable merger or acquisition not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences.

As also provided under question 9, the wording of article 16 of the Competition Law envisages imposing a monetary penalty if merger or acquisition transactions subject to approval are realised without the approval of the Competition Board. The monetary fine is 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) in Turkey. The liability for fines is on firms that are the acquirers in the case of an acquisition, and on both merging parties in the case of a merger. The minimum fine is 26,027 liras for 2019.

- 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The foreign-to-foreign nature of the transaction does not prevent imposition of any administrative monetary fine (either for suspension requirement or for violation of article 7) in and of itself. In case of failure to notify (ie, closing before clearance), foreign-to-foreign mergers are caught under the Turkish Competition Law to the extent they affect the relevant markets within the territory of the Republic of Turkey.

As an example, in the *Simsmetal/Fairless* decision (dated 16 September 2009, No. 09-42/1057-269), where both parties were only exporters into Turkey, the Competition Board imposed an administrative monetary fine on Simsmetal East LLC (ie, the acquirer) subsequent to first paragraph of article 16 of Law No. 4054, totalling 0.1 per cent of Simsmetal East LLC's gross revenue generated in the fiscal year 2009, because of closing the transaction before obtaining the approval of the Competition Board. Similarly, the Competition Board's *Longsheng* (dated 2 June 2011, No. 11-33/723-226), *Flir Systems Holding/Raymarine PLC* (17 June 2010, No. 10-44/762-246) and *CVRD Canada Inc* (8 July 2010, No. 10-49/949-332) decisions are examples whereby the Board imposed a turnover-based monetary fine based on the violation of the suspension requirement in a foreign-to-foreign transaction.

- 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Under article 10 of Communiqué No. 2010/4, a transaction is deemed to be 'realised' (ie, closed) on the date when the change in control occurs. It remains to be seen whether this provision will be interpreted by the Competition Authority in a way that provides the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement. This has been rejected by the Competition Board so far (eg, the Competition Board's *Total SA* decision dated 20 December 2006 No. 06-92/1186-355, and *CVR Inc-Inco Limited* decision dated 1 February 2007 No. 07-11/71-23), the Board arguing that a closing is sufficient for the suspension violation fine to be imposed, and that a further analysis of whether change in control actually took effect in Turkey is unwarranted.

## Public takeovers

- 15 | Are there any special merger control rules applicable to public takeover bids?

The notification process differs for privatisation tenders. With regard to privatisation tenders, Communiqué No. 1998/4 of the Competition Board was replaced with a new communiqué entitled Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2). According to Communiqué No. 2013/2, it is mandatory to file a pre-notification before the public announcement of tender and receive the opinion of the Competition Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds 30 million liras. Further to that, the Communiqué promulgates that in order for the acquisitions to become legally valid through privatisation, which requires pre-notification to the Competition Authority, it is also mandatory to get approval from the Competition Board. The application should be filed by all winning bidders after the tender but before the Privatisation Administration's decision on the final acquisition.

## Documentation

- 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Communiqué No. 2010/4 has introduced a new and much more complex notification form, which is similar to the Form CO of the European Commission. One hard copy and one electronic copy of the merger notification form shall be submitted to the Competition Board. The notification form itself is revised from Communiqué No. 1997/1; in parallel with the new notion that only transactions with a relevant nexus to the Turkish jurisdiction will be notified anyway, there has been an increase in the information requested, including data with respect to supply and demand structure, imports, potential competition, expected efficiencies, etc. Some additional documents such as the executed or current copies and sworn Turkish translations of some of the transaction documents, annual reports including balance sheets of the parties, and, if available, market research reports for the relevant market are also required. Bearing in mind that each subsequent request by the Competition Board for incorrect or incomplete information will prolong the waiting period, detailed and justified answers and information to be provided in the notification form is to the advantage of the parties.

## Investigation phases and timetable

- 17 | What are the typical steps and different phases of the investigation?

The Competition Board, upon its preliminary review of the notification (ie, Phase I), will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days following a complete filing. In the absence of any such notification, the decision is deemed to be an 'approval' through an implied approval mechanism introduced with the relevant legislation. Moreover, any written request by the Competition Board for missing information will stop the review process and restart the 30-calendar-day period at the date of provision of such information.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish competition law, Phase II investigations take about six months. If necessary, the Competition Board may extend this period once by up to six months.

In practice, only exceptional cases require a Phase II review, and based on ELIG Gürkaynak Attorneys-at-Law's experience in over 300

merger control filings so far, most notifications obtain a decision within 40 to 45 days of the original date of notification. Neither Law No. 4054 nor Communiqué No. 2010/4 foresees a 'fast-track' procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

## 18 | What is the statutory timetable for clearance? Can it be speeded up?

Pursuant to article 10 of the Competition Law, if the Competition Board, upon its preliminary review of the notification, decides to further investigate the transaction, it shall notify the parties within 30 days (from the filing) and the transaction will be suspended and additional precautionary actions deemed appropriate by the Competition Board may be taken until the final decision is rendered. Article 13(4) of Communiqué No. 2010/4 states that if the investigation is decided to be further investigated, provisions of articles 40 to 59 of the Competition Law shall be applied to the extent they are compatible with the relevant situation. Regarding the procedure and steps of such an investigation, article 10 makes reference to sections IV (articles 40 to 55) and V (articles 56 to 59) of the Competition Law, which govern the investigation procedures and legal consequences of restriction of competition, respectively.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The substantive test is a typical dominance test. According to article 7 of the Competition Law and article 13 of Communiqué No. 2010/4, mergers and acquisitions that do not create or strengthen a dominant position and do not significantly lessen competition in a relevant product market within the whole or part of Turkey shall be cleared by the Competition Board.

Article 3 of the Competition Law defines dominant position as:

*any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply.*

Market shares of about 40 per cent and higher are considered, along with other factors such as vertical foreclosure or barriers to entry, as an indication of a dominant position in a relevant product market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position, but also significantly lessens the competition in the whole territory of Turkey or in a part of it, pursuant to article 7 of the Competition Law.

#### 20 | Is there a special substantive test for joint ventures?

The Competition Board evaluates joint-venture notifications according to two criteria: existence of joint control in the joint venture, and the joint venture being an independent economic entity (ie, having adequate capital, labour and an indefinite duration). In recent years, the Competition Board has consistently applied the test of 'full-functioning' while determining whether the joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in view of the two criteria mentioned above, the standard dominance test is applied. Additionally, under the merger control regime, a specific section in the notification form aims to collect information to

assess whether the joint venture will lead to coordination. Article 13/III of Communiqué No. 2010/4 provides that the Competition Board will carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis, but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form allows for such a review as well.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

Unilateral effects have been the predominant criteria in the Competition Authority's assessment of mergers and acquisitions in Turkey. That said, in recent years, there have been a couple of exceptional cases where the Competition Board discussed the coordinated effects under a 'joint dominance test', and rejected the transaction on those grounds (eg, the Competition Board's *Ladik* decision dated 20 December 2005 No. 05-86/1188-340). These cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund. The 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 establishment of joint dominance by certain players in the market whereby competition would be significantly lessened. Regarding one such decision, when an appeal was made before the Council of State it ruled by mentioning, inter alia, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Competition Board, which was based on collective dominance. No transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet. A few decisions discuss those theories of harm.

Although no transaction has been blocked on the grounds of 'vertical foreclosure' or 'conglomerate effects' yet, in *Toyota/Vive* decision (dated 6 April 2017, No. 17-12/143-63), the Board provided an assessment on the main factors that should be considered for the evaluation of the conglomerate concentrations. This decision is significant because the Board did not focus on conglomerate effects of transactions before, though conglomerate effects have been an important issue for EC in 2017 (eg, *Qualcomm/NXP* and *Bayer/Monsanto*). The transaction concerns the acquisition of sole control over Vive BV by Toyota. While the parties to the transaction submitted that there would not be an affected market, because their activities did not horizontally or vertically overlap in Turkey, the Board decided that the transaction would lead to a conglomerate concentration, given that the activities of the parties are complementary and substitute to each other. Accordingly, the Board asserted that foreclosing the market to competitors is realised through unilateral conducts in the form of tying, bundling and other exclusionary behaviours, and in addition to the market shares of the parties, the incentive and the ability to foreclose a market should be considered while assessing the existence of conglomerate effects. Upon its review process, the Board ultimately decided that the market shares of the transaction parties and the market structures of the two relevant product markets would not give transaction parties the market power and ability to foreclose the market and granted an unconditional approval to the transaction. Conglomerate effects were also analysed in the scope of the *Luxottica/Essilor* decision (dated 1 October 2018, No. 18-36/585-286) where the Board examined the possible leveraging effect of Luxottica's market power in the market for sunglasses and optical frames for the market for ophthalmic lenses. At the end of its

review, the Board conditionally cleared the transaction based on certain structural commitments.

### Non-competition issues

**22** | To what extent are non-competition issues relevant in the review process?

Mergers and acquisitions are assessed on the basis of competition criteria rather than public interest or industrial policies. In view of that, the Competition Authority has financial and administrative autonomy and is independent in carrying out its duties. Pursuant to article 20 of the Competition Law, no organ, authority, entity or person can give orders or directives to affect the final decisions of the Competition Board.

### Economic efficiencies

**23** | To what extent does the authority take into account economic efficiencies in the review process?

Efficiencies that result from a concentration may play a more important role in cases where the combined market share of the parties exceeds 20 per cent for horizontal overlaps and the market share of both parties exceeds 25 per cent for vertical overlaps. In cases where the market share remains below these thresholds, the parties are at liberty to skip the relevant sections of the notification form on efficiencies. The Competition Board may take into account efficiencies in reviewing a concentration to the extent they operate as a beneficial factor in terms of better quality production or cost savings such as reduced product development costs through the integration, reduced procurement and production costs, etc.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

**24** | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the Competition Board during the investigation stage are very broad.

Article 9 of the Competition Law provides that if the Competition Board establishes that article 4, 6 or 7 of the Competition Law is infringed, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided so as to establish competition and maintain the situation before infringement and forward its opinion concerning how to terminate such infringement.

Mergers and acquisitions prohibited by the Competition Board are not legally valid and the transaction documents are not binding and enforceable even if the 'closing' is done prior to the clearance.

Pursuant to article 13(5) of Communiqué No. 2010/4, authorisation granted by the Competition Board concerning the merger and acquisition shall also cover the limitations that are directly related and necessary to the implementation of the transaction. The principle is that parties to the transaction should determine whether the limitations introduced by the merger or acquisition exceed this framework. Furthermore, article 13(4) and article 14(2) of Communiqué No. 2010/4 stipulate that in its authorisation decision, the Competition Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled.

The Competition Board may at any time re-examine a clearance decision and decide on prohibition and application of other sanctions for a merger or acquisition if clearance was granted based on incorrect or misleading information from one of the undertakings or the obligations foreseen in the decision are not complied with. In this case, the

transaction shall be re-examined by the Competition Board, which may decide on prohibition and application of the sanctions mentioned in question 9.

### Remedies and conditions

**25** | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Board may grant conditional approvals to mergers and acquisitions, and such transactions may be implemented provided that measures deemed appropriate by the Competition Board are taken, and the parties comply with certain obligations. In addition, the parties may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Competition Board. These commitments are increasing in practice and may either be foreseen in the transaction documents or may be given during the review process or an investigation. The parties can complete the merger before the remedies have been complied with. However, the merger gains legal validity after the remedies have been complied with.

**26** | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Article 14 of Communiqué No. 2010/4 enables the parties to provide commitments to remedy substantive competition law issues of a concentration under article 7 of the Competition Law. The parties may submit to the Competition Board proposals for possible remedies either during the preliminary review or the investigation period. If the parties decide to submit the commitment during the preliminary review period, the notification is deemed filed only on the date of the submission of the commitment. The commitment can be also served together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

Strategic thinking at the time of filing is somewhat discouraged through language confirming expressly that the review periods would start only after the filing is made. This is already the current situation in practice, but now it is explicitly stated. The Competition Board is now expressly given the right in Communiqué No. 2010/4 to secure certain conditions and obligations to ensure the proper performance of commitments.

**27** | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been several cases where the Competition Board has accepted the remedies or commitments (such as divestments) proposed to, or imposed by, the European Commission as long as these remedies or commitments ease competition law concerns in Turkey (see, for example, *Agilent-Varian* decision No. 10-18/212-82 of 18 February 2010, *Cookson/Foseco* decision No. 08-25/254-83 of 20 March 2008 and *Bayer/Monstanto Company* decision No. 18-14/261-126 of 8 May 2018).

### Ancillary restrictions

**28** | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The conditions for successfully qualifying a restriction as an ancillary restraint are exactly the same as those applied in EU competition law. Therefore, a restriction such as a non-competition obligation should be directly related and necessary to the concentration, should be restrictive only for the parties and proportionate. As a result, for instance, it may be said that a restriction will be viewed as ancillary as long as its

nature, geographic scope, subject matter and duration is limited to what is necessary to protect the legitimate interests of the parties entering into the notified transaction. The Competition Board's approval decision will be deemed to also cover only the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment, and the Competition Board will not have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction anymore. In the event the ancillary restrictions are not compliant, the parties may face article 4, 5 and 6 examinations.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Pursuant to article 15 of Communiqué No. 2010/4, the Competition Board may request information from third parties including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to article 11(2) of Communiqué No. 2010/4, if the Competition Authority is required by legislation to ask for another public authority's opinion, this would cut the review period and restart it anew from day one.

Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition may participate in a hearing held by the Competition Board during the investigation, provided that they prove their legitimate interest.

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Communiqué No. 2010/4 introduced a mechanism in which the Competition Authority publishes the notified transactions on its official website ([www.rekabet.gov.tr](http://www.rekabet.gov.tr)), including only the names of the undertakings concerned and their areas of commercial activity. Therefore, once notified to the Competition Authority, the existence of a transaction is no longer a confidential matter.

If the Competition Board decides to have a hearing during the investigation, hearings at the Competition Authority are, in principle, open to the public. The Competition Board may, on the grounds of protection of public morality or trade secrets, decide that the hearing shall be held in camera.

The main legislation that regulates the protection of commercial information is article 25(4) of the Competition Law and Communiqué No. 2010/3 on Regulation of Right to Access to File and Protection of Commercial Secrets (Communiqué No. 2010/3), which was enacted in April 2010. Communiqué No. 2010/3 puts the burden of identifying and justifying information or documents as commercial secrets to the undertakings. Therefore, undertakings must request confidentiality from the Competition Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing. While the Competition Board can also ex officio evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as not confidential.

Lastly, the final decisions of the Competition Board are published on the website of the Competition Authority after confidential business information is taken out.

Under article 15(2) of Communiqué 2010/3, the Competition Authority may not take into account confidentiality requests related to information and documents that are indispensable to be used as evidence for proving the infringement of competition. In such cases, the Competition Authority can disclose such information and documents that could be considered as trade secrets, by taking into account the balance between public interest and private interest, and in accordance with the proportionality criterion.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Article 43 of Decision No. 1/95 of the EC Turkey Association Council (Decision No. 1/95) authorises the Competition Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures if the Competition Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such provision grants reciprocal rights and obligations to the parties (EU-Turkey), and thus the European Commission has the authority to request the Competition Board to apply relevant measures to restore competition in relevant markets.

The Commission has been reluctant to share any evidence or arguments with the Competition Authority, in the few cases where the Competition Authority has explicitly asked for them.

Apart from that, the Competition Authority has international cooperation with several antitrust authorities in other jurisdictions. Additionally, the Competition Authority develops training programmes for cooperation purposes. In recent years, programmes have been organised for the board members of the Pakistani Competition Authority, top managers of the National Agency of the Kyrgyz Republic for Anti-Monopoly Policy and Development of Competition, members of the Mongolian Agency for Fair Competition and Consumer Protection, and board members of the Turkish Republic of Northern Cyprus's Competition Authority. Similar programmes have also been developed in cooperation with the Azerbaijan State Service for Antimonopoly Policy and Consumers' Rights Protection, the State Committee of the Republic of Uzbekistan on De-monopolisation and the Ukrainian Anti-Monopoly Committee. These programmes were held according to the bilateral cooperation agreements.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

As per Law No. 6352, which took effect on 5 July 2012, the administrative sanction decisions of the Competition Board can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days upon receipt by the parties of the reasoned decision of the Competition Board. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be taken in accordance with the Administrative Procedural Law. As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Competition Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution if the execution of the decision is likely to cause irreparable damages and the decision is highly likely to be against the law.

A significant development in competition law enforcement was the change in the competent body for appeals against the Competition Board's decisions. The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts

(appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds and investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

The time frame for appeal to the Council of State against final decisions of the Competition Board is 60 days starting from the receipt of the reasoned decision. The judicial review period before the Administrative Court usually takes about eight to 12 months. After exhausting the litigation process before the Administrative Courts of Ankara, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the administrative courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the administrative court.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the annual Mergers and Acquisitions Status Report for 2017, the Competition Board reviewed 184 transactions in total, including 168 merger and acquisitions, five privatisations and eight cases beyond the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system because of lack of change in control) and three information notes.

With regard to 2018, pursuant to the Merger and Acquisition Status Report of the Competition Authority (for the year of 2018), the Board reviewed a total of 223 transactions; these transactions included 204 merger and acquisition transactions and thirteen privatisations, four cases beyond the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system because of lack of change in control) and two information notes. Among these transactions, one concentration (within the climatisation sector) was taken into Phase II review in 2018, whereas three transactions were granted clearance after the submission of remedies.

In 2018, 121 transactions notified to the Board were foreign-to-foreign transactions, which constitute more than half of the concentrations notified in 2018.

Generally, the Competition Authority pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high.

The Competition Authority handles transactions and possible concentrations in the Turkish cement and aviation sectors with special scrutiny. There are a number of ongoing investigations in this sector. It would also be accurate to report that the Competition Authority has a special sensitivity to markets for construction materials. In addition to cement, markets for construction iron, aerated concrete blocks and ready-mixed blocks were investigated and the offenders were fined by the Competition Authority.

To the extent that these decisions were also supported by worries over high levels of concentration, it would be prudent to anticipate that



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the Competition Authority will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

Additionally, the Competition Authority published a sector inquiry in 2018 for the hazelnut sector and in 2019 for the fair organisation and hosting sector.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

With respect to the legislative reforms, the Draft Competition Law, which was issued by the Authority in 2013 and officially submitted to the Presidency of the Turkish Parliament on 23 January 2014, is now null and void following the beginning of the new legislative year of the Turkish parliament. To re-initiate the parliamentary process, the draft law must again be proposed and submitted to the presidency of the Turkish Parliament. At this stage, it remains unknown whether the Turkish parliament or the government will renew the draft law.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The Board adopted many significant decisions in the past year. One of which is the transaction concerning the merger of Luxottica Group SpA and Essilor International SA (*Luxottica/Essilor*, 1 October 2018, 18-36/585-286). There were competitive concerns with respect to the conglomerate effects that could arise from the integrated portfolio of the combined entity, in addition to the horizontal overlap within the markets for 'wholesale of branded sunglasses' and 'wholesale of branded optical frames'. Thus, the Authority initiated a Phase II review on 1 October 2017. Some structural and behavioural remedies were proposed to the Turkish Competition Authority to address the horizontal and conglomerate effects of the transaction, which included the divestiture of Merve Optik Sanayi ve Ticaret AŞ ('Merve Optik'), which is an affiliate of Essilor that distributes several brands of both sunglasses and optical frames. The Board conditionally approved the transaction on 1 October 2018.

The Board also reviewed the acquisition of sole control over Monsanto by Bayer (8 May 2018, 18-14/261-126). The Board considered that the transaction may result in the creation or strengthening

of Bayer's dominant position and thus, may significantly impede effective competition in the relevant market. It therefore decided to take the transaction into a Phase II review through its decision of 15 May 2017. Bayer's commitment to divest its global cotton and vegetable seeds businesses was then submitted to the EU Commission. The Board conditionally approved the transaction based on the commitments submitted to the Commission because of the fact that the new transaction would not result in the creation or strengthening of a dominant position nor significantly impede competition, as the commitments submitted by Bayer with regard to the vegetable seeds, cotton seeds and corn seeds and seeds businesses and insecticide seed dressings for corn subject to the investigation would eliminate horizontal and vertical overlaps occurring in the relevant markets in Turkey.

# Ukraine

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Asters

## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The Ukrainian merger control legislation includes:

- the Law of Ukraine on Protection of Economic Competition 2001 (the Competition Law);
- the Law on the Antimonopoly Committee of Ukraine 1993 (the Law on the AMC);
- the Resolution Approving the Regulation on the Procedure for Filing Applications with the Antimonopoly Committee of Ukraine for Obtaining its Prior Approval of the Concentration of Undertakings 2002 (the Concentrations Regulation);
- the Methodology for Establishment of the Monopoly (Dominant) Position of the Undertakings on the Market 2002;
- Guidelines on Calculation of Fines for Violation of Ukrainian Competition Law 2016 (the Guidelines on Fines);
- Guidelines on the Assessment of Horizontal Mergers 2016;
- Guidelines on the Assessment of Non-Horizontal Mergers 2018; and
- Guidelines on Definition of Control 2018.

The Antimonopoly Committee of Ukraine (AMC) is the primary state authority entrusted with ensuring protection of competition; it has powers to investigate and grant or refuse clearances for mergers (concentrations) as well as to investigate and penalise violations of the merger control regime. If the AMC refuses to approve a concentration, the Cabinet of Ministers of Ukraine (CMU) may overrule the decision.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The Competition Law refers to the term 'concentration', which is defined quite broadly to cover the following transactions:

- (i) the merger of two or more previously independent undertakings, or the takeover of one undertaking by another;
- (ii) the acquisition of direct or indirect control over an undertaking, including through:
  - acquisition or lease of a significant part of the assets of an undertaking (including in the process of its liquidation); or
  - appointments to certain positions (eg, chairperson, deputy chairperson or more than half the members of decision-making or supervisory corporate bodies), etc if the same persons already hold the said positions in other undertakings (ie, cross-directorship);
- (iii) the establishment by two or more undertakings of a new undertaking that will independently pursue business activity on a lasting basis, while its establishment does not result in coordination of

- competitive behaviour either of its parents or of the new undertaking, on the one hand, and its parents, on the other; and
- (iv) the direct or indirect acquisition of participation interests (shares, equity) whereby certain thresholds (25 per cent or 50 per cent of the votes in the highest governing body of the undertaking concerned) are reached or exceeded.

With regard to (ii), although it provides only a couple of examples of notifiable transactions, it is in fact a catch-all provision intended to cover acquisitions with respect to any kind of control.

The Ukrainian approach to qualification of transactions is quite formalistic and the AMC usually concentrates on the form of a transaction rather than its substance. For instance, in case of multi-stage transactions, the AMC requires separate steps formally qualifying as a concentration to be notified separately; for example, an acquisition of joint control by two independent undertakings through a special purpose vehicle (SPV) would normally require two separate clearances – one for joint establishment of a purely technical SPV and one for the acquisition of a target. Depending on the structure of a deal, it may involve other triggering events requiring additional clearances.

The same complexity is in place with multiple acquisitions; for example, in asset deals involving (among other assets) acquisition of shares in a number of directly acquired entities, where one undertaking simultaneously acquires from the same seller a number of direct targets, each of these acquisitions shall technically be cleared by the AMC through issuing a separate clearance decision.

The Competition Law also provides for a number of exemptions from the filing obligation; in particular, the following transactions do not qualify as concentrations, meaning that no merger clearance is required irrespective of parties' turnover or asset value figures:

- the establishment of a new undertaking that aims at, or results in, coordination of competitive behaviour either of its parents or of the new undertaking, on the one hand, and its parents on the other (such establishment is generally regarded as concerted practices and may require antitrust clearance);
- the acquisition of participation interests (shares, equity) qualifying as a financial buyer transaction (ie, the shares are acquired by a financial institution for the purposes of further resale within one year (may be extended), provided that the acquirer does not exercise voting rights attached to the acquired shares);
- the acquisition of control over an undertaking or part thereof by a receiver or a representative of a state authority (eg, in an insolvency procedure); and
- intra-group transactions, provided that control relations within the group were established in compliance with the Ukrainian merger control rules.

### 3 | What types of joint ventures are caught?

Any establishment by two or more undertakings of a new undertaking that will independently pursue business activity on a lasting basis qualifies as a concentration, unless such establishment results in co-ordination of competitive behaviour either of its parents or of the new undertaking, on the one hand, and its parents, on the other. In the latter case, it may require an antitrust (as opposed to a merger) clearance.

A joint venture is deemed to be established once it is registered in the commercial register or the like. Preparatory stages of a joint venture often need to be passed for the joint venture to become a full-function undertaking, which also amounts to a notifiable concentration and, if not cleared by the AMC, can attract sanctions.

### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law provides for a very broad definition of control, referring to the ability to exercise decisive influence (including via blocking rights) on the strategic decisions related to the business activity of an undertaking. In particular, control is deemed to exist if an undertaking:

- directly or indirectly holds or manages more than 50 per cent of shares, participation interest, votes, or is entitled to receive at least 50 per cent of the profits of another undertaking;
- ownership to or right to use (eg, lease) of all (or major part of) assets of another undertaking;
- is authorised to appoint the CEO, vice CEO or more than 50 per cent of the members of the supervisory board (the board of directors), the management board or the audit committee (or if the same persons hold positions of CEO, vice CEO, the chairman, the vice chairman or more than 50 per cent of the members of said boards or committee, etc, in two undertakings); or
- otherwise controls another undertaking (eg, through contractual (management) arrangements).

In 2018, the AMC adopted Guidelines on Definition of Control, which closely follow the lines of the Commission Consolidated Jurisdictional Notice. This document provides further guidance as to the concept of control, in particular:

- distinguishes between negative and positive sole control. Negative control arises where a shareholder has veto rights for strategic decisions, but cannot adopt such decisions independently;
- recognises the difference between de jure and de facto types of sole control. It is explained that, in contrast to de jure control, de facto control may arise because of specific case-by-case circumstances (for instance, a minority shareholder may have decisive influence at the general meeting level, relying on prospective assessment of past shareholder participation and voting patterns); and
- clarifies that veto rights over budget, business plan, strategic investments, appointment of senior management, or activity on certain markets will generally be regarded as giving rise to control.

The Guidelines further clarify that change in the quality of control occurs in situations where there is (i) a change from sole to joint control or vice versa, or (ii) an increase in the number or a change in the identity of controlling shareholders. No changes in the quality of control arise in case of a switch from negative to positive sole control, or changes in the level of shareholdings of the same controlling shareholders, provided powers they have remain the same.

Standard minority shareholder protection rights are generally not regarded as conferring control over the undertaking.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A transaction qualifying as a concentration requires merger clearance by the AMC if it satisfies the following criteria:

- the combined worldwide value of assets or turnover of the parties to the concentration exceeds €30 million and the value of Ukrainian assets or turnover of each of at least two parties exceeds €4 million; or
- Ukrainian value of assets or turnover in Ukraine of the target or of at least one of the founders of a new entity exceeds €8 million and worldwide turnover of at least one other party exceeds €150 million.

All figures shall be taken for the last financial year immediately preceding the year of the concentration.

In either case, the parties to a concentration should be considered at their group level. That means that the assets or turnover of the controlling shareholder or controlling seller should still be counted towards the target.

The concentrations falling below these thresholds do not require merger clearance by the AMC. However, the parties may voluntarily file such concentrations.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory; there are no exceptions.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

An obligation to notify arises if the parties hit the Ukrainian filing thresholds irrespective of the overall effect of the transaction in Ukraine. Thus, even foreign-to-foreign deals having no reasonable nexus to Ukraine and its competitive environment may be caught.

However, pursuant to general provisions of the Competition Law, an argument can be made that application of the turnover or asset thresholds should be qualified by the effects doctrine. Under this interpretation, it may be argued that clearance is not required as the transaction lacks reasonable local nexus and cannot have any anticompetitive effect. Still, this argument runs contrary to the current approach of the AMC in application of merger control rules. The AMC has on several occasions expressed its unofficial position on the issue: it claimed that such transactions are subject to clearance as the AMC has exclusive authority to determine whether a particular transaction may or may not impact competition in Ukraine, and verification of such impact is in fact conducted while reviewing a merger case and granting the clearance.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

In connection with the conflict with Russia, Ukraine introduced sanctions against certain companies. The list includes companies mainly from the Russian Federation and Ukraine, including Crimea, as well as several companies from other jurisdictions. The AMC will reject merger control notifications or drop their review (if such notifications have already progressed into Phase I or II) if (i) any of the parties to the concentration (or any individuals or entities connected to them by relations of control) is on the Ukrainian sanctions list, and (ii) a particular type of sanctions applies to a given individual or entity (eg, prohibition on disposal of assets, equity).

Also, special rules apply to review of the notifications that concern capitalisation and reorganisation of banks – the AMC will review them and grant clearances within 10 days after receipt of the complete set of documents.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for filing a notification in Ukraine. The only requirement is that the AMC clearance is obtained before the implementation of the concentration. It is possible to notify transactions at their early stages where no definitive agreement is reached.

Failure to notify can lead to a fine of up to 5 per cent of the consolidated turnover in the year immediately preceding the year when the fine is imposed, but in practice the fines in merger cases are considerably lower. The Guidelines on Fines (last revised in 2016) sets basic amounts of fines for violation of competition laws, including for merger cases. Under the Guidelines of Fines, the basic fines in merger cases are:

- 10 per cent of the turnover on the relevant (and adjacent) Ukrainian markets – for failure to notify a concentration that results in monopolisation or substantial restriction of competition;
- between 510,000 hryvnas (approximately €17,400) and 5 per cent of the turnover on the relevant (and adjacent) Ukrainian markets – for failure to notify a concentration that does not lead to monopolisation or significant restriction of competition or have impact on Ukrainian product markets; and
- between 170,000 hryvnas (approximately €5,800) and 510,000 hryvnas (approximately €17,400) for failure to notify a concentration in case the parties are active on non-overlapping and non-adjacent markets in Ukraine.

When defining the basic fine, the AMC may apply coefficients depending on the effect of violation on competition, social importance of the products, profitability of economic activity connected with violation, which may increase or decrease the fine. Also, in each case, the above basic amounts are subject to possible further adjustment for aggravating or mitigating circumstances.

Although the statutory ceiling for a fine, of 5 per cent of the turnover in the year preceding the fining decision, remains in force, the authority clarified that the maximum theoretical fine can be imposed only in exceptional circumstances to ensure deterrence. The Guidelines on Fines have a recommendatory nature and are non-binding. However, the AMC has publicly committed to follow its rules on setting fines strictly.

The fine may be imposed on the entire corporate group of the offender whose actions or omissions have led to violation of the Competition Law (in practice: on the acquiring party, the founding partners in case of establishment of a joint venture or the merging entities).

In addition to the financial penalties, parties may potentially be subject to any or all of the following sanctions:

- third-party damages claims (double the amount of actual damages sustained);
- reputational issues (information about the imposed fine, identity of the parties and non-confidential version of decision are published by the AMC on its website);
- possible complications with Ukrainian clearance of future transactions, as the AMC may scrutinise these more actively; or
- invalidation of the transaction.

#### 10 | Which parties are responsible for filing and are filing fees required?

The filing is a joint obligation of the participating undertakings, which can mean the acquirer and the target. The controlling seller can also be the applicant on the target's side in a share deal or generally in an assets deal, the founding partners with respect to joint ventures or the merging entities.

The filing fee is 20,400 hryvnas (approximately €690) per one notifiable event (a transaction may require multiple notifications depending on its structure).

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The parties are subject to a standstill obligation. Closing prior to clearance constitutes a violation of Ukrainian merger control rules. The suspension requirement applies globally and Ukrainian merger control rules do not provide for any possibilities to obtain individual derogation or avoid sanctions by carving out Ukraine.

The only exception concerns tender and bid process where a notifiable concentration should be filed within 30 days after the winner of a tender or bid is announced. However, this provision was originally designed for local privatisation procedures and may not be adaptable to public bids abroad.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The same sanctions apply in case of closing or integrating the activities of the merging businesses (even partly) before clearance, as outlined in question 9. However, in practice, closing a non-problematic transaction before clearance but after the filing was made is likely to receive a more favourable treatment by the AMC than an omission to file.

The fining decisions are publicly available from mid July 2015. Since then the AMC has imposed more than 100 fines for failure to notify, closing or integrating activities before clearance. In almost all such cases, the amount of fine did not exceed 510,000 hryvnas (approximately €17,400) and these were likely imposed for implementing non-problematic transactions. The authority publishes only redacted versions of decisions on its website and it is not possible to comprehensively analyse the reasons behind the calculation of a fine.

One of the largest fines for closing before clearance amounted to approximately 3 million hryvnas (approximately €100,000). According to publicly available information, the closing occurred by means of interlocking directorship, which was discovered during the Phase II review. Otherwise, the transaction was found non-problematic and was cleared without conditions.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes.

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no such solutions. Still, a hold-separate or carve-out arrangement is likely to be treated by the AMC as a mitigating factor when deciding on the amount of a fine.

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

In a tender or bid process, a notifiable concentration should be filed within 30 days after the winner of a tender or bid is announced. However, this rule was designed for local privatisation procedures and may not be adaptable to public bids abroad.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification shall include the following, in particular:

- Simplified procedure:
  - description of the transaction structure, indicating transaction stages, and the timeline for their implementation along with the draft or copy of transactional documents; information if the clearance is sought or granted in other jurisdictions;
  - description of the source of financing, indicating terms and conditions and submitting documents to confirm availability of own funds (eg, balance sheet, excerpt from bank account) or to evidence that a financial institution lending funds does not acquire control over the borrower in the result of the financing arrangement (eg, loan agreement);
  - parties' asset and turnover data – globally and in Ukraine for the previous financial year;
  - for all markets – general outline of the parties' activities globally and in Ukraine, indicating Ukrainian subsidiaries and companies active in Ukraine; and
  - for the relevant markets – value and volume-based sales and market share data; indicating competitors and their estimated market shares on overlapping markets.
- Standard procedure (in addition to the above list applicable to simplified procedure):
  - detailed economic analysis of the transaction's effect on the Ukrainian market;
  - information regarding membership in associations; and
  - parties' excerpts from the trade register or similar (notarised and apostilled or legalised).

Furthermore, along with the hard copy of the notification, parties are required to provide a CD with an electronic version (PDF/Word, etc) of the notification and all documents attached to it.

Documents to be submitted to the AMC should be duly certified and translated into Ukrainian. Confidential information should be properly marked in the notification so that the AMC treats it accordingly.

As regards the missing information in the notification, there may be the following scenarios:

- If the required information is missing from the start: the authority may either request it during the review or issue a declaration of incompleteness within the 15-day preview period and the parties will have to file anew, adding the missing information. In such scenario, no sanctions are imposed on the notifying parties.
- If the parties fail to submit information upon request within Phase II review: the authority may close a merger case without ruling on the essence. If so, the parties may submit a repetitive application.

Also, failure to provide information to the AMC within the specified period or provision of wrong, inauthentic or untrue information may result in a fine in the amount of up to 1 per cent of the respective party's turnover in the year immediately preceding the year when the fine is imposed.

However, the Guidelines on Fines clarify that the fine for such violation is capped at 136,000 hryvnas (approximately €4,600). This amount is also subject to possible adjustment for aggravating or attenuating circumstances.

Finally, the AMC may reconsider its decision if it was based on materially incomplete or inauthentic information.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

The law does not provide for formal consultations with the authority before notifying a merger, although informal consultations are usually possible. After notifying a merger, the standard review process will include the following steps:

- Preview period. The AMC has 15 calendar days to decide whether the notification is complete and can be accepted for the substantive review (Phase I). If the AMC considers the notification as incomplete, it can be rejected without review on the substance. In such case, the parties would need to file a supplemented notification anew, restarting the process.
- Phase I review. This stage involves a substantive review and assessment by the AMC of whether the concentration can be approved or whether there are potential grounds to prohibit the concentration, in which case Phase II is initiated. The Phase I review period is up to 30 calendar days during which the AMC will either grant clearance or initiate Phase II.
- Phase II review. In case the AMC sees any grounds to prohibit the concentration, it can initiate Phase II review, which involves a close analysis of the transaction and the associated competition concerns, examination of expert opinions and other additional information. In practice, the Phase II review period is limited to 135 calendar days, which starts on the day Phase II notice is sent to the parties. The parties, however, can request extension of the review period, if necessary. During this period, the AMC will either issue the clearance (either conditional or unconditional) or adopt a decision prohibiting the concentration.

A fast-track simplified 25-day review procedure is available for transactions where only one party is active in Ukraine or parties' combined shares do not exceed 15 per cent on the overlapping markets or 20 per cent on vertically related markets. The AMC tends to interpret the 15 or 20 per cent threshold quite restrictively and irrespective of whether an overlap occurs on a relevant or non-relevant market.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

A standard merger review timetable is as follows:

- Preview period: 15 calendar days;
- Phase I review period: up to 30 calendar days (in practice, it is possible to request a faster review, although there is no formal procedure for this); no prolongation is possible; and
- Phase II review period: three months (extendable, if additional documents, information or expert opinion are required), but, in practice, shall not exceed 135 calendar days starting from the day that Phase II notice is sent to the parties (see question 17).

Also, a fast-track, simplified 25-day review procedure is available for transactions reasonably raising no competition concerns (see question 17).

The authority usually takes the whole of the Phase I and Phase II review period for review of transactions and adopts the relevant decisions during the last week before the respective deadline.

If prior to or on the date when the Phase I or Phase II period expires the AMC has failed to adopt any decision on the concentration, clearance by tacit consent is deemed to have been granted, although in practice the AMC tends to issue formal clearances.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

Pursuant to the Competition Law, the AMC approves the concentration if it does not lead to monopolisation (achievement or strengthening of a dominant position in the market) or a substantial restriction of competition in the Ukrainian market or a significant part of it. Otherwise, the transaction will be prohibited unless the parties offer sufficient remedies (see question 25).

The test for dominance is as follows:

- above 35 per cent market share if held individually;
- above 50 per cent if held collectively by two or three undertakings with the largest market shares; and
- above 70 per cent if held collectively by four or five undertakings with the largest market shares.

Pursuant to the Guidelines on the Assessment of Horizontal Mergers and recently adopted Guidelines on the Assessment of Non-Horizontal Mergers, the AMC is also required to consider the following countervailing factors while reviewing the concentrations:

- likelihood that buyer power would act as a countervailing factor;
- likelihood that entry would maintain effective competition on the relevant markets; and
- 'failing firm' defence.

#### 20 | Is there a special substantive test for joint ventures?

No.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

As a general rule, the AMC approves the concentration if it does not lead to monopolisation (achievement or strengthening of a dominant position in the market) or a substantial restriction of competition in the Ukrainian market or a significant part of it (see question 19).

Under the Guidelines on the Assessment of Horizontal Mergers, the authority is also required to assess whether the concentration would result in any of the following effects:

- unilateral or non-coordinated effects – whether the merger will eliminate important competitive constraints on one or more firms, which consequently would have increased market power; and
- coordinated effects – whether the merger will change the nature of competition in such a way that firms that previously were not coordinating their behaviour, would have been significantly more likely to coordinate and raise prices or otherwise harm effective competition.

Also, under the Guidelines on the Assessment of Non-Horizontal Mergers (approved in early 2018), the AMC is required to consider the following potential effects:

- non-coordinated effects:

- upstream foreclosure (vertical mergers): raising costs of rivals by restricting their access to an important input;
- downstream foreclosure (vertical mergers): raising costs and reducing revenue streams of rivals by integrating with an important customer in a downstream market to foreclose access to an important customer base; and
- foreclosure in related markets (conglomerate mergers): reducing rivals' ability or incentive to compete by combination of products in closely related markets to leverage strong market position from one market to another by means of tying or bundling practices; and
- coordinated effects – possibility that non-horizontal mergers could increase the likelihood of tacit coordination.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

The AMC would predominantly consider competition issues. Other considerations may still be used as supporting arguments, although they are unlikely to be decisive.

However, the CMU may overrule the AMC's prohibition decision when the positive effects of the transaction on the public interest outweigh the negative impact of the restriction of competition caused by the transaction (see question 23).

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The AMC may take into account economic efficiencies when reviewing the notification, although such arguments are unlikely to be decisive. In cases posing serious competition concerns, adequate remedies would nevertheless be required.

However, economic or other efficiencies will be taken into account by the CMU, which may still authorise a transaction that has been prohibited by the AMC. Such a decision is possible if the positive effects of the transaction on the public interest outweigh the negative impact of the restriction of competition caused by the transaction, unless this restriction is not necessary for attaining the purpose of the concentration or jeopardises the market economy system.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The AMC can prohibit a concentration if it leads to monopolisation or a substantial restriction of competition in the Ukrainian market or a significant part of it.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The AMC clearance decision can be made conditional on the parties undertaking to perform, or refrain from performing, certain actions aiming at removing or mitigating the negative impact of the concentration on the market competition, which may be either structural (for example, divestitures) or behavioural (for example, restrictions on use or management of certain assets or price increases).

Under the Competition Law, in case during the Phase II review the AMC sees any grounds for a merger to be prohibited, it shall inform the parties of these grounds and the parties, in turn, can propose remedies to the AMC within a 30-day period (extendable upon the parties' request). Practically, this means that discussions on remedies start at Phase II. Still, offering remedies at Phase I is not prohibited; however, it will most probably automatically bring the case to Phase II, as Phase I review implies the absence of any substantive competition concerns. So, initiation of discussions on remedies with the authority is very unlikely to help avoid Phase II investigation.

In practice, remedies in most cases are behavioural and conditional clearances often include reporting requirements allowing the authority to monitor compliance.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no uniform conditions. The only relevant requirements are that remedies should alleviate competition concerns, be proportionate and supervision of their implementation should be reasonable.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

During the past five years or so, the AMC cleared transactions subject to binding commitments in approximately 2 per cent of cases. As not all the AMC's decisions are publicly available (the AMC started publishing its decisions only since mid July 2015), its practices in this regard cannot be comprehensively reviewed.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Ancillary restraints are not covered by merger clearance and may require a separate clearance; for example, antitrust clearance with respect to non-compete clauses.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The AMC may involve third parties (competitors, suppliers and consumers, experts, etc) in the merger case review process if the AMC's decision on the notified transaction may significantly affect rights and interests in competition. Third parties may be involved during Phase II. The AMC acts in its full discretion when deciding on the issue; the respective decision is then communicated to the notifying parties.

Third parties can submit their observations, in particular, relating to the notified transaction and its impact on the market. Such observations are then attached to the case as evidence and must be taken into account when the AMC decides on the case. The AMC may request information, documents or opinions from the third parties if it considers such data relevant and necessary for the case assessment. Normally, when issuing such an information or documents request, the authority will indicate the deadlines for provision of the requested data. Non-compliance with a request may result in sanctions for a third party.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Automatic confidentiality does not apply to any information. Confidentiality may be available to the parties on their request. The parties shall provide a grounded justification when applying for the confidentiality, as well as a non-confidential version of the information. If not satisfactorily justified, the parties' confidentiality request will be rejected by the AMC.

The AMC is required to publish short notes regarding its resolutions on the initiation of Phase II review, and non-confidential versions of its decisions in merger and concerted practice applications or cases, as well as decisions in cases on competition law violations within 10 working days of the adoption of the resolution or decision.

Currently, the AMC publishes on its website a short note of the resolution or decision made (with the identity of the parties and the essence of the resolution or decision); notes on decisions are then followed by publication of their non-confidential versions.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Cooperation of the AMC with other competition authorities is usually based on bilateral treaties (Ukraine has entered into cooperation agreements, inter alia, with the EU, Bulgaria, Hungary, Latvia, Lithuania and Slovakia).

The AMC also cooperates with international organisations, such as the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development and the International Competition Network.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

If the AMC prohibits the concentration, the CMU may still grant a clearance if its positive effects for the public interest outweigh the negative impact of the restriction of competition, unless that restriction is not necessary for achieving the purpose of the concentration or jeopardises the market economy system. Still, there are no publicly available cases of CMU granting clearance for the concentration that was prohibited by the AMC.

The AMC's decisions can also be challenged in commercial courts. The relevant statement of claim indicating the grounds for invalidation of the AMC decision should be filed to a commercial court within two months from the date of receipt of the decision.

Courts' decisions may further be appealed to the competent appellate instance within a 20-day period. Further, if the appeal is unsuccessful, the claimant may go to a higher cassation court – the Supreme Court of Ukraine (the cassation commercial court).

Because there have been very few AMC prohibition decisions and in each of these cases the authority has thoroughly and deliberately assessed the facts and the potential impact of the transaction on the relevant markets, there have been no instances of successful appeals in merger cases (although not all court decisions are publicly available). Further, there is no public record of successful appeals against the AMC clearance decisions.

Nevertheless, there have been several notable appeal cases (including with respect to the AMC clearance decision in the *Procter &*

*Gamble/Olvia Beta Cleaning Products* assets case) with the definition of the relevant product market as the central and most disputable issue.

## Time frame

### 33 | What is the usual time frame for appeal or judicial review?

Decisions of the AMC can be appealed to the commercial courts within two months upon the receipt of the decision. The new procedural rules governing the review of the case in commercial courts entered into force in late 2017. Now, the consideration of cases in the first instance may last:

- up to 135 calendar days;
- in the appeal – up to 75 calendar days; and
- in cassation – up to 80 calendar days.

However, such terms are not always met because of the courts' heavy workload, insufficient personnel, the necessity of conducting additional investigations, collection of documents and information, etc.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the AMC's statistics, in 2018 the AMC reviewed 532 merger notifications.

Of these applications, 447 (85 per cent) were cleared, 79 were rejected by the AMC or withdrawn by the parties, and in six cases the AMC closed the review without taking a decision. The vast majority of applications did not raise competition concerns and were cleared within Phase I; Phase II investigations were initiated in 25 cases (approximately 4.5 per cent of the overall number of applications submitted to the AMC).

Also, during 2018–2019 the AMC imposed the three biggest fines in its history for implementing M&A transaction without prior merger clearance. These fines ranged from approximately €500,000 to approximately €1.9 million and concerned local transactions. Such an increase in the level of fines shows that the AMC wants merging parties to take the merger control regime more seriously.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

Current proposals for merger control reform concern the following:

- Calculation of fines in merger cases. According to the AMC, further changes to the Guidelines on Fines are possible. Also, the draft law on calculation of fines was rejected by the Parliament in February 2019. The draft law aimed to make the Guidelines on Fines binding upon the AMC and empower courts to annul the AMC's decisions on fines or obligations imposed on the parties, and to order the AMC to reconsider cases in this regard.
- Definition of the relevant market and monopoly position. The AMC presented drafts of the Methodology on the Market Definition and Methodology on Establishment of the Monopoly Position of the Undertakings on the Market. These documents should replace the regulation originally adopted in 2002 and improve the rules on defining the relevant market and establishment of the monopoly position of the undertaking on such market.
- Amendments to the simplified procedure. Draft amendments to the Competition Law suggest also applying a 25-day simplified procedure to the transactions where:
  - none of the parties to the concentration is engaged in business activities in the same product and geographical market,

or in a product market that is upstream or downstream from a product market in which the other party to the concentration engages;

- a party is to acquire sole control of an undertaking over which it already has joint control, assuming such joint control was acquired in compliance with the competition law in the past; and
- parties submit voluntary filings (ie, where the concentration does not require clearance);
- Increasing filing fees. Draft amendments to the Competition Law suggest increasing filing fee for submission of the notification, that does not qualify for review under the simplified procedure from 20,400 hryvnas (approximately €690) to 40,800 hryvnas (approximately €1,400). The filing fee for the simplified procedure notifications will not change: 20,400 hryvnas (approximately €690).
- Calculation of the target assets or turnover. Currently the assets or turnover of the controlling shareholder or controlling seller need to be counted towards the target, although control link may be lost after closing. Thus, the local filing threshold is often met only formally: for example, by the exiting seller rather than by the target. In December 2018, the AMC published a draft amendment to the Merger Regulation that should resolve this issue.
- Assessment of joint ventures. The AMC is developing Guidelines on the assessment of transactions in the form of establishment of joint ventures. No details are available yet.
- Guidelines regarding remedies. The AMC is working on the Guidelines on the remedies in merger control cases. They should clarify the procedure of applying the structural remedies (for example, divestitures), as well as the procedure for monitoring compliance with such remedies. No further details are available yet.

Besides that, the following issues may evolve in the near future:

- composition of the target group (currently, the target is required to disclose detailed information on the controlling shareholder or seller in the notification, although control link may be lost post-closing; such an approach often places an enormous unjustified burden on the notifying parties); and
- ancillary restraints (currently, ancillary restraints such as non-compete obligations accompanying a merger are often formally regarded as anticompetitive concerted practices requiring a separate clearance), etc.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

##### Guidelines on Definition of Control

In November 2018, the AMC adopted Guidelines on Definition of Control, replacing the 2002 AMC methodology regarding the same. In this document the AMC consolidates its practice on the definition and assessment of control. Although the document is not legally binding, it provides valuable comprehensive guidance on how AMC treats different transaction structures and explains rules applicable to specific deals. In general, the Guidelines closely follow the lines of the Commission Consolidated Jurisdictional Notice.

##### Exclusion of seller from the merger control thresholds calculation

The AMC expressed its intention to exclude turnover of controlling sellers and other controlling shareholders from the notifiability assessment and take into account only the turnover generated by the business being acquired. The relevant draft amendment to the Merger

Regulation aiming to resolve this issue was presented by the AMC in December 2018. Currently, the AMC is updating the draft based on feedback received from the public. The amendment is expected to come into force in 2019.

#### **Record fines for merger control violations**

During 2018–2019, the AMC imposed the three biggest fines in its history for merger control violations. The first fine (approximately €500,000) was imposed in November 2018 on a Ukrainian individual for the acquisition of control over a Ukrainian bank. The second fine (approximately €1.8 million) and the third fine (approximately €1.9 million) were imposed in April 2019 on large Ukrainian groups for acquisitions of big Ukrainian industrial plants. Such an increase in the level of fines shows that the AMC wants merging parties to take the merger control regime more seriously.



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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation consists of Federal Law No. 4 of 2012 concerning the Regulation of Competition (the Competition Law) and its implementing regulations, issued under Cabinet Resolution No. 37 of 2014 (the Regulations). Two more recent Cabinet Resolutions have further clarified the scope of the legislation: Cabinet Resolution No. 13 of 2016 – which in particular defines ‘dominance’ and sets the relevant merger filing thresholds by reference to an at least 40 per cent market share – and Cabinet Resolution No. 22 of 2016 – which defines small and medium enterprises (that are exempt from the Competition Law) by reference to number of employees and revenue, and which vary by sector.

The Competition Law and the Regulations establish a comprehensive regime of both merger control and prohibitions on anticompetitive agreements and abuse of a dominant position. Responsibility for enforcement lies with the Competition Department of the Ministry of Economy, supported by a Competition Regulation Committee, chaired by the Undersecretary of the Ministry of Economy.

The Competition Law is still in its early stages. Although the Law was originally published (and officially came into force) in February 2013, the applicable merger filing thresholds, however, only came into force in August 2016 and there remain certain gaps in the legislation, to be addressed separately through further Cabinet Resolutions. At this stage, there is also no guidance on how the Competition Law may be interpreted and applied in future. The Competition Law and the Regulations are largely based on EU competition law and reflect many elements of EU and international norms. Pending practical experience and further clarification from the authorities, it may be expected therefore that the Competition Law will seek to follow EU precedent.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

Merger control clearance is required for transactions that result in the acquisition of direct or indirect control through total or partial transfer (through merger or acquisition) of ownership or benefit in assets, equity, shares or obligations from one entity to another.

#### 3 | What types of joint ventures are caught?

The Competition Law does not deal explicitly with joint ventures. However, the definition of ‘economic concentration’ for the purposes of merger control review (see question 2) is very broad and may apply to a broad range of joint ventures. It is not clear whether, in implementing its new merger control regime, the UAE will seek to follow EU precedent in distinguishing between ‘full-function’ joint ventures (which

are notifiable) and ‘non-full-function’ joint ventures (which fall to be assessed under the provisions relating to restrictive agreements). This is an area that may receive further clarification as the Competition Law is brought into force and applied in practice.

#### 4 | Is there a definition of ‘control’ and are minority and other interests less than control caught?

The Competition Law defines a notifiable economic concentration as ‘a total or partial’ transfer of ownership rights, resulting in the ‘direct or indirect control’ of one entity over another, and where the relevant market share thresholds are met (see question 5). Under certain circumstances, it is possible therefore that acquisitions of minority interests will also be caught. However, there is no set threshold for such partial transfers of ownership rights, and the Competition Law and Regulations also do not contain any definition of ‘control’. Consequently, it remains to be seen how this will be applied in practice, and in particular the extent to which the Competition Law will follow EU precedent in this regard.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

According to the Law and the recently published merger filing thresholds, merger control clearance is required for transactions resulting in an at least 40 per cent market share and that may affect competition in the relevant market, in particular by creating or enhancing a dominant position.

The first criterion (ie, the reference to a 40 per cent market share) is in line with neighbouring countries in the region that follow a similar model (noting that the Competition Law also provides that the Cabinet may increase or decrease the applicable market share thresholds in accordance with the evolution of the market). With respect to the second criterion, however (ie, the requirement that the transaction ‘may affect competition’), this is more unusual in that it appears to require a substantive competition assessment at the initial stage of deciding whether the deal needs to be notified, and it remains to be seen how this will be applied. It is also not clear whether any increment in market share is required, or whether the threshold may be met by one party alone, even in the absence of any competitive overlap. At this stage it is unclear whether it may be possible to engage informally with the competition authority ahead of a transaction, to determine whether or not a filing would be required. Absent further guidance on this issue, it is likely that, in practice, companies exceeding the relevant market share thresholds would need to notify their deal, irrespective of this additional substantive assessment.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

For transactions that meet the notification thresholds, filing is mandatory and suspensory. However, the Law currently excludes from its application a number of economic sectors, in particular telecommunications, financial services, cultural activities, oil and gas, pharmaceutical production and distribution, postal services including express delivery, electricity and water production and distribution, sewage and waste disposal, and land, sea, air and rail transport. Transactions involving companies in these sectors would not trigger a merger notification to the Ministry, although other considerations relating to separate sector-specific regulatory regimes may apply. Transactions involving small and medium-sized enterprises (as defined under Cabinet Resolution No. 22 of 2016 – see question 1), and entities that are either owned or controlled by the government, are also not subject to notification.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Law and Regulations apply to all entities operating in the UAE, as well as to activities that take place abroad and have an effect on competition in the UAE.

Foreign-to-foreign mergers are therefore captured in the UAE where the jurisdictional thresholds are met, regardless of the location or nationality of the parties, subject to the local effects test (ie, the parties must operate in UAE markets or engage in activities abroad that have harmful effects on competition in the UAE).

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

In general, foreign ownership of UAE onshore companies is limited to a 49 per cent shareholding. These restrictions on foreign ownership require all UAE companies to have a minimum of 51 per cent ownership by UAE nationals at all times. In certain industry sectors, different foreign ownership restrictions, which further reduce the permitted level of foreign ownership, may be applicable. This general rule is subject to certain exceptions in connection with investors who are nationals of states that are members of the Gulf Cooperation Council. Aside from these shareholding restrictions, there is no separate approvals process for foreign investment in the UAE.

However, sector regulators and other government authorities in the UAE retain a certain degree of discretion to approve or reject proposed transactions affecting the UAE. Sector-specific regulation plays an important role with respect to many industry sectors in the UAE. Thus, for example, while the regulated sectors listed in question 6 have been excluded from the scope of application of the Competition Law, investment in these sectors (including in relation to a foreign company operating through a branch in the UAE) will generally require a separate approval procedure to be undertaken with the relevant regulator, in particular to update the company's UAE licences and registration. Considerations in this context will not necessarily or exclusively be competition-related, and sector regulators and other government authorities retain considerable discretionary powers to reject a transaction where they have concerns, including in relation to national security or public policy.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

For transactions that trigger the notification obligation, the Regulations provide that filing must be made at least 30 days prior to the conclusion of the draft contract or agreement bringing about the economic concentration.

It is not entirely clear how this provision relating to a 'draft contract or agreement' will operate in practice, and whether the sale and purchase agreement may in fact be signed, with closing conditional on receipt of competition clearance. Parties may be reluctant to approach the competition authority until they have a firm deal, evidenced by a legally binding agreement.

Failure to notify a notifiable transaction may result in fines of between 2 and 5 per cent of the infringing company's annual revenue deriving from the sale of the relevant goods and services in the UAE. Alternatively, where this cannot be assessed, a fine of between 500,000 and 5 million UAE dirhams may be imposed.

The Competition Law also provides that a court may order the closing down of an infringing establishment for a period of three to six months, with the infringement decision published in daily newspapers.

Further, third parties who have been harmed by an infringement may also seek damages.

As noted in question 1, the Competition Law is still in its very early stages, and there have not been any enforcement cases to date.

## 10 | Which parties are responsible for filing and are filing fees required?

The Competition Law and Regulations require that the 'concerned entities' submit a notification for approval of the transaction. Notification is to be made by one entity, authorised to make the filing by the other concerned entities by power of attorney. While the term 'concerned entity' would obviously include the entity or entities acquiring control, and information is also required of the target, it is not clear to what extent responsibility for filing (and any liability for failing to file) may also fall on the business being acquired. This may be clarified in due course through the issuance of further Cabinet Resolutions. The Competition Law and Regulations do not currently mention any filing fees.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Once a notification has been received and all the formal requirements fulfilled, the Ministry will issue a notice to the notifying party confirming that the notification is complete and starting the timetable for review.

From then, the Minister must issue a decision on the concentration within 90 days, which may be extended by an additional 45 days. If no decision is issued during this period, the concentration will be deemed approved.

Notification under UAE merger control law is suspensory, meaning that the parties cannot close prior to clearance.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing before clearance, or any other form of integration before clearance (gun jumping), may result in a fixed fine of between 50,000 and

500,000 dirhams. Other penalties, including the temporary closing down of the establishment for three to six months, or damages claims by affected third parties, may also be applicable (see question 9). As mentioned, the Competition Law is still in its very early stages and there have been no enforcement cases to date for failing to notify, or for closing before clearance.

**13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?**

As noted in question 7, the Competition Law and Regulations do not distinguish between mergers involving local or foreign entities. While there has not been any enforcement practice to date, in the future, it cannot be excluded that sanctions would apply in the context of foreign transactions, where these meet the notification thresholds in the UAE.

**14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?**

As noted in questions 7 and 13, the Competition Law and Regulations do not distinguish between mergers involving UAE-based or foreign entities, and a transaction that triggers the notification requirement in the UAE should therefore not be closed prior to obtaining clearance, regardless of the location or nationality of the parties.

As there is currently no enforcement practice of the new Competition Law in the UAE, it is not clear whether and to what extent 'hold-separate' or other arrangements, by which the UAE business alone might be made subject to merger clearance in the UAE, may be deemed acceptable by the UAE authorities. These and other possible solutions will need to be tested with the Ministry as competition law and practice develop in the future.

### Public takeovers

**15 | Are there any special merger control rules applicable to public takeover bids?**

Mergers and takeover bids relating to public companies listed on the Abu Dhabi Securities Exchange or Dubai Financial Market are subject to discretionary prior approval from the Emirates' Securities and Commodities Authority and to filing with the relevant stock exchange and potentially with other local regulators in the relevant emirate. Stake building in public companies is also subject to discretionary approval.

The Competition Law, however, does not deal specifically with the issue of public takeover bids, and there are therefore no special merger control rules applicable in this context.

### Documentation

**16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?**

The procedural requirements for a merger control filing are set out in the Regulations. Notification must be made in Arabic using the official form from the Ministry and three copies submitted. The following documents must also be appended to the filing, for both the acquirer and the target (including a certified translation of each document that is not originally in Arabic):

- memorandum or articles of association;
- draft share or asset purchase agreement;
- audited financial statements for the past two financial years; and
- details of shareholders and their levels of shareholding.

The notifying parties must also submit a report on the economic dimensions and the competition effects of the concentration. This includes, in particular, a requirement to identify upfront any potential competition issues resulting from the transaction, and to suggest possible remedies.

### Investigation phases and timetable

**17 | What are the typical steps and different phases of the investigation?**

The timetable for review is 90 days from receipt of a complete notification, which may be extended by a further 45 days. The Competition Law and Regulations do not currently provide for an expedited review process. This may in part be explained by the fact that the merger control regime is intended to apply only to those transactions that, prima facie, are likely to raise competition concerns, therefore making an expedited review less likely. It remains to be seen, however, whether in practice, faster clearances may be obtained.

**18 | What is the statutory timetable for clearance? Can it be speeded up?**

Once a notification has been received, a review of the transaction will be undertaken by the Competition Regulation Committee, which may hold meetings with the notifying parties and with other stakeholders. The Committee may also seek the views of third parties and other authorities in the UAE.

After it has completed its review (within a maximum 135 days from receipt of the notification), the Committee will submit a report on the transaction to the Minister of Economy, with a recommendation on the appropriate resolution to be issued. As in other jurisdictions, the transaction may be either approved or prohibited, or alternatively approved subject to conditions.

## SUBSTANTIVE ASSESSMENT

### Substantive test

**19 | What is the substantive test for clearance?**

The substantive test for clearance is set out in the Competition Law and the Regulations, which provide that a notifiable transaction will be approved if it shall not affect competition negatively or if its positive economic impact would outweigh any negative effect on competition. The first test is phrased in rather general terms, and for now there is no guidance on how it will be applied in practice; while the second test appears to pave the way for the consideration of efficiencies.

The Regulations further specify the list of criteria according to which the Competition Regulation Committee will evaluate the anticipated effects of a transaction on competition. These include factors that are commonly found in other jurisdictions, such as the level of actual and potential competition, the likely impact of the transaction on market concentration (with, specifically, reference being made to the likelihood of the emergence of a 'dominant position' on the relevant market), price levels and barriers to entry. The impact of the transaction on 'innovation, creativity and technical efficiency', as well as its impact on consumers' interests, are also explicitly stated to be taken into account in the merger control assessment.

In addition to the above, other non-competition-related factors may also be taken into account in the merger control assessment. Of particular note is the Regulations' explicit reference, in the merger control assessment, to the extent to which the transaction will 'contribute to the promotion of investment, exportation or supporting the capacity of national entities to international competition'. Such a clear 'national champions' policy is unusual in the context of existing

competition law frameworks, and it remains to be seen how this will be applied in practice – and particularly how this policy factor may interplay with the UAE's other international obligations, for example in the context of its accession to the WTO.

## 20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. Unlawful coordination between independent parents may be assessed under the provisions relating to restrictive agreements and practices (article 5 of the Competition Law).

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The factors set out in the Regulations for the assessment of a notified concentration (see question 19) suggest that the Competition Regulation Committee will look beyond the sole question of market shares and dominance, and will take into account a wide range of factors to carry out an economic analysis of the anticipated effects of the merger on competition.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

See question 19. The Regulations specifically envisage that industrial policy, and in particular 'the promotion of investment, exportation or supporting the capacity of national entities to international competition' will be a relevant consideration in the assessment of a notified concentration, where the merger might otherwise lead to a lessening of competition.

Pending application of these rules in practice, however, it is not clear how the Competition Regulation Committee will balance such public interest considerations against the potential detriment to competition resulting from the notified transaction.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

Where a transaction is likely to lead to a lessening of competition, the Competition Law explicitly paves the way for the taking into account of efficiencies, by requiring the Committee to consider whether any positive impact from the transaction may exceed its detriment to competition. Further, the Regulations explicitly provide that 'the potential impact on innovation, creativity and technical efficiency' should be part of this assessment.

However, as there is as yet no practical experience of the Competition Law, the extent to which the Committee is likely to be willing to take these and other efficiencies into account, as well as the related burden of proof on the notifying parties, remains to be determined.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Following the review of a notified concentration, the Competition Committee has the power to either prohibit the transaction, or alternatively to approve it subject to conditions. In the latter case, the

Competition Law and Regulations further provide that the Minister of Economy may revoke the approval of a concentration (i) if it is found that the circumstances under which the approval has been granted no longer exist, (ii) if the parties fail to comply with any commitment on the basis of which conditional approval was granted or (iii) if information provided during the review process is shown to have been misleading or incorrect.

While the ability to revoke a competition clearance is common to most other competition law regimes, where the parties either fail to observe agreed commitments or are otherwise shown to have provided false or misleading information, the reference in (i) to a potentially wider change in circumstances is unusual and may warrant further clarification from the authorities.

Further, as noted in question 11, during the duration of the review process (which can last up to 135 days), the suspension obligation applies, and parties may not take any step towards consummation of the transaction pending clearance.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Approval of a transaction may be conditioned on the fulfilment of certain pre-approved remedies. The Competition Law and Regulations do not currently detail whether the Committee is likely to favour only structural remedies, or whether behavioural remedies may also be considered. In addition, as noted in question 16, the parties are required at the outset, in the notification form, to provide suggested remedies to counter any competition concerns.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Neither the Competition Law nor the Regulations specify conditions or the timing relating to the implementation of remedies.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Not applicable, as there is currently no public record of enforcement practice under the UAE Competition Law, although the authority is now accepting notifications.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Law and Regulations do not specifically cover the topic of ancillary restrictions, and so there is currently no guidance on this issue, pending enforcement practice of the Competition Law.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Yes. The Regulations provide that the Competition Regulation Committee may seek the views of parties that may be affected by the transaction and other stakeholders, to assist with its review of the transaction. In particular, the Committee may send information requests to such parties (to which they must respond within 15 days), as well as hold meetings with them to seek their views and recommendations on the transaction.

With respect to complainants, the Competition Law and Regulations provide that any concerned person may submit a complaint to the competent authority concerning any violation of the Law. The complaint shall be made in writing, using a form prepared by the Ministry for that purpose, and identifying, in particular, the name of the complainant and respondents, the provisions of the Law claimed to have been violated, as well as relevant facts and evidence to support the complaint. The Committee, on accepting the complaint, shall notify the defendant and all interested parties within 10 days. It is not clear from the Competition Law and Regulations, however, what the time frame is within which complaints may be submitted, in the context of a transaction.

### Publicity and confidentiality

**30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?**

The Regulations provide that the Competition Regulation Committee will keep a special register of notifications. Where information is to be treated confidentially, the parties must submit a non-confidential summary of the notification, sufficient to clarify the content of the confidential data. It remains to be seen in practice how much detail will be expected in relation to this non-confidential summary.

In addition, the Competition Law explicitly makes it a duty for the Ministry to ensure the confidentiality of information received and reviewed in the context of notifications. Breaches of confidentiality by Ministry personnel are punishable by a fine of 50,000 to 200,000 dirhams.

### Cross-border regulatory cooperation

**31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?**

As there has been as yet no enforcement practice of the Competition Law, there is no track record of the Competition Regulation Committee cooperating with antitrust authorities in other jurisdictions.

## JUDICIAL REVIEW

### Available avenues

**32 | What are the opportunities for appeal or judicial review?**

Resolutions issued by the Minister, including merger control decisions, may be appealed within 60 days of the decision. The Competition Law and Regulations do not contain further details in relation to the appeals process.

### Time frame

**33 | What is the usual time frame for appeal or judicial review?**

See question 32.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

**34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?**

As has been noted above, the Competition Law is still in its early stages. However, given the relatively long list of current exclusions from the Law (see question 6), it is to be expected that, in its initial enforcement phase, the Competition Regulation Committee will focus on a much more limited number of sectors. Businesses operating in sectors that are not excluded may therefore be particularly at risk.



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### Reform proposals

**35 | Are there current proposals to change the legislation?**

There are currently no proposals to change the legislation, although as noted above, further clarity is still expected to be provided with respect to a number of practical aspects relating to the implementation of the Law.

## UPDATE AND TRENDS

### Key developments of the past year

**36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?**

A limited number of notifications have been submitted and cleared by the Authority. There is currently, however, no public record to access the notifications made and clearances issued.

# United Kingdom

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The primary legal basis for merger control in the United Kingdom (UK) is the Enterprise Act 2002 (EA), which came into force on 20 June 2003. In April 2014, the EA was significantly amended by the Enterprise and Regulatory Reform Act 2013 (ERRA). In particular, the Office of Fair Trading (OFT) and Competition Commission (CC) were merged into a single authority, the Competition and Markets Authority (CMA). The CMA's primary duty is to seek to promote competition, both within and outside the UK for the benefit of consumers. Published guidance explains how the provisions work in practice and secondary legislation implements some of the provisions.

The EA establishes an administrative procedure for merger control, which is now solely implemented by the CMA. In limited cases, raising defined public interest issues, the Secretaries of State for Business, Energy and Industrial Strategy (BEIS) or Culture, Media and Sport may also be involved in the decision-making process. Under the general EA merger regime:

- the CMA has a duty to refer mergers (anticipated or completed) for a Phase II review where it believes that there is, or may be, a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (SLC) in the UK. Exceptions to the duty to refer exist in certain circumstances (see question 19);
- following a reference for a Phase II investigation, the CMA conducts a more detailed analysis to decide whether a relevant merger situation has been or will be created and, if so, whether the situation results, or may be expected to result, in an SLC within any markets within the UK. If the CMA decides that there is an SLC, it must go on to determine how to remedy, mitigate or prevent the adverse effects (see question 24); and
- different rules are in place (see question 8) for public interest, special public interest and water merger cases.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The EA applies to a 'relevant merger situation', which may be a completed or anticipated merger. The CMA must make a reference for a Phase II review where it believes that there is or may be a relevant merger situation that has resulted or may be expected to result in an SLC. An 'anticipated merger' may be a merger that has been signed but not yet completed, or it may be a merger in contemplation. Where these conditions are met, a reference for a Phase II review must be made unless one of the exceptions to the duty to refer applies (see question 19) or, where appropriate, it may seek and accept undertakings in lieu of a reference from the merging parties (see question 25).

A relevant merger situation will arise when the following conditions are satisfied:

- two or more enterprises cease to be distinct, that is, are brought under common ownership or control or there are arrangements in progress or in contemplation that will lead to enterprises ceasing to be distinct. Control is not limited to legal control (see question 4);
- either the merger has not yet taken place, or the merger has taken place not more than four months before the reference is made, unless the merger took place without having been made public and without the CMA being informed of it (in which case, the four-month period starts from the announcement or at the time the CMA is told); and
- the transaction meets certain jurisdictional thresholds (the share of supply or turnover tests described in question 5).

The EA defines an 'enterprise' as the 'activities, or part of the activities, of a business' that are carried out for gain or reward (it need not therefore be a separate legal entity). CMA Guidance (see Mergers: Guidance on the CMA's jurisdiction and procedure and the Merger Assessment Guidelines) indicates that an enterprise may comprise any number of components, including the assets and records needed to carry on the business and the employees working in the business, together with the benefit of existing contracts or goodwill, or both. A business need not currently be trading to constitute an enterprise. In June 2014, the CMA found, following a legal challenge, that it did have jurisdiction over Groupe Eurotunnel's acquisition of three ferries and related assets previously belonging to SeaFrance (now liquidated). The CMA found considerable continuity between the former SeaFrance services and Groupe Eurotunnel's new services on the same route. The assets in question were considered to form a business that was already geared up to run a ferry service; the situation was thus distinct from buying mere assets in the market. The Supreme Court upheld the CMA's decision regarding the definition of 'enterprise' for the purposes of UK merger control in December 2015 (see question 32).

#### 3 | What types of joint ventures are caught?

The creation of a new joint venture, or a shift in control or influence over an existing joint venture, may give rise to a relevant merger situation, provided that the share of supply test or the turnover test (see question 5) is met.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The CMA documents, Mergers: Guidance on the CMA's jurisdiction and procedure and Merger Assessment Guidelines, provide guidance on the meaning of control. Control can comprise any of the following:

- material influence – which arises on the basis of an ability materially to influence another enterprise's policy. This can arise at relatively low levels of shareholding, perhaps as low as 10 to 15 per cent. Other factors such as board representation, industry standing and contractual relationships between the enterprises involved may also be taken into account. The Court of Appeal upheld a finding that BSKyB's acquisition of a 17.9 per cent stake in ITV gave rise to material influence in the circumstances of the case. This concept can therefore clearly catch transactions that would not be caught by the EU Merger Regulation (EUMR). For example, the OFT referred Ryanair's acquisition of a 29.82 per cent shareholding in Aer Lingus Group plc (the European Commission having concluded that it did not have the power to require Ryanair to divest itself of the minority stake under EU merger rules) to the CC in June 2012. The CC reached its decision in July 2013, requiring Ryanair to reduce its shareholding in Aer Lingus to 5 per cent. Its conclusion that the 29.82 per cent shareholding gave material influence was based on a range of factors including, in particular, Ryanair's ability to block special resolutions and the sale of Heathrow slots under the articles of association. This conclusion was reiterated by the CMA in its final decision in June 2015 following an application by Ryanair to the CMA to reconsider its decision based on material changes to circumstances. Following the CMA's final decision, in October 2015, Ryanair withdrew its application before the Court of Appeal regarding the same issue;
- de facto control – the ability to control policy, which may arise on the acquisition of a higher level of shareholding, such as 30 per cent of voting rights; or
- legal control – a controlling interest, unlikely to arise unless one enterprise holds more than 50 per cent of the shares carrying voting rights in the other. In some (exceptional) cases, acquisition of a shareholding in excess of 50 per cent may not give rise to legal control where an agreement with the other shareholders circumscribes the majority owner's rights (see, for example, *Coca-Cola Company/Fresh Trading Limited*, where a shareholding increase from around 20 per cent to above 50 per cent did not give rise to legal control, as the acquirer obtained no additional voting rights (either in the shareholders' meeting or at board meetings)).

A change from material influence to de facto control or legal control, or from de facto control to legal control, can constitute a new relevant merger situation (see question 2).

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The EA provides alternative thresholds based respectively on share of supply and turnover:

- the 'share of supply' test is satisfied only when the merger itself creates or enhances a 25 per cent share of supply or purchases of any goods or services in the UK (or in a substantial part of it). This is not a market share test and allows a wide discretion in describing the goods or services, which need not amount to relevant economic markets;
- the turnover in the UK of the enterprise over which control is being acquired exceeds £70 million. This is determined by aggregating the total value of the turnover in the UK of the enterprises that cease to be distinct and deducting:
  - the turnover in the UK of any enterprise that continues to be carried on under the same ownership or control (eg, the acquiring enterprise); or

- if no enterprise continues to be carried on under the same ownership and control (eg, formation of a new joint venture), the turnover in the UK which, of all turnovers concerned, is the turnover of the highest value.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing in the UK is voluntary. However, a large number of deals are, in practice, notified prior to completion to give the parties legal certainty as, irrespective of a notification, the CMA may commence an investigation on its own initiative and subsequently refer the merger for a Phase II investigation. This carries the risk of remedies being imposed even if the transaction has already been completed. Further, the CMA monitors the market for transactions falling within its jurisdiction that have not been voluntarily notified and has significant interim measures powers, which enable it to prevent or unwind action that might prejudice the outcome of a reference for a Phase II investigation or impede remedial action. The CMA can intervene as soon as it has reasonable grounds for suspecting that it may be the case that arrangements are in progress or in contemplation, but uses interim orders mainly in the context of completed mergers (see further question 11). The CMA stated in its 2018/19 Annual Plan that, to achieve a balanced and targeted approach to investigating non-notified mergers, it will welcome informal briefings from companies to advise on whether a potential merger is likely to come under CMA scrutiny.

Filing must be by merger notice in the form prescribed by statute or by a submission containing the same information (see question 10).

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There is no system of mandatory notification in the UK (see question 6). It is implicit in the jurisdictional criteria (see question 5) that at least one of the enterprises will be active within the UK (although it need not necessarily be incorporated within the UK). These principles apply equally to non-UK companies that sell to (or acquire from) UK customers or suppliers. In assessing whether a firm is active in the UK, the CMA will have regard to whether its sales are made directly or indirectly (via agents or traders) and the extent to which a firm is active at each level of trade.

In June 2013, the Court of Appeal confirmed the CC's jurisdiction over the *AkzoNobel/Metlac* merger on the basis that AkzoNobel had significant influence over its UK subsidiaries, which were carrying on business in the UK, including the setting of strategies and approval of operational decisions and did not itself need to be carrying out commercial activities in the UK.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The UK does not currently have a domestic legal framework that specifically governs inward foreign direct investment. However, the EA merger regime sets out special rules for mergers involving public interest issues and special public interest cases (including mergers involving certain government contractors that possess information relating to defence and of a confidential nature). Broadly, where the Secretary of State intervenes in a public interest case, that case is considered in light of both competition and public interest issues. Where the Secretary of State intervenes in a special public interest case (ie, one in which the CMA does not have jurisdiction under its normal rules) the outcome of the case is dependent on public interest issues only.

The public interest grounds on the basis of which the Secretary of State may intervene are national security, media plurality, the stability of the UK financial system and new public interest considerations that may be added by the Secretary of State. Where the Secretary of State issues an intervention notice specifying a 'media public interest consideration', Ofcom is required to report whether it is, or may be, the case that the merger may be expected to operate against the public interest, to assist the Secretary of State in its decision as to whether there is a plurality concern requiring further investigation by the CMA. At the request of the Secretary of State, Ofcom published a measurement framework for media plurality in November 2015. One recent example of an intervention by the Secretary of State for Digital, Culture, Media and Sport on public interest grounds is the investigation into the proposed acquisition of Sky plc by 21st Century Fox. In June 2018, the Secretary of State for Digital, Culture, Media and Sport accepted the CMA's recommendation that the proposed acquisition was not in the public interest due to media plurality concerns and accepted the CMA's recommendation that the most effective and proportionate remedy was for Sky News to be divested to a suitable third party.

There is also a special regime for water (and sewerage) mergers. In some circumstances water mergers are subject to mandatory reference to the CMA and are governed by the Water Industry Act 1991 (as amended by the EA and Water Act 2003) and the Water Act 2014. There are currently no special provisions for other regulated utilities (such as electricity, gas, telecommunications or rail), which are subject to the EA merger regime although various regulatory approvals are required for the acquisition of certain regulated businesses and businesses operating in the financial or insurance sector. The Industry Act 1975 confers power on the Secretary of State to prohibit changes of control over an important manufacturing undertaking where the change of control would be contrary to the interests of the UK, although this power has not been used in practice.

In June 2018, the CMA published guidance on changes to the UK merger thresholds for changes of control over enterprises that are active in any of three defined sectors: the development or production of items for military or military and civilian use; quantum technology; and computing hardware. The turnover threshold applicable to such 'relevant enterprises' has been reduced from £70 million to £1 million, and the share of supply test has been broadened to include mergers involving a target with 25 per cent or more share of supply of the relevant goods and services in the UK (as well as where the merger leads to an increase in the share of supply to, or above, this 25 per cent threshold, which is the requirement for those enterprises not deemed 'relevant enterprises'). The new tests were approved by Parliament and came into force on 11 June 2018. The purpose of these changes is to ensure that the Secretary of State is able to intervene to address any national security-related issues raised by such transactions, and the CMA has stated that the amendments to the jurisdictional thresholds will not result in different treatment of the three defined sectors from a competition perspective.

As discussed further at question 35, BEIS is still considering additional long-term reforms to the public interest regime, which are intended to introduce a new notification regime for mergers relevant to national security and critical infrastructure.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As there is currently no obligation to notify a merger, there are no filing deadlines and no sanctions apply if notification is not made. Where

parties do not notify, however, they take the risk that, whether or not third parties complain, the CMA may call in the merger for review and adopt a decision to refer for a Phase II review (within the prescribed period of four months following a completed transaction becoming public or the CMA being informed of it) and that divestment or other remedies could be ordered following an adverse report. In addition, the CMA has the power to take pre-emptive action to preclude conduct that might prejudice the appraisal of a merger (see question 11).

#### 10 | Which parties are responsible for filing and are filing fees required?

Despite the voluntary nature of the regime, certain procedural considerations must be taken into account if a decision is taken to notify the transaction.

Filing is by merger notice (or by a submission containing the same information). Any person carrying on an enterprise to which the notified arrangements relate may file a merger notice. It is not necessary for merger notices to be made jointly. A merger notice requires the CMA to decide within a statutory period (see question 11) whether to refer the merger for a Phase II review.

In certain limited circumstances, informal advice may be sought from the CMA prior to notification. The CMA stated in its 2018/19 Annual Plan that, to achieve a balanced and targeted approach to investigating non-notified mergers, it welcomes informal briefings from companies to advise on whether a potential merger is likely to come under CMA scrutiny. The CMA is willing to provide such guidance for good faith confidential transactions giving rise to genuine issues. The parties must be prepared to acknowledge to the CMA any theory of harm that could reasonably lead to a Phase II reference. The CMA will not offer informal advice where there is sufficient guidance already from case precedents, nor will it advise on structuring options for water mergers. As the CMA is unable to consult third parties, any advice given is qualified accordingly and based on the assumption that the information provided is accurate.

Subject to certain exceptions, any merger that is investigated by the CMA is subject to a fee, which is payable either on publication by the CMA of a reference decision or a decision not to make a reference. For further information, see CMA guidance on its merger intelligence function.

#### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The main review periods in an EA process are as follows:

- Phase I review: a binding 40-working-day period applies;
- consideration of any undertakings in lieu (UILs) of reference for a Phase II review: the parties have up to five working days from receiving a decision that the test for reference for a Phase II review is met (an SLC decision) to offer UILs (although they can do so earlier). The CMA has up to 10 working days from the date of its SLC decision to decide provisionally whether to accept the UILs and a total of 50 working days from the date of its SLC decision formally to accept the UILs, which can be extended by 40 working days for 'special reasons', such as needing further consultation with third parties or if the case involves an up-front buyer;
- Phase II review: 24 weeks from the date of reference, with the possibility for the CMA to extend this by eight weeks; and
- implementation of Phase II remedies: the CMA has 12 weeks (extendable by six weeks for special reasons) to accept any final undertakings offered by the parties to obtain conditional clearance.

The possibility exists for a 'fast-track' reference procedure. This may be used upon the request of merging parties in circumstances where there is sufficient evidence that the Phase II reference test is met at an early

stage in the investigation. The CMA takes into account its administrative resources and the efficient conduct of the case in deciding whether to agree to the use of the fast-track procedure, and has used this power in five cases so far (BT's acquisition of EE in 2015, the *Ladbroke's/Coral* merger in 2016, the merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust, Tesco PLC's acquisition of Booker Group in 2017 and the proposed merger between J Sainsbury Plc and Asda Group Ltd, which was blocked by the CMA).

Although the EA regime allows parties to close transactions without notifying the CMA, there are, in practice, significant constraints on merging parties' freedom once the CMA starts to review a merger (whether following a notification or on its own initiative). The CMA has powers to impose initial enforcement orders (IEOs) both to prevent further integration and also to unwind any integration that has already taken place.

IEOs can be imposed as soon as the CMA has reasonable grounds for believing that it is or may be the case that arrangements are in progress or in contemplation. The CMA has indicated that it is likely to use such powers for anticipated mergers only in relatively rare circumstances. However, the CMA has stated that it will normally make initial enforcement orders in investigations of completed mergers, which will remain in force until clearance or remedial action is taken. There are penalties for failing to comply with an IEO. Where the CMA considers that, without reasonable excuse, an IEO has not been complied with, it may impose a penalty of up to 5 per cent of the worldwide turnover of the addressee of the IEO. The CMA has a template initial enforcement order to which additional restrictions may be added and has released updated guidance on the use of IEOs and derogations in merger investigations (June 2019). The CMA has imposed a number of fines for breaches of an IEO in 2018 and 2019, including two separate fines of £100,000 and £200,000 in the *Electro Rent/Microlease* merger, a £120,000 fine in the *Vanilla/Washstation* merger, a £146,000 fine in the *Nicholls' (Fuel Oils)/DCC* merger and a £300,000 fine in the *Ausurus Group/Metal & Waste Recycling* merger.

If a Phase II reference is made, the EA prohibits, except with the consent of the CMA, any party to a completed merger from undertaking further integration or any party to an anticipated merger from acquiring an 'interest in shares' in another. The CMA will rarely grant its consent. The EA also provides the CMA with power to accept undertakings or to make an order preventing the parties to a merger from taking action that might prejudice the eventual outcome of the merger reference. Any Phase I initial enforcement orders will usually continue in force for the duration of the Phase II inquiry and may be supplemented where appropriate with additional restrictions.

### Pre-clearance closing

#### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Merger notification is not compulsory, although constraints on integration may be imposed by the CMA (see question 11). A person who has sustained loss as a consequence of a breach of a statutory restriction preventing the acquisition of interests in shares or further integration may bring an action for damages. Breach of such a provision is also enforceable by civil proceedings brought by the CMA for an injunction or for interdict or for any other appropriate relief or remedy. Similar provisions apply in relation to any breach of an undertaking or order.

#### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Merger notification is not compulsory in the UK, so sanctions cannot be imposed simply for closing before clearance, unless this has involved breach of a statutory obligation, an undertaking or an order (see questions 11 and 12).

#### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The EA regime does not prevent closing prior to clearance (see questions 11 and 12). There are some limited restrictions on the powers of the CMA to take enforcement action in relation to foreign companies, but these are narrow and do not appear to have been an impediment to the OFT or CC previously.

### Public takeovers

#### 15 | Are there any special merger control rules applicable to public takeover bids?

If the merger involves the purchase of a public company that is subject to the Takeover Code, the Takeover Code requires that the bid should lapse if the merger is referred to a Phase II investigation prior to the bid becoming unconditional in other respects. Upon such a lapse, the bidder and the shareholders of the target company will no longer be bound by acceptances of the offer made prior to the reference. The bid may, however, be revived (within a certain time frame) if, subsequently, it is cleared unconditionally by the CMA or the CMA allows it to proceed subject to certain undertakings being given.

### Documentation

#### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The company must provide, to the extent relevant, the information set out in the template merger notice, which covers the basic information that the CMA requires about the transaction and the markets involved. The company can either use the prescribed merger notice form, or provide a bespoke submission containing the same information, along with a signed and annotated version of the merger notice, indicating where in the submission the relevant information can be found. Copies of the form and current procedures are available on the CMA's website (<https://www.gov.uk/government/organisations/competition-and-markets-authority>). In addition to a full description of the transaction and proposed timetable, the merger notice requires information relating to the main products and services supplied by the merging enterprises and estimates of market shares in any UK market. Information on horizontal overlaps, vertical links, entry barriers, buyer power and customer benefits are also relevant. Financial information is also required. In 2017, the CMA published a revised merger notice template following a consultation process. This new template is intended to clarify the interpretation of certain questions and guidance notes and to ensure that information provided is adequate and proportionate in the circumstances of the case (in many cases this took the form of clarifying in what circumstances certain granular data may be required of the parties). In practice, the core requirements of the merger notice have not been affected and for the most part the proposed changes reflect the CMA's existing practice.

The time required to complete a merger notice depends on the complexity of the case and the ability of the parties to collate the relevant information promptly. The CMA will not commence its 40-working-day review period until it is satisfied that the merger notice is complete and,

in practice, a series of pre-notification discussions have been completed. The CMA states that it will endeavour to review submissions and revert to the parties within a reasonable time frame, generally within five to 10 working days of receipt (although this can be longer depending on the complexity of the case).

The CMA has the power to impose penalties on merging parties for breach of procedural requirements, including for failure to comply with document requests, or for provision of inaccurate information. For example, in 2017, the CMA imposed a fine of £20,000 on Hungryhouse, during the review of its acquisition by Just Eat, for failing to provide certain documents without reasonable excuse. The information gathering process employed by Hungryhouse had failed to identify responsive documents, and the CMA found that Hungryhouse should have been aware that this was a substantial risk. In 2019, the CMA imposed a fine of £15,000 on AL-KO for late provision of certain responsive documents to two CMA document requests without reasonable excuse. Under section 117 of the Enterprise Act, it is a criminal offence to supply false or misleading information to the CMA, knowingly or recklessly.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

See question 11 for details of the timetable. There is a statutory, 40-working-day Phase I timetable that the CMA must follow. The CMA has the power to 'stop the clock' (eg, in circumstances where the parties have not responded to an information request). The CMA can also use its 'stop the clock' powers in relation to the four-month period that applies to completed mergers (see question 9). This period may also be extended in certain circumstances. To increase the speed of Phase I review, the CMA's Annual Plan 2018/2019 set a target of approving at least 70 per cent of less complex mergers within 35 working days and seeks to complete 70 per cent of Phase II cases without an extension to the 24-week statutory deadline. The basic Phase II period is 24 weeks from the date of the Phase I reference and can be extended by eight weeks for 'special reasons'. The CMA's Annual Plan 2018/2019 set out the target of implementing Phase II merger remedies without the need for an extension to the statutory deadline in at least 80 per cent of cases. The statutory deadline is 12 weeks and can be extended by six weeks for 'special reasons'. The CMA concluded a review and consultation of its remedies guidance across Phase I and Phase II mergers, issuing a revised version of its guidance in December 2018.

However, additional time should be factored in outside the statutory periods for pre-notification discussions with the CMA case team, prior to formal submission of a merger notice. The CMA states in its Guidance on the CMA's jurisdiction and procedure that it strongly encourages allowing a minimum of two weeks from submission of a draft merger notice to formal notification, even for straightforward cases, and this can be significantly longer for more complicated cases. Pre-notification discussions from submission of a substantially complete draft merger notice to the start of the statutory timeline take, on average, between four and six weeks.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The EA provides for two phases of investigation. First the CMA carries out a preliminary (Phase I) investigation to decide whether there is or may be a relevant merger situation and there is a realistic prospect that the merger will result in an SLC, in which case, it has a duty to refer the merger for a Phase II investigation. Where a reference is made, the CMA then launches a detailed investigation by an Inquiry Group to consider

whether the merger has resulted, or may be expected to result, in an SLC and, if so, how to remedy, mitigate or prevent such effects.

In making its Phase I assessment, the CMA will gather supplementary information from the merging parties and will seek to verify that information with third parties (eg, competitors, major customers or suppliers; see question 29). The CMA will conduct a 'state of play' meeting and, where competition issues are raised, it will generally meet with the parties to discuss their submissions (an 'issues meeting'). To help the parties prepare for this meeting, the CMA sends an 'issues letter' to the parties to the merger. This will set out the core arguments and evidence in favour of a reference in the case. Following the issues meeting, all of the evidence including the main parties' and any third parties' submissions will be considered within the CMA. Following an internal CMA case review meeting, there is a separate decision meeting at which the case is debated and scrutinised. The final decision is then communicated to the parties to the merger.

The major steps followed in a Phase II investigation are gathering information, issuing questionnaires, hearing witnesses, verifying information, providing a statement of issues, considering responses to the statement of issues, notifying provisional findings, notifying, considering and implementing possible remedies, considering exclusions from disclosure and publishing reports.

All decisions (ie, that a case is not a relevant merger situation or acceptances of undertakings in lieu of a reference), Phase II references and clearance or prohibition decisions are published on the CMA's website, subject to excision of business secrets. The decision will also be announced through the Regulatory News Service.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

The EA imposes a duty on the CMA to refer a relevant merger situation for further investigation at Phase II where it has a positive and reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that a relevant merger situation will lessen competition substantially in any market in the UK. The CMA may exercise a discretion not to refer in three circumstances:

- where the market is not of sufficient importance;
- where the substantial lessening of competition (SLC) would be outweighed by benefits to consumers (rare); or
- where the arrangements are not sufficiently advanced or likely to proceed.

Following a reference, the CMA will then conduct a more detailed investigation to determine whether a relevant merger situation has been created and, if so, whether it has resulted, or may be expected to result, in an SLC within any market or markets in the UK for goods or services. Where the CMA concludes that the merger situation has resulted or is likely to result in an SLC, it will have to determine the appropriateness of taking remedial action and the action to take (itself or by others, such as the government, regulators or public authorities).

The CMA merger assessment guidelines provide that a merger may be expected to lead to an SLC where it can be expected to reduce rivalry to such an extent that competitive incentives are dulled, to the likely detriment of customers (eg, through higher prices, or reduced choice, quality or innovation). In making the assessment, the CMA will draw up theories of harm to provide a framework for its assessment and to compare the prospect for competition with the merger against a counterfactual situation without the merger. In assessing whether there may be an SLC, the CMA will generally conduct analysis under the following heads (although not necessarily systematically): definition of

relevant geographical and product markets, measures of concentration, horizontal mergers – unilateral and coordinated effects, non-horizontal mergers – vertical effects, efficiencies, entry and expansion and countervailing buyer power. The guidelines and recent cases indicate, however, an increasing reliance on mechanisms for direct analysis of competitive effects in merger cases and a move away from a detailed assessment of market definition (see, for example, *Unilever/Alberto Culver* and *Zipcar/Streetcar*).

## 20 | Is there a special substantive test for joint ventures?

When a joint venture constitutes a relevant merger situation, the substantive test for clearance will be the same as for any other merger (see questions 19 and 21).

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

The CMA is concerned about horizontal (unilateral and coordinated), vertical and conglomerate effects of mergers.

In assessing horizontal mergers, the CMA is concerned both with non-coordinated (or unilateral) effects and coordinated anticompetitive effects (see question 19). The possibility of coordinated effects has been an issue in a number of merger cases; see, for example, *Knauf Insulation Ltd/Superglass Insulations Ltd* (the CC prohibited a merger that would remove an independent competitor in an already concentrated market), *James Budgett Sugars Ltd/Napier Brown Foods plc* (the CC concluded that, although it was likely that coordinated effects were present prior to the merger, the merger did not make coordination significantly more sustainable or effective so an SLC could not be expected), *Taminco NV/Air Products and Chemicals Inc* (the CC cleared a merger that would reduce the number of European players on the market from three to two on the basis that Air Products and Chemicals Inc would in any event withdraw from the market), and *DS Smith Plc/Linpac Containers Ltd* (the CC cleared the merger but, given the level of concern expressed by customers, recommended that further investigation by the OFT under the Competition Act 1998 and articles 101 or 102 of the Treaty on the Functioning of the European Union would be justified).

The CMA guidelines indicate that, in its appraisal of mergers, the CMA will also investigate vertical foreclosure effects, that is, mergers that might result in input foreclosure (limiting rivals' ability to compete by deteriorating terms of access to key inputs) or customer foreclosure (limiting access to important customers) leading to an SLC. For instance, in October 2016, the CMA found that the Intercontinental Exchange, Inc (ICE)/Trayport merger would lead to an SLC as a result of vertical foreclosure effects (in particular, that ICE would have the ability and incentive to follow a partial input foreclosure strategy) and ordered the divestiture of Trayport. In July 2017, the CMA referred *Tesco plc/Booker Group plc* for Phase II review to investigate, inter alia, possible vertical effects, although the merger was ultimately cleared unconditionally.

In the context of conglomerate mergers, adverse effects principally result from the fact that the merger may allow the merging firms to foreclose competition through tying or bundling or gain increased market power over a portfolio of products.

The CMA has not specifically investigated common ownership concerns as yet, but it is open for it to do so if relevant in a particular transaction. It is increasingly considering 'loss of innovation' theories of harm for instance in *Ladbroskes/Coral* and *Thermo Fisher/Roper Technologies*.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

Except for the cases where a special regime applies (see question 8), the substantive test for clearance is a solely competition-based test.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

The CMA may consider economic efficiencies both in Phase I and in Phase II, although it has only rarely accepted that they would outweigh any SLC created by a merger.

When considering in Phase I whether the merger may be expected to lead to an SLC, the CMA may consider what efficiency gains are directly created by the merger and whether such efficiency gains would have a positive effect on rivalry in the market so that no SLC would result. In addition, the CMA may take efficiencies into account where they do not avert an SLC, but will nonetheless be passed on after the merger in the form of customer benefits. In this case, the exception to the duty to refer may apply. The CMA cleared the *University Hospitals Birmingham NHS FT/Heart of England NHS FT* merger in August 2017 at Phase I, despite finding SLCs in various elective specialties. The CMA placed significant weight on advice on probable benefits from the sector regulator, which considered that substantial improvements to patient care were expected. In *Digital Property Group/Zoopla* in 2012, the OFT concluded that the merger would have pro-competitive effects (an increased ability to compete with the largest player in the market), which it analysed within an efficiencies framework; however, it also concluded that the loss of competition would be limited, so it is unclear whether the OFT would have been able to clear the merger anyway, even in the absence of those pro-competitive effects.

At Phase II the CMA may also, when considering whether there is or will be an SLC, consider whether efficiency gains that are directly created by the merger would increase rivalry among the remaining firms in the market. In addition, if the CMA decides that the merger has resulted or will result in an SLC, it can consider relevant customer benefits when deciding on the question of remedies. The CMA cleared the *Central Manchester University Hospitals/University Hospital of South Manchester* merger in Phase II in August 2017 despite finding various SLCs, again drawing on views of the sector regulator relating to the expected benefits.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If, following a Phase II review, the CMA concludes by a two-thirds majority of the investigating panel that the merger will have an anti-competitive outcome, it will take steps to remedy, mitigate or prevent the SLC and adverse effects resulting therefrom to the extent that such steps are reasonable and practicable. It may take remedial action itself to preserve or restore the status quo, to increase the competition for the merged firms or to prevent possible exploitative or anticompetitive behaviour on the part of the merged firm. Given that mergers are able to complete prior to investigation by the CMA, in some cases the remedy imposed may involve unwinding the transaction (such as in *ICE/Trayport*, in October 2016). In February 2019, for the first time the CMA issued an unwinding order during an ongoing investigation (in relation to certain integration by the parties) even prior to having reached

a decision in the *Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd* merger inquiry. The CMA may also recommend the taking of action by others.

## Remedies and conditions

### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Undertakings may be offered to remedy any identified adverse competition concerns at both Phase I (to prevent a reference) and Phase II (to remedy any adverse findings the CMA identifies following a reference).

The CMA may only accept undertakings in lieu of reference for a Phase II review in cases where it has concluded that the merger should otherwise be referred for a Phase II review. It has published guidance on the criteria it applies when considering whether to accept undertakings in lieu. Broadly, it will only do so where it is confident that all potential competition concerns it identified would be resolved without need for further investigation. Consequently, they are only likely to be appropriate where the competition concerns raised are remedied in a clear-cut way and the remedies proposed are capable of ready implementation. The CMA has stated in its guidance that it is unlikely to accept behavioural remedies at Phase I. Recent practice indicates that it is becoming more likely that the CMA will require an up-front buyer, for instance, where the package does not relate to a stand-alone business or where there is only a small number of candidate purchasers. In the calendar year to the end of March 2019, the CMA accepted undertakings in lieu of a reference to Phase II in two cases.

Where a reference is made for a Phase II review, and the CMA finds an anticompetitive outcome, it must determine the appropriateness of taking remedial action and the action to take. In doing so, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any resulting adverse effects. In respect of its own actions, the CMA itself has the choice of seeking undertakings or imposing orders. The CMA's order-making power is broad but limited to the factors set out in the EA. The undertakings that can be agreed are not so limited and therefore provide greater flexibility. In each case the CMA must consider the appropriateness of remedies, their cost and proportionality and effectiveness. In the calendar year to the end of March 2019, the CMA accepted remedies in four cases, out of a total of 11 closed Phase II cases.

### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Under the ERRA, parties have five working days to offer UILs after receiving the CMA's Phase I reference decision. However, parties may propose UILs at any stage during Phase I. The CMA has 10 working days from the SLC decision to accept any UILs in principle, and a total of 50 working days from its SLC decision formally to accept UILs (subject to one extension of up to 40 working days for special reasons).

At Phase II, there is a statutory deadline of 12 weeks, extendible once by up to six weeks for special reasons, following the CMA's final report, to implement remedies. Within this period, the CMA consults with the main parties and then publishes a draft set of undertakings or order for third-party comment. Once the undertakings or order are finalised, the CMA publishes a 'notice of acceptance of undertakings' or 'notice of making an order'. After this point, any further implementation of remedies passes to a special committee or inquiry group.

### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CMA can require the same type of remedies in foreign-to-foreign mergers as in domestic mergers, if the merger falls within the CMA's jurisdiction. See question 34.

## Ancillary restrictions

### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Both an agreement that results (or would result) in enterprises ceasing to be distinct (ie, a merger situation), and any provision of the agreement that is directly related and necessary to the implementation of the merger are exempt from the Competition Act 1998 (see Schedule 1). The CMA's substantive and procedural approach to ancillary restraints generally follows that of the European Commission (it will only give guidance on ancillary status where the case gives rise to novel or unresolved questions).

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

#### 29 | Are customers and competitors involved in the review process and what rights do complainants have?

The CMA generally gives third parties the opportunity to intervene and frequently relies on the views of such parties for the verification of information. At Phase I, the CMA will actively seek the views of relevant third parties (eg, competitors, major customers or suppliers) and will request third-party views in all public merger situations by means of an invitation to comment notice published through the Regulatory News Service and on the CMA's website. Third parties also have the opportunity to comment on the purpose and effect of any proposed undertakings in lieu of a reference.

Similarly, where a merger has been referred for a Phase II review, the CMA requires information about the markets involved and invites evidence both from main parties and third parties likely to be affected by the merger. Particular third parties may be invited to attend an individual hearing with the case team or, if the CMA considers it appropriate, it may hold a public or joint hearing for third parties.

Third parties may also be able to bring judicial review proceedings to challenge any decision by which they are aggrieved (see question 32).

### Publicity and confidentiality

#### 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CMA has stated its commitment to transparency while maintaining appropriate confidentiality. Its approach is set out in its statement on Transparency and Disclosure. The fact of a merger notification is published, and third parties are given opportunities to comment. Although meetings and hearings in front of the CMA are generally conducted in private, the CMA may decide to convene at least one public hearing in mergers considered to be of particular public interest, at which third parties are invited to make their views known.

Further, the EA provides for all decisions to be published (although it is the CMA's policy to give an opportunity to request the excision of confidential information from those decisions) and for details of all undertakings and orders that have been agreed and accepted or imposed under the EA to be recorded in a public register of undertakings and orders that can be found on the CMA's website.

As regards protecting commercial information from disclosure, the CMA has confidentiality obligations under part 9 of the EA. Account must also be taken of the Freedom of Information Act 2000 (FOIA), which confers a right for an applicant to be informed in writing of whether the public authority (which includes the CMA and sectoral regulators) holds information of the description specified in the request and, if so, to have that information disclosed. Some important exceptions to the duty on the authority to disclose information under the FOIA exist that may protect information provided under the EA (eg, where disclosure would constitute an actionable breach of confidence or is otherwise prohibited under another piece of legislation). Personal data is also subject to the Data Protection Act 1998 (legislation) such as Part 9 of the Enterprise Act (Data Protection) and the General Data Protection Regulation, which sets out rules for processing data relating to living individuals.

### Cross-border regulatory cooperation

#### 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The EUMR (see the European Union chapter) provides for cooperation between the European Commission and the national competition authorities (NCAs) and the allocation of cases between the European Commission and the NCAs respectively.

As a competent authority in the UK, the CMA receives details of all mergers notified in Brussels. It examines each case, consults other government departments as necessary, and provides the UK's view to DG Competition in Brussels where appropriate. The CMA also represents the UK at hearings convened by the European Commission and attends Advisory Committee meetings.

Further, the EUMR provides for the transfer of cases between the European Commission and the NCAs. The CMA will, if notified of a merger that has been notified to another NCA, send notice to officials in that authority. The case-handlers will then exchange views on the case without exchanging confidential information (the parties can, by waiver, make exchange of confidential information possible). In *Orange/T-Mobile*, the OFT made an application under article 9 of the EUMR for UK aspects of the case to be remitted from the European Commission to the OFT for consideration. Following discussions with the European Commission and Ofcom, however, it was able to satisfy itself that its concerns were fully met by the remedies offered to the European Commission by the parties and withdrew its request. The CMA also has a right to reject an application to the European Commission for a case to be referred to it under article 4(5) of the EUMR where it would otherwise be subject to UK merger review. In *London Stock Exchange/LCHClearnet*, the OFT vetoed the parties' request for review by the European Commission and instead the case was reviewed by the OFT and the NCAs in Spain and Portugal respectively. The CMA may also, in certain circumstances, refer a case to the European Commission under article 22 of the EUMR (either relating solely to the UK part of a transaction, or jointly with other NCAs) (see, for example, *Amadeus/Navitaire*, referral request by the CMA in September 2015, subsequently joined by Austria, Germany and Spain) where it considers that it would be more appropriately investigated by the European Commission (see European Union chapter).

Waivers may also be provided by the parties for the CMA to discuss a case with competition authorities in other jurisdictions (outside the EEA), if relevant.

In its Annual Plan 2019/2020, the CMA has stated that, post-Brexit, international cooperation with other agencies will be crucial and that while it is possible the CMA will not in future be a member of the European Competition Network, the CMA would expect to maintain strong and effective relationships with European competition authorities through new bilateral or multilateral arrangements with the European Commission and EU member states.

## JUDICIAL REVIEW

### Available avenues

#### 32 | What are the opportunities for appeal or judicial review?

The EA provides the Competition Appeal Tribunal (CAT) with power to review decisions adopted in merger cases. Any person aggrieved by a decision of the CMA, or a decision of the Secretary of State, in connection with a reference or possible reference can apply to the CAT. The EA provides that the CAT is to apply 'the same principles as [those] applied by a court on an application for judicial review'.

In a number of cases, a third-party competitor has challenged a decision not to make a merger reference; see, for example, *IBA Health Ltd v OFT* (successful challenge to the decision of the OFT in the CAT not to refer a merger between iSoft and Torex to the CC, upheld on appeal to Court of Appeal), *Unichem v OFT* (the CAT again quashed, at the request of a third-party competitor, a decision by the OFT not to refer a merger to the CC on the grounds that the OFT had failed to test and verify key evidence sufficiently) and in *Celesio v OFT* (application dismissed).

In *Somerfield/Morrisons*, a challenge was made to the CC's decisions that the merger between the parties would result in an SLC and that Somerfield should divest itself of certain stores to approved buyers. The CAT held that, in deciding what was reasonable action appropriate for remedying, mitigating or preventing an SLC, the CC had a clear margin of appreciation. In *Stericycle*, the CAT held that the CC had acted reasonably and within its margin of discretion in ordering the parties to the transaction to unwind parts of their integration and in appointing a hold-separate manager. In January 2010, however, the CAT quashed the decision of the CC in relation to *Ticketmaster/Live Nation*; this followed the concession by the CC that the appellant (CTS Eventim) had an arguable case that the CC's procedure had not been fair. In May 2010, the CC cleared the transaction for a second time. In November 2016, ICE appealed the CMA's finding of an SLC in *ICE/Trayport* and its direction to divest Trayport, arguing that the CMA erred in various ways in its assessment and that its direction was ultra vires, irrational and disproportionate. The CAT rejected most of ICE's grounds, upholding only one aspect, that a subsidiary part of the decision was not sufficiently reasoned, and remitting that point to the CMA for reconsideration. The CMA subsequently confirmed its decision on that aspect of the case.

The CC's prohibition of the *Akzo Nobel/Metlac* merger in 2012 was unsuccessfully appealed to the CAT on grounds including that Akzo Nobel was not 'carrying on business in the UK' and then the Court of Appeal, which also upheld the prohibition. Permission to appeal to the Supreme Court was rejected in December 2014. In *Groupe Eurotunnel/Sea France*, the parties appealed to the CAT, which quashed the CC's decision imposing remedies and remitted the case to the CC for reconsideration of whether two enterprises had ceased to be distinct. The CMA (succeeding the CC) confirmed the original findings in June 2014 and the Supreme Court ultimately upheld the CC's original remedies.

### Time frame

#### 33 | What is the usual time frame for appeal or judicial review?

An application to the CAT for judicial review must be made within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the reasons for the decision, whichever is the earlier. The cases that have been heard by the CAT under the EA regime have generally been dealt with quickly, within two to five months, and in some cases within a month of the case being registered with the CAT (for example, *IBA Health Ltd v OFT* and *Ticketmaster/Live Nation* (following the CC's concession – see question 32)).

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Between 1 April 2018 and 31 March 2019, the CMA gave unconditional clearances at Phase I to 41 mergers, accepted UILs in two cases and referred 11 cases to Phase II. Of the 11 Phase II reviews that were completed in the same period, three were unconditionally cleared and four were cleared subject to remedies.

Merger references considered by the CMA over the past few years have related to a broad range of sectors, including supermarkets, hospitals, platforms and consumer products.

### Reform proposals

#### 35 | Are there current proposals to change the legislation?

In October 2017, BEIS published a green paper on possible changes to the current public interest intervention regime. The changes are intended to be implemented in two phases. The short-term reforms came into force in June 2018. These reforms are intended to expand the merger control regime to capture small transactions relating to military and dual-use sectors, computing hardware and quantum technologies (see question 8 for details). The consultation on the long-term reforms closed in January 2018. These reforms are intended to introduce a new notification regime for mergers relevant to national security and critical infrastructure. In July 2018, BEIS published a White Paper on the proposed new regime, which would also give the government the right to call in for review transactions that could give rise to national security risks. The White Paper closed in October 2018 and at the time of writing, no conclusions have been published.

On 25 February 2019, the CMA published preliminary proposals for legislative reforms that include merger control reforms (see question 36).

At this stage, it is not clear what the changes occasioned by Brexit will be in relation to the UK competition regime.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 25 February 2019, the CMA's recently appointed chair, Lord Tyrie, made a number of proposals to BEIS. The proposed reforms include proposals to shift to mandatory notification of mergers above a certain threshold, and introduce a standstill obligation designed to prevent parties from proceeding with the transaction prior to the CMA's approval. The CMA is also proposing that higher or full-cost recovery from merging parties be reconsidered (the CMA states that it currently recovers around half the cost of its mergers work from fees paid by merging parties).

In its Annual Plan 2019/2020, the CMA lists as one of its priorities the promotion of better competition in online markets. The CMA has recently investigated several tech-related mergers (such as its review of PayPal's acquisition of iZettle, cleared in June 2019 after a Phase II review). It has remarked that a key challenge of merger control in this regard is predicting whether there will be harm to future competition, and stated its intention to increase its understanding of these issues and develop its framework in this regard.

Planning for Brexit also continues. The nature of any changes resulting from Brexit remains uncertain at present. Cases that previously



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would have fallen within the remit of the EU merger control regime – often the biggest cases – may in future also require review from the CMA if the national jurisdictional thresholds are met. It is expected that significantly more transactions (approximately 30 to 50 more Phase I cases per year) would be notified to the CMA post-Brexit.

# United States

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

Section 7 of the Clayton Act, enacted in 1914 and amended in 1950, is the principal US antitrust statute governing mergers and acquisitions. Section 7 prohibits acquisitions of assets or stock where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'. Transactions may also be challenged under section 1 or 2 of the Sherman Act as unreasonable restraints of trade or as attempts at monopolisation. The Federal Trade Commission (the FTC) also has the authority under section 5 of the FTC Act to challenge a transaction as an 'unfair method of competition'.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) was enacted to give the federal agencies responsible for reviewing the antitrust implications of mergers and acquisitions – the Federal Trade Commission and the Antitrust Division of the Department of Justice (collectively, 'the antitrust agencies' or 'the agencies') – the opportunity to review the antitrust issues presented by certain acquisitions of assets, non-corporate interests or voting securities before those acquisitions are completed. Pursuant to congressional authorisation, the FTC, with the agreement of the Antitrust Division, has promulgated detailed and complex rules (the Rules) governing pre-merger notification under the HSR Act. Both the HSR Act and the Rules were amended significantly in February 2001, and the Rules again underwent significant revision in 2005 and 2011. The antitrust agencies also have jurisdiction to investigate and challenge transactions under the US antitrust laws noted above, whether or not they have been notified under the HSR Act and whether or not they have been consummated.

The Antitrust Division has exclusive federal responsibility for enforcing the Sherman Act; the FTC is an independent administrative agency and has exclusive responsibility for enforcing the FTC Act and joint authority (with the Antitrust Division) over enforcement of the Clayton Act. Although both agencies have jurisdiction to enforce the antitrust laws, any given merger or acquisition will be examined by only one of the two bodies. Which agency will concern itself with any particular transaction is decided by informal discussions between the two agencies and can often be predicted (but not with certainty) on the basis of the agency's relative familiarity with the industry or companies involved.

Mergers and acquisitions can, under some circumstances, also be challenged by private parties and by state attorneys general. The risk of a challenge by private parties has been reduced somewhat by court decisions requiring that such challengers demonstrate a threat that the private party challenger will be injured by the anticompetitive aspects of the transaction (rather than, for example, by the new firm's enhanced effectiveness as a competitor). In situations where a private party has standing to challenge a transaction, that party can seek the same

remedies (including divestiture) that are available to the government, although a private party may be subject to certain equitable defences (such as laches and 'unclean hands'), which might protect a consummated transaction from attack.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The HSR Act requires parties to file a formal notification with the Antitrust Division and the FTC – and to wait a specified number of days (30 days in most transactions) while the designated agency reviews the filings – before consummating certain acquisitions of assets, non-corporate interests or voting securities. The HSR Act can apply to any kind of transaction (be it an acquisition of a majority or minority interest, a joint venture, a merger or any other transaction that involves an acquisition of assets, non-corporate interests or voting securities).

Although the term 'assets' is not defined in the HSR Act, the agencies have taken the position that it should be given a broad interpretation similar to that which it has been given by the courts in interpreting section 7 of the Clayton Act. Under these principles, it is clear that acquisitions of assets – within the meaning of the HSR Act – will include acquisitions of both tangible and intangible assets. The acquisition of exclusive patent licences, for example, may require notification.

The Rules define 'voting securities' broadly to include, generally speaking, any security in a corporate entity that either currently entitles the holder to vote for the election of directors, or is convertible into such a security. The acquisition of corporate securities that do not at present possess, or are not convertible into securities that will possess, such voting power is exempt from the HSR Act. Although they are defined as voting securities, the Rules exempt the acquisition of convertible securities, options and warrants at any time before they are converted or exercised. It may, however, be necessary to make a filing before such securities can be converted (provided that the relevant jurisdictional tests are met at the time of conversion).

An acquisition of interests in a non-corporate entity (eg, an LLC or partnership) that confers the right to either 50 per cent or more of the profits or, in the event of dissolution, 50 per cent or more of the assets of the entity is considered to be an acquisition of the underlying assets of the entity. In other words, the Rules do not treat non-corporate interests as 'voting securities', regardless of the voting rights that those interests may have.

#### 3 | What types of joint ventures are caught?

If it involves an acquisition of non-corporate interests or voting securities, the formation of a for-profit joint venture may be subject to the HSR Act. Generally, not-for-profit joint ventures are exempt, although in certain cases they may be reportable. The Rules contain a special provision governing the formation of new corporations and corporate

joint ventures (new companies). As a general matter, where two or more persons contribute to form a new company, and as a result receive voting securities of this new company, the Rules treat the contributing parties as acquiring persons, and the new company as the acquired person. In these cases, the Rules provide a special jurisdictional test based on the size of all contributors and the size of the new company itself.

Additionally, if the acquisition is of interests in a joint venture that is formed as a non-corporate entity, only the acquiring person (if applicable) that will hold 50 per cent or more of the interests in the entity will be subject to HSR reporting obligations. If no acquiring person will hold 50 per cent or more following the acquisition, the formation of the non-corporate joint venture is not reportable.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The requirement to comply with the HSR Act is not limited to transactions that involve a change of control. As explained in greater detail below, any acquisition that results in the acquiring person holding voting securities of another company valued in excess of \$90 million (current threshold) may require a filing, even if that amount represents a very small percentage of the total outstanding voting securities of the target. (However, acquisitions of less than 50 per cent of a non-corporate entity are not reportable, and there is a limited exemption for up to 10 per cent of a corporation's voting securities.)

The HSR Rules do include a definition of 'control'. However, this definition is used primarily to determine which companies should be included within the 'acquiring' or 'acquired' persons (see below). The basic principles used in determining if control exists are as follows:

- controlling a corporate entity means either holding 50 per cent or more of its outstanding voting securities, or having the contractual power presently to designate 50 per cent or more of its directors;
- controlling a partnership, LLC, or other non-corporate entity means having the right to either 50 per cent or more of its profits or, in the event of its dissolution, 50 per cent or more of its assets;
- a natural person will never be deemed to be controlled by any other entity or person; and
- controlling a trust means having the contractual power to remove and replace 50 per cent or more of the trustees.

#### Thresholds, triggers and approvals

##### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The initial determination of whether the notification requirements of the HSR Act may be applicable to a particular acquisition of assets, non-corporate interests or voting securities focuses upon the following jurisdictional issues:

- whether either the acquiring or acquired persons are engaged in US commerce or in any activity affecting US commerce (the commerce test);
- the amount of assets, non-corporate interests or voting securities that will be held as a result of the acquisition (the size-of-the-transaction test);
- where the size of the transaction is US\$359.9 million (as adjusted annually) or less but greater than US\$90 million (as adjusted annually), the magnitude of the worldwide sales and assets of the acquiring and acquired persons (the size-of-the-parties test), and
- whether any exemptions apply to the transaction. The HSR dollar thresholds are adjusted annually to reflect changes in the GNP. The thresholds in this chapter will be in effect from 3 April 2019 until early 2020.

#### The commerce test

This requires that either the acquiring or acquired party be engaged in US commerce or in any activity affecting US commerce.

#### The size-of-the-transaction test

The size-of-the-transaction test looks at the assets or voting securities that will be held by the acquiring person as a result of a proposed acquisition. In other words, any voting securities or, in some cases, assets held by the acquiring person prior to the transaction, together with those assets or voting securities to be acquired in the acquisition in question, must be considered. Likewise, the acquisition of non-corporate interests of an entity must be aggregated with any interests currently held by the acquiring person in that same entity to determine whether or not the acquiring person holds 50 per cent or more of the entity, thus potentially requiring HSR notification.

An HSR filing is not required in connection with any particular acquisition unless it will result in the acquiring person holding assets or voting securities having an aggregate total value in excess of US\$90 million (as adjusted annually). In most cases, this threshold is cumulative. For example, if an acquirer already owns US\$50 million of voting securities of an issuer, and seeks to acquire US\$45 million in voting securities of that same issuer, the US\$45 million acquisition will result in the acquirer 'holding' voting securities of US\$95 million.

However, while the acquisition of a 50 per cent or more interest in a non-corporate entity is considered an acquisition of the assets of the entity, the value of the interest is not the value of 100 per cent of the underlying assets, but rather only of the percentage interest held as a result of the acquisition.

#### The size-of-the-parties test

The size-of-the-parties test does not apply to transactions resulting in holdings valued in excess of US\$359.9 million (as adjusted annually). For all smaller transactions, the test remains in effect.

The size-of-the-parties test looks at the size of both the acquiring and acquired person and, generally speaking, is satisfied if one party (including all entities in its corporate family) has worldwide sales or assets of US\$18 million or more (as adjusted annually), and the other has worldwide sales or assets of US\$180 million or more (as adjusted annually). Sales and assets, as a general rule, are defined as those set forth in a party's last regularly prepared income statement and balance sheet.

It is important to note that 'acquiring person' and 'acquired person' are terms of art under the HSR Act and the Rules. To summarise a complex definition, these terms include not only the entity making the acquisition and the entity being acquired, but also the entire corporate family of which each is a part. Thus, assuming that a corporate family's assets or sales, or both, are US\$180 million or more, a purchase or sale of assets or voting securities by any subsidiary of that corporate family would satisfy the size-of-the-parties requirement under the HSR Act if the other party to the transaction was part of a corporate family that had assets or sales of US\$18 million or more (as adjusted annually).

#### Exemptions

Once it is determined that a proposed transaction meets the jurisdictional tests described above, the next step in determining if a pre-merger notification filing is required is examining whether the transaction qualifies for any of the exemptions set forth in the HSR Act or the Rules.

There are a variety of such exemptions, each of which excuses certain categories of transactions from the notification and waiting requirements of the HSR Act. For example, the notification requirements do not apply to:

- the acquisition of non-voting securities;
- certain acquisitions of voting securities 'solely for the purpose of investment';

- the acquisition of goods or realty in the ordinary course of business;
- certain acquisitions that require the prior approval of another federal agency;
- stock dividends and splits;
- certain acquisitions by securities underwriters, creditors, insurers and institutional investors; and
- certain financing transactions where the acquiring person contributes only cash to a non-corporate entity and will no longer control the entity after it realises its preferred return.

The FTC has also adopted a specific set of exemptions applicable to transactions involving non-US companies in which the US sales or assets involved are both below certain thresholds (as adjusted annually). These are described in response to question 7.

The application of each of these exemptions will, of course, depend upon the particular circumstances of the transaction, and upon the limits and conditions to those exemptions set forth in the HSR Act and the Rules.

Finally, as noted above, transactions that fall below the HSR thresholds or are otherwise exempt from HSR reporting can still be investigated and challenged, even after they are consummated. Some of the recent challenges are described in greater detail in response to question 24.

## 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the threshold requirements described above are met and no exemption is available (such as those described above), filing under the HSR Act is mandatory; that is, the proposed transaction cannot be consummated until the filing is completed and applicable waiting periods, discussed below, have expired. There is no scheme for voluntary filings as such, but parties to non-reportable transactions can bring their transaction to the attention of the agencies.

## 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

In certain circumstances, the acquisition of foreign assets or voting securities of a foreign company is exempt from the pre-merger notification requirements of the HSR Act. The Rules reflect the agencies' views that certain foreign acquisitions may affect competition in the United States, but that pre-merger notification should not be required if there is insufficient nexus with US commerce.

### Acquisitions of foreign assets

The HSR Rules provide that acquisitions of foreign assets by US and non-US companies shall be exempt from the HSR Act unless the foreign assets that would be held as a result of the acquisition generated sales in or into the US exceeding US\$90 million during the acquired person's most recent fiscal year. Even if the acquisition exceeds this threshold (as adjusted annually), the acquisition will nonetheless be exempt if:

- both the acquiring and acquired persons are foreign;
- the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than US\$198 million; and
- the assets that will be held as a result of the transaction are valued at US\$359.9 million or less.

### Acquisitions of voting securities of a non-US issuer

With respect to acquisitions of a foreign issuer by a US person, the Rules provide that such an acquisition shall be exempt from the HSR Act unless the foreign issuer (together with any entities it controls) either holds

assets in the US valued over US\$90 million, or made aggregate sales in or into the US of over US\$90 million in the most recent fiscal year.

The Rules also make clear that if interests in several foreign issuers are being acquired from a common parent company, the assets and sales of all the target companies must be aggregated to determine whether either of the US\$90 million thresholds described above (as adjusted annually) is exceeded.

With respect to acquisitions of voting securities of a foreign issuer by a foreign person, the Rules provide that such an acquisition shall be exempt unless it confers on the acquiring person control of the target issuer (ie, it is an acquisition that will give the acquiring person 50 per cent or more of the voting stock of the target) and the target, again, either holds assets in the US valued at more than US\$90 million, or made aggregate sales in or into the US of more than US\$90 million in the most recent fiscal year. As with acquisitions by US persons, if controlling interests in multiple foreign companies are being acquired from the same parent company, the US assets and sales of all the target companies must be aggregated to determine whether either of the US\$90 million thresholds (as adjusted annually) is exceeded. Even if either of the US\$90 million thresholds described above (as adjusted annually) is exceeded, the transaction will nonetheless be exempt where:

- both the acquiring and the acquired persons are foreign;
- the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than US\$198 million; and
- the value of the voting securities that will be held as a result of the transaction is US\$359.9 million or less.

Finally, if both foreign assets and foreign voting securities are being acquired from the same acquired person, the US sales attributed to both the assets and to the foreign issuer must be aggregated to determine whether the US\$90 million threshold (as adjusted annually) is exceeded.

The Rules also provide an exemption from the requirements of the HSR Act for acquisitions of foreign assets or voting securities where the parent of the buyer or seller is the government of that same foreign jurisdiction.

## 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Certain industries (including banking, telecommunications and media, transport and energy) have special legislation governing mergers and acquisitions. In these industries, approval of other federal agencies may be required for certain transactions. Transactions in some industries may require review by both the antitrust agencies and the agency more specifically charged with overseeing the industry (for example, the Federal Communications Commission for telecommunications mergers). Other industries have certain restrictions on foreign ownership of US assets. Finally, transactions that have national security implications may also require special notification and approval by the Committee on Foreign Investment in the United States (organised within the US Department of Treasury).

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

## 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for making a filing under the HSR Act. The parties can submit their filings at any time after the execution of a letter of intent (which can be non-binding) or a definitive agreement. However,

it is crucial to note that if a transaction is covered by the HSR Act, it cannot be consummated until all required filings have been made and the applicable waiting periods have been observed. Additionally, even after filings are submitted, it is a violation of the HSR Act for an acquiring party to take steps that have the effect of transferring beneficial ownership of the target business to the acquirer prior to the expiry of the waiting period. Failure to comply with the HSR Act can result in a fine of up to US\$42,530 per day (as adjusted) and the agencies may seek to unwind a transaction that has been consummated in violation of the HSR Act.

In general, the level of compliance with the HSR Act has been extremely high. In those instances in which a required filing has not been made, or the waiting period not observed, the agencies have not hesitated to seek significant penalties. The agencies have brought at least 18 failure to file cases in the past 12 fiscal years, and obtained fines ranging from US\$180,000 to US\$11 million. In 2016, the Department of Justice (DOJ) filed suit against ValueAct Capital for failure to make an HSR filing when purchasing over US\$2.5 billion of Baker Hughes and Halliburton voting securities. In not making a filing, ValueAct relied on the investment-only exemption, but the DOJ argued that exemption was not applicable when ValueAct tried to influence the companies' business decisions during the course of their proposed merger. In June 2016, ValueAct agreed to pay a US\$11 million fine. In 2017, Duke Energy Corporation was required to pay US\$600,000 in civil penalties when it acquired Osprey Energy Center from Calpine Corporation before filing the required notification form and observing the required waiting period under the HSR Act. More specifically, the DOJ alleged that, pursuant to a tolling agreement, Duke Energy acquired beneficial ownership of Osprey's business before Duke Energy had fulfilled its obligations under the HSR Act.

Individual investors are also at risk when not complying with the HSR Act. In January 2017, the FTC charged two individuals in two different cases with violating the HSR Act. In one of the cases, an investor was fined for failure to file under the HSR Act for acquisitions of company stock post-IPO. The investor's pre-IPO ownership of Colfax Corporation was above 50 per cent, and therefore any subsequent purchase would have been exempt even though the original acquisition of these shares was also exempt from the HSR Act. However, because of the IPO, his holdings, which were valued in excess of the HSR Act threshold, decreased below the control level to approximately 20.8 per cent. Thus, Rales was required to file and observe the HSR waiting period prior to making any post-IPO purchase of Colfax Corporation voting securities. In the second case, the FTC fined Mr Ahmet Okumus US\$180,000 for failing to report his purchases of voting securities in the internet services company Web.com through his hedge fund. Although the Commission found his HSR violation to be inadvertent, it still sought penalties because this was Mr Okumus' second HSR violation in two years. Similarly, in December 2018, the FTC fined James Dolan, the Executive Chairman and a Director of Madison Square Garden Company (MSG) US\$609,810 for failing to report his receipt in September 2017 of MSG restricted stock units in connection with his compensation. Mr Dolan had filed HSR in August 2016 for the US\$50 million (as adjusted) HSR threshold and was thus permitted under the HSR Act to acquire additional MSG voting securities valued up to the US\$100 million (as adjusted) threshold. The MSG shares received by Mr Dolan in September 2017 resulted in Mr Dolan holding MSG shares valued in excess of the US\$100 million (as adjusted) threshold. This was Mr Dolan's second HSR violation.

## 10 | Which parties are responsible for filing and are filing fees required?

If a transaction is subject to the filing requirements of the HSR Act, buy-side and sell-side parties to the transaction must make separate filings with the antitrust agencies. All acquiring persons that are required to

file must pay a filing fee that is calculated according to the total value of the securities or assets to be held as a result of the transaction. The parties may agree to split the fee or even have the acquired person pay the fee. Transactions valued at less than US\$180.0 million are subject to a filing fee of US\$45,000. Transactions valued at US\$180.0 million or more but less than US\$899.8 million are subject to a filing fee of US\$125,000. Transactions valued at US\$899.8 million or more are subject to a filing fee of US\$280,000. This fee must be submitted at the time the notification form is filed, or the waiting period will not begin.

## 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

If a transaction is subject to the HSR Act, and a filing is thus required, the acquisition must be delayed for a 30-day period (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), a 15-day period) while the agencies review it. If the agencies take no action, the transaction may be consummated when the waiting period has expired. The agencies do not issue a formal decision clearing a transaction.

To the extent that a merger is subject to the HSR Act, the initial waiting period generally begins as soon as both parties to the transaction have made the requisite filing with the antitrust agencies. In cases involving tender offers and other acquisitions of voting securities from third parties, the waiting period begins as soon as the acquiring person has made the requisite filing, although the acquired party must file within a prescribed time.

If any deadline for governmental action falls on a weekend or a legal public holiday, the deadline is automatically extended to 11.59pm Eastern Time the next business day.

### Early termination of the waiting period

The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the agencies may, at their discretion, grant such requests. It should be noted that when early termination is granted, the agencies are required to publish notice of their action in the Federal Register. This notification only identifies the acquiring person, the acquired person and the acquired entity. None of the confidential business information filed by the parties is disclosed.

### Extension of the waiting period

The agency responsible for reviewing a particular transaction may, before the end of the initial 30-day waiting period, issue what is generally referred to as a 'second request' seeking additional information from the parties to a transaction. The issuance of a second request extends the waiting period to the 30th day (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), the 10th day) after the date of substantial compliance with the request for additional information. The procedural aspects of a second request are discussed further in question 18 below. In some cases, the parties may also withdraw and 'refile' under the HSR Act, which starts a new initial 30-day (or 15-day) waiting period. This voluntary process gives the agency additional time to review the deal and may avoid the need for a second request.

### Pre-clearance closing

## 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

A transaction subject to the HSR Act may not close prior to the expiry or early termination of the applicable waiting period. Failure to comply can result in a fine of up to US\$42,530 per day (as adjusted) and the

agencies may seek to unwind a transaction that has been consummated in violation of the Act. As noted in question 9, the agencies have imposed fines for failure to file and observe the waiting period.

In August 2015, the FTC filed a complaint against Third Point LLC and three affiliated hedge funds (collectively, Third Point) relating to their failure to make an HSR filing and observe the waiting period when acquiring Yahoo! Inc (Yahoo) shares in 2011. The complaint alleged that the investment-only exemption was inapplicable because Third Point took certain actions inconsistent with passivity, such as contacting potential Yahoo board members and making statements about proposing directors for Yahoo. Third Point settled with the FTC and the FTC did not seek civil penalties because the violation was inadvertent and it was Third Point's first HSR violation. In another case dealing with the investor-only exemption, in September 2015, Leucadia National Corporation (Leucadia) settled a complaint brought by the FTC, where the FTC argued the investment-only exemption did not apply when as a result of a transaction, Leucadia's ownership interest in Knight Capital Group, Inc converted into shares of a new entity (KCG Holdings) worth approximately US\$173 million. The FTC argued that Leucadia should have made an HSR filing and observed the waiting period, because the investment-only exemption does not apply when an institutional investor acquires voting securities of the same type as any entity included within the acquiring person, and in this instance, both the acquiring and acquired persons were broker-dealers. This was Leucadia's second HSR violation, and it agreed to pay civil penalties of US\$240,000.

In October 2015, Len Blavatnik, an investor, agreed to pay civil penalties of US\$656,000, settling a complaint brought by the FTC for his failure to make an HSR filing relating to his August 2014 acquisition of TangoMe shares worth approximately US\$228 million. Blavatnik previously violated the HSR Act in 2010, and did not consult HSR counsel prior to acquiring TangoMe's shares.

Merging parties may also be fined for 'gun jumping' – taking steps that have the effect of transferring beneficial ownership of the target business prior to the expiry or early termination of the applicable waiting period or periods. In the most recent example of such an enforcement action, in November 2014, a federal court ordered Flakeboard America Limited and SierraPine, both makers of MDF particleboard, to pay to the DOJ fines of almost US\$5 million for pre-closing actions that allegedly violated HSR gun jumping and Sherman Act laws under a settlement agreement. Additionally, the Antitrust Division, in January 2010, fined Smithfield Foods and Premium Standard Farms for an alleged gun jumping violation where Smithfield entered into a merger agreement with Premium Standard and reserved for itself the right to review certain contracts of Premium Standard. The Antitrust Division claimed that the parties violated the HSR Act when Premium Standard submitted three large, multi-year contracts to Smithfield for approval, alleging that this action was sufficient to show that the acquirer had taken 'operational control' of the target prior to the expiry of the HSR Act waiting period. The parties agreed to pay a US\$900,000 fine.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Unless an exemption applies, sanctions are applied in cases involving closing before clearance in foreign-to-foreign mergers in the same manner as the sanctions are applied to domestic transactions. For example, in 1997, Mahle GmbH (Mahle), a German piston manufacturer, and Metal Leve, SA (Metal Leve), a Brazilian competitor, were each fined US\$2.8 million for failure to file and observe the HSR waiting period prior to closing an acquisition by Mahle of 50.1 per cent of Metal Leve. Both companies manufactured diesel engine parts through US subsidiaries.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no special remedy rules or practices applicable to foreign-to-foreign mergers. If the transaction gives rise to competitive issues in the United States, those issues must be resolved before the transaction can proceed.

#### Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

The Rules contain provisions that are applicable only to tender offers. As noted in question 11 in the discussion of the waiting periods, if the transaction in question is a cash tender offer (or a transfer in bankruptcy covered by 11 USC section 363(b)), the statutory initial waiting period is 15 days (instead of the usual 30 days). If a second request is issued in such a transaction, the waiting period is extended for 10 days (instead of the usual 30 days) after the date on which the acquiring person substantially complies with the request. Also, for any tender offer, failure to substantially comply with a second request by the acquired person does not extend the waiting period. Further, in cases involving tender offers or other acquisitions of voting securities from third parties, the waiting period begins when the acquiring person files. All other aspects of the HSR Act are equally applicable to public and non-public transactions.

#### Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Notification and Report Form (the Form) that must be submitted to comply with the HSR Act requires the filing party to provide basic information about its US revenues, corporate organisation and certain minority shareholdings of entities engaged in an industry similar to the target's operations on a worldwide basis, and the structure of the transaction (including the executed purchase agreement or letter of intent), as well as a variety of business documents. In particular, the parties are required to submit all studies, surveys, analyses and reports prepared by or for any officers or directors (of any entity within the filing party) for the purpose of evaluating or analysing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographical markets. Documents routinely found to be responsive, and filed by parties, include board and management presentations, confidential information memoranda, synergy and efficiency analyses. Documents need not be formal presentations, and emails may need to be filed if they meet the criteria set forth above.

The antitrust agencies consider these documents highly relevant to their initial evaluation of the antitrust implications of a transaction. The agencies also require submission of certain documents analysing synergies or efficiencies to be achieved in the transaction. Private equity and other investment funds making acquisitions must also include certain activities of 'associates' and portfolio investments that are not 'controlled' (see the definition of control in question 4) by the acquirer but are engaged in an industry similar to the target's operations. (Refer to the FTC's website, <https://www.ftc.gov/enforcement/premerger-notification-program>.)

Unlike, for example, the European Union's Form CO, completion of the Form does not require any discussion or description of the relevant markets or the competitive conditions in those markets. Preparation of the Form can take a few days to a number of weeks, depending principally on whether the company has submitted a filing in the recent past and on how the company organises its data.

An officer or director must certify under penalty of perjury that the information in the HSR form is true, correct and complete.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

Once the parties to a transaction file their Forms, the FTC will initially review the Forms to ensure that they are complete and comport with the transmittal rules. Then, the two antitrust agencies decide between themselves which one of them will review the transaction beyond the filings themselves and publicly available information. If either the FTC or the Antitrust Division wants to conduct such further review of the transaction, it notifies the other agency and obtains 'clearance'. If both agencies want to investigate the merger, the matter is assigned through an internal liaison process. Often, one of the agencies will have greater expertise than the other with respect to a particular industry or company.

Once a transaction has been assigned to a particular agency, a staff attorney will normally contact the parties' lawyers to ask for additional information. Responding to such a request is not mandatory during the initial waiting period, but a failure to respond may leave the agency with important issues unresolved that may result in the issuance of a formal second request. The FTC and the DOJ have published guidelines listing the types of information and documents that may be useful to provide during the initial waiting period (available on the FTC's website at <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources> and on the DOJ's website at <https://www.justice.gov/atr/merger-review-process-initiative-policy>).

Often, the information provided to the agency during the initial waiting period will be sufficient to allow the agency to terminate its investigation. It is not uncommon for the parties to submit some form of letter or 'position paper' to the agency during the initial waiting period, addressing the questions of the agency and explaining in detail why the transaction will not substantially lessen competition or create a monopoly. It is also very common for the agency to contact the parties' customers and competitors to obtain additional information regarding the industry, and to interview executives from the merging firms.

For those mergers that continue to raise significant antitrust issues at the end of the initial waiting period, the procedure available to the agencies is to issue a 'request for additional information and documentary material' or, as it is more commonly referred to, a 'second request'. In some cases, the parties may also withdraw and 're file' under the HSR Act, which starts a new initial 30-day (or 15-day) waiting period. This voluntary process gives the agency additional time to review the deal and may avoid the need for a second request.

A second request is a detailed set of interrogatories and document demands designed to provide the agency responsible for reviewing the transaction with information on issues such as market structure, entry conditions, competition, marketing strategies, and the rationale of the acquisition under review.

Compliance with a second request may be a burdensome and time-consuming task, requiring the parties to a transaction to produce substantial volumes of documents and to answer detailed questions. The burden may be particularly great in cases involving parties located outside the United States, because the rules require all documents submitted in response to a second request to be translated into English.

However, the agencies have implemented a number of reforms to the second request process designed to reduce the burdens associated with compliance by, among other things, limiting the scope of initial document requests and the number of company personnel whose files must initially be searched. Parties often negotiate with the reviewing agency to attempt to further limit the scope of material requested.

Either during the period of compliance, or following the submission of the complete response, it is not uncommon for the agency reviewing the transaction to take the sworn testimony of senior executives of the parties to the transaction. These oral examinations, or depositions, can cover a wide range of issues and are usually designed to explore the rationale for the transaction, entry issues, competitive conditions and other strategic issues. The depositions can be useful vehicles for the parties to put forward their views on the likely competitive impact of the transaction.

Following the parties' compliance with the second request (which can take a number of months), the agency responsible for reviewing the particular transaction must decide whether to let the transaction proceed, or to seek a court order enjoining the transaction, or take other enforcement action for alleged violation of the antitrust laws. Alternatively, the parties and the responsible agency may enter into a 'consent agreement' – a form of settlement that is designed to address the anticompetitive effect that the agency believes may result if the transaction proceeds as planned. If the agency in question takes no action, the parties are free to consummate the transaction at the end of the second 30-day waiting period.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

As noted, if a transaction is subject to the HSR Act, the closing of the transaction must be delayed for an initial 30-day waiting period (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), a 15-day period) following the filing of the Form. The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the agencies may, at their discretion, grant such requests. If the agency decides to issue a request for additional information and documentary material ('second request'), the applicable waiting period will be extended until the 30th day (or the 10th day in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b)) following substantial compliance with the second request.

Although they have not taken a public position on expediting requests for early termination as a result of economic circumstances, the antitrust agencies have been sensitive to the need to complete investigations of mergers involving distressed firms promptly. The agencies generally grant requests for early termination swiftly for transactions clearly raising no competitive concerns.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

As noted earlier, the Clayton Act prohibits acquisitions the effect of which 'may be substantially to lessen competition or to tend to create a monopoly'. As a general matter, in merger cases, the US federal courts have largely adopted the analytical methodology set out in the Horizontal Merger Guidelines issued by the antitrust agencies. The previous Guidelines were first released in 1992 to guide the antitrust agencies' determination whether to challenge a horizontal merger and describe their approach to counsel and the business community. The current, revised set was published in August 2010.

The unifying theme of these Guidelines is that a merger should not be permitted if it will create or enhance market power or facilitate its exercise. The agencies assess market power by analysing whether the merged entity 'is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives'.

Under the Guidelines, the likelihood that a proposed transaction will create or enhance 'market power' or facilitate its exercise may be established either by direct evidence of likely anticompetitive effects (or actual anticompetitive effects in cases of consummated transactions) or alternatively by circumstantial evidence. The guidelines recognise the potential for merger efficiencies to enhance competition and benefit consumers. In practice, the agencies have found efficiencies most likely to make a difference when likely adverse competitive effects were not great. Also see question 23.

Although the Guidelines have no force of law, they are highly influential in the antitrust agencies' determinations whether to challenge horizontal mergers. The 2010 Guidelines, in particular, downplay the reliance on market definition in the horizontal merger analysis, and provide for certain alternative measurements of anticompetitive effects. Because most horizontal merger investigations in the US are resolved at the agency level, rather than challenged in court, the revised Guidelines provide important insight into how best to address agency concerns.

The Guidelines note that in extreme cases a failing firm defence may be taken into account; however, in practice these situations are very rare.

## 20 | Is there a special substantive test for joint ventures?

Joint ventures involving competitors that completely eliminate competition between the parties and that are intended to exist for at least 10 years are analysed in the same way as all other mergers or acquisitions. In February 2019, the FTC approved a joint venture involving three polyethylene terephthalate (PET) resin producers' acquisition of an under-construction PET production facility. The terms of the final order restrict how the joint venture partners can use the assets in the joint venture. Other competitor collaborations are analysed by the agencies pursuant to a framework described in the agencies' 2000 'Antitrust Guidelines for Collaborations Among Competitors', available at [https://www.ftc.gov/system/files/documents/public\\_statements/300481/000407ftcdojguidelines.pdf](https://www.ftc.gov/system/files/documents/public_statements/300481/000407ftcdojguidelines.pdf).

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

Market share analysis is only one method of antitrust analysis in the US. The responsible agency, if it believes that the transaction may raise competitive concerns, will examine all aspects of competition in the relevant markets. In recent years, the agencies have been particularly concerned about transactions that have combined competitors that sell products or services that are especially close substitutes for each other, which could give rise to unilateral effects, as well as the possibility of coordinated effects. (See the agencies' 2010 Horizontal Merger Guidelines for a more detailed discussion of unilateral and coordinated effects.)

Elimination of potential competition – where one of the merging firms is about to enter the relevant market – has also been a concern, particularly in pharmaceutical mergers. For example, in July 2018 the FTC settled its charges that Amneal Pharmaceuticals' acquisition of an equity stake in Impax Laboratories Inc would likely harm future competition in US markets for seven generic pharmaceutical products by requiring divestitures and licensing arrangements. Also, in January 2017, the FTC claimed Mallinckrodt plc harmed competition when its subsidiary Questcor Pharmaceuticals Inc acquired the US rights to Synacthen Depot, a potential competitor to Questcor's HP Acthar Gel product. Mallinckrodt agreed to grant a licence to develop Synacthen Depot to a licensee approved by the FTC and to pay a fine of US\$100 million. In March 2015, the FTC challenged Impax Laboratories

Inc's US\$700 million acquisition of CorePharma, LLC. To settle the FTC's charges that the acquisition would be anticompetitive, the parties agreed to divest CorePharma's generic pilocarpine tablet line (used to treat dry mouth) and its generic ursodiol tablet line (used to treat cirrhosis and gall bladder diseases). The FTC was concerned that the acquisition would reduce the number of future suppliers in these two drug markets. In November 2014, the FTC challenged Medtronic Inc's US\$42.9 billion acquisition of Covidien plc, alleging that the acquisition would be anticompetitive because both companies were developing drug-coated balloon catheters. At the time there was only one company supplying the product and Medtronic and Covidien were the only companies with products in clinical trials. Medtronic agreed to divest Covidien's drug-coated balloon catheter business to The Spectranetics Corporation.

Vertical concerns are less common, but a number of transactions have been subject to the consent decrees, which the agencies based on vertical theories (see, for example, the 2011 Comcast/NBC Universal joint venture, where the Antitrust Division and the Federal Communications Commission imposed several undertakings, and Google's acquisition of ITA Software, which are further described in question 25). Finally, conglomerate theories or 'portfolio effects' have not, as such, been a genuine source of concern to the antitrust agencies in recent times.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

The antitrust agencies can seek to enjoin only transactions that violate certain substantive antitrust statutes (section 7 of the Clayton Act, section 5 of the FTC Act, and sections 1 and 2 of the Sherman Act). The agencies have often pointed out that they do not and cannot consider non-competition factors in analysing a merger.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Horizontal Merger Guidelines clarify how the antitrust agencies analyse and evaluate claims that mergers will result in efficiencies and lower prices. The FTC Chairman was quoted in 1997 as saying that presentation of efficiencies from a merger 'won't change the result in a large number of cases, [rather they will have] the greatest impact in a transaction where the potential anticompetitive problem is modest and the efficiencies that would be created are great'.

The Guidelines' discussion of economic efficiencies can be summarised as follows:

- they explain the relevance of efficiencies in merger analysis;
- they indicate that the agencies will only consider those efficiencies that are 'merger-specific'; that is, efficiencies that could not be achieved by the parties in the absence of the merger;
- they make it clear the parties to a merger will have to substantiate any efficiency claims by 'reasonable means'. Efficiency claims will not be considered if they are vague or speculative; and
- they clarify the types of efficiencies that are more likely to be accepted by the agencies. For example, reductions in production costs that are achieved through a consolidation of underutilised manufacturing facilities are more likely to receive favourable consideration than are efficiencies relating to procurement, management or capital costs.

In sum, the Guidelines' discussion of efficiencies provides a useful clarification of the issue and makes explicit the actual practice of the agencies in recent years. The Guidelines do not necessarily, however, hold out

the promise that merging parties are likely to encounter less vigorous merger enforcement in the United States as a result of presenting robust evidence of merger efficiencies. By way of example, in October 2016, the proposed merger between Penn State Hershey Medical Center and PinnacleHealth System was abandoned by the parties after a Circuit Court remanded the case, and directed the District Court to enter a preliminary injunction even though the parties presented 'considerable evidence' to show that the merger would produce pro-competitive effects.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The antitrust agencies have the power to subpoena documents and information in a merger investigation. In addition, the agencies have the authority to seek an injunction in federal court prohibiting completion of a proposed transaction. The FTC may also bring an administrative proceeding to determine the legality of a merger or other transaction. The agencies do not have the authority to preliminarily enjoin a transaction themselves; but if a court preliminarily enjoins a transaction, both agencies may seek a permanent injunction from the court. In addition, the FTC may issue an order, following administrative trial, permanently enjoining the transaction. As a practical matter, however, parties usually abandon a transaction if a preliminary injunction is issued. As noted, mergers and acquisitions can, under some circumstances, also be challenged by state attorneys general and private parties.

In March 2018, the FTC issued two Administrative Complaints. One complaint alleged that CDK Global's acquisition of Auto/Mate would be anticompetitive, and the other alleged that the acquisition of the Wesson brand by The JM Smucker Company would be anticompetitive. In each transaction, the parties decided to abandon their merger after the complaint was issued.

In September 2018 the FTC sued to block two acquisitions. The FTC sued to block the acquisition of National Titanium Dioxide Company's TiO<sub>2</sub> business by Tronx Limited, and the District Court enjoined the transaction, finding that it was likely to substantially lessen competition for chloride-process TiO<sub>2</sub> in North America. The FTC also sued to block the proposed merger between Wilhelmsen Maritime Services and Drew Marine. The District Court also enjoined this transaction, finding that it was likely to substantially lessen competition for marine water treatment chemicals and related services to global fleets.

In January 2017, the DOJ sued to block Aetna Inc's bid to acquire Humana Inc, and the District Court enjoined the merger, finding that the transaction was likely to substantially lessen competition in the sale of individual government-sponsored health plans.

In April 2017, the US Court of Appeals upheld a District Court decision to enjoin Anthem's proposed acquisition of Cigna. Eleven states and the District of Columbia joined the DOJ in this challenge, which allegedly would have combined two of the four largest national medical health insurance carriers in the US in the largest merger in the history of the US health-insurance industry.

In July 2017, the DOJ sued to block the merger of Energy Solutions, Inc and Waste Control Specialists LLC, alleging that the acquisition would substantially lessen competition for disposal of low-level radioactive waste in violation of the Clayton Act. The District Court decided to enjoin the merger.

If the responsible agency believes that all relevant information has not been provided in the parties' filings or in the parties' response to a request for additional information, the applicable waiting period will not commence until all information has been provided. The FTC

has recently challenged the sufficiency of an acquirer's responses to a second request (which led to a temporary settlement with the agency and, ultimately, abandonment of the transaction).

Failure to comply with any provision of the HSR Act may result in a fine of up to US\$42,530 for each day (as adjusted) during which the person is in violation of the HSR Act. The agencies have imposed very substantial fines (up to US\$11 million) on parties for completing transactions without observing the requirements of the HSR Act. The agencies may also seek injunctive relief to prevent a violation of the HSR Act.

In addition, if a transaction has been completed in violation of the HSR Act and is believed to violate the antitrust laws, the agencies may seek to undo the transaction through an action in the district court. This would be more likely where the agency believes the acquisition also violated the substantive merger laws.

Finally, as noted in question 5, the antitrust agencies have jurisdiction to investigate and challenge transactions that fall below the HSR Act notification thresholds, even after they are consummated. They have challenged more than 30 such transactions since December 2008, in industries including pharmaceuticals, medical diagnostics, medical devices, chemical additives (oxidates), educational marketing databases, voting machines and food processing.

In January 2014, the DOJ filed suit against Heraeus Electro-Nite Co, LLC (Heraeus), challenging its September 2012 acquisition of substantially all the assets of Midwest Instrument Company, Inc (Minco) in a transaction that was not reportable under the HSR Act. Both Heraeus and Minco supplied sensors and instruments to measure and monitor the temperature and composition of molten steel. The complaint alleged that Heraeus engaged in the transaction to eliminate its closest competitor (with about a 35 per cent market share) after its market share had been reduced from approximately 85 per cent to approximately 60 per cent. The complaint further alleges that the acquisition eliminated the competition between the two parties, creating a near monopoly. The parties agreed to a settlement, and in the final judgment filed in April 2014, Heraeus was required to sell all the Minco assets to a divestiture buyer and take other actions designed to restore the competition that existed prior to the transaction.

In April 2013, the FTC filed a complaint against Graco, Inc and a simultaneous consent decree based on two acquisitions Graco made of competitors in the 'fast set equipment' (FSE) market in 2005 and 2008 (neither deal required an HSR filing). In prior challenges to consummated mergers, the agencies usually required the divestiture of assets sufficient to replicate the competitor that was acquired. However, these options were not available in the Graco matter because the acquired companies had been fully integrated into Graco's operations, and separation was no longer possible. This prompted the FTC to adopt a settlement that incorporates some novel elements. In particular, Graco agreed to settle a private litigation it had brought against another competitor and license certain technology to that competitor. In addition, Graco is prohibited from retaliating against distributors that carry competing FSE products or from entering into exclusive contracts with its distributors or from offering to its distributors 'loyalty discounts' above certain levels.

In October 2012, the FTC filed a complaint and simultaneous consent order in the matter of Magnesium Elektron North America, Inc (MEL). The complaint alleged that MEL's non-reportable US\$15 million acquisition of Revere Graphics Worldwide, Inc (Revere) in 2007 resulted in a merger-to-monopoly because the two companies had been the only two suppliers in the market for magnesium plates for photo engraving. The consent decree required MEL to divest the Revere photoengraving products acquired through the transaction.

## Remedies and conditions

### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the agency responsible for a given transaction determines that the transaction may harm competition in a relevant market, the parties and the agency may attempt to negotiate some modification to the transaction or settlement that resolves the competitive concerns expressed by the agency. The most common form of such a settlement is a consent order, pursuant to which the acquiring company agrees to divest a certain portion of its existing assets or a portion of the assets it will acquire.

In the context of certain acquisitions, the antitrust agencies have indicated that, before they will enter into a consent order, the parties must identify an acceptable buyer for the businesses that are to be sold and must enter into a definitive divestiture agreement with such a buyer (with the buyer being approved by the responsible agency). Furthermore, consent orders require that the divestiture be completed within a fixed period of time. If the divestiture is not completed within this period, a trustee can be appointed to complete the divestiture.

The agencies have required divestitures in a number of recent transactions, including the following: Fresenius Medical Care and NxStage Medical (April 2019, pharmaceutical products); Penn National Gaming and Pinnacle Entertainment (February 2019, gaming, lodging entertainment); Agilent Technologies and Varian, Inc (October 2018, scientific products); and CRH plc and Ash Grove Cement Company (March 2018, building materials).

Behavioural remedies may also be imposed, though they have been uncommon in practice. However, the imposition of such remedies, which are often uniquely tailored to the merger concerned and require detailed monitoring, has been on the rise where mergers may present vertical foreclosure issues.

In May 2018, the FTC settled its charges that a proposed merger between two companies providing air ambulance transport services in Hawaii was likely to lessen competition. Under the terms of the settlement, AMR Holdco agreed to sell the business in question and enter into a Monitor Agreement pursuant to which the parties' divestiture, asset maintenance and other obligations would be monitored.

In December 2018, the FTC settled its charges that Northrop Grummon's acquisition of Orbital ATK likely would provide Northrop the ability and incentive to harm competition for missile contracts. Under the terms of the settlement, Northrop agreed to make its solid rocket motors and related services available on a non-discriminatory basis to all competitors for missile contracts and separate the operation of its SRM business from the rest of its operations with a firewall. The settlement also allows the Department of Defence to appoint a compliance officer to oversee Northrop's conduct related to the settlement.

In June 2017, the DOJ entered into a consent decree with The Dow Chemical Company and El DuPont de Nemours & Co, requiring them to divest multiple crop protection and two petrochemical products to proceed with their proposed \$130 billion merger. The DOJ claimed that the parties were two of only a handful of chemical companies that manufacture certain crop protection chemicals and that vigorous competition between them had benefited farmers through lower prices, more effective solutions and superior service, which would be lost if the merger was allowed to proceed.

In December 2017, the DOJ settled with CLARCOR Inc and Parker-Hannifin Corporation with respect to their merger, which was consummated in February 2017 after complying with the HSR filing and waiting period requirements. The DOJ alleged that prior to the merger the parties were the only suppliers of a certain aviation fuel filtration system and filter elements to US customers, with the only other manufacturer of such products being located in Germany. The settlement required that Parker-Hannifin divest this business.

In July 2013, the FTC challenged General Electric Company's US\$4.3 billion acquisition of the aviation business of Avio SpA, alleging that the acquisition gave GE the ability and incentive to disrupt the design and certification of an engine component designed by Avio for rival aircraft manufacturer Pratt & Whitney. GE and Pratt & Whitney were the only engine manufacturers for Airbus's A320neo aircraft and competed head-to-head for A320neo sales. Avio was the sole designer for the accessory gearbox (AGB) on the Pratt & Whitney engine for that Airbus aircraft. As a condition to the transaction, the FTC prohibited GE from interfering with Avio's design and development work on the AGB for the Pratt & Whitney engine, and from accessing Pratt & Whitney's proprietary information about the AGB that was shared with Avio.

In April 2011, the Antitrust Division allowed Google Inc's acquisition of ITA Software, Inc to proceed on condition that Google continue to license and improve ITA's travel software product, which was used by airfare comparison and booking websites. Google's acquisition of ITA was considered to be its first step toward entering the online travel search market, and the Antitrust Division expressed concern that Google's ownership of ITA's software would give the former the incentive to foreclose competitors' access to ITA or significantly reduce the quality of the software available to them.

In January 2011, the Antitrust Division required that Comcast and General Electric's NBC Universal business (NBCU), as a condition of a joint venture between Comcast and NBCU, provide online video distributors (OVDs) with access to their video programming on terms comparable to those given to traditional multichannel video programming distributors. Conditions also included prohibitions on restrictive licensing practices, which serve to limit distribution of content to OVDs, and retaliation against any other content provider for providing programming to an OVD.

In January 2010, the Antitrust Division imposed, as a condition of the merger between Ticketmaster and Live Nation, which combined the country's primary ticketing service provider and largest concert promoter, certain 'anti-retaliation' restrictions, prohibiting the merged firm from retaliating against any concert venue owner that chooses another firm's ticketing or promotional services. The conditions included allowing former Ticketmaster clients to retain a copy of ticketing data generated while a Ticketmaster client. The Antitrust Division also imposed a 'firewall' preventing the merged firm from using information obtained from its ticketing business in its promotions and artist management businesses. The Antitrust Division's settlement lasts for 10 years.

The Antitrust Division, in June 2011, released a revised version of the Antitrust Division's Policy Guide to Merger Remedies, which is intended to provide guidance to Antitrust Division staff in their work analysing proposed remedies for mergers, including structural (divestment) remedies, conduct (behavioural) remedies, and 'hybrid' or combination remedies. The Policy Guide is available at <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>. FTC's guidance on negotiating merger remedies is available at <https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies>. The FTC studied its merger remedies from 2006–2012, and in January 2017 released its findings. The evaluation covered 50 FTC merger orders involving divestitures of ongoing businesses and limited packages of assets, in horizontal and vertical mergers. The FTC's Merger Remedies Report is available at <https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics>.

### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

In fashioning an acceptable divestiture, the agencies' goals are to eliminate the competitive problems raised by the transaction, find a buyer that can effectively and rapidly 'step into the competitive shoes' of the

divesting party, and ensure that the buyer has all the assets necessary to enable it to be an effective competitor. In this regard, the Federal Trade Commission has published a helpful guide to its divestiture process entitled 'Frequently Asked Questions About Merger Consent Order Provisions' (<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq>) and a Statement of the Bureau of Competition on Negotiating Merger Remedies (<https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies>). The Department of Justice has also issued its Policy Guide to Merger Remedies (<https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>).

In April 2018, the FTC settled its charges that the proposed merger between Red Ventures and Bankrate would harm competition in the market for third-party paid referral services for senior living facilities. Under the terms of the settlement, the parties agreed to divest Caring.com no later than six months after the acquisition and provided transition services to an FTC-approved buyer.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As stated above, the range of remedies are the same for domestic and foreign transactions. In most transactions, remedies involve the divestiture of certain assets, a business line or intellectual property (or a combination thereof) of one of the parties that overlaps in the geographic or product market of the other party. Sometimes, one party is required to license certain intellectual property to a third-party competitor (or potential competitor). The agencies do not discriminate between foreign-to-foreign mergers and those involving domestic undertakings when imposing remedies, so long as the requisite anticompetitive effect in the United States is found.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The HSR review process does not result in affirmative 'clearance' or 'approval' of a transaction or any ancillary arrangements. Instead, if the agencies decide not to challenge a transaction, the applicable waiting period expires and the parties are free to close the transaction. The agencies retain the legal right to challenge the transaction or any ancillary arrangements in the future, although, as a practical matter, this is not very likely.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

## 29 | Are customers and competitors involved in the review process and what rights do complainants have?

Complainants (customers, competitors or others) have no formal rights to participate in the HSR process. Nonetheless, as a practical matter, the agencies are very likely to contact a broad group of interested parties if a transaction presents possible competitive issues. The agencies often rely on information provided by such parties (particularly from customers) in deciding whether or not to challenge a particular transaction. Both agencies' procedures, however, provide for third-party participation before a settlement is made final: at the FTC there is a period for public comment, and the DOJ must follow the procedures of the Tunney Act providing notice and an opportunity to file views. Under certain limited circumstances, private individuals, as well as foreign and state governments, may sue in federal court for damages or injunctive relief based on violations of the Clayton Act or the Sherman Act.

### Publicity and confidentiality

## 30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Pursuant to the HSR Act, the information contained in the Form, as well as the fact that the Form has been filed, is confidential and may be disclosed only to Congress or pursuant to an administrative or judicial proceeding. The same is true of information submitted in response to a second request.

As noted above, however, if early termination is requested and granted, notice of the fact of early termination will be published in the Federal Register and on the website of the FTC. In addition, if the responsible agency interviews third parties in connection with the transaction, the practical impact may be to make public the existence of the transaction.

### Cross-border regulatory cooperation

## 31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The United States' efforts to cooperate with other antitrust authorities during merger investigations continue to increase. The United States has entered into various cooperation agreements with jurisdictions such as Australia, Brazil, Canada, Chile, Colombia, Israel, Japan, Mexico, Peru and the European Union that allow competition authorities to share certain information relating to antitrust investigations. Cooperation can also occur without an agreement. International enforcement efforts may be further assisted by the International Antitrust Enforcement Assistance Act of 1994 (IAEAA), which authorises the Antitrust Division and FTC to enter into written agreements with foreign antitrust enforcement authorities to exchange otherwise confidential investigative information in situations where such exchange is in the public interest. The IAEAA also authorises the domestic enforcement agencies to collect evidence in the United States on behalf of foreign antitrust authorities. The United States is party to an antitrust-specific mutual legal assistance agreement with Australia, authorised by the IAEAA.

In addition, the United States has entered into memoranda of understanding with Russia, China, India and Korea to facilitate exchange of policy developments and best practices and provides for cooperation on competition law enforcement matters as appropriate.

When dealing with merger reviews with international dimensions, parties or third parties may provide the agencies with waivers of confidentiality to enable cooperating agencies to discuss confidential information and analyses. In September 2013, the antitrust agencies issued a model waiver of confidentiality for parties and third parties to use in transactions involving concurrent review by non-US competition authorities and a set of frequently asked questions to accompany the model waiver. The model waiver and FAQ document are available at <https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust>.

## JUDICIAL REVIEW

### Available avenues

## 32 | What are the opportunities for appeal or judicial review?

If the agency responsible for reviewing a transaction determines that the transaction would violate the US antitrust laws, and if an acceptable consent arrangement cannot be negotiated, the agency may apply to a federal court for a preliminary injunction blocking the acquisition. The agencies are not required, however, to seek preliminary relief. Failure to seek such relief does not preclude the agency's challenge at a later time (see questions 24 and 28).

To obtain a preliminary injunction, the agency has to persuade a court that it has a 'probability of success on the merits' of its antitrust claims. The merits will be adjudicated in a subsequent trial before the court or in an FTC administrative proceeding. The preliminary injunction action may be essentially a 'mini-trial', during which the agency and the parties submit evidence to the court on the antitrust issues. In some instances, the trial on the merits and the preliminary injunction motion have been combined in an action for permanent injunction.

If the responsible agency obtains an injunction from the district court prohibiting the transaction, the parties may appeal to the court of appeals for the circuit in which the district court is located. If the court of appeals denies the appeal, the parties may petition the Supreme Court to hear the case. It is rare for the Supreme Court to accept such an appeal.

In June 2018, the US District Court, despite objections from the DOJ, ruled that AT&T could acquire Time Warner without any conditions, in a decision emphasising that vertical integration is often pro-competitive and lawful. The case was the first time in 40 years that a court heard a fully litigated challenge to a merger proposing to combine companies at different links in the same supply chain. The DOJ argued that the merger would substantially lessen competition in the video programming and distribution market by enabling AT&T to use Time Warner's 'must-have' television content to raise its rivals' video programming costs, therefore harming consumers with increased prices. However, the judge ruled that the government failed to prove that the transaction would violate the antitrust laws.

In March 2017, the FTC sued to block the merger of Advocate Health Care Network and NorthShore University HealthSystem, alleging that the combination would create the largest hospital system in the North Shore area of Chicago. The FTC alleged that the combined entity would control more than 50 per cent of the general acute care inpatient hospital services in the area. While the District Court denied the FTC's initial request for a preliminary injunction, the Seventh Circuit reversed, and after further proceedings, the District Court granted an injunction and the parties abandoned the merger.

In 2014, the Sixth Circuit reviewed and upheld an FTC hospital merger decision and order, which challenged ProMedica Health System's (ProMedica) acquisition of rival St Luke's in 2010 (the parties are two hospital providers in Toledo, Ohio). In January 2011, the FTC challenged the transaction arguing that it was anticompetitive and would raise prices for consumers and ordered a divestiture of St Luke's. The Sixth Circuit agreed with the FTC's analysis and upheld its decision and order. In 2015, the Supreme Court declined to hear the case.

## Time frame

### 33 | What is the usual time frame for appeal or judicial review?

The usual time frame for a resolution of an agency's application for an injunction to block an acquisition is approximately three to six months. An appeal to a court of appeals of an injunction blocking the transaction may be heard within a few months of the grant of that injunction. As noted above, it is rare for the Supreme Court to accept an appeal of a court of appeals decision.

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

#### 34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The agencies have been active in their enforcement of the merger laws in recent years. Numerous transactions have resulted in divestiture agreements or court challenges. In addition, the agencies have

become more active in making informal enquiries to the parties for further information during the initial HSR Act waiting period. The FTC and DOJ provide annual reports on their enforcement actions, which are available online at <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

The agencies have required divestitures or other conditions, or both, through settlements, in a number of cases in recent years involving technology and information databases, pharmaceuticals, medical devices and clinics, telecommunications services, energy, media, supermarkets, agriculture, and scientific research and measurement devices. It appears that technology, telecommunications and media, and products and services related to the healthcare industry will, in particular, continue to be enforcement priorities.

## Reform proposals

### 35 | Are there current proposals to change the legislation?

The most recent significant amendments to the HSR Rules were in 2005 when the FTC amended the rules regarding the application of the HSR Act to non-corporate entities (partnerships, LLCs, etc). Dollar thresholds in the HSR Act and the Rules are adjusted annually to reflect changes in the GNP. In July 2011, the FTC released significant amendments to the Form, which streamline several items within the Form. The FTC more recently finalised some additional changes to the HSR Rules, the most significant of which would apply to licensing transactions in the pharmaceutical industry. Refer to the FTC's website, <https://www.ftc.gov/enforcement/premerger-notification-program>, to confirm the currently applicable thresholds and for notice of any potential changes to rules.

In 2013, the FTC formally adopted a change to its pre-merger rules that essentially codified the existing informal practice of withdrawing and refiling HSR notifications. The purpose of a 'pull and refile' is to effectively restart the initial 30-calendar-day waiting period and allow the agencies additional time to complete a review of a transaction without being forced to issue a second request to obtain additional time (see question 17). The new rule specifies that an acquirer can withdraw and refile a notification within the second business day of withdrawal without paying a new filing fee. While an acquirer can withdraw and refile multiple times, the proposals make clear that an acquirer can refile without paying a new fee only once.

In June 2016, the FTC announced an increase in the maximum civil penalties it may impose for violations of the HSR Act. The maximum civil penalty for HSR violations increased from a daily fine of US\$16,000, to a much larger fine of US\$40,000 per day, which was adjusted to US\$42,530 in January 2018. These higher maximum civil fines apply to violations that predate the effective date. The agencies annually adjust for inflation their maximum civil penalty threshold every January.

As of 2016, rule changes allow for HSR filings to be submitted on DVD. The notification form and instructions were also updated in September 2016 and July 2018. The most recent amendments can be found at <https://www.ftc.gov/policy/federal-register-notice/16-cfr-parts-801-803-amendments-hsr-premerger-notification-rules>.

## UPDATE AND TRENDS

### Key developments of the past year

#### 36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The DOJ brought suit in November 2017 to block the vertical merger of AT&T, the United States' largest traditional pay-TV distributor, with Time Warner, a significant television programmer that owns cable television networks including the Turner networks (eg, TNT, TBS, CNN) and HBO. At trial, the DOJ's principal theory of harm was that the merger would

increase the leverage of the Turner networks in negotiating carriage agreements with television distributors that compete with AT&T, thus leading to higher prices to those distributors, which would be passed on to television consumers. Under that theory, Turner would have greater bargaining leverage because, in the event that negotiations with a distributor reached an impasse and led to a blackout of Turner networks on that distributor, some consumers would switch from the distributor to DirecTV, mitigating Turner's affiliate fee losses during the blackout.

The matter was tried before the District Court in March–April 2018, making it the first litigated vertical merger challenge brought by the DOJ in 41 years. On 12 June 2018, the judge issued a 172-page opinion rejecting the government's theories of harm and denying its request to enjoin the transaction. The parties then closed the merger on 15 June 2018. In July 2018, the DOJ appealed the District Court's decision and argument was held before a three-judge DC Circuit panel on 6 December 2018. In a fact-driven unanimous decision delivered on 27 February 2019, the DC Circuit upheld the District Court's determination that the DOJ failed to prove that the transaction was likely to increase Turner's bargaining leverage.

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# Uzbekistan

Bakhodir Jabborov

GRATA International

## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The merger control regime is regulated by the Law of the Republic of Uzbekistan No. ZRU-319 on Competition (the Competition Law), which entered into force on 6 December 2012, replacing the Law on competition and restriction of monopolistic behaviour in the commodities markets. The Competition Law now also governs merger control in financial markets, whereas the previous Law applied only to commodity markets.

Other legislation includes Regulation No. 230 on the order of reviewing and obtaining preliminary consent for concluding shares acquisition agreements in legal entities, approved by the Decree of the Cabinet of Ministers of Uzbekistan on 20 August 2013 (Regulation No. 230), and Regulation No. 344 on the order of issuing a preliminary consent for establishing associations of legal entities, merger and consolidation of legal entities, approved by the Decree of the Cabinet of Ministers of Uzbekistan on 27 December 2013 (Regulation No. 344). These regulations establish detailed procedures for obtaining the antimonopoly pre-approval in the commodities markets and financial markets.

Uzbek merger control provisions are enforced by the Antimonopoly Committee of the Republic of Uzbekistan (the Antimonopoly Committee) and its 14 regional departments across the country.

### Scope of legislation

#### 2 | What kinds of mergers are caught?

The following transactions will require an antimonopoly clearance, provided that the respective thresholds are met (with respect to the thresholds, see question 5):

- establishment of association of legal entities;
- merger and consolidation of legal entities; and
- acquisition transactions.

It seems that basic principles of the merger control regime that existed until 2012 were retained in the Competition Law; however, the relevant pre-closing notification was significantly revised. One major improvement was that in respect of acquisitions the merger control requirements only apply in cases where the acquisition of a new or increase of an existing stake cross certain thresholds (35, 50 and 75 per cent in the case of joint-stock companies and 50 and 66 per cent in the case of limited liability companies). In other words, notification is no longer required for each and every increase of an existing stake (previously acquisition of even a single share above the 35 per cent threshold required notification).

Filing would not, however, be required by limited liability companies or joint-stock companies where the foreign purchaser has an

Uzbek subsidiary, but the target has no subsidiary or local presence in Uzbekistan.

The filing is not required for an entity, even if the above criteria are met, if there is a specific presidential decree or a decree of the Cabinet of Ministers on the merger, consolidation or acquisition of shares of such entity.

Unlike the previous regulations, now the same test for clearance is set on the financial markets for banks, insurance companies, leasing companies, non-banking credit organisations and professionals in securities markets. The test and procedures for clearance for such financial markets' members differ by the amount of threshold as described in question 5.

#### 3 | What types of joint ventures are caught?

Uzbekistan merger control does not set out specific rules applicable to the establishment of joint ventures. Joint ventures are reviewed within the general legal framework. In other words, the creation of a joint venture is treated as an acquisition of shares or rights by the joint venture company from its founders and third parties. When a joint venture is established from scratch, notification requirements are not applied.

In addition to new merger control requirements, the Competition Law introduced a revised clearance procedure for agreements restricting competition. Joint venture agreements, shareholders' agreements and certain other agreements relating to the creation of joint ventures that could potentially restrict competition in Uzbekistan may be challenged by the Antimonopoly Committee.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law does not provide for a definition of control. However, through the definition of 'group of persons', the Competition Law determines that control includes the following main situations:

- two or more legal entities where one legal entity, directly or indirectly, holds or represents more than 50 per cent of the voting shares in a company;
- the holding or representing by individuals together with their close relatives of more than 50 per cent of voting shares in two or more companies;
- the holding or representing by a legal entity of more than 50 per cent of voting shares in each of two or more companies;
- two or more legal entities where executive management positions are held by the same individuals or by their close relatives;
- two or more legal entities where more than 50 per cent of seats in the collegial executive management body or supervisory board are held by the same individuals or by their close relatives;

- two or more legal entities, where one company, by virtue of law, constitutive documents or agreements is entitled to give mandatory instructions to another; and
- two or more legal entities, where one individual or legal entity, by virtue of law, constitutive documents or agreements is entitled to give mandatory instructions to another.

### Thresholds, triggers and approvals

#### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

For legal entities in commodities markets: notification and pre-approval are required if the aggregate balance sheet value of the assets of both parties to the transaction or the aggregate amount of sales of goods for the last calendar year of both parties exceeds 100,000 times the minimum monthly wage (MMW), which is currently 202,730 soums.

For legal entities in financial markets: notification and pre-approval are required if the aggregate balance sheet value of the assets of both parties to the transaction exceeds:

- US\$450 million with respect to banks;
- US\$25 million with respect to insurance companies;
- US\$3 million with respect to leasing companies; and
- US\$400,000 with respect to non-banking credit organisations and professionals in the securities market.

Notification and prior approval is also required if one of the parties to the transaction holds a dominant position in the market.

For the purpose of determining whether the thresholds apply, the purchaser and target are taken into account (the seller is not taken into account). Asset values or market shares and volume of sales are assessed at the level of individual entities (eg, the target or local subsidiaries) and at the group of companies level.

The thresholds can be satisfied by one party only and it does not matter which party. Consequently, if the target owns a legal entity that is registered in Uzbekistan, the first two thresholds set out above will in practice almost always be met.

#### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory in all cases where the transaction meets the thresholds set by the legislation. However, if there is a special resolution issued by the government in respect of certain deals (where the government approves the purchase by an investor of certain shares in the local entity or consolidation of legal entities), then it is regarded as if formal approval has been received.

Intra-group transactions are also subject to mandatory Antimonopoly Committee control.

#### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Based on the provisions of the Competition Law, which state that the Law applies to transactions carried out outside Uzbekistan if the transaction may have an adverse impact on competition in Uzbekistan, from current practice we can surmise that a foreign-to-foreign transaction falls within the Uzbekistan merger control regime where the target entity directly or indirectly controls any Uzbek entities, owns assets located in Uzbekistan or has substantial turnover from operations in Uzbekistan.

Usually, foreign-to-foreign mergers are not subject to merger clearance or notification if the target does not have any local presence

in Uzbekistan in the form of a subsidiary or branch or shareholding in any of the existing corporate forms (limited liability company, joint-stock company, etc). In addition, Uzbek merger control only applies to transactions outside the territory of Uzbekistan, if such transactions (acquiring indirect control, etc) may have an impact on the relevant market of Uzbekistan. In practice, however, applicability of filing is reviewed on a case-by-case basis and decided at the discretion of the Antimonopoly Committee.

#### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, there are special rules with respect to foreign investments in the mass media sector such as TV, radio, newspapers, web sources, etc. In particular, there is a prohibition on the acquisition by a foreign investor of 30 per cent or more shares in mass media.

### NOTIFICATION AND CLEARANCE TIMETABLE

#### Filing formalities

#### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no legal deadlines for a pre-completion filing. Merger control clearance must be obtained before completion and the filing must be made well in advance of the envisaged completion date of the transaction.

The purchaser is liable for a penalty. However, there is no procedure for holding a foreign entity liable in the case of foreign-to-foreign transactions. In case of a breach of the Competition Law in mergers, consolidations and acquisitions, the following fines and penalties can be imposed:

- administrative: a fine in the amount of one to three times MMW applies where an individual is involved (and three to five times MMW, if committed repetitively within one year of the date of the application of a fine for the similar actions), and of three to five times MMW applies where a legal entity is involved (and five to ten times MMW, if committed repetitively within one year of the date of the application of a fine for the similar actions); and
- criminal (applicable after imposing administrative fine): a fine in the amount of 25 to 50 times MMW, or deprivation of a right to hold certain positions for the period from three to five years, or up to 360 hours of mandatory public works, or up to three years of corrective labour. There is no notion of corporate criminal liability in Uzbekistan, therefore criminal liability is imposed on the official or any other authorised person from the company of the purchaser and only if such violation is repeated twice during one year.

In addition, the Antimonopoly Committee may apply to a court to invalidate, in full or in part, agreements and other transactions for which its prior authorisation or subsequent notice was required but has not been obtained or given, or to liquidate a company if it was incorporated without prior approval, provided that the relevant transaction or incorporation results in limitation of competition.

#### 10 | Which parties are responsible for filing and are filing fees required?

The purchaser of the shares or assets is responsible for filing with the Antimonopoly Committee. There are no filing fees.

### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Antimonopoly Committee is obliged to consider antitrust filings within 10 calendar days of the filing date and take a decision on approving the filing or returning it as incomplete and in this case the review period will start anew as soon as the full set of documents is submitted. However, if the Antimonopoly Committee determines that further disclosure, documents or information is needed or that the transaction may result in limitation of competition, the Antimonopoly Committee may extend the term of review by up to 30 calendar days.

Closing of the transaction must be suspended prior to clearance.

#### Pre-clearance closing

### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If a transaction that falls under the scope of the merger control is closed before antimonopoly pre-approval has been obtained, the potential penalties are as set out in question 9.

It should be noted that in practice the parties can only be prevented from closing by a court decision. However, for a direct acquisition of shares in a company registered in Uzbekistan, closing cannot be carried out without preliminary approval of the antitrust authority, as the registration agency may request a preliminary approval of the transaction.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

See question 9. As noted above, clearance must be made before closing. As there is no procedure for holding a foreign entity liable in case of foreign-to-foreign transactions, we are not aware of any such cases.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Hold-separate arrangements are not provided for by the Competition Law.

#### Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules and notably no exemption from the prohibition on completing the transaction before clearance.

#### Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Competition Law lists the documents and information that must be collected for the filing. These include the following:

- an application, which must include the full name of the business entity, information about the transaction, purpose of the agreement to be concluded, list of the executive and supreme management bodies of all parties to the transaction and information on shareholdings in other business entities;
- copies of constitutive documents (certificate of incorporation, articles of association). A copy of a passport if an individual is involved, including full passport details of an individual;
- information on types of activities rendered, names of goods and the volume of goods manufactured and sold by an applicant for the last

two years prior to the application, or from the date of company's operation if less than two years;

- annual financial and statistical reports for the past two calendar years;
- information on the group of persons indicating certain grounds for forming the group, including other additional information, as may be requested by the Antimonopoly Committee; and
- a power of attorney.

The documents listed above (except for the power of attorney) are required from all parties to the transaction. Documents issued abroad must carry an apostille (if the country where the document is issued is a party to the 1961 Hague Convention on Apostille) or be legalised. They need to be further translated into Uzbek or Russian by a certified translator and the translation must be notarised in Uzbekistan.

In the event of supplying the Antimonopoly Committee with wrong or misleading information, the following fines and penalties can be imposed:

- administrative: a fine in the amount of one to three times MMW applies where an individual is involved (and three to five times MMW, if committed repetitively within one year of the date of the application of a fine for the similar actions), and of three to five times MMW applies where a legal entity is involved (and five to 10 times MMW, if committed repetitively within one year of the date of the application of a fine for the similar actions); and
- criminal (applicable after imposing administrative fine): a fine in the amount of up to 25 times MMW, or deprivation of a right to hold certain positions for the period of up to three years.

However, in practice, we are not aware of any cases of application of fines or penalties for submitting wrong information and the Antimonopoly Committee may simply request clarification of the submitted information or ask the applicant to submit missing information.

#### Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

After submission of all necessary information and documents, the Antimonopoly Committee must decide within 10 calendar days of the filing date whether to clear the merger or return it as incomplete and in this case the review period will start anew as soon as the full set of documents is submitted.

If the transaction raises competition concerns, the Antimonopoly Committee is entitled to extend the review for up to 30 calendar days. In practice, the Antimonopoly Committee usually issues its decisions within 30 calendar days. There are no legal means to speed up clearance.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

Upon filing, the set of documents and information as filed is forwarded to the Special Committee of the Antimonopoly Committee (the Special Committee) formed by its chairman.

The Special Committee is obliged to consider antitrust filings within 10 calendar days of the filing date and take a decision on approving the filing or returning it as incomplete.

As mentioned above, if the Antimonopoly Committee determines that further disclosure, documents or information are needed or that the transaction may result in limitation of competition, the Antimonopoly Committee may extend the term of review by up to 30 calendar days.

The Antimonopoly Committee is entitled at its own discretion to invite the applicant (or his or her authorised representatives) and other concerned parties to attend meetings of the Special Committee.

A decision of the Antimonopoly Committee approving the transaction must be signed by the chairman and members of the Special Committee in two copies, stamped and sent to the applicant on the same day. This decision is valid for one year and transactions on the establishment of association of legal entities, merger and consolidation of legal entities and acquisition of the shares must be entered not later than one year from the date of the decision.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

A merger must be prohibited or made conditional by the Antimonopoly Committee if it leads to the creation or strengthening of a dominant position in the relevant Uzbekistan market sector or otherwise leads to a limitation of competition in the Uzbekistan market.

Dominance is defined in the Competition Law as the position of one or several companies or groups in the market for a specific product or service that allows it or them to carry out their business activities independently from their competitors and seriously influence the terms of trade of such product or service or to impede other companies' access to this market sector.

A company or group is viewed as dominant if its market share is:

- 50 per cent or more; or
- between 35 per cent and 50 per cent, provided a company or group had a stable market share for at least one year and there are possibilities to enter the market for new entrants and competitors.

#### 20 | Is there a special substantive test for joint ventures?

No, there is no special substantive test for joint ventures in Uzbekistan. The general merger control rules will apply.

### Theories of harm

#### 21 | What are the 'theories of harm' that the authorities will investigate?

The Antimonopoly Committee investigates whether the transaction may lead to limitation of competition in the Uzbekistan market, including through abuse of a dominant position or coordinated actions of two or more business entities. These actions may include:

- reduction of the quantity of goods on the market with the purpose of creating scarcity on commodities or the financial market, which results in an increase of prices;
- establishing monopolistic high or low prices for goods;
- creating barriers on commodities or financial markets for new entrants;
- an increase or decrease in the prices of commodities or financial markets that is not owing to market forces; and
- other actions that may lead to limitation of competition on the commodities or financial markets of Uzbekistan.

### Non-competition issues

#### 22 | To what extent are non-competition issues relevant in the review process?

Usually, the legal test for clearance is competition-related and other issues, including the ones related to industrial policy or public interest are not covered by the review process. However, in the event the Antimonopoly Committee identifies any non-compliance with industry policy or conflict to public interests it very likely to report its findings to the relevant state authorities.

### Economic efficiencies

#### 23 | To what extent does the authority take into account economic efficiencies in the review process?

The Antimonopoly Committee's role is to find a compromise between protection of competition and economic development in Uzbekistan. The Antimonopoly Committee considers the economic impact of the transaction and may give clearance even if the transaction results in limitation of competition, provided that the parties perform certain actions to mitigate or eliminate the negative effects. Economic efficiencies are not covered by the review process.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

#### 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Antimonopoly Committee is authorised to either prohibit a transaction that has or may have an adverse effect on competition or to require the parties to fulfil certain conditions before a clearance is issued. In this event, the Antimonopoly Committee issues binding orders aimed at protecting competition. If a transaction that leads or may lead to limitation of competition in the Uzbekistan market is closed without Antimonopoly Committee approval, the Antimonopoly Committee is authorised to challenge the transaction in court.

### Remedies and conditions

#### 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

An approval may be subject to compliance with certain conditions at the decision of the Antimonopoly Committee. The Antimonopoly Committee may condition its approval, inter alia, with divestment undertakings or behavioural remedies.

#### 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Conditions of divestments undertakings or behavioural remedies, as well as timing, are specified by the Antimonopoly Committee in each particular case.

#### 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no relevant track record available regarding remedies in foreign-to-foreign mergers.

### Ancillary restrictions

#### 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Law is silent on this matter. Most likely, the clearance decision will cover only the transaction in question. If there are any doubts on whether an antitrust approval is required for related arrangements, an additional application should be filed.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Usually, customers and competitors are not involved in the review process. However, the Antimonopoly Committee is entitled at its own discretion to invite the applicant (or his or her authorised representatives) and other concerned parties to attend meetings of the Special Committee.

### Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The review process is not public.

Commercial secrets and any other information protected by law cannot be withheld in a filing. The Antimonopoly Committee has the right to demand it from the parties and suspend the review process until it is provided. The Antimonopoly Committee is under an obligation not to disclose commercial secrets or any other information protected by law contained in filings. The Antimonopoly Committee's officials are criminally liable for unauthorised disclosure and compensation of the material damage done by such disclosure. However, in practice, these types of cases are rare.

### Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Uzbekistan has signed bilateral treaties on legal assistance and legal cooperation with a number of countries, and each treaty provides a mechanism for how requests for information can be submitted to other jurisdictions. In practice, to our knowledge the Antimonopoly Committee's cooperation with antitrust authorities in other jurisdictions is very limited.

## JUDICIAL REVIEW

### Available avenues

32 | What are the opportunities for appeal or judicial review?

Decisions of the Antimonopoly Committee may be challenged in the Uzbek court or with superior government authority. An appealed decision of the Antimonopoly Committee is put on hold for the duration of the appeal process.

### Time frame

33 | What is the usual time frame for appeal or judicial review?

Uzbekistan's judicial process takes approximately two months at each of the three review levels: the first instance court, the court of appeal (or cassation) and the supervisory court of appeal. In practice, it could take up to six months to overturn a decision of the Antimonopoly Committee. If the case reaches the fourth appeal level, the Highest Economic Court, the review could take six months or longer.



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## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Usually, the Antimonopoly Committee grants clearance without delay if all procedural requirements are met and a merger does not restrict competition.

Recent practice indicates that the Antimonopoly Committee requires filing of a notification even for foreign-to-foreign mergers where one of the entities carries out certain activities in Uzbekistan without having an established presence there (sales, supplies of equipment or commodities, etc). Usually, the Antimonopoly Committee's reply is provided without delay in the form of clearance or confirmation that the merger does not affect the Uzbek market.

Regardless of the above reviewed thresholds, the most recent practice has been that applicability of filing and pre-approval is reviewed on a case-by-case basis and decided by the Antimonopoly Committee, which is the only state body authorised to make an assessment of whether or not a particular transaction has any impact on the relevant market in Uzbekistan. Thus, obtaining a prior written confirmation of the Antimonopoly Committee that no pre-approval is required for a particular transition is a must even if the envisaged transaction does not exceed the thresholds provided in the Competition Law.

### Reform proposals

35 | Are there current proposals to change the legislation?

As described above, Uzbekistan's antimonopoly regulations have recently been amended, including the introduction of the Law of the Republic of Uzbekistan on Competition dated 6 January 2012, Regulation No. 230 and Regulation No. 344. No other changes are expected at this point.

# Zambia

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

#### 1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Competition and Consumer Protection Act No. 24 of 2010 (the Act) and it is enforced by the Competition and Consumer Protection Commission (the Commission). All disputes arising from the decisions made by the Commission's Board are adjudicated by the Competition and Consumer Protection Tribunal (the Tribunal) whose decisions are subject to appeal to the superior courts of Zambia. In addition, the Competition and Consumer Protection (General) Regulations 2011, and the Competition and Consumer Protection (Tribunal) Rules 2012 have been issued pursuant to sections 87 and 78, respectively of the Act. Further, in exercise of its powers under section 84 of the Act, the Commission released the Competition and Consumer Protection Commission Guidelines for Merger Regulations (the Guidelines) in 2015 and the Settlement Procedure Guidelines in 2016. Further, the Commission also issued Administrative and Procedural Guidelines in 2014 (the Administrative Guidelines) and the Leniency Programme has come into effect as well as the Fines Guidelines and the Guidelines on Calculating Merger Fees (2018).

### Scope of legislation

#### 2 | What kinds of mergers are caught?

All transactions where an enterprise, directly or indirectly, acquires or establishes direct or indirect control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses are captured as mergers. Such transactions include amalgamation or combination of enterprises, joint venture mergers or acquisition of interest in another enterprise; for instance, acquisition of shares, assets or leases, etc.

#### 3 | What types of joint ventures are caught?

The Act provides that a merger occurs where a joint venture (JV) occurs between two or more independent enterprises. The Act does not define the term 'joint venture' nor does it provide express instructions on which joint ventures should be captured. However, not all JVs are subject to merger control. The Commission distinguishes between 'full function' JVs and JVs that are 'auxiliary' to the activities of their parent enterprises.

A full-function JV, whose assets or turnover value is above the notification threshold, has to be notified to the Commission as a merger. By definition, such a JV performs on a lasting basis all the functions of an autonomous economic entity, competing with other enterprises in a relevant market, and has sufficient resources and staff to operate

independently on the relevant market. Although full-function JVs would generally conduct little business with the parent enterprises, there may be situations in which the JV uses a parent enterprise's networks or outlets to conduct its sales. A full-function JV may also rely entirely for an initial start-up period on sales to its parent enterprises or purchases from them before it can become established independently on the market. The length of the start-up period depends on the characteristics of the market concerned.

Auxiliary JVs fulfil a specific purpose for their parent enterprises; for example, in sales, production or research and development. Such JVs will not be considered as a merger subject to control. However, parties to auxiliary JVs may have to apply to the Commission for authorisation under Part III of the Act.

#### 4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Scenarios of when control occurs are given in the Act as:

- beneficially owning more than half of the issued share capital of the enterprise;
- being entitled to the majority of the votes at a general meeting or having the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
- having the power to appoint or to veto the appointment of a majority of the directors of the enterprise;
- being the holding company of a subsidiary;
- having the ability to materially influence the policy of the enterprise; and
- having the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust.

In light of the above, the definition of 'control' would extend to having the ability to control the composition of a board (through veto or appointment powers) as well as contractual arrangements (such as voting agreements that result in the ability to control a majority of the votes that may be cast at a general meeting). Control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the enterprise, such as budget, business plans, major investments, appointment of senior management or market specific rights. The latter would include decisions on technology to be used where technology is a key feature of the merger enterprise.

## Thresholds, triggers and approvals

### 5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger transaction requires authorisation by the Commission where the combined turnover or assets, whichever is higher, in Zambia of the merging parties is at least 50 million fee units in the merging parties' most recent financial year in which these figures are available. Fifty million fee units is equivalent to 15 million kwacha. There are circumstances, however, in which transactions falling below the above thresholds may be investigated. The Commission may, where it has reasonable grounds to believe that a merger falls below the prescribed thresholds, review the merger if the following factors exist:

- the merger is likely to create a position of dominance in a localised product or geographical market;
- the merger is likely to contribute to the creation of a dominant position through a series of acquisitions that are not individually subject to prior notification;
- the merger may substantially prevent or lessen competition;
- the merger is concluded outside Zambia and has consequences in Zambia that require further consideration; or
- as a result of the merger there are, or are likely to be, competition and public interest factors that must be considered.

### 6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory only in relation to the mergers that meet the notification requirements. A filing is not mandatory in the case of a transaction that does not meet the prescribed threshold. However, a party seeking clarification as to whether a proposed merger is required to be notified may apply to the Commission for negative clearance in the prescribed manner and upon payment of the prescribed fee.

### 7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers that have an indirect or direct effect on the structure of local markets are notifiable.

The Commission focuses on foreign-to-foreign mergers where the merging foreign entities have a subsidiary or interest in an undertaking operating or located in Zambia. An enterprise in Zambia that comes within the control of a foreign enterprise will be subject to notification and review as far as the operation has an effect on competition in Zambia. In such a case, the turnover or assets that will be assessed will be those of an enterprise present (ie, the enterprise is duly registered in accordance with Zambian law and generates turnover within Zambia) or with a presence in Zambia (ie, the enterprise is not duly registered in accordance with Zambian law but has sales in Zambia). In the event that the control of a Zambian enterprise comes about purely as a result of a merger or acquisition involving enterprises wholly domiciled outside Zambia, the Commission will nonetheless assess the merger if it has a local nexus. The Commission will only assert jurisdiction over such transactions if the foreign enterprise has a local nexus of sufficient materiality, such as having subsidiaries in Zambia or having made 10 per cent of its sales in Zambia over the last three years.

### 8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no rules on foreign investment and special sectors prescribed by the Act. However, merging parties have to obtain approvals from other relevant regulators, if any.

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

### 9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Act does not impose deadlines for filing and the Commission has in certain instances accepted notifications made after conclusion. The Act prohibits the implementation of a merger without obtaining merger approval.

There are sanctions for implementing a merger that is reviewable by the Commission without the approval of the Commission. These sanctions include an administrative penalty not exceeding 10 per cent of the annual turnover of the enterprise. Furthermore, the implemented transaction is declared void.

### 10 | Which parties are responsible for filing and are filing fees required?

Any party to the transaction or the parties' appointed representatives can notify the Commission and pay filing fees. The parties may lodge a joint notification (which is the option preferred by the Commission), but if there are two or more independent parties intending to take over a competitor separately then each party is required to lodge a separate notification.

The notification fees for the application for authorisation of a merger in respect of notifiable mergers is 0.1 per cent of the turnover or assets, whichever is higher. The turnover or assets refers to the annual turnover or assets of all the parties to the transaction in Zambia. The annual turnover and assets of the parties to the transaction will be grouped in sets and it will be the sets that will be considered. The highest value among the figures reflected in the sets of annual turnover and assets will be considered for the calculation of the notification fee, with a ceiling of 5 million Kwacha on the filing fee. When considering the annual turnover or assets of the parties to the transaction, the concept of a single economic unit will be considered (ie, it is the position of the Commission that if a merging party has subsidiaries located in Zambia, they form a single economic unit). For parties wholly domiciled outside Zambia, the notification fee will be based on the total values of the assets or turnover generated in Zambia.

### 11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is no prescribed waiting period, but there is an initial assessment period of 90 days for authorisation of the merger, which runs from the date of notification to the Commission for the grant of approval. The Commission may extend the assessment period by a period not exceeding 30 days after it gives notice 14 days prior to the expiry of 90 days.

If the Commission does not issue its determination regarding a proposed merger within the period specified, the proposed merger shall be deemed to be approved.

The implementation of the transaction has to be suspended while awaiting clearance.

## Pre-clearance closing

### 12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

It is an offence punishable by an administrative fine not exceeding 10 per cent of the enterprise's annual turnover (based on the latest audited accounts), in the absence of authority from the Commission, to participate in effecting:

- a merger that is reviewable by the Commission but has been implemented without the approval of the Commission;
- a merger that is rejected by the Commission; or
- a merger that fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval.

A reviewable merger that is implemented without the Commission's authorisation is void.

The Commission, however, accepts notifications even after the conclusion of a merger and in practice may not impose the foregoing sanctions.

### 13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions can be imposed in cases involving closing before clearance in foreign-to-foreign mergers if such transaction had the necessary nexus requiring notification with the Commission. This is usually the case where enterprises involved in foreign-to-foreign mergers have subsidiaries or sales in Zambia and merger approval has not been obtained from the Commission.

### 14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Where an initial assessment reveals no competition concerns, the Commission as a matter of course issues interim authorisations and this enables the parties to close before final clearance by the Board of the Commission (the Board). An interim authorisation is only issued when the Commission is satisfied that a notified transaction gives rise to no competition concerns and it can be reviewed before the final authorisation being granted. The Commission may also require parties to make such undertakings that, in the opinion of the Commission, may remedy any competition concerns to which a notified merger may give rise.

## Public takeovers

### 15 | Are there any special merger control rules applicable to public takeover bids?

The Act does not make reference to public takeover bids and consequently sets no special rules in relation to public takeover bids.

## Documentation

### 16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification is required to be detailed enough for the Commission to be able to make a preliminary assessment with a view of authorising the merger. The notification is made on a prescribed Form 1 as well as a Supplementary Information Request form, which are fairly detailed. Form 1 specifies the following documents to accompany the application:

- two copies of the latest annual report and audited accounts (including the balance sheet);

- a copy of the agreement or other documents relating to the transaction;
- a press release or other shareholders, board or management statement on the transaction;
- other market or industry study reports that support the transaction; and
- strategic plans or minutes of the board on the transaction.

Notwithstanding the above, supplementary information requests may be done prior to assessment and during assessment if need be. Further, applicants for merger approval may have pre-notification meetings with the Commission to, inter alia, determine the information actually required by the Commission and may result in a significant reduction in the information required to be submitted. The Commission may, at any time, revoke an approved merger if a party to the merger submitted materially incorrect or misleading information in support of the merger.

## Investigation phases and timetable

### 17 | What are the typical steps and different phases of the investigation?

There is a two-phase investigation process. The first phase is conducted by the Commission's management during the first 35 calendar days of an investigation and starts with the review of the application, followed by third-party stakeholder consultations and, finally, a preliminary assessment report. If it is concluded at the first phase that a merger is less than likely to harm competition and that no further evidence is likely to be uncovered to revise this finding, the Sub-Technical Committee of the Board (TC) will 'fast-track' clearance of the merger application. The full Board may then delegate authority to the TC to issue a final authorisation of the merger by calendar day 45.

In the event that a TC Phase I clearance is rejected by the full Board, the application proceeds to Phase II of the investigation. During Phase II, the Commission will conduct further market research and analysis, culminating in a staff paper to the Board. By day 90, merging parties are informed in writing of the Board's determination and the Board's decision will follow thereafter.

### 18 | What is the statutory timetable for clearance? Can it be speeded up?

The period allowed for assessment of a proposed merger is up to 90 calendar days from the date of application with the possibility of an extension of 30 days if prior notice is given 14 days before the expiry of the 90 days. The Commission is required to complete its assessment of a proposed merger and issue its determination within 90 days of the date of the application for authorisation, unless a party to the proposed merger fails to provide the Commission with the information required. The speed of the transaction will depend on their complexity and on whether they fall under Phase I or Phase II. Phase I transactions are concluded within 45 days, while Phase II take more than 45 days but are subject to statutory time limitations.

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### 19 | What is the substantive test for clearance?

There are three substantive tests for clearance:

- the first test is the market assessment test, which simply seeks to determine the likely effects of the proposed merger in the relevant market, on trade and the economy in general;

- the second test is the competition assessment test, which seeks to assess whether the merger is likely to prevent or substantially lessen competition in a market in Zambia; and
- the third test is the public interest assessment test, which seeks to determine whether the proposed merger will be in the interest of the public. Public interest factors that may be considered include the saving of a failing firm, the extent to which a proposed merger would maintain or promote exports from Zambia or employment in Zambia, the extent to which a proposed merger would promote technical or economic progress and the transfer of skills in Zambia, etc.

## 20 | Is there a special substantive test for joint ventures?

There is no special substantive test with respect to joint ventures, as joint ventures are appraised on the same basis as mergers if they fall under the definition.

### Theories of harm

## 21 | What are the 'theories of harm' that the authorities will investigate?

The theory of harm, which is the starting point for any merger investigation, is whether the merger is likely to prevent or lessen competition in the relevant market. In a merger assessment, the Commission will generally consider the basic theories of harm, namely unilateral or monopolisation effects, coordinated effects and non-horizontal (foreclosure) effects. Market dominance and vertical foreclosure are important factors and are frequently referred to in most merger investigations, particularly with respect to vertically integrated undertakings.

### Non-competition issues

## 22 | To what extent are non-competition issues relevant in the review process?

The Commission applies the public interest test in almost all merger evaluations. Even though there is no definition in the Act of what 'public interest' is, it is said to include the extent to which the proposed merger is likely to result in a benefit to the public that would outweigh any detriment attributable to a substantial lessening of competition. There is no exhaustive list of factors that fall under the public interest test, but fundamentally issues such as employment and the effect of the proposed merger on the economy in the relevant market or region affected by the merger are of paramount consideration.

### Economic efficiencies

## 23 | To what extent does the authority take into account economic efficiencies in the review process?

One of the expressed substantive tests under the Act is the market assessment test, the main objective of which is to strengthen the efficiency of production and distribution of goods and services.

A review of the cases handled by the Commission since its inception reveals that the concept of economic efficiencies is applied within the context of the 'rule of reason'. The Commission approved a scheme between two competitor airlines to implement what is essentially a non-compete and joint-marketing arrangement. In making its decision, the Commission considered that the arrangement served the broader interests of the economy.

## REMEDIES AND ANCILLARY RESTRAINTS

### Regulatory powers

## 24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission has power 'to take such action as it considers necessary or expedient to prevent or redress the creation of a merger'. The Commission has the power to prevent an unauthorised merger and it has jurisdiction to impose fines or make declaratory pronouncements regarding mergers.

### Remedies and conditions

## 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Almost all merger authorisations are subject to behavioural and sometimes divestiture undertakings. Hardly any authorisations are granted in the absence of these conditions. At times the Commission may give conditional approvals so that some competition concerns can be addressed.

## 26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

Should the Commission determine that a merger has resulted or is likely to result in a substantial lessening of competition within a market, it may give an enterprise such directions as it considers necessary to remedy the adverse effects on competition. In the case of a prospective merger, the Commission may require an enterprise to divest such assets as are specified in a direction within the period so specified in the direction, before the merger can be completed or implemented. In the case of a completed merger, the Commission may require an enterprise to divest itself of such assets as are specified in a direction within the period so specified in the direction.

The case of *Lublend Limited* represents a merger evaluation combining behavioural and divestiture remedies. In this case, the Commission required the acquiring firm to restructure Lublend Limited so as to allow one of the shareholders to increase its stake to 50 per cent. The acquiring firm was also required to undertake not to interfere with the fixing of blending fees in relation to non-shareholders. In addition, the acquiring undertaking was required to give undertakings that it would facilitate free access to blending facilities by its competitors.

This case does not represent a standard approach of the Commission as it evaluates each merger on its own merits and there are no standard conditions or remedies applicable to all cases. For this reason, there are equally no set timelines applicable to all remedies.

## 27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The cases under review show that the Commission has imposed remedies with respect to foreign-to-foreign mergers that have been found to have an effect on local markets, especially where the foreign-to-foreign entities have subsidiaries in Zambia.

### Ancillary restrictions

## 28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There are no guidelines in the Act with regard to ancillary restraints and the Commission has not laid down any administrative rules regarding the treatment of ancillary restraints in merger assessments. In practice, clearance decisions will only cover ancillary restraints in

circumstances where such ancillary restrictions raise competition concerns as a consequence of which behavioural or structural conditions are imposed. Where a decision is silent on ancillary restraints, they are implicitly cleared.

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

As part of its investigation process, the Commission typically conducts public consultations seeking the comments of relevant industry players and other stakeholders with respect to proposed mergers. To the extent that competitors and customers are consulted, competitors and customers play a role in the review process. The Act does not define the meaning of 'public' and therefore both customers and competitors are captured under the Act.

### Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

There is no statutory requirement for the review process to be made public, but the Commission shall place any document filed in the public record unless the party submitting it asserts a claim of confidentiality at the time of filing it. A party requesting for information to be treated confidentially must give reasons for the information being confidential and the Commission has the discretion to decide whether the information will be confidential. If the Commission grants the request for confidentiality, an abridged version or a dummy version of the confidential information shall be placed in the public record. Notwithstanding the foregoing, the Commission may share confidential information when it is under a legal obligation to do so. If the Commission rejects a request for confidentiality, it shall inform the relevant party in writing and such party shall have the right to appeal the Commission's decision. The Commission usually announces its decisions and in its annual reports the Commission highlights cases conducted. The notifying parties may highlight information that they consider confidential and request that such information not be disclosed.

The Board of the Commission prohibits the publication of, or disclosure of information to, unauthorised persons. Any person who contravenes this commits an offence and is liable, upon conviction, to a fine not exceeding 200,000 penalty units (equivalent to 60,000 kwacha) or imprisonment for a period not exceeding two years, or both.

### Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission is a member of the International Network of Competition Authorities (ICA).

Therefore, the Commission may be requested by a foreign competition authority to investigate and make an appropriate determination where it has reasonable grounds to believe that anticompetitive practices in Zambia are damaging competition in the foreign country. The Act also provides for cooperation.

The Commission cooperates with antitrust authorities in other jurisdictions. This is supported by a statutory provision in the Act. The Commission can enter into a formal agreement with an authority from a different jurisdiction. This cooperation has been reflected in a number of agreements to which Zambia is a party. For instance, in the

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2002 Southern African Customs Union Agreement, the 2009 Southern African Development Community (SADC) Declaration on regional cooperation in competition and consumer policies, and the 2004 COMESA Competition Regulations, which all provide for cooperation between member states in the area of competition law enforcement. In January 2013, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) became operational and administers the COMESA Competition Regulations and the Commission is expected to cooperate with the CCC. The Commission has also signed Memoranda of Understanding with the CCC, Competition and Fair Trading Commission of Malawi, Federal Trade Commission and a Multilateral Memorandum of Understanding with CA under SADC.

## JUDICIAL REVIEW

### Available avenues

32 | What are the opportunities for appeal or judicial review?

The Act has made provisions for an appeal to the Tribunal. Therefore, any person or an enterprise that is aggrieved with an order or direction of the Commission may appeal to the Tribunal within 30 days. Any person wishing to appeal against the decision of the Tribunal may appeal to the High Court within 30 days of the determination, and thereafter to the Court of Appeal and finally the Supreme Court.

There are recent examples where parties to a merger action aggrieved by the decision of the Commission have appealed to the Competition and Consumer Protection Tribunal (the Tribunal). We are aware of only one Tribunal judgment concerning mergers, which is the 2014 case of *First National Bank Zambia Limited and Afgri Leasing Services Limited v the Competition and Consumer Protection Commission 2014/CCPT/006*.

### Time frame

33 | What is the usual time frame for appeal or judicial review?

An appeal has to be lodged within 30 days of the decision being made by the Tribunal. In a recent ruling of the High Court, the court observed that a party that did not appeal against a decision of the Commission within 30 days lost the right to appeal. There is no set period within which an appeal from the Tribunal can be heard, except to mention that matters brought to the High Court by way of appeal are dealt with expeditiously.

**ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS****Enforcement record**

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2009 and 2010, the Commission considered a total of two foreign-to-foreign mergers, both of which were approved without conditions.

There is still widespread lack of awareness and a lack of adequate appreciation of the principles of competition policy and law within legal circles and this slows down the Commission's merger assessment because of protracted correspondence with legal practitioners. There is a need therefore for training and capacity building to equip practitioners with the necessary skills and basic knowledge of the principles of competition policy and law. The Commission has thus conducted training for the Supreme, High and Magistrate Courts' judges as a starting point in ensuring that the necessary skills and basic knowledge on the principles of Competition Law is imparted.

**Reform proposals**

35 | Are there current proposals to change the legislation?

We understand that there are proposals to amend the Act, but we are yet to see what these amendments will entail.

# Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Albania	
Voluntary or mandatory system	Mandatory system: the filing of a notification with the Albanian Competition Authority is mandatory in cases where the applicable turnover thresholds are met.
Notification trigger/filing deadline	Concentrations have to be notified within 30 days from the date of entering into the merger agreement or the agreement pursuant to which a controlling interest is acquired, or from the date of publication of the public offer to purchase or exchange shares.
Clearance deadlines (Stage 1/Stage 2)	<p>A preliminary proceeding (Phase I) applies where a merger is unlikely to lead to the creation or strengthening of a dominant position in the relevant market. The Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. Since June 2016, a fast-track proceeding is available.</p> <p>An in-depth (Phase II) proceeding applies where the transaction gives rise to concerns regarding a dominant position being created or reinforced. The Authority must investigate the case and issue a decision within three months from the start of such Phase II proceeding (which can be extended by up to one month).</p> <p>If within these time limits, the Authority does not issue a decision, the concentration is deemed to be approved.</p>
Substantive test for clearance	The Authority assesses whether the concentration may lead to a substantial lessening of competition in the market or a part thereof, especially by the creation or strengthening of a dominant position on the relevant market.
Penalties	If the undertakings that are required to notify the merger fail to duly file within the set time limits (late filing), the Authority may impose fines of up to 1 per cent of their annual turnover in the last completed business year. If the undertakings concerned close the transaction prior to clearance, the Authority may impose fines amounting to up to 10 per cent of each participating undertaking's previous annual turnover.
Remarks	Although the Albanian merger control regime is still a rather young regime, it has experienced a clear increase in activities by the Authority in enforcing merger control law (and competition law in general).
Algeria	
Voluntary or mandatory system	An operation is subject to merger control when such operation qualifies as a 'concentration' within the meaning of the Algerian competition law and this concentration is likely to affect competition on a relevant market. The notification is automatically required when the concentration aims at achieving a threshold in excess of 40 per cent of the sales or purchases made on a given market. When those conditions are met, notification of such operation to the Competition Council is mandatory, the Competition Council having a three-month period to render its decision. It should be noted that the notification has a suspensory effect.
Notification trigger/filing deadline	<p>As soon as the transaction becomes sufficiently advanced and certain.</p> <p>The upcoming reform of the competition law clarifies the notification trigger (ie, when the parties concerned are in a position to submit a project sufficiently advanced (signing of a letter of intent in particular)).</p>
Clearance deadlines (Stage 1/Stage 2)	The Algerian competition law does not provide for deadlines per phase. Overall, the Competition Council has three months from the filing to render its decision.
Substantive test for clearance	<p>The substantive test for clearance is whether the concentration impacts competition on a relevant market, in particular by strengthening a dominant position.</p> <p>The notification is automatically required when the concentration aims at achieving a threshold in excess of 40 per cent of the sales or purchases made on a given market.</p>
Penalties	The sanction incurred in case of a concentration closed without prior clearance, consists in a maximum fine of 7 per cent of the turnover realised during the past fiscal year in Algeria by the parties to the concentration or by the undertaking resulting from the concentration.
Remarks	Recently, the Competition Council published press releases intended for the economic operators on the merger control framework, recalling the sanctions incurred when a notifiable concentration is realised without the Council authorisation.

Australia	
Voluntary or mandatory system	Voluntary, although there are two ways of obtaining clearance: informal clearance and authorisation.
Notification trigger/filing deadline	Because the system is voluntary, there are no mandatory notification triggers or filing deadlines. However, the ACCC's Merger Guidelines indicate that it expects to be notified where the products of the merger parties are substitutes or complementary and post-merger the firm will have a market share of more than 20 per cent. The informal clearance process can take between two and 28 weeks, and significantly more in complex cases or where a remedy is proposed, so parties should file with the ACCC early enough to allow the informal clearance process to be finalised before the transaction is completed.
Clearance deadlines (Stage 1/Stage 2)	Informal clearance may take between two and 28 weeks, possibly significantly more in complex cases or where a remedy is proposed. The ACCC must reach a determination on an application for authorisation of a merger within 90 days (which can be extended). If a decision has not been made within this period, the ACCC is taken to have refused to grant the authorisation.
Substantive test for clearance	For informal clearance, the ACCC considers whether the acquisition would have, or be likely to have, the effect of substantially lessening competition in the relevant market. For authorisation applications, the ACCC can grant merger authorisation if it satisfied that either the proposed acquisition would not be likely to substantially lessen competition, or the likely public benefit from the proposed acquisition outweighs the likely public detriment.
Penalties	The maximum penalty for a corporation breaching the merger provisions of the CCA is the greater of the following: A\$10 million; three times the value of the benefit that the body corporate obtained directly or indirectly and that is reasonably attributable to the contravening conduct; or where that value cannot be readily calculated, 10 per cent of the annual turnover of the body corporate and its related bodies corporate. For individuals, the maximum penalty is A\$500,000. Other remedies include injunctions restraining completion of the transaction, divestiture and a declaration that the transaction is void.
Remarks	Although merger clearance in Australia is voluntary, the law is vigorously enforced by the ACCC. Where parties choose not to make a voluntary merger notification to the ACCC, it is not uncommon for the ACCC to contact the parties seeking information to enable the ACCC to determine if the transaction is likely to raise competition concerns.
Austria	
Voluntary or mandatory system	Mandatory system, based on: <ul style="list-style-type: none"> <li>• turnover thresholds; and</li> <li>• specific legal definitions for transactions constituting notifiable concentrations.</li> </ul>
Notification trigger/filing deadline	A merger must be notified prior to its completion if, in the last business year: <ul style="list-style-type: none"> <li>• the combined worldwide turnover of all undertakings concerned exceeded €300 million;</li> <li>• the combined Austrian turnover of all undertakings concerned exceeded €30 million; and</li> <li>• the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.</li> </ul> <p>Even where these thresholds are met, mergers are exempt from the notification obligation where the domestic turnover of only one of the undertakings concerned exceeded €5 million and where the worldwide combined turnover of the other undertakings concerned did not exceed €30 million.</p> <p>Note: a merger must be notified in any case if: the combined worldwide turnover of all undertakings concerned exceeded €300 million, the combined Austrian turnover of all undertakings concerned exceeded €15 million, the value of consideration exceeds €200 million and the target is active in Austria to a significant extent.</p> <p>It is possible to file a pre-merger notification even prior to the signing of the relevant agreement, provided the parties have, in principle, agreed on structure and timing of the transaction and intend to enter into this agreement in the foreseeable future. There is no filing deadline but mergers subject to merger control must not be completed before clearance.</p>
Clearance deadlines (Stage 1/Stage 2)	Stage 1: four weeks from filing (six weeks in the case of extension upon request by the notifying party; legal amendment of 2013). Stage 2: five months from receipt by the Cartel Court of a request of Stage 2 proceedings (six months in the case of extension upon request by the notifying party; legal amendment of 2013).
Substantive test for clearance	Whether the merger will create or strengthen a dominant market position.
Penalties	The Cartel Court can impose on each party that has intentionally or negligently violated the standstill obligation a fine in the amount of up to 10 per cent of the worldwide turnover achieved by that party in the last business year.
Remarks	Acquisitions of 25 per cent or more of the shares of a company are subject to merger control even if they do not confer sole or joint control on the acquirer. Special rules for media mergers, both as regards the calculation of turnover and the substantive test for clearance. Special rules also for calculation of turnover of banks and insurance companies. Bank exemption – temporary acquisitions by financial institutions are exempted from merger control subject to certain conditions. Due to the two-level authority system (with the statutory parties having a right to appeal against court decisions), long stop dates need to be carefully considered for (potentially) problematic cases.

Belgium	
Voluntary or mandatory system	Mandatory system. The form of notification is the special form similar to Form CO and made in French or Dutch.
Notification trigger/filing deadline	Combined Belgian turnover over €100 million and at least two of the parties have an individual Belgian turnover of at least €40 million. A concentration must be notified and cleared prior to its implementation.
Clearance deadlines (Stage 1/Stage 2)	Stage 1 decisions must be adopted within 40 working days. Stage 2 decisions must be made within an additional 60 working days. If the parties offer commitments in order to meet competition concerns, the first phase can be extended by 15 working days and the second phase by 20 working days.
Substantive test for clearance	Whether a concentration would 'significantly impede effective competition' on the Belgian market or on a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.
Penalties	A fine of up to 1 per cent of the total turnover in the preceding financial year where the notifying parties obstruct merger control investigations (eg, by providing incorrect or incomplete information). Where parties implement the concentration without clearance, a fine of up to 10 per cent of the total turnover in the preceding financial year can be imposed.

Bosnia and Herzegovina	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	Signing of the respective agreement, the announcement of a public offer of shares or an acquisition of control – 15 days.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 30 days from the issuance of the certificate of completeness for (i) the approval of the concentration or (ii) initiation of Stage 2. Stage 2: 3 months from the initiation of Stage 2, possible extension by additional 3 months.
Substantive test for clearance	Concentration resulting in the creation or strengthening of a dominant position that may restrict competition in the market.
Penalties	<p>Failure to notify within due time:</p> <ul style="list-style-type: none"> <li>• a fine of up to 1 per cent of the total turnover of the undertakings concerned, realised in the business year preceding the concentration;</li> <li>• a fine of between 5,000 and 15,000 Bosnia and Herzegovina convertible marks for the responsible individuals.</li> </ul> <p>Closing a concentration without obtaining prior clearance:</p> <ul style="list-style-type: none"> <li>• a fine of up to 10 per cent of the parties' total turnover in the year preceding the closing;</li> <li>• a fine of between 15,000 and 50,000 Bosnia and Herzegovina convertible marks for the responsible individuals.</li> </ul>

Brazil	
Voluntary or mandatory system	Mandatory system for mergers, acquisitions, consolidations and joint ventures that produce an effect in Brazil and meet the double turnover legal threshold.
Notification trigger/filing deadline	There is no deadline for filing in Brazil, but transactions cannot be closed or implemented before clearance. The notification with CADE should be made preferably after the signing of the binding document.
Clearance deadlines (Stage 1/Stage 2)	Simple and ordinary cases that are not challenged by the General Superintendence do not go to CADE's Tribunal are approved at the General Superintendence level. Complex cases that are challenged by the General Superintendence are first reviewed by the General Superintendence and then sent to CADE's Tribunal for analysis and decision. Clearance time has been in an average of 15 days for simple cases, and can take six or more months for complex ones (up to 240 plus possible 60 or 90-day extensions). In complex cases, pre-filing meetings with authority are not only welcome but required.
Substantive test for clearance	<p>The law provides for both dominance and substantial lessening of competition tests, though the former one has implicitly been more used by CADE.</p> <p>CADE can approve transactions, despite any anticompetitive effects, if the merger achieves the following results:</p> <ul style="list-style-type: none"> <li>• an increase in the productivity or competitiveness;</li> <li>• an increase in the quality of goods and services; and</li> <li>• it contributes to efficiency and technological and economic development.</li> </ul> <p>Additionally, a relevant part of these results must be shared with the consumers.</p>
Penalties	<p>Pecuniary penalty that may range from 60,000 to 60 million reais:</p> <ul style="list-style-type: none"> <li>• act null and void;</li> <li>• administrative proceeding if the deal is considered harmful to competition.</li> </ul>
Remarks	<p>CADE has stated in the decision of the <i>Cisca/Technicolor</i> merger review (merger review No. 08700.009018/2015-86) that CADE will not accept carveouts of the Brazilian assets as a means to avoid gun jumping.</p> <p>We welcome the publication of CADE's Resolution No. 16 establishes that the analysis of fast-track cases will not surpass 30 days, and Resoluio No. 17 sets forth rules on the 'associative agreements' and the Memorandum of the Understanding signed between CADE and the Central Bank deals with each agency's jurisdiction in merger control cases involving the banking sector.</p> <p>In July 2019, CADE's Tribunal approved Resolution No. 24 of 2019 that replaces Resolution No. 13 and establishes procedural aspects for gun-jumping investigations and the notification of transactions the submission of which is not mandatory. It also sets forth the criteria for the calculation of gun-jumping fines based on CADE's practices, including aggravating factors (eg, timing, severity of conduct and intent). On the same date, CADE approved Resolution No. 25 of 2019 that provides for the formal aspects and standards for the Commissioners of CADE's Tribunal to write and present their votes on cases before they are read during CADE's hearing sessions.</p>

**Bulgaria**

Voluntary or mandatory system	Mandatory and voluntary.
Notification trigger/filing deadline	The entry into an agreement, the publication of a bid or the announcement of acquisition of control as a result of trading in exchange traded securities, but before the undertaking of actual actions to accomplish the concentration. No filing deadline.
Clearance deadlines (Stage 1/Stage 2)	Phase I: three + 25 working days (possibility to extend by up to 20 working days). Phase II: four months (possibility to extend by up to 40 working days). Information requests stop the clock. The deadlines are instructive.
Substantive test for clearance	The creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded. A clearance is possible despite the creation or strengthening of dominance, where significant efficiencies resulting from the transaction outweigh any potential negative effects.
Penalties	Up to 10 per cent of the annual turnover of the infringer.

**Canada**

Voluntary or mandatory system	Notification is mandatory for transactions that exceed certain thresholds. However, the Competition Act's substantive jurisdiction extends to mergers of any size that have an effect on the Canadian marketplace, whether involving domestic parties or purely foreign-to-foreign mergers.
Notification trigger/filing deadline	No filing deadline. Where advance notification is required, parties may file at any time after reaching an agreement or letter of intent. However, transactions may not be completed during mandatory no-close periods.
Clearance deadlines (Stage 1/Stage 2)	A mandatory 30-day no-close period is triggered by submission of a notification. If the Commissioner issues a supplementary information request, submission of the required responses will trigger a further no-close period that expires 30 days after both parties have responded.
Substantive test for clearance	Whether the merger is likely to prevent or lessen competition substantially in a relevant market.
Penalties	The criminal penalty for not filing a mandatory notification is a fine of up to C\$50,000, as well as the possibility of an additional penalty of up to C\$10,000 per day for closing a transaction prior to the expiry of a waiting period. Remedies for an anticompetitive merger include prohibition of a proposed merger, dissolution or divestiture.
Remarks	The acquisition of control of a Canadian entity by a non-Canadian will also require notification and possibly review and approval under the Investment Canada Act.

**China**

Voluntary or mandatory system	Notification is mandatory.
Notification trigger/filing deadline	Notification is required for any transaction that constitutes a 'concentration of undertakings' if one of the following notification triggers is met: <ul style="list-style-type: none"> <li>• The total worldwide turnover of all parties to the transaction exceeded 10 billion yuan and the PRC turnover of each of at least two parties to the transaction exceeded 400 million yuan in the preceding financial year.</li> <li>• The combined PRC turnover of all parties to the transaction exceeded 2 billion yuan and the PRC turnover of each of at least two parties to the transaction exceeded 400 million yuan in the preceding financial year.</li> </ul> <p>There is no filing deadline.</p>
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 30 days from the notification being declared complete by SAMR. Stage 2: 90 days from the date of SAMR's decision to initiate further review of the transaction with the possibility of extension by another 60 days.
Substantive test for clearance	Whether the concentration has or is likely to have 'the effect of eliminating or restricting competition'.
Penalties	SAMR may order the undertakings to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and adopt other necessary measures to restore the market situation to that before the implementation of the concentration. SAMR may also impose a fine of a maximum of 500,000 yuan.
Remarks	SAMR may order the undertakings to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and adopt other necessary measures to restore the market situation to that before the implementation of the concentration. SAMR may also impose a fine of a maximum of 500,000 yuan.

**Colombia**

Voluntary or mandatory system	Mandatory system when the companies meet certain conditions.
Notification trigger/filing deadline	Merger control triggers whenever the transaction implies the acquisition of competitive control between parties engaged in the same economic activities or value chain, and surpassing an economic threshold of approximately US\$16 million in operating income or total assets. No specific deadlines for filing are established in the law. However, the parties must obtain clearance before closing the transaction.
Clearance deadlines (Stage 1/Stage 2)	For a notification proceeding (ie, when the parties account for less than 20 per cent of the relevant market), SIC has 10 business days to issue an acknowledgement of receipt. For a prior approval proceeding, once the parties have submitted all the required information, SIC has (i) 30 business days to decide the proceeding in Stage I, or (ii) three months from the time the answer to the second information request has been submitted to decide the proceeding in Phase II; exceptionally (iii) SIC may reset the three-month period for one time only through a second Phase II information request.

Colombia	
Substantive test for clearance	<p>It is assessed whether a transaction produces an 'undue restriction on competition'. In the analysis conducted by SIC, the following aspects are reviewed:</p> <ul style="list-style-type: none"> <li>• Relevant market definition. This covers two aspects: market product and geographical market.</li> <li>• Quantitative assessment, including market shares estimate, and concentration, asymmetry and dominance indexes.</li> <li>• Qualitative assessment, including barriers to entry and buyer power.</li> <li>• Potential anticompetitive effects.</li> </ul>
Penalties	<p>For gun jumping, SIC could impose the following sanctions:</p> <ul style="list-style-type: none"> <li>• Against the parties, fines up to 100,000 monthly legal wages (approximately US\$25 million for 2018) or 150 per cent of the revenue obtained from the infraction.</li> <li>• Against individuals involved, fines up to 2,000 monthly minimum legal wages (approximately US\$500,000 for 2018).</li> </ul> <p>Additionally, SIC may order the reversion of the transaction, if there is evidence that it generated an undue restriction on competition.</p>
Remarks	<p>In Colombia, all of the parties to the transaction (including the seller) may be fined if they fail to notify the transaction before SIC. There are special provisions for cases involving financial entities and aeronautical matters, which are covered by the respective regulatory authorities; each of those sectors is under special surveillance and transactions have to meet sector-specific conditions.</p>

Costa Rica	
Voluntary or mandatory system	Mandatory
Notification trigger/filing deadline	Five days after closing.
Clearance deadlines (Stage 1/Stage 2)	Thirty days after the information is complete (special complexity cases may be extended up to 60 days).
Substantive test for clearance	Anticompetitive effects analysis. Analysis of potential anticompetitive effects of the transaction. If such anticompetitive effects exist, the Commission analyses the potential efficiencies generated by the transaction and determines whether they offset the anticompetitive effects. Market dominance, coordinated effects, vertical foreclosure, are among the issues considered.
Penalties	Up to approximately US\$200,000.

Croatia	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	The notification has to be submitted to the CCA prior to the implementation of the concentration and following the conclusion of the merger agreement on the basis of which control or decisive influence will be acquired or following the publication of the invitation to tender.
Clearance deadlines (Stage 1/Stage 2)	In Phase I, the CCA has 30 days to clear the concentration. If no decision has been adopted after the expiry of the waiting period, the concentration is deemed to be cleared in Phase I. Should the authority enter into Phase II proceedings, the final decision regarding the concentration must be taken within three months (which may be extended by an additional three months). If no decision is taken prior to the expiry of the waiting period, the concentration is presumed by law to be approved in Phase II.
Substantive test for clearance	The CCA assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.
Penalties	In the case of a breach of the merger control rules, the CCA may impose fines ranging between up to 1 and up to 10 per cent of an undertaking's total annual turnover realised in the preceding business year, depending on the type of breach.

Cyprus	
Voluntary or mandatory system	Mandatory system for concentrations of major importance.
Notification trigger/filing deadline	No filing deadline exists but a concentration cannot partially or entirely be implemented without notification and clearance while the CPC can order the partial or complete dissolution of a concentration that was not notified and was implemented.
Clearance deadlines (Stage 1/Stage 2)	<p>Clearance is notified within one month to the notifying undertakings, as of the date of the notification or the date at which additional information is received by the CPC, which period can be extended by 14 days.</p> <p>In the case where a full investigation will be conducted (Phase II), the Service has three months to submit its report to the CPC and the latter has four months from such submission to issue its decision as to the compatibility or not of the concentration, by which time the parties must also be notified.</p>
Substantive test for clearance	<p>A concentration, which creates or strengthens a dominant position in the affected markets within Cyprus, shall be declared incompatible with the requirements of the competitive market.</p> <p>In reviewing a concentration as to its compatibility with the competitive market, the CPC takes into account the following:</p> <ul style="list-style-type: none"> <li>• the structure of the affected markets;</li> <li>• the market position of the participants;</li> <li>• the economic power of all the undertakings in the market;</li> <li>• any barriers of entry to the affected market;</li> <li>• the interests of the intermediate and end consumers of the products and services; and</li> <li>• the alternative sources of supply of the products and services that are traded in the affected markets and of their substitutes.</li> </ul>

**Cyprus**

Penalties	<p>Partially or completely putting into effect a concentration without prior approval carries a fine of 10 per cent of the total turnover of the notifying undertakings in the financial year immediately preceding the concentration, in addition to a fine of up to €8,000 for each day that the infringement persists.</p> <p>Implementing a concentration without conforming to a condition imposed by the CPC carries a fine of 10 per cent of the total turnover of the notifying undertakings in the financial year immediately preceding the concentration, in addition to a fine of up to €8,000 for each day that the infringement persists.</p> <p>A fine of up to €50,000 may be imposed for a failure to provide requested information or clarifications, or for providing misleading or inaccurate information.</p>
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**Czech Republic**

Voluntary or mandatory system	Mandatory system.
Notification trigger/filing deadline	<p>There is no deadline for filing the notification, but the concentration may not be implemented unless and until it has been approved by the Office.</p> <p>The notifying party may file the notification as soon as the legally binding transaction documents have been signed.</p> <p>The notification may even be submitted prior to the signing of the relevant transaction documents, provided the parties have, in principle, agreed on the structure and timing of the concentration.</p>
Clearance deadlines (Stage 1/Stage 2)	<p>Phase I: 30 days (in case of a simplified procedure, 20 days).</p> <p>Phase II: up to five months.</p> <p>Where remedies are proposed, extension of the above deadlines by 15 days.</p>
Substantive test for clearance	<p>The Office assesses the notified concentrations against a test which basically corresponds to the 'substantial impediment to effective competition' test under the EU Merger Regulation.</p> <p>The Office shall prohibit implementation of concentrations that would significantly impede competition on the relevant market. A significant impediment to competition can be caused particularly by the creation or threat of a dominant position.</p> <p>The Act presumes that a concentration will not have as its result the significant impediment of competition where the aggregate market share of the parties to the concentration on the relevant market does not exceed 25 per cent.</p>
Penalties	<p>Fine up to 10 million Czech koruna or 10 per cent of the net turnover.</p> <p>Measures necessary to restore effective competition on the relevant market, particularly demerger obligation.</p>

**Denmark**

Voluntary or mandatory system	Mandatory system.
Notification trigger/filing deadline	<ul style="list-style-type: none"> <li>• Combined aggregate turnover in Denmark of all the undertakings concerned is more than 900 million kroner and the aggregate turnover in Denmark of each of at least two of the undertakings concerned is more than 100 million kroner; or</li> <li>• the aggregate turnover in Denmark of at least one of the undertakings concerned is more than 3.8 billion kroner and the aggregate worldwide turnover of at least one of the other undertakings concerned is more than 3.8 billion kroner.</li> </ul>
Clearance deadlines (Stage 1/Stage 2)	<p>Stage 1: 25 working days from notification.</p> <p>Extension: 35 working days from notification if one or more of the participating undertakings are proposing commitments.</p> <p>Stage 2: 90 working days from the expiry of stage 1.</p> <p>Extension: possible if new or revised commitments are proposed at a later time, on request by the parties or with the parties' consent.</p> <p>Suspension: the transaction is suspended until a final decision is reached with limited exceptions for public bids.</p>
Substantive test for clearance	The substantive test is substantial impediment of effective competition (SIEC): A merger that will not significantly impede effective competition, in particular due to the creation or strengthening of a dominant position, shall be approved. A merger that will significantly impede effective competition, in particular due to the creation or strengthening of a dominant position, shall be prohibited.
Penalties	Fines for failure to file, implementation before clearance or breach of conditions set by the Competition Council.
Remarks	Special rules for the calculation of turnover of financial institutions.

**Ecuador**

Voluntary or mandatory system	The Antitrust Law includes mandatory economic concentration notifications when established thresholds are exceeded, as well as informative notifications.
Notification trigger/filing deadline	<p>The Antitrust Law requires that economic concentration notifications be filed within a period of eight calendar days from the date of agreement execution.</p> <ul style="list-style-type: none"> <li>• 30% of the market</li> <li>• 78.8% of prior year's turnover</li> </ul>

Ecuador	
Clearance deadlines (Stage 1/Stage 2)	Sixty working days from the date the SCPM notifies that it has received the submitted notification. The SCPM may suspend the term for up to 60 calendar days. Furthermore, the initial term of 60 working days may be extended for up to 60 working days, as an exception. In total, up to six months.
Substantive test for clearance	<ul style="list-style-type: none"> <li>• Structure of the defined relevant market.</li> <li>• Concentration indexes.</li> <li>• Barriers to entry.</li> <li>• Efficiencies analyses.</li> <li>• Supply and demand structure.</li> <li>• Benefits for or detriments to the consumer that the concentration and competitive pressures could cause.</li> <li>• General interest.</li> </ul>
Penalties	<ul style="list-style-type: none"> <li>• 8 per cent of the breaching economic operator's total turnover in the fiscal year prior to the year the fine is imposed for having filed an economic concentration notification beyond the legally defined time period.</li> <li>• 10 per cent, for executing an economic concentration operation when notification is mandatory, before the operation is notified to or authorised by the SCPM.</li> </ul>
Egypt	
Voluntary or mandatory system	Mandatory post-closing obligation. No exemption as long as conditions are met. Purely informative, no approval or clearance is sought or granted.
Notification trigger/filing deadline	Thirty calendar days from closing.
Clearance deadlines (Stage 1/Stage 2)	Not applicable.
Substantive test for clearance	Not applicable.
Penalties	Criminal fine up to 500,000 Egyptian pounds for failure to notify and up to 1 million Egyptian pounds for intentionally providing false information.
European Union	
Voluntary or mandatory system	European Merger Control Regulation. Mandatory system. Form of notification: special form. Form CO. Detailed information on the parties (turnover, business sectors, groups), the merger proposal, the affected markets, competitors and customers in any of the EU official languages. Short Form CO can be used in certain circumstances for mergers raising no issues and Form RS is applicable for pre-notification referral requests by the notifying parties.
Notification trigger/filing deadline	<ul style="list-style-type: none"> <li>• Combined worldwide turnover over €5 billion and EU-wide turnover of at least two parties over €250 million unless each of the parties achieves more than two-thirds of the EU turnover in one and the same state;</li> <li>• combined worldwide turnover over €2.5 billion;</li> <li>• EU-wide turnover of at least two of the undertakings over €100 million each;</li> <li>• combined turnover in each of at least three member states over €100 million; or</li> <li>• a turnover in each of those three member states by each of at least two of the undertakings over €25 million unless each of the parties achieves more than two-thirds of the EU turnover in one and the same state.</li> </ul> <p>Filing must be made prior to implementation. The filing can be made prior to the conclusion of a binding agreement so long as the parties intend in good faith to enter a binding agreement.</p>
Clearance deadlines (Stage 1/Stage 2)	<p>Stage 1: 25 working days from notification or 35 working days from notification where the parties have submitted commitments intended to form the basis of a clearance decision.</p> <p>Stage 2: 90 working days, plus 15 working days where commitments have been offered after the 55th day. Possibility of 20-working-day extension.</p> <p>Suspension effects: suspension of transaction until final decision with limited exceptions for public bids.</p>
Substantive test for clearance	Whether a merger will significantly impede effective competition in the EEA or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. In addition, the cooperative aspects of full-function joint ventures are appraised in accordance with the criteria of article 101(1) and (3) TFEU. Broadly, economic benefits must outweigh the detriment to competition.
Penalties	<p>Failure to file or implementation before clearance: fines of up to 10 per cent of parties' turnover.</p> <p>Failure to provide information or supply of incorrect, incomplete, misleading information: fines of up to 1 per cent of parties' turnover (in certain circumstances).</p> <p>Failure to comply with a condition or obligation imposed by decision: fines of up to 10 per cent of parties' turnover. Possible revocation of clearance decision (for breach of obligation) and order for dissolution or other measures (for breach of condition).</p> <p>Implementation contrary to a prohibition Commission decision: fines of up to 10 per cent of parties' turnover and possible order for dissolution of the merger or other measures.</p> <p>Periodic penalties of up to 5 per cent of average daily aggregate turnover payable for each day that certain infringements persist.</p>
Remarks	Special rules for the calculation of thresholds for banks and insurance companies.

### Faroe Islands

Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	The participating undertakings must have a total turnover of 75 million kroner in the Faroe Islands and at least two of the participating undertakings must have a turnover of at least 15 million kroner in the Faroe Islands, or at least one of the participating undertakings must have a turnover of 75 million kroner in the Faroe Islands and at least one other of the participating undertakings must have a turnover of 75 million kroner worldwide.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 30 days from notification. Stage 2: three months in addition to the 30 days of Stage 1.
Substantive test for clearance	The substantive test is substantial impediment of effective competition (SIEC). A merger that will not significantly impede effective competition, in particular due to the creation or strengthening of a dominant position, shall be approved. A merger that will significantly impede effective competition, in particular due to the creation or strengthening of a dominant position, shall be prohibited.
Penalties	Fines for failure to file, implementation before clearance or breach of conditions set by the Competition Council.
Remarks	Filing can be made either in Faroese or Danish. Possibility on case-by-case basis to make arrangements with the Faroese Competition Authority to file in other languages.

### Finland

Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	Combined aggregate worldwide turnover of the parties exceeds €350 million and the aggregate turnover in Finland of at least two of the parties exceeds €20 million. Filing must be made prior to implementation. The filing can be made as soon as the parties demonstrate with sufficient certainty their intention to conclude a concentration.
Clearance deadlines (Stage 1/Stage 2)	The FCCA must either approve the concentration or initiate an in-depth investigation within 23 working days of the filing of the complete notification (Stage 1). If the FCCA decides to initiate an in-depth investigation, it must within 69 working days (or 115 working days with the permission of the Market Court) of such decision either approve the concentration or request the Market Court to block it (Stage 2).
Substantive test for clearance	Whether the concentration may significantly impede effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.
Penalties	Fines of up to 10 per cent of the total turnover of the relevant undertaking(s) may be imposed. In addition, the Market Court may order the concentration to be dissolved or annulled (eg, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of the joint control).
Remarks	Foreign-to-foreign mergers are caught where the relevant jurisdictional thresholds are met.

### France

Voluntary or mandatory system	Compulsory system. Form of notification: no special form. Similar type of information but less detailed than Form CO. In French.
Notification trigger/filing deadline	<p>Main thresholds:</p> <ul style="list-style-type: none"> <li>• combined worldwide turnover over €150 million; and</li> <li>• at least two of the undertakings concerned each achieved turnover in France over €50 million; and</li> <li>• the concentration does not have an EU dimension.</li> </ul> <p>Thresholds specific to retail sector:</p> <ul style="list-style-type: none"> <li>• worldwide combined pre-tax turnover of over €75 million; and</li> <li>• at least two of the undertakings concerned each achieved in the retail trade sector in France a turnover exceeding €15 million; and</li> <li>• the concentration does not have an EU dimension.</li> </ul> <p>Thresholds specific to the French overseas territories:</p> <ul style="list-style-type: none"> <li>• worldwide combined pre-tax turnover of over €75 million; and</li> <li>• at least two of the undertakings concerned each achieved a pre-tax turnover exceeding €15 million (or lowered to €5 million in the retail trade sector) in at least one (but not necessarily the same) French overseas department or community; and</li> <li>• the concentration does not have an EU dimension.</li> </ul> <p>Filing: No time limit for notification; but in any event sufficiently in advance of completion, as French merger control has a suspensive effect.</p>

France	
Clearance deadlines (Stage 1/Stage 2)	<p>First phase: 25 working days for the Authority, plus five working days for the Minister to possibly ask the opening of a second phase; review is automatically extended by 15 working days if remedies are proposed, and it can also be further extended by up to 15 working days if the notifying party requests a 'stop the clock'. The Authority may also stop the clock if it is not provided with relevant information.</p> <p>Second phase: 65 working days for the Authority, plus 25 working days for the Minister to possibly decide the case. Second phase may be extended by up to 20 working days if remedies are proposed/modified after the first 45 days of the second phase, and can also be further extended by up to 20 working days if the notifying party requests a 'stop the clock'. Eventually, it can be extended with no limit of time by the Authority if the notifying party or a third party fails to provide in due time requested pieces of information.</p> <p>In a nutshell:</p> <ul style="list-style-type: none"> <li>• the first stage will normally last between 25 and 60 working days; and</li> <li>• the second stage will normally last between 90 and 130 working days, and even longer with no time limit in the event of failure to provide information.</li> </ul> <p>Suspension effect: suspension until clearance (possibility of a derogation upon request).</p>
Substantive test for clearance	Substantial lessening of competition with particular emphasis on the creation or reinforcement of a dominant position. The authorities also examine whether the operation creates or reinforces purchasing power, placing suppliers in a state of economic dependency.
Penalties	Failure to file or implementation before clearance: for corporate entities, 5 per cent of their turnover in France; for individuals, €1.5 million.
Remarks	<p>Special rules for press and audiovisual sectors, banks and insurance companies.</p> <p>Foreign investments are generally unrestricted but some of them in strategic sectors are subject to declaration or prior authorisation. Foreign-to-foreign mergers are subject to notification if the French relevant turnover thresholds are met.</p>

Germany	
Voluntary or mandatory system	Mandatory system.
Notification trigger/filing deadline	<p>Notification trigger:</p> <ul style="list-style-type: none"> <li>• the concentration does not have an EU dimension; and</li> <li>• combined worldwide turnover of all parties is over €500 million; and</li> </ul> <p>Either (i):</p> <ul style="list-style-type: none"> <li>• at least one party has turnover of over €25 million in Germany; and</li> <li>• another party has turnover of over €5 million in Germany;</li> </ul> <p>Or (ii):</p> <ul style="list-style-type: none"> <li>• one party has turnover of over €25 million in Germany, but neither the target nor any further participating undertaking has a turnover in Germany exceeding €5 million;</li> <li>• the value of consideration for the transaction of over €400 million; and</li> <li>• the target is active in Germany to a significant extent.</li> </ul> <p>No notification is required if thresholds in (i) are met but one party to the merger achieved less than €10 million worldwide turnover (in the case of the target including the seller and its affiliates provided that the seller controls the target and, in the case of the acquirer, including its affiliates).</p>
Clearance deadlines (Stage 1/Stage 2)	<p>Stage 1: one month from notification.</p> <p>Stage 2: four months from notification (extension possible if merging parties consent). Extension by one month, if merging parties submit remedies proposals.</p> <p>Suspension effects: suspension until clearance (possibility of a derogation upon request for important reasons).</p>
Substantive test for clearance	Whether a merger will significantly impede competition, in particular if it will create or strengthen a dominant market position (statutory rebuttable presumptions of dominance) which is not outweighed by improvement of market conditions on other markets (balancing clause).
Penalties	For incomplete, incorrect or late notification and completion before clearance, fines of up to €1 million or, in the case of undertakings, of up to 10 per cent of their total worldwide group turnover in the preceding business year. If the transaction is completed before clearance, it is also regarded as invalid until final clearance is given.
Remarks	Special rules for calculation of thresholds in cases of goods traded only as well as for the publishing and broadcasting sector and for credit and other financial institutions and insurance companies. In addition to merger control proceedings, there are special regulatory procedures for certain strategic sectors, banks and insurance companies. Post-completion notice is required 'without undue delay' after completion of the notified merger.

Greece	
Voluntary or mandatory system	Filing is mandatory, in Greek.
Notification trigger/filing deadline	Pre-merger filing: combined aggregate worldwide turnover of at least €150 million and aggregate turnover in Greece for each of at least two participating undertakings exceeding €15 million. Filing within 30 calendar days of signing of a binding agreement.
Clearance deadlines (Stage 1/Stage 2)	<p>Stage 1: one month from notification.</p> <p>Stage 2: two additional months. Implementation is prohibited until issuance of the Commission's decision.</p>
Substantive test for clearance	A concentration must not substantially restrict competition in the Greek market, especially by way of creating or reinforcing a dominant position.
Penalties	Pre-merger filing: in case of failure to file, fines ranging from €30,000 up to 10 per cent of the aggregate turnover may be imposed by the Commission. In case of early closing, fines range from €30,000 up to 10 per cent of the aggregate turnover.
Remarks	Special provisions for acquisition of major holdings in companies in traditionally regulated sectors (ie, banking, insurance, media, telecommunications, etc).

Greenland	
Voluntary or mandatory system	Mandatory system.
Notification trigger/ filing deadline	<ul style="list-style-type: none"> <li>• Combined aggregate turnover in Greenland of all the undertakings concerned is more than 100 million kroner; and</li> <li>• the aggregate turnover in Greenland of each of at least two of the undertakings concerned is more than 50 million kroner.</li> </ul> <p>Filing deadline: Concentrations falling within the thresholds must be notified to the Consumer and Competition Authority after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest; and in any event before implementation. A specific deadline can be expected in the future executive orders.</p>
Clearance deadlines (Stage 1/Stage 2)	<p>Stage 1: 40 working days from notification.</p> <p>Stage 2: 90 working days from the expiry of Stage 1.</p> <p>Extension: possible if new or revised commitments are proposed at a late time, on request by the parties or with the parties' consent.</p> <p>Suspension: the transaction is suspended until a final decision is reached.</p>
Substantive test for clearance	Whether the concentration significantly impedes effective competition, in particular as a result of the creation or strengthening of a dominant position. In addition, the cooperative aspects of full-function joint ventures are appraised in accordance with the criteria applying to anticompetitive agreements.
Penalties	Fines may be imposed for failure to notify (and unlawful implementation).
Remarks	Filing fees were introduced by Executive Order No. 3 of 10 March 2016.
Hong Kong	
Voluntary or mandatory system	Voluntary apart from the mandatory requirement under the Takeovers Code, which requires that an offeror of a potential mandatory general offer seeks the prior consent of the CA in relation to the 'change' of a carrier licensee before it triggers an obligation to make a mandatory general offer.
Notification trigger/ filing deadline	There is no financial trigger for notification. There is generally no requirement for pre-notification except in a situation involving a mandatory general offer.
Clearance deadlines (Stage 1/Stage 2)	<p>There is no formal timeline for clearance.</p> <p>The Competition Ordinance only stipulates that the competition authority may only commence an investigation of a merger within 30 days after the day on which the competition authority first became aware, or ought to have become aware, that a merger has taken place; if the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Tribunal for an order within six months of the day on which the merger was completed or the competition authority became aware of the merger (whichever is later).</p>
Substantive test for clearance	The substantive test to be applied is whether the merger has, or is likely to have, the effect of substantially lessening competition in Hong Kong.
Penalties	<p>There are no specified sanctions for not filing, because the merger control regime is voluntary in general. However, the competition authority may apply to the Tribunal for an order to unwind a completed merger or to prohibit a proposed merger, if it has reasonable cause to believe that the merger will likely contravene the Merger Rule.</p> <p>In the case of a mandatory general offer involving the 'change' of a carrier licensee, failure to obtain the CA's prior consent before triggering the mandatory general offer may result in disciplinary action under the Takeovers Code. Possible sanctions include issuance of a public apology, public censure, and requirements on the company involved, licensed representatives and registered institutions not to act or implement the merger or acquisition.</p>
Remarks	<p>The merger control regime at present only applies to transactions where an undertaking that directly or indirectly holds a telecommunications carrier licence is involved.</p> <p>It is anticipated that the regime might be extended to more or all sectors in the future.</p>
Hungary	
Voluntary or mandatory system	<p>Filing is mandatory in the case of mergers that reach the jurisdictional thresholds.</p> <p>Filing is voluntary in the case of mergers that do not reach the jurisdictional thresholds, but may be subject to the GVH's investigation.</p>
Notification trigger/ filing deadline	No deadline for filing, but the merger cannot be implemented without the GVH's permission. Mergers above the statutory threshold must be notified.
Clearance deadlines (Stage 1/Stage 2)	<p>Fast-track review: eight days.</p> <p>Stage 1: 30 days (including fast-track review).</p> <p>Stage 2: four months (including Stage 1).</p>
Substantive test for clearance	The SIEC test is applied.
Penalties	The GVH may block the transaction and impose fines.
Remarks	Sector-specific rules apply to mergers in the media, energy, telecom and financial sectors.
Iceland	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	The CA shall be notified of a merger before it takes effect but after the conclusion of an agreement on the proposed merger, the public announcement of a takeover bid or the acquisition of a controlling interest in an undertaking.
Clearance deadlines (Stage 1/Stage 2)	<p>Stage 1: 25 working days.</p> <p>Stage 2: up to 90 working days.</p>
Substantive test for clearance	The substantive test for clearance is whether the merger impedes effective competition by creating or strengthening an individual or collective dominant position or otherwise significantly impeding effective competition.

Iceland	
Penalties	A merger falling within the regime shall not take effect while it is being examined by the CA. Any violation of this can be subject to fines of up to 10 per cent of the total turnover of the preceding business year of any undertaking or association of undertakings involved in the violation.
India	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	A combination would be required to be notified to the CCI, and receive approval from the CCI prior to closing.
Clearance deadlines (Stage 1/Stage 2)	Phase I: 30 working days from receipt of notification excluding 'clock stops' for responding to information requests. This can extend to 45 working days if the CCI reaches out to third parties. Phase II: Up to 210 days from receipt of notification. Where modifications are proposed in Phase II, the time may be extended up to an additional 60 working days.
Substantive test for clearance	Combinations that cause, or are likely to cause, an appreciable adverse effect on competition (AAEC) in India are void.
Penalties	The CCI has the power to impose a penalty of up to 1 per cent of the total turnover or value of assets, whichever is higher, of the proposed combination. In addition, in the event the CCI believes the transaction will have or be likely to have an AAEC in India, the transaction will be treated as void, and all actions taken in pursuance of the void transaction shall also be void. In such a case, the CCI also has the power to unwind the transaction, though this has not happened to date.
Indonesia	
Voluntary or mandatory system	Both systems are applicable. Notification is voluntary prior to the closing of transaction (pre-merger notification) and mandatory after the completion of transaction (post-merger notification). Even though a merger has been notified prior to its completion, the notification of the complete merger is still mandatory. However, there will be no reassessment as long as there is no substantial change to market conditions and accordingly the review process will be completed in a short period of time.
Notification trigger/filing deadline	The specified threshold is met. The merger is between or among non-affiliates. The merger has a direct impact to the market in Indonesia (local effects test). The merger is a share-based transaction (or other transaction that is similar to or has a similar impact to a share-based transaction) which results in change of control.
Clearance deadlines (Stage 1/Stage 2)	For pre-merger review, there are two phases. Phase I: maximum 30 working days and Phase II: maximum 60 working days. The KPPU will clear the merger in Phase I if the post-HHI is less than 1,800 or above 1,800 but the delta is less than 150 points in case of a horizontal merger or if there is no dominant position in the relevant markets concerned in case of a vertical merger. For post-merger review, the process consists of only one phase and must be completed within a maximum of 90 working days.
Substantive test for clearance	Factors to be considered are: <ul style="list-style-type: none"> <li>• level of concentration after the transaction;</li> <li>• barriers to entry;</li> <li>• the possibility of unilateral, coordinated effects, or foreclosure effects;</li> <li>• efficiencies; and</li> <li>• whether one of the merging parties is a failing undertaking.</li> </ul>
Penalties	The penalties do not apply for failure to file before the closing of a transaction. However, fines of 1 billion rupiah per day commencing after 30 working days have elapsed since the transaction, while a maximum fine of 25 billion rupiah may be imposed by the authority for failure to file a post-merger notification.
Remarks	For transactions cleared with conditions, the parties to the transaction may proceed with the transaction provided that they fulfil the conditions stipulated in KPPU Opinion. In addition, the KPPU will supervise the implementation of the conditions required, the behaviour of the parties and the competition in the relevant market.
Ireland	
Voluntary or mandatory system	The Irish merger control regime is a mandatory system and no exceptions exist. The mandatory obligation to notify arises where, for the most recent financial year: <ul style="list-style-type: none"> <li>• the aggregate turnover in the state of the undertakings involved is not less than €60 million; and</li> <li>• the turnover in the state of each of two or more of the undertakings involved is not less than €10 million.</li> </ul> Section 18(3) of the Act provides for voluntary notification of a merger that does not meet the jurisdictional thresholds. The CCPC can request parties to potentially problematic mergers that fall below the relevant financial thresholds to voluntarily notify mergers under section 18(3).
Notification trigger/filing deadline	The notification must be made prior to the merger or acquisition being put into effect. The notification may be made in the following circumstances: <ul style="list-style-type: none"> <li>• one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted;</li> <li>• the undertakings involved demonstrate to the CCPC a good faith intention to conclude an agreement or a merger or acquisition is agreed;</li> <li>or</li> <li>• in relation to a scheme of arrangement, a scheme document is posted to shareholders.</li> </ul>

Ireland	
Clearance deadlines (Stage 1/Stage 2)	<p>A Phase I clearance determination must be issued by the CCPC within 30 working days of the submission of a full and complete filing by the merging parties (the 'appropriate date'), unless either the CCPC has used its power to 'stop and restart the clock' by issuing a formal request for information, or where the parties and the CCPC negotiate remedies to 'ameliorate the effects of the merger', which extends the Phase I period to 45 working days.</p> <p>A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date, unless the CCPC has used its power to 'stop the clock' by sending a formal request for information, or where the parties and the CCPC negotiate remedies to 'ameliorate the effects of the merger', which extends the Phase II period to 135 working days.</p>
Substantive test for clearance	Section 20(1)(c) of the Act provides that the substantive test for assessment of competition issues is 'whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State' (the SLC test).
Penalties	<p>Under section 18(9) of the Act, wilful and knowing failure to notify a merger or acquisition that is caught by the jurisdictional thresholds is a criminal offence punishable by fines of up to €250,000, plus €25,000 per day for a continued breach. The CCPC does not have legal powers to impose a fine itself; instead the CCPC can recommend that the Director of Public Prosecution initiate a prosecution in the Irish Courts. Liability attaches to the undertaking itself and/or the 'person in control' of an undertaking. Section 18(11) of the Act provides that the 'person in control' of an undertaking is:</p> <ul style="list-style-type: none"> <li>• in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention;</li> <li>• in the case of a partnership, each partner who knowingly and wilfully authorises or permits the contravention; or</li> <li>• in the case of any other form of undertaking, any individual in control of that undertaking who knowingly and wilfully authorises or permits the contravention.</li> </ul>
Remarks	The revised thresholds have resulted in a significant reduction in merger notifications in 2019. As of 20 June 2019, 16 mergers had been notified to the CCPC, a 68% reduction as compared to the same time period in 2018.
Israel	
Voluntary or mandatory system	If thresholds are met, filing of pre-merger notification forms is mandatory.
Notification trigger/filing deadline	A merger that has to be notified under the Competition Law may not be executed before it has been cleared by the Director General.
Clearance deadlines (Stage 1/Stage 2)	Thirty days for decision-making, otherwise the merger is deemed to be cleared. This period can be extended either with the parties' consent or the ICA Director General's decision.
Substantive test for clearance	The Director General shall object to a merger or stipulate conditions for it, if he or she believes that there is a reasonable risk that, as a result of the merger as proposed, the competition would be significantly damaged or the public would be injured in one of the following: price level, quality, quantity of a product (or scope of a service) supplied, or the constancy and conditions of such supply.
Penalties	<p>In the criminal arena: up to three years' imprisonment (in aggravating circumstances – up to five years); fine of up to about 2.2 million shekels plus 14,000 shekels for each day such offence persists. Fines are doubled for a corporation.</p> <p>Administrative:</p> <ul style="list-style-type: none"> <li>• financial sanctions: 8 per cent of the annual revenue, up to a maximum of 24 million shekels;</li> <li>• an administrative declaration, stating that a merger has been unlawfully implemented, exposing the merging parties to civil lawsuits; or</li> <li>• separation of an entity merged in violation of the Competition Law subject to several conditions to be fulfilled.</li> </ul>
Remarks	According to the Competition Law, the Minister of Industry, Trade and Labour is authorised to exempt a merger from all or some provisions of the law, if he or she believes that it is necessary on the grounds of foreign policy or national security.
Italy	
Voluntary or mandatory system	Mandatory system. Form of notification: special form. Detailed information similar to the EU Form CO. In Italian.
Notification trigger/filing deadline	Combined turnover over €498 million in Italy and turnover of each of at least two of the undertakings involved in Italy over €30 million. No filing deadline; no standstill obligation. Pre-notification procedure is available but not required for all transactions. It is necessary to notify the transaction prior to implementation: the IAA, when opening a Phase II investigation, has the power to order the suspension of a notified concentration pending approval if it raises serious competition concerns.
Clearance deadlines (Stage 1/Stage 2)	Phase I: 30 days (15 days for public bids) from notification. Phase II: 45 additional days (extendible by a further 30 days where the information provided is materially incomplete). As a general rule, the transaction can be implemented after notification (not suspensory).
Substantive test for clearance	Whether the merger will create or strengthen a dominant position in the national market in a way that threatens to eliminate or reduce competition to a considerable and lasting extent. De facto the same test under the EUMR is applied.
Penalties	<p>Failure to file: fines of up to 1 per cent of the notifying parties' worldwide turnover in the last fiscal year.</p> <p>Implementation before clearance: no penalties.</p> <p>If parties implement the transaction notwithstanding a prohibition decision or non-compliance with conditions imposed in a Phase II clearance decision, the IAA may impose fines of between 1 and 10 per cent of the turnover of the businesses concerned.</p>
Remarks	Special provisions in the electricity and gas, defence, broadcasting, telecommunications and film distribution sectors and for banks and insurance companies. In addition, special powers granted to the government (golden share rules) applicable to M&A transactions relating to assets in key industries, such as defence and national security, energy, communications and transportation.
Japan	
Voluntary or mandatory system	It is a mandatory system.
Notification trigger/filing deadline	Different thresholds apply depending on the transaction structure. For example, for share acquisitions exceeding the threshold of either 20% or 50% stake, the acquiring group must have Japanese turnover of over ¥20 billion and the target group (excluding the seller) over ¥5 billion. No filing deadline, apart from the suspensory obligation until clearance.

Japan	
Clearance deadlines (Stage 1/Stage 2)	30 calendar days from formal submission of filing for Stage 1. Once Stage 2 is triggered, the later of 120 days from the date of the FTC's acceptance of the notification or 90 days from the date of submission of the additional materials or information.
Substantive test for clearance	Merger Guidelines elaborate on the items considered by the FTC, but generally consistent with other major jurisdictions.
Penalties	Gun jumping is subject to a criminal fine of up to ¥2 million.
Kenya	
Voluntary or mandatory system	Currently, Kenya has a mandatory notification system.
Notification trigger/filing deadline	There are no notification triggers under the Act, nor is there a filing deadline. Nevertheless, the merging parties are prohibited from implementing the merger without the Authority's approval.
Clearance deadlines (Stage 1/Stage 2)	The Authority has up to 180 days after the submission of a merger notification form to determine whether to approve the proposed merger, or approve it with conditions or reject it outright.
Substantive test for clearance	The Authority applies both the substantial lessening of competition and the public interest tests.
Penalties	Any person who fails to comply with the Part IV notification and approval requirements commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenya shillings or both. The Authority may also impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's annual turnover in Kenya of the offending undertakings.
Korea	
Voluntary or mandatory system	Filing with the Korea Fair Trade Commission (KFTC) is mandatory.
Notification trigger/filing deadline	<p>The following transactions must (subject to the jurisdictional threshold set forth below) be reported to the KFTC:</p> <ul style="list-style-type: none"> <li>• the acquisition of 20 per cent (15 per cent in the case of listed companies in Korea) or more of the shares of the target company;</li> <li>• the acquisition of additional shares of the target company to become the largest shareholder of that company as a result thereof;</li> <li>• participation in the establishment of a new company as the largest shareholder;</li> <li>• the acquisition of all or a principal portion of the business or fixed assets of the target company;</li> <li>• merger with the target company; and</li> <li>• the occupation by an officer or an employee of a position as an officer of the target company, where such person maintains his or her officer status in the acquiring company (except for interlocking directorate between affiliate companies).</li> </ul> <p>As a jurisdictional threshold, there is a reporting requirement if the one party involved, together with its affiliates both before and after the transaction, has total assets or annual turnover of 300 billion won or more, and the other party involved, together with its affiliates both before and after the transaction, has total assets or annual turnover in the amount of 30 billion won or more.</p> <p>The acquiring company must report a transaction within 30 days of the date on which the underlying transaction takes place. Where a large enterprise with total assets or annual sales together with its affiliates both before and after the transaction) of 2 trillion won or more acquires a company, the pre-closing notification must be filed any time after the date of signing the relevant agreement and before the date of the consummation of the transaction.</p>
Clearance deadlines (Stage 1/Stage 2)	Thirty days, which can be extended by up to 90 days. Therefore, the total can be 120 days. Note that this period can be prolonged upon the KFTC officer's request for supplementary information.
Substantive test for clearance	<p>Whether a proposed M&amp;A transaction has an anticompetitive effect on the relevant Korean market.</p> <p>If the combined market share of the parties meets all the elements stated below, the business combination is presumed to have an anticompetitive effect on the relevant market:</p> <ul style="list-style-type: none"> <li>• whether the combined market share of the company resulting from the business combination in question results in monopoly status. The test for monopoly status is whether the market share of a single company is 50 per cent or more in the relevant market or the aggregate market share of three companies or fewer is 75 per cent or more in the relevant market;</li> <li>• whether the aggregated market share of the combined company is the largest in the relevant market; and</li> <li>• whether the aggregated market share of the combined company exceeds that of the company holding the second-largest market share by 25 per cent or higher of the combined market share of the parties.</li> </ul>
Penalties	These include prohibition of the merger transaction, disposition of all or part of the shares acquired, transfer of business, or any other behavioural remedies deemed necessary to correct the anticompetitive effect caused by the transaction. The KFTC may impose a fine of up to 100 million won on companies that fail to file.
Remarks	Since new guidelines for foreign-to-foreign mergers became effective on 1 July 2003, the KFTC has enforced them quite actively and expects more foreign-to-foreign merger cases to be caught in the future.

## Liechtenstein

Voluntary or mandatory system	In general, there is no specific national legislation regarding merger control in Liechtenstein. The Liechtenstein Authority (ie, the Office of Justice) is authorised to apply merger control. For merger control on a supra-national level in Europe, the basic provisions are contained in the EEA Agreement and Annexe XIV to the EU Merger Regulation. Additionally, the provisions of Protocol 4 on the functions and powers of the EFTA Surveillance Authority in the field of competition do apply (Protocol 4 to the Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice).
Notification trigger/filing deadline	There is no special merger control legislation in Liechtenstein; however, the EU Merger Regulation is directly applicable. According to the provisions of the EU Merger Regulation, a transaction can be notified prior to the conclusion of a binding agreement. Once an agreement has been entered into, or a bid launched, there is no deadline or recommended period in which the parties must file a notification. However, the notification of the concentration needs to be made before its implementation.
Clearance deadlines (Stage 1/Stage 2)	Within 25 working days of when the notification is made, the EFTA Surveillance Authority (ESA) or the European Commission must reach a decision where the parties submit commitments (remedies) to resolve competition issues. In case of serious doubts, the competent authority will commence investigations; the period of this investigation is 90 working days.
Substantive test for clearance	The principle is that the activities of the EU and its member states should be conducted in accordance with the principle of an open market economy with free competition. Concentrations significantly impeding effective competition in the common market or a substantial part of it are prohibited in accordance with the provisions of the EU Merger Regulation.
Penalties	Companies failing to suspend implementation of a merger pending examination or that put into effect a merger that is prohibited by the ESA or the European Commission are exposed to fines.
Remarks	There is no specific national merger control, antitrust or cartel legislation in Liechtenstein. It is unlikely that a national merger control legislation will be implemented in the near future in Liechtenstein.

## Malaysia

Voluntary or mandatory system	Both regimes are voluntary.
Notification trigger/filing deadline	<p>Notification trigger</p> <p>Aviation services sector</p> <ul style="list-style-type: none"> <li>• Combined turnover in Malaysia in the preceding financial year of at least 50 million ringgit; or</li> <li>• combined worldwide turnover in the preceding financial year of at least 500 million ringgit.</li> </ul> <p><b>Communications and multimedia sectors</b></p> <p>Proposed horizontal M&amp;A:</p> <ul style="list-style-type: none"> <li>• At least one party is a licensee in a dominant position; or</li> <li>• M&amp;A would result in the proposed merged or acquired firm obtaining a dominant position (post-M&amp;A market share of 40 per cent or more).</li> </ul> <p>Completed horizontal M&amp;A:</p> <ul style="list-style-type: none"> <li>• Merged or acquired entity is a licensee in a dominant position.</li> </ul> <p>Proposed non-horizontal M&amp;A:</p> <ul style="list-style-type: none"> <li>• At least one of the parties is a licensee in a dominant position.</li> </ul> <p>Completed non-horizontal M&amp;A:</p> <ul style="list-style-type: none"> <li>• Merged or acquired entity is a licensee in a dominant position</li> </ul> <p><b>Filing deadline</b></p> <p>Aviation services sector</p> <p>Anticipated mergers:</p> <ul style="list-style-type: none"> <li>• When merger parties have bona fide intention to proceed with anticipated merger;</li> <li>• details of the anticipated merger are available; and</li> <li>• anticipated merger has been made public or may be made public by MAVCOM.</li> </ul> <p>Completed mergers:</p> <ul style="list-style-type: none"> <li>• At any time.</li> </ul> <p><b>Communications and multimedia sectors</b></p> <p>Notification &amp; assessment:</p> <ul style="list-style-type: none"> <li>• Parties are encouraged to submit transactions prior to completion. However, this is not mandatory. MCMC may even assess M&amp;A that proceeded prior to the issuance of the M&amp;A Guidelines.</li> </ul> <p>Authorisation of conduct:</p> <ul style="list-style-type: none"> <li>• MCMC allows licensees to apply before, during or after submitting an assessment application pursuant to the M&amp;A Guidelines;</li> <li>• however, parties are encouraged to apply prior to engaging in any conduct that may be construed to have the purpose or effect of substantially lessening competition.</li> </ul> <p>Aviation services sector:</p> <ul style="list-style-type: none"> <li>• On a case-by-case basis.</li> </ul>
Clearance deadlines (Stage 1/Stage 2)	<p>Communications and multimedia sectors:</p> <ul style="list-style-type: none"> <li>• Phase 1 assessment: within 30 days of receipt of valid Form 1.</li> <li>• Phase 2 assessment: will commence within 10 business days from the date of receipt of a valid Form 2. Indicative timeframe for completion is 120 business days from the date of commencement.</li> </ul>

Malaysia	
Substantive test for clearance	Both regimes use the 'substantial lessening of competition' test.
	Aviation services sector <ul style="list-style-type: none"> <li>Up to 10 per cent of worldwide turnover of the enterprise over period of infringement.</li> <li>non-compliance of guidelines can lead to fines of up to 1 million ringgit or 5 per cent of annual turnover.</li> </ul>
Penalties	Communications and multimedia sectors <ul style="list-style-type: none"> <li>Criminal penalties: fine of up to 500,000 ringgit, imprisonment up to five years, or both.</li> <li>A person may further be liable to a further fine of 1,000 ringgit for every day or part of a day during which the offence is continued after conviction.</li> </ul>
Malta	
Voluntary or mandatory system	Mandatory system.
Notification trigger/filing deadline	Filing of a notification of concentrations, for which there is an administrative filing fee of €163.06, must be done within 15 days prior to their implementation and following: the conclusion of the relevant agreement; the announcement of the public bid; or the acquisition of a controlling interest.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: six weeks, but can be increased to two months if after notification and not later than the end of the fifth week the undertakings concerned submit commitments. Also, until the end of the fifth week, the undertakings concerned may request suspension of periods for three weeks to discuss a new commitment proposed but which would be granted at the discretion of the DG. Under the simplified procedure, duration of Stage 1 is four weeks instead of six weeks. Stage 2: four months but suspension for a period of up to one month may be requested by the undertakings concerned when they submit commitments, and the request will be generally acceded to. But concentration is suspended only during Stage 1.
Substantive test for clearance	The DG will consider: the need to maintain and develop effective competition in the Maltese market; the geographical and product markets and potential competition from other undertakings; whether the business or part of the business of a party to the concentration has failed or is likely to fail; the market position of the undertakings concerned and their economic and financial power; the alternatives available to suppliers and users and their access to supplies or markets; any legal or other barriers to entry; supply and demand trends for the relevant goods and services; the interests of the intermediate and ultimate consumers; the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition; and the nature and extent of development and innovation in a relevant market.
Penalties	Penalties for failure to file a notification before implementation are a fine of between €1,000 and €10,000; and penalties for breaching the mandatory waiting period are up to 10 per cent of the turnover of the undertaking that benefits from the transaction.
Remarks	There are no bills or amendments to the law in the pipeline, though one may envisage an amendment to the Control of Concentrations Regulations and the Maltese Competition Act aimed at increasing the thresholds, which are currently set at low parameters that are easily exceeded even where the effect on competition may in fact turn out to be negligible.
Mexico	
Voluntary or mandatory system	Mandatory. Filing fee of approximately US\$9,000
Notification trigger/filing deadline	Monetary thresholds met. The transaction must be notified before closing. Mandatory waiting period upon notice by the agency. Main monetary thresholds: consideration above approximately US\$75 million. For the Mexican component of the transaction; acquisition of 35 per cent or more of target's assets or stock and target's sales or assets in Mexico above approximately US\$75 million; or combined sales or assets of parties of approximately US\$200 million and target size of over approximately US\$35 million.
Clearance deadlines (Stage 1/Stage 2)	Fast-track: 15 days. Stage 1: approximately 35 days. Stage 2: from 60 to 155 days.
Substantive test for clearance	Lessening, impairing or preventing competition.
Penalties	Up to 5 per cent of the parties' turnover in Mexico for failing to notify. The agency may order divestitures or behavioural remedies.
Remarks	No waiting period or freeze orders. Closing, only after the COFECE or IFT issues its final resolution.
Morocco	
Voluntary or mandatory system	The filing is mandatory.
Notification trigger/filing deadline	The notification of a concentration must occur when: <ul style="list-style-type: none"> <li>the combined aggregate worldwide pre-tax turnover of all of the undertakings or groups of natural or legal persons parties to the concentration is equal to or more than 750 million dirhams; or</li> <li>the aggregate Morocco-wide pre-tax turnover of at least two of the undertakings or groups of natural or legal persons concerned by the concentration is equal to or more than 250 million dirhams; or</li> <li>the undertakings that are parties to the concentration, or that are the subject of the concentration, or the undertakings that are economically linked to them, have generated altogether, during the previous calendar year, more than 40 per cent of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market.</li> </ul> <p>The notification should take place as soon as the parties concerned are able to present a sufficiently concrete file to allow the investigation of the case.</p>

**Morocco**

Clearance deadlines (Stage 1/Stage 2)	<p>Phase I: the Competition Council assesses the concentration within 60 days of the notification. If the parties offer commitments during Phase I, the 60-day deadline may be extended by 20 days. In case of particular necessity, parties may ask the Competition Council to suspend the deadline of the examination of the transaction for a maximum of 20 days.</p> <p>Phase II: the Competition Council assesses the transaction within 90 days. If the notifying parties offer commitments less than 30 days before the end of the 90-day deadline, the deadline will then expire 30 days after the reception of the commitments.</p> <p>The 90-day deadline may also be suspended at the request of the parties for up to 30 days in case of particular necessity. This deadline may also be suspended by the Competition Council, in particular when the notifying parties have failed to provide it with requested information or to inform it of the occurrence of a new material event. The time limit resumes when the cause of the suspension has been addressed.</p>
Substantive test for clearance	The substantive test for clearance is whether the planned concentration is likely to infringe competition, notably by creating or strengthening a dominant position or a buying power that places suppliers in a position of economic dependency.
Penalties	<p>The sanctions for not filing are as follows:</p> <ul style="list-style-type: none"> <li>• for legal entities responsible for filing: a fine that amounts to a maximum of 5 per cent of the pre-tax turnover made in Morocco during the last fully closed financial year, increased, when applicable, by the turnover made in Morocco during the same period by the acquired company; and</li> <li>• for natural persons responsible for filing: a fine of a maximum amount of 5 million dirhams.</li> </ul> <p>Upon failure to file a notification, the Competition Council also compels the parties, subject to a daily penalty payment, to notify the operation, unless they revert to the previous state of affairs.</p>
Remarks	Law No. 104-12 of 30 June 2014 on free pricing and competition and Law No. 20-13 of 30 June 2014 relating to the Competition Council, which transfer the merger control function to the Competition Council, have taken effect after the appointment of the new Competition Council's president and members, which occurred in November and December 2018.

**Netherlands**

Voluntary or mandatory system	Mandatory system. Form of notification: Standard form. In Dutch.
Notification trigger/filing deadline	Combined worldwide turnover exceeding €150 million and at least two undertakings each with turnover in the Netherlands exceeding €30 million. Filing deadline: complete notification prior to merger becoming effective. Special thresholds apply to concentrations in the insurance and healthcare sectors.
Clearance deadlines (Stage 1/Stage 2)	Phase I: Four weeks, Phase II: 13 weeks (subject to suspension should the authority require additional information).
Substantive test for clearance	Whether the concentration significantly impedes effective competition in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position.
Penalties	<p>Failure to file or implementation before clearance: transaction void plus fines of maximum €900,000 or 10 per cent of the worldwide turnover (whichever is higher).</p> <p>Incorrect or incomplete information: fines of up to €900,000 or 1 per cent of the worldwide turnover (whichever is higher).</p>

**North Macedonia**

Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	The participants are obliged to notify the Commission prior to the implementation of a concentration and following the conclusion of the merger agreement, or the announcement of the public bid on the purchase or the acquisition of the controlling interest in the charter capital of the undertaking.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 25 business days. Stage 2: 90 business days.
Substantive test for clearance	A concentration, that would significantly prevent, restrict or distort efficient competition on the market or its significant part, in particular as a result of the creation or strengthening of a dominant position of the participants, is non-compliant with the provisions of the LPC.
Penalties	Failure to notify is a misdemeanour penalised by a fine amounting to up to 10 per cent of the value of the aggregate annual income of the undertaking (respective to its group) made in the business year preceding the year when the misdemeanour was committed. In addition to the fine, the Commission for misdemeanour matters may impose to the legal person a temporary ban on the performance of specific activity for between three and 30 days, and to the natural person a ban on the performance of an occupation, activity or duty for between three and 15 days.
Remarks	The average duration of procedures in 2018 in which the Commission approved the concentrations was 20 business days.

**Norway**

Voluntary or mandatory system	Mandatory notification for concentrations where the undertakings concerned exceed certain turnover thresholds. No particular rules for foreign-to-foreign mergers. Combined threshold is 1 billion kroner annual turnover in Norway. Individual threshold is 100 million kroner annual turnover in Norway.
Notification trigger/filing deadline	No deadline for filing. As long as the transaction is not implemented, it is entirely up to the parties when to submit the notification. The notification can be submitted as early as desired by the parties; as long as the content requirements can be fulfilled, and as soon as the parties are ready to go public.

Norway	
Clearance deadlines (Stage 1/Stage 2)	After receipt of a notification the NCA has 25 working days to give notice that intervention may take place (Phase I) and then another 45 working days to present a reasoned draft prohibition decision or accept and make binding remedies presented by the notifying party or parties (Phase II). The parties have 15 working days to comment on a draft prohibition decision and the NCA then has another 15 working days to render such a decision.
Substantive test for clearance	The NCA shall intervene against concentrations that significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. The NCA investigates possible unilateral, coordinated, vertical and conglomerate effects of the concentration. The NCA takes into account substantiated efficiencies that benefit consumers, are merger-specific and verifiable.
Penalties	Infringement of the prohibition against implementation of the transaction (automatic suspension) may lead to significant fines. The same goes for infringement of a final decision of intervention. The NCA may issue a fine of up to 10 per cent of the undertaking's global turnover.
Remarks	As of 1 April 2017, an independent Board of Appeals handles the appeals against decisions of the NCA made after the implementation date. Some amendments to the Norwegian Competition Act also applied as of 1 July 2016, including the change of the substantive test for clearance of mergers to that of the EUMR.

Pakistan	
Voluntary or mandatory system	Mandatory system.
Notification trigger/filing deadline	As soon as agreement is reached in principle or a non-binding letter of intent is signed.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: Most mergers are cleared at this stage. The CCP has 30 working days to examine a merger application from the time of its filing. No decision in 30 working days means the merger is cleared. Stage 2: Few merger issues reach this stage. If the CCP raises concerns, then Stage 2 begins after the conclusion of the 30-working-day period for Stage 1. Stage 2 involves its own 90-working-day period for review. No decision in 90 working days of Stage 2 (or 120 working days overall) means the merger is cleared. The CCP will issue a show-cause notice and provide the opportunity of a hearing before passing any adverse order, interim or final.
Substantive test for clearance	Substantial lessening of competition by creating or strengthening of a dominant position.
Penalties	Prohibition, unwinding the merger, including interim orders to protect competition. Fines of up to 10 per cent of turnover or 75 million Pakistani rupees.
Remarks	No penalty has ever been imposed in merger-related cases since the CCP's inception in 2007.

Philippines	
Voluntary or mandatory system	Mandatory. Prior clearance required for all transactions exceeding the threshold. Failure to comply results in: <ul style="list-style-type: none"> <li>• nullity of agreement; and</li> <li>• imposition of administrative penalties.</li> </ul>
Notification trigger/filing deadline	The trigger is based on the Size of the Party Test and Value of the Transaction Test. Notification shall be done prior to the consummation of the transaction. The transaction is void if no prior clearance is obtained.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 30 days from the submission of completed documents as determined by the PCC. Stage 2: 60 days from the lapse of the Stage 1 period.
Substantive test for clearance	The SLC test.
Penalties	Behavioural remedies are used (eg, a cease and desist order or consent judgment). There are also administrative fines of up to 250 million Philippine pesos. In addition, divestiture, disgorgement of excess profits, corporate reorganisation and other structural remedies may be used.

Poland	
Voluntary or mandatory system	If a concentration meets the statutory thresholds and no exemptions apply, the notification is mandatory.
Notification trigger/filing deadline	There is no official deadline for filing. The parties are obliged to notify their intention of the concentration, which means that the notification has to be filed before implementation. There is a bar on closing.
Clearance deadlines (Stage 1/Stage 2)	The authority has one month to issue its decision for simple case in stage one. Complex cases may enter into the second stage, which gives the OCCP an additional four months to complete the review.
Substantive test for clearance	The OCCP clears a concentration that does not result in significant impediments to competition in the market, in particular, by the creation or strengthening of a dominant position in the market (in practice, the SIEC test applies).
Penalties	If an undertaking has implemented a concentration without regulatory clearance, the general principle is that the OCCP may fine the undertaking by way of a decision, the fine not to exceed 10 per cent of the revenue earned in the accounting year preceding the year within which the fine is imposed.

Portugal	
Voluntary or mandatory system	Mandatory notification.
Notification trigger/filing deadline	<ul style="list-style-type: none"> <li>• Combined market share in Portugal higher than 50 per cent;</li> <li>• combined market share in Portugal equal to or higher than 30 per cent and lower than 50 per cent, provided that the individual turnover in Portugal of at least two participant undertakings exceeds €5 million; or</li> <li>• combined turnover in Portugal of more than €100 million, provided that the individual turnover in Portugal of at least two participant undertakings exceeds €5 million.</li> </ul> <p>Two or more concentrations made within a period of two years among the same individuals or legal entities, which considered individually would not be subject to prior notification, are deemed as a sole concentration subject to such prior notification when the set of concentrations reaches the turnover figures set out above. Notification must be filed after the conclusion of the agreement and before their closing or, whenever relevant, after the date of disclosure of the preliminary announcement of a public takeover bid or of an exchange offer or the date of disclosure of the announcement of the acquisition of a controlling shareholding in a listed company, or, in the case of a public procurement procedure, after the definitive award of the contract and before the closing.</p> <p>When the participant undertakings show serious intent to conclude an agreement or, in the case of a public takeover bid or of an exchange offer, the undertakings show public intent to carry out the offer, the concentration may be notified before the above deadlines. Projected concentrations may be the object of pre-notification assessment by the Authority.</p>
Clearance deadlines (Stage 1/Stage 2)	<p>Phase I: within 30 working days of the notification's effective date (extendible, notably, if requests for additional information are made), the Authority shall clear the concentration (with or without conditions or obligations) or initiate an in-depth investigation. Lack of decision is deemed as clearance.</p> <p>Phase II: within 90 working days, counted as of the effective date of the notification (extendible, notably, if requests for additional information are made), the Authority must authorise the concentration (with or without conditions or obligations), or prohibit the concentration. Lack of decision is deemed as clearance.</p>
Substantive test for clearance	Concentrations falling within the scope of the Act are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it, in particular if such impediments result in the creation or strengthening of a dominant position.
Penalties	<p>Penalties are applied within a sanctioning procedure launched by the Authority, which shall be subject to the opportunity principle, pursuant to which the Authority may, on public interest grounds, grant different degrees of priority in respect of the matters it is called to assess.</p> <p>Failure to file: fines up to 10 per cent of the turnover in the year preceding that of the decision; periodic penalty payments up to 5 per cent of the average daily turnover in the year preceding that of the decision, applied per day.</p> <p>Violation of obligation of suspending transaction until clearance: fines of up to 10 per cent of the turnover in the year preceding that of the decision.</p> <p>Non-compliance with decision that prohibited the transaction or that approved it with conditions or obligations attached: fines up to 10 per cent of the turnover in the year preceding that of the decision, legal transactions being null and void.</p>
Remarks	Filing subject to fees. Obligation of suspending transaction may be derogated by the Authority.
Romania	
Voluntary or mandatory system	The filing of a notification with the RCC is mandatory, provided the thresholds are met.
Notification trigger/filing deadline	The notification has to be submitted to the RCC prior to the implementation of the concentration.
Clearance deadlines (Stage 1/Stage 2)	<p>Phase 1 – 45 days as of the effective date.</p> <p>Phase 2 – five months as of the effective date.</p>
Substantive test for clearance	The RCC assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.
Penalties	<p>In case a merger is implemented before a clearance decision is received, the RCC may impose a fine of between 0.5 and 10 per cent of the undertaking's total annual turnover in the preceding financial year.</p> <p>In addition, the RCC may order measures aimed at restoring efficient competition in the relevant market.</p>
Russia	
Voluntary or mandatory system	Mandatory system. Free form of notification, standard form for disclosure of certain information, in Russian.
Notification trigger/filing deadline	<p>No filing deadline but prior to the completion of transaction if:</p> <ul style="list-style-type: none"> <li>• the aggregate book value on a worldwide basis of all companies within the acquirer's group and the target's group &gt; 7 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group &gt; 400 million roubles; or</li> <li>• the aggregate turnover on a worldwide basis of all companies within the acquirer's group and the target's group &gt; 10 billion roubles and the aggregate book value on a worldwide basis of all companies within the target's group &gt; 400 million roubles; and</li> <li>• for joint venture agreements between competitors operating in the territory of Russia: the aggregate book value on a worldwide basis of all parties to the agreement (and their respective groups) exceeds 7 billion roubles or their aggregate turnover on a worldwide basis exceeds 10 billion roubles for the calendar year preceding entry into the joint venture agreement.</li> </ul>
Clearance deadlines (Stage 1/Stage 2)	Two-stage process. Statutory waiting period at Stage 1 is 30 days from submission of all necessary documents, and at Stage 2, another two months. Either at Stage 1 or Stage 2, conditions for clearing the transaction may be issued. Suspension effects: completion prior to clearance is prohibited. The transaction may be challenged by the antimonopoly authority if completed before clearance.
Substantive test for clearance	Would the transaction constitute or strengthen a dominant position of a legal entity? Does (or may) it cause limitation of competition in a market? Positive social and economic effects from the transaction are taken into consideration.
Penalties	Failure to submit a pre-acquisition filing 300,000 roubles to 500,000 roubles (on legal entities) and 15,000 roubles to 20,000 roubles (on managers).

Russia	
Remarks	Special rules apply to certain Russian law-specific types of transactions and to transactions with 'financial entities' (eg, banks, securities dealers and brokers, insurance companies, non-governmental pension funds, share investment trusts, leasing companies, credit consumer unions) and natural monopolies (eg, gas and oil pipeline distribution, electric power transmission, rail transport, services provided at transport terminals, public electronic and postal communications providers) as targets.
Saudi Arabia	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	Creation of an establishment with a dominant position (ie, an establishment that is in a position to influence the prevailing price of a specific commodity, product or service through controlling at least 40 per cent of the total supply of that commodity, product or service in Saudi Arabia). Notification must occur at least 60 days prior to implementation.
Clearance deadlines (Stage 1/Stage 2)	The Competition Council has 60 days to inform a notifying party whether the transaction is under review, or whether the transaction has been blocked. If the Council has informed the notifying party that the transaction is under review within the 60-day deadline and has not cleared the transaction within that period, the Council will have an additional 30 days to conduct its review.
Substantive test for clearance	Whether the transaction will lessen competition in Saudi Arabia. No guidance is given on how the substantive test interacts with the 'dominance' jurisdictional test.
Penalties	Failure to notify: fines of up to 10 per cent of sales, capped at 10 million Saudi riyals (to be doubled in the case of recurrence). Other sanctions may also be imposed.
Remarks	In its assessment, the Council is required to consider whether the notified transaction can be justified by reason of 'public interest', as well as economic efficiencies where it appears from other factors that the transaction is likely to substantially prevent or lessen competition. There is, however, no guidance on what constitutes 'public interest' for these purposes.
Serbia	
Voluntary or mandatory system	The filing of a notification with the Commission is mandatory in cases where the applicable jurisdictional thresholds have been met.
Notification trigger/filing deadline	The merger notification must be submitted to the Commission within a period no later than 15 days after the triggering event, ie, the signing of the agreement, the announcement of a public offering, the announcement of the start or end date of a public takeover bid, or the acquisition of control (whichever occurs first). The filing may already be submitted once the parties have a serious intention to conclude the relevant agreement (ie, they sign a letter of intent, or announce their intention to make a public offer for the purchase of shares in an undertaking).
Clearance deadlines (Stage 1/Stage 2)	After submitting the complete filing, the Commission will decide either in one month (in Phase I) or within four months from the decision to initiate in-depth proceedings (Phase II).
Substantive test for clearance	The Commission assesses whether the notified concentration will lead to a significant prevention, restriction or distortion of effective competition, in particular, if it will result in the creation or strengthening of a dominant position in the relevant market. In addition to a test of dominance (over 40 per cent market share), the Commission will consider anticompetitive effects that could potentially arise out of a concentration (eg, loss of current and potential competition, unilateral effects resulting from horizontal mergers, joint dominance, conglomerate effects, vertical effects).
Penalties	For late filing, the Commission may impose on the notifying party a procedural penalty in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of that undertaking). For failure to file and breach of the suspension obligation the Commission may impose a fine of up to 10 per cent of the total annual turnover of the responsible undertaking generated in Serbia in the preceding financial year (protective measure). Moreover, it may also order to dissolve the concentration, sell shares, terminate a contract, or take other measures necessary to re-establish the status as before implementation of the concentration (measure of de-concentration).
Singapore	
Voluntary or mandatory system	Voluntary.
Notification trigger/filing deadline	Notification encouraged where: <ul style="list-style-type: none"> <li>the merged entity will have a market share of 40 per cent or more; or</li> <li>the merged entity will have a market share of between 20 and 40 per cent and the post-merger market share of the three largest firms, that is, the concentration ratio of three largest firms (CR3), is 70 per cent or more.</li> </ul> Mergers involving small companies where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S\$5 million and the combined worldwide turnover of all of the parties is below S\$50 million will be unlikely to raise competition concerns.
Clearance deadlines (Stage 1/Stage 2)	Phase I review: approximately 30 working days. Phase II review: approximately 120 working days.
Substantive test for clearance	Whether a merger has resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.
Penalties	Financial penalty of up to 10 per cent of turnover in Singapore for each year of infringement for such period, up to a maximum of three years for an infringement that was committed intentionally or negligently. Directions at the discretion of the Commission include directions to: <ul style="list-style-type: none"> <li>prohibit an anticipated merger from being carried out or dissolve or modify a merger in such manner as the Commission may direct;</li> <li>dispose of operations, assets or shares;</li> <li>enter into legally enforceable agreements; or</li> <li>provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine.</li> </ul>

Slovakia	
Voluntary or mandatory system	The filing of a notification with the AMO is mandatory in cases in which a concentration meets the applicable jurisdictional thresholds.
Notification trigger/filing deadline	There is no explicit filing deadline. However, in any event the concentration has to be notified to the AMO prior to its implementation (ie, before any rights or obligations resulting from a concentration are executed). Inter alia, the notification can be filed with the AMO already prior to the conclusion of a formal merger agreement.
Clearance deadlines (Stage 1/Stage 2)	If the concentration does not require an in-depth analysis due to the identification of competition law concerns, the AMO issues a decision within 25 working days of the receipt of the notification (Phase I proceedings). In cases that require an in-depth analysis, the AMO may initiate in-depth proceedings within 25 working days from the receipt of the notification (Phase II proceedings). Once the AMO has initiated Phase II, it must issue a decision within 90 working days. Requests for information stop the clock. At the request of the parties or with their consent, the AMO may also prolong the Phase I and II periods, even repeatedly, by a total of up to 30 working days at a maximum. The AMO may request the parties to propose conditions (commitments) within 30 working days upon delivery of such request. This effectively stops the clock, that is, the above-described Phase I and II review/decision-making periods are not in effect until the parties submit their proposed commitments or the expiry of the 30-day period (whichever occurs first).
Substantive test for clearance	The AMO examines whether the concentration will not significantly impede effective competition in the relevant market, in particular due to the creation or strengthening of a dominant position (SIEC test).
Penalties	In the event of failure to notify the concentration or failure to comply with the standstill obligation, the AMO may impose a fine of up to 10 per cent of the undertaking's worldwide turnover generated in the preceding business year; or up to €330,000 on an undertaking that generated a turnover not exceeding €330 or has not achieved any turnover, or when its turnover cannot be calculated.
Slovenia	
Voluntary or mandatory system	The filing of a notification with the CPA is mandatory in cases where the applicable jurisdictional thresholds have been met.
Notification trigger/filing deadline	A merger notification has to be submitted to the CPA no later than 30 days after the conclusion of the agreement, the announcement of a public bid, or the acquisition of a controlling interest (whichever of these triggering events occurs first). If the CPA requested the parties to provide a notification of the concentration because their combined market share in Slovenia exceeds 60 per cent, the merger notification has to be submitted no later than 30 days from receipt of this request.
Clearance deadlines (Stage 1/Stage 2)	In the event the concentration does not raise serious doubts as to its compatibility with the Slovenian competition law rules, the CPA must issue its decision within 25 working days of the receipt of a complete notification (Phase I). In cases that raise serious doubts as to their compatibility with the Slovenian competition law rules, the CPA initiates Phase II proceedings within 25 working days of receipt of a complete notification. Once the CPA has initiated Phase II, it must issue a decision within 60 working days from initiating such proceedings. If the parties propose remedies, the deadline for issuing the Phase I or II decision is extended by an additional 15 working days.
Substantive test for clearance	The CPA assesses whether the intended concentration results in a significant impediment of effective competition within the territory of the Republic of Slovenia, or on a substantial part of it, in particular due to the creation or strengthening of a dominant position.
Penalties	In the case of a failure to notify the concentration within the filing deadline (or failure to notify the concentration at all), the CPA may impose fines of up to 10 per cent of the annual turnover generated by the undertakings concerned in the preceding business year. In addition, a fine of between €5,000 and €10,000 may be imposed on the responsible persons of such undertakings and (if applicable) a fine of between €3,000 and €5,000 on a natural person already controlling at least one undertaking. If the nature of the infringement of the filing obligation is particularly serious, a fine of between €15,000 and €30,000 may be imposed on the responsible person of a legal entity, and (if applicable) a fine of between €10,000 and €15,000 on a natural person already controlling at least one undertaking.
South Africa	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	N/A.
Clearance deadlines (Stage 1/Stage 2)	Small and intermediate mergers – 60 business days. Large mergers – 40 business days, extensions of 15 business days at a time.
Substantive test for clearance	(i) Whether the merger results in a substantial lessening or prevention of competition in any relevant market, which cannot be outweighed by technological, efficiency or other pro-competitive factors, and (ii) the effect of the merger on certain public interest grounds.  Penalties The merger parties may face the following sanctions for failing to notify an intermediate or large merger: <ul style="list-style-type: none"> <li>• an administrative penalty of up to 10% of annual turnover in South Africa and exports from South Africa during the preceding financial year; and</li> <li>• be ordered to sell any shares, interest or other assets it has acquired pursuant to the merger (ie, divestiture) and any provision of an agreement to which the merger was subject may be declared void.</li> </ul>
Penalties	N/A.

Spain	
Voluntary or mandatory system	Mandatory system. Form of notification: special form. Detailed information similar to Form CO. In Spanish. Short notification for straightforward cases is also available.
Notification trigger/filing deadline	<ul style="list-style-type: none"> <li>• Combined turnover in Spain of over €240 million and at least two parties have turnover of over €60 million each; or</li> <li>• combined market share in Spain (or in a 'defined' market within Spain) of 30 per cent or more, unless the turnover in Spain of the target or the target's asset value does not exceed €10 million and the individual or combined market share of the parties does not amount to 50 per cent or more in any 'affected market' in Spain or in any 'defined' geographical market within Spain.</li> </ul> <p>Filing prior to completion.</p>
Clearance deadlines (Stage 1/Stage 2)	Stage 1: one month, extended by 10 days if commitments offered. Stage 2: two months, extended by 15 days if commitments offered. If no unconditional clearance, the Ministry of the Economy has 15 days to decide whether to request government intervention. If it does, the government has one month to make a decision. Suspension until clearance.
Substantive test for clearance	Whether the notifiable concentration might prevent the maintenance of effective competition in the whole or part of the national market.
Penalties	<ul style="list-style-type: none"> <li>• Failure to file: fines up to 1 per cent of the turnover of the relevant undertaking if (i) the parties fail to file a concentration carried out through a public takeover bid in Spain within statutory deadline; or (ii) the parties fail to file a concentration upon ex-officio request by the CNMC.</li> <li>• Implementation before clearance: fines of up to 5 per cent of the turnover of the relevant undertaking.</li> <li>• Non-compliance with relevant final decision: fines of up to 10 per cent of the turnover of the relevant undertaking and potential daily penalties of up to €12,000 per day of delay.</li> </ul>
Remarks	If the Ministry of the Economy requests the government's intervention at the end of Stage 2, the government's decision is based on general public policy and general interest criteria.
Sweden	
Voluntary or mandatory system	Mandatory system.
Notification trigger/filing deadline	Combined turnover in Sweden of 1 billion kronor, and each of at least two of the undertakings concerned has a turnover in Sweden exceeding 200 million kronor. Filing prior to completion.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 25 working days from a complete notification, or 35 working days if commitments have been offered. Stage 2: three months. Suspension: suspensory effect during Stage 1 and possibility of suspension during Stage 2.
Substantive test for clearance	Whether the merger will significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof, in particular as a result of the creation of a dominant position. However, a merger may not be prohibited if essential national interests of security or resources are thereby set aside.
Penalties	Failure to file: no penalties (unless in a particular case the parties have been ordered to notify subject to a fine). Implementation before clearance: no penalties (unless in a particular case the parties have been ordered to respect the standstill requirement subject to a fine).
Remarks	The Swedish merger control rules are modelled on the EU Merger Regulation.
Switzerland	
Voluntary or mandatory system	Mandatory filing.
Notification trigger/filing deadline	Turnover of 2 billion Swiss francs worldwide or 500 million Swiss francs in Switzerland and turnover of at least two enterprises involved of 100 million Swiss francs in Switzerland. Prior to completion of merger.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: one month (clearance or opening of investigation). Stage 2: four months (investigation).
Substantive test for clearance	No dominant market position created or enhanced liable to eliminate effective competition. Improvement of competition in other markets outweighing dominant market position.
Penalties	Penalty up to 1 million Swiss francs. Fine of up to 20,000 Swiss francs (on the individual manager).
Remarks	Special approvals for: banks; acquisition of Swiss real estate companies; companies holding special concessions or licences.
Taiwan	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	<p>A notification filing must be made where a combination meets any of the thresholds set out in the FTA and where there are no exemptions. Clearance must be obtained before completion of the combination. Clearance occurs 30 working days from the date the FTC accepts the complete filing materials, provided that this period may be shortened or extended by the FTC by written notice as it deems necessary. The filing thresholds include:</p> <ul style="list-style-type: none"> <li>• where any of the parties has a 25 per cent share in a market in Taiwan;</li> <li>• as a result of the merger, the enterprises will have a 33 per cent market share;</li> <li>• where all the parties in aggregate, in the preceding fiscal year, had combined global sales in excess of NT\$40 billion, and each of at least two of the parties has sales, in the preceding fiscal year, in Taiwan exceeding NT\$2 billion; and</li> <li>• where the Taiwan-sourced annual turnover of one of the parties is NT\$15 billion in general with another party having NT\$2 billion of the same or NT\$30 billion in the case of a financial enterprise with another party having NT\$2 billion of the same.</li> </ul>
Clearance deadlines (Stage 1/Stage 2)	Clearance before closing is required. The reviewing authority has 30 working days from accepting the complete filing materials to acquiesce, object, unilaterally shorten the review period, or unilaterally extend the review period for an additional 60 working days. Thus, filing should be made at least 90 working days before the scheduled closing.

Taiwan	
Substantive test for clearance	Generally, whether the economic benefits of the combination outweigh the restrictions on competition that result from the combination.
Penalties	Fines range from NT\$200,000 to NT\$50 million. The FTC also has broad equitable powers to block or unwind unauthorised combinations. Further, according to the Administrative Penalty Act, if the benefit gained exceeds the maximum statutory fine permitted, the fine may be increased to an amount comparable to the benefit gained.
Remarks	No 'carveouts' are allowed. Where required, the notification must be made in a timely manner, or the parties will be subject to a penalty.
Thailand	
Voluntary or mandatory system	Merger control in Thailand is a mandatory system whereby any business merger that may result in the creation of either a monopoly, or a business operator with dominant market power, as prescribed by the Trade Competition Commission (TCC), is required to file an application to obtain prior approval from the TCC (pre-merger filing). In addition, the merging entity must notify the TCC within seven days after the completion of the merger if the merger may substantially lessen competition (post-merger notification).
Notification trigger/filing deadline	The deadline for pre-merger filing is any date before the closing date of the transaction (ie, the date of the merger). The deadline for post-merger notification is seven days from the closing date of the transaction.
Clearance deadlines (Stage 1/Stage 2)	The TCC must complete its consideration of an application within 90 days of filing. If the TCC is unable to complete its consideration within this period, the TCC may extend the period by up to 15 additional days.
Substantive test for clearance	The substantive test for clearance is that the merger: <ul style="list-style-type: none"> <li>• is reasonably necessary in the business;</li> <li>• is beneficial to business promotion;</li> <li>• does no serious harm to the economy; and</li> <li>• has no material effect on the due interest of consumers in general.</li> </ul> <p>Failure to submit a pre-merger filing may result in:</p> <ul style="list-style-type: none"> <li>• administrative sanction: a fine of not exceeding 0.5 per cent of the total value of the merger transaction; or</li> <li>• civil penalty: any person who incurs damages from the violation of pre-merger filing by a business operator under section 51 may claim such damages.</li> </ul>
Penalties	In addition, the TCC may issue an order to a business operator to suspend, cease or vary the merger that is in violation of the pre-merger filing requirement. In the case where the business operator fails to comply with this order, it will be subject to an administrative fine of not exceeding 6 million baht and a daily fine of not exceeding 300,000 baht throughout the period of violation. Failure to submit a post-merger notification may result in: <ul style="list-style-type: none"> <li>• administrative sanction: a fine of not exceeding 200,000 baht and a daily fine of not exceeding 10,000 baht throughout the period of the violation.</li> </ul>
Remarks	The merger control provisions have just come into force in Thailand. Interpretation and application of the laws by the authority of certain criteria and requirements for pre-merger filing and post-merger notification are still unclear.
Turkey	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	No filing deadline. Final and executed version of the transaction document requested. No closing before approval.
Clearance deadlines (Stage 1/Stage 2)	Thirty days following a 'complete' notification. Waiting period of six months with the possibility of a further six months' extension in the case of a Phase II investigation.
Substantive test for clearance	Dominance test: creation of a dominant position or strengthening of an existing dominant position as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country.
Penalties	Realisation of a notifiable transaction without the approval of the Competition Board: turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2019 is 26,027 liras. Liability for fines is on the acquiring firm in the case of an acquisition or on both merging parties in the case of a merger. Moreover, a notifiable transaction, not notified to and approved by the Competition Board shall be deemed as legally invalid with all its legal consequences. If the Board concludes that a non-notified notifiable transaction would have been prohibited had it been notified, fines of up to 10 per cent of turnover generated in the financial year preceding the date of the fining decision will be incurred (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the respective party.
Ukraine	
Voluntary or mandatory system	Mandatory.
Notification trigger/filing deadline	A transaction qualifying as a concentration requires AMC merger clearance if in the last financial year immediately preceding the year of the concentration: <ul style="list-style-type: none"> <li>• the combined worldwide value of assets or turnover of the parties to the concentration exceeds €30 million and the value of Ukrainian assets or turnover of each of at least two parties exceeds €4 million; or</li> <li>• Ukrainian value of assets or turnover in Ukraine of the target, or of the seller of the assets, or of at least one of the founders of a new entity exceeds €8 million and worldwide turnover of at least one other party exceeds €150 million.</li> </ul> <p>All figures shall be taken for the last financial year immediately preceding the year of the concentration. In either case, the parties to a concentration should be considered at their group level. That means that the assets or turnover of the controlling shareholder or seller should still be counted towards the target.</p>

Ukraine	
Clearance deadlines (Stage 1/Stage 2)	Preview period: 15 calendar days. Phase I review period: up to 30 calendar days. Phase II review period: up to 135 calendar days. Also, there is a fast-track simplified 25-day review procedure for transactions where: (i) only one party is active in Ukraine; or (ii) parties' combined shares do not exceed 15 per cent on the overlapping markets or 20 per cent on vertically related markets.
Substantive test for clearance	No monopolisation or substantial restriction of competition in the Ukrainian market or a significant part of it.
Penalties	Statutory maximum fine for pre-clearance closing or closing without clearance is up to 5 per cent of the consolidated turnover in the year immediately preceding the year when the fine is imposed. In practice, according to the Guidelines on Fines, the actual fines in merger cases are lower.
Remarks	The Ukrainian merger control regime is extraterritorial, in some cases excessively: the AMC claims jurisdiction over transactions reasonably lacking sufficient local nexus.

United Arab Emirates	
Voluntary or mandatory system	Mandatory; however, a number of exclusions currently exist (for companies operating in certain sectors, government-owned or government-controlled entities, and for small and medium-sized enterprises).
Notification trigger/filing deadline	Forty per cent market share thresholds, as well as a preliminary assessment as to whether the transaction is likely to affect competition in the UAE. Filing must be made at least 30 days prior to the conclusion of a draft contract or agreement bringing about the transaction (unclear whether this allows for the signing of a legally binding share purchase agreement).
Clearance deadlines (Stage 1/Stage 2)	Initial review period of 90 days, may be extended by a further 45 days. The Law does not provide for any expedited review process.
Substantive test for clearance	Whether the transaction will negatively affect competition, or whether there may be economic benefits that would outweigh the detriment to competition.
Penalties	Fine of between 2 and 5 per cent of sales in the UAE, or alternatively 500,000 to 5 million UAE dirhams for failure to notify. Fine of 50,000 to 500,000 dirhams for implementing the transaction before clearance (gun jumping). Closing down of an infringing establishment for three to six months. Possibility for affected third parties to seek damages.
Remarks	Although the Competition Law is now officially in force, certain gaps in the legislation and considerable uncertainty in its application remain. Companies doing deals in the UAE that are likely to meet the 40 per cent market share threshold will need to consider carefully whether to make a merger control filing, and if so how to approach the Ministry, in the absence of any formal filing process or of any public record of decisions to date.

United Kingdom	
Voluntary or mandatory system	Voluntary system. Form of notification: CMA's prescribed form. In English.
Notification trigger/filing deadline	The turnover in the UK of the enterprise being taken over exceeds £70 million or combined share of supply in UK of 25 per cent created or enhanced. Filing: no formal time limit.
Clearance deadlines (Stage 1/Stage 2)	Stage 1: 40 working days. Stage 2: 24 weeks (can be extended for eight weeks for special reasons). Suspension effects: ability to impose 'hold-separate' obligations on mergers at either stage.
Substantive test for clearance	Whether the merger will result in a substantial lessening of competition in the United Kingdom or a substantial part of the United Kingdom.
Penalties	Failure to file: no penalties. Implementation before clearance: no penalties, unless in breach of a statutory prohibition, undertaking or order. Non-compliance with orders for the production of documents or information: penalties.
Remarks	Special provisions for cases involving national security, media mergers, government contractors, water mergers or mergers necessary to protect financial stability.

United States	
Voluntary or mandatory system	Mandatory system. Each party must submit a filing. Filing fee (paid by acquiring person) is between US\$45,000 and US\$280,000, depending on size of the transaction.
Notification trigger/filing deadline	Must satisfy the commerce test, size-of-parties test (for deals valued between US\$90 million and US\$359.9 million) and size-of-transaction test, and not qualify for an exemption. No filing deadline.
Clearance deadlines (Stage 1/Stage 2)	30-day initial waiting period (15 days for all-cash tender offer or sale in bankruptcy). Can be shortened by early termination or extended by issuance of a second request. Stage 2 period ends on the 30th day after compliance by all parties with the second request (in the case of a cash tender offer, Stage 2 ends on the 10th day after compliance by the acquiring person with second request). Transaction suspended until waiting periods have been observed.
Substantive test for clearance	Whether the transaction may substantially reduce competition or tend to create a monopoly.
Penalties	Failure to file: fine of up to US\$42,530 per day; divestiture can be required. Transaction cannot be implemented prior to clearance. Same penalties apply if transaction is consummated before approval.
Remarks	Special rules can apply to certain industrial sectors (telecommunications, banking).

## Uzbekistan

Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	<p>For legal entities in commodities markets:</p> <ul style="list-style-type: none"> <li>• the notification and pre-approval are required if the aggregate balance sheet value of the assets of both parties to the transaction; or</li> <li>• the aggregate amount of sales of goods for the last calendar year of both parties exceeds 100,000 times the minimum monthly wage (MMW), which is currently 202,730 soums.</li> </ul> <p>For legal entities in the financial market: the notification and pre-approval are required if the aggregate balance sheet value of the assets of both parties to the transaction exceeds:</p> <ul style="list-style-type: none"> <li>• US\$450 million with respect to banks;</li> <li>• US\$25 million with respect to insurance companies;</li> <li>• US\$3 million with respect to leasing companies;</li> <li>• US\$400,000 with respect to non-banking credit organisations and professionals in the securities market.</li> </ul> <p>There are no legal deadlines for a pre-completion filing. Merger control clearance must be obtained before the transaction.</p>
Clearance deadlines (Stage 1/Stage 2)	<p>Ten calendar days.</p> <p>May be extended to up to 30 calendar days. Acquisition of 35 per cent or more shares in a joint-stock company or 50 per cent or more shares in a limited liability company, when the related threshold is reached.</p>
Substantive test for clearance	Acquisition of 35 per cent or more shares in a joint-stock company or 50 per cent or more shares in a limited liability company, when the related threshold is reached.
Penalties	<p>Administrative liability: a fine in the amount of one to three times MMW applies where an individual is involved, and five to 10 times MMW applies where a legal entity is involved.</p> <p>Criminal liability (applicable after imposing administrative fine): a fine in the amount of 25 to 50 times MMW, or deprivation of a right to hold certain positions for a period of three to five years, or up to three years of corrective labour. There is no notion of corporate criminal liability in Uzbekistan, therefore criminal liability is imposed on the official or any other authorised person from the company of the purchaser and only if such violation is repeated twice during one year.</p> <p>In addition, the Antimonopoly Committee may apply to a court to invalidate, in full or in part, agreements and other transactions for which its prior authorisation or subsequent notice was required but has not been obtained or given, or to liquidate a company if it was incorporated without prior approval, provided that the relevant transaction or incorporation results in limitation of competition.</p>

## Zambia

Voluntary or mandatory system	Filing is mandatory only in relation to the mergers that meet the notification requirements. A filing is not mandatory in the case of a transaction that does not meet the prescribed threshold. However, a party seeking clarification as to whether a proposed merger is required to be notified may apply to the Commission for negative clearance in the prescribed manner and upon payment of the prescribed fee.
Notification trigger/ filing deadline	<p>A merger transaction requires authorisation by the Commission where the combined turnover or assets, whichever is higher, in Zambia of the merging parties is at least 50 million fee units (equivalent to 15 million kwacha) in the merging parties' most recent financial year in which these figures are available.</p> <p>The CCP Act does not impose deadlines for filing; however, the Commission will normally penalise and stipulate a period within which the enterprise should file its notification for failure to do so at an earlier stage.</p>
Clearance deadlines (Stage 1/Stage 2)	The CCP Act stipulates the clearance time to be 90 days, but the interim authorisation for cases that do not appear to raise competition concerns can be granted within three weeks. Interim authorisations are subject to the board of commissioners' ratification and can be reversed.
Substantive test for clearance	The Competition and Consumer Protection Commission uses a multiple assessment criteria encompassing the substantial lessening of competition (SLC) test, the dominance test, efficiency test and the public interest test. However, the SLC test has the greatest weight in analysing a case.
Penalties	Various penalties exist under the CCP Act in respect of specific provisions. There is a general penalty of 30,000 kwacha prescribed in section 82 of the CPP Act.

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Cartel Regulation	Franchise	Pensions & Retirement Plans	Structured Finance & Securitisation
Class Actions	Fund Management	Pharmaceutical Antitrust	Tax Controversy
Cloud Computing	Gaming	Ports & Terminals	Tax on Inbound Investment
Commercial Contracts	Gas Regulation	Private Antitrust Litigation	Technology M&A
Competition Compliance	Government Investigations	Private Banking & Wealth Management	Telecoms & Media
Complex Commercial Litigation	Government Relations	Private Client	Trade & Customs
Construction	Healthcare Enforcement & Litigation	Private Equity	Trademarks
Copyright	High-Yield Debt	Private M&A	Transfer Pricing
Corporate Governance	Initial Public Offerings	Product Liability	Vertical Agreements
Corporate Immigration	Insurance & Reinsurance	Product Recall	
Corporate Reorganisations	Insurance Litigation	Project Finance	
Cybersecurity	Intellectual Property & Antitrust	Public M&A	
Data Protection & Privacy	Investment Treaty Arbitration	Public Procurement	
Debt Capital Markets		Public-Private Partnerships	
Defence & Security		Rail Transport	
Procurement		Real Estate	
Dispute Resolution			

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